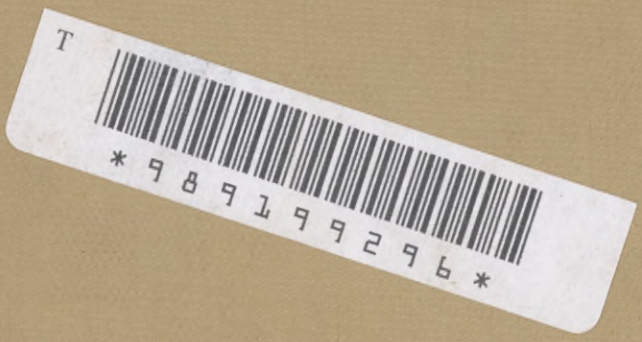

UNITED STATES REPORTS

VOLUME 148

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1892

J. C. BANCROFT DAVIS

REPORTER

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1902

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.

DAVID JOSIAH BREWER, Associate Justice.

HENRY BILLINGS BROWN, Associate Justice.

GEORGE SHIRAS, Jr., Associate Justice.

HOWELL EDMONDS JACKSON, Associate Justice.[2]

RICHARD OLNEY, Attorney General.[3]

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 Jackson was appointed in the place of Mr. Justice Lamar, deceased. His commission is dated February 18, 1893. On the 4th of March, 1893, the oath of office was administered to him in open court, and he immediately took his seat upon the bench.

[3] Mr. Miller having resigned, Mr. Olney was appointed in his place, and commissioned March 6, 1893. He qualified March 7, and was presented to the court on that day.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

Table of Cases Reported.

TABLE OF CASES

CITED IN OPINIONS.

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

(B.) Statutes of States and Territories.

(C.) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1892.

THE J. E. RUMBELL.[1]

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 1117. Submitted October 14, 1892. — Decided March 6, 1893.

In the admiralty and maritime law of the United States the following propositions are established by the decisions of this Court:

(1) For necessary repairs or supplies furnished to a vessel in a foreign port, a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty;

(2) For repairs or supplies in the home port of the vessel, no lien exists, or can be enforced in admiralty, under the general law, independently of local statute;

(3) Whenever the statute of a State gives a lien, to be enforced by process *in rem* against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States;

(4) This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States, sitting in admiralty.

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[1] The docket title of this case is *George C. Finney et al. Appellants*, v. *F. August Reich et al.*

Statement of the Case.

In the admiralty courts of the United States, a lien upon a vessel for necessary supplies and repairs in her home port, given by the statute of a State, and to be enforced by proceedings *in rem* in the nature of admiralty process, takes precedence of a prior mortgage, recorded under section 4192 of the Revised Statutes.

THIS was a certificate from the Circuit Court of Appeals for the Seventh Circuit under the act of March 3, 1891, c. 517, § 6, (26 Stat. 828,) of a question upon which it desired the instruction of this court, in an admiralty appeal. The case, as stated in the certificate, was as follows:

On August 15, 1891, under a writ of *venditioni exponas* from the District Court of the United States for the Northern District of Illinois, in admiralty, the propeller J. E. Rumbell was sold by the marshal for the sum of $1850, and the proceeds were paid into the registry of the court.

On August 21, 1891, F. August Reich and August Reich, partners under the name of F. A. Reich & Son, former owners of the vessel, who had sold and delivered her to Michael C. Hayes on April 23, 1891, filed a petition against those proceeds, claiming the sum of $3000, and interest, due upon notes given to them by Hayes for the purchase money, and secured by mortgage of the vessel, executed by Hayes to them on the day of the sale, and recorded on the same day in the office of the collector of customs of the port of Chicago, the residence of the owner and the home port of the vessel, under section 4192 of the Revised Statutes of the United States. In that mortgage it was provided that if at any time there should be any default of payment, or if the mortgagees should deem themselves in danger of losing any part of the debt by delaying its collection until the time limited for its payment, or if the mortgagor should suffer the vessel to run in debt beyond the sum of $150, the mortgagees might immediately take possession of the vessel and, after ten days' notice to the mortgagor, sell her to satisfy the mortgage debt. The petition of the mortgagees alleged that each of these contingencies had happened.

On September 16, 1891, George C. Finney and others filed a petition against said proceeds, for sums due to the petitioners

severally, and amounting in all to $1108.56, for shipchandler's supplies, engineer's supplies, groceries, provisions, fuel, lumber and repairs, bought for and furnished to the vessel at the port of Chicago, since the recording of the mortgage, and used for the benefit of the vessel, and alleged to have been reasonable and proper to be furnished and done; and also for the sum of $220 due to Patrick Bowe, one of these petitioners, for services as master of the vessel, since the recording of the mortgage; "for which supplies, repairs and services" (the certificate stated) "there was a lien upon the said vessel under the laws of the State of Illinois."

The District Court found and adjudged that the sums claimed in each petition were due to the petitioners respectively; that in the distribution of the proceeds the claim of the mortgagees, Reich & Son, should have priority over that of the other petitioners, Finney and others; and that the entire proceeds of the sale of the vessel, amounting (after payment of seamen's wages and preferred claims for towage and salvage) to $1105.59, should be paid to the mortgagees.

Finney and others appealed to the Circuit Court of Appeals, which certified to this court the following question: "Whether a claim arising upon a vessel mortgage is to be preferred to the claim for supplies and necessaries furnished to a vessel in its home port in the State of Illinois subsequently to the date of the recording of the mortgage?"

Mr. C. E. Kremer for appellants.

Mr. Charles E. Pope for appellees.

I. The appellants had no lien under the general maritime law, and the contracts under which they furnished the supplies are not maritime contracts.

It has been repeatedly held by this court, by the Supreme Court of Illinois and by other tribunals, that persons furnishing repairs and supplies to a vessel in her home port, do not acquire thereby any lien upon the vessel by the general maritime law, as received in the United States. *The Lotta-*

wanna, 21 Wall. 558; *Tug Boat, E. P. Dorr* v. *Waldron*, 62 Illinois, 221; *The Mary Bell*, 1 Sawyer, 135; *The Josephine Spangler*, 9 Fed. Rep. 773; *The Marcelia Ann*, 34 Fed. Rep. 142; *The Madrid*, 40 Fed. Rep. 677.

The reasons why a maritime lien is given for supplies furnished in a foreign port, are obvious. To promote commerce and enable vessels in a foreign port to procure without delay needed supplies, there is a necessity for the pledging of the credit of the vessel. Vessel owners usually have no credit in a foreign port, and, if material-men in a foreign port had to inquire into the credit of the owner residing in the home port, or ascertain whether any mortgage was or was not there recorded, great delay and great loss to commerce would inevitably result. To make such inquiries in the home port, by material-men residing there, would cause no loss or delay, but would, on the contrary, save in many cases very great loss. *The Madrid*, 40 Fed. Rep. 677.

There is no allegation or proof that the supplies, repairs or services furnished in this case were necessary, or that they were furnished on the credit of the vessel. Under the general maritime law a lien could not attach in the absence of those facts. *The Grapeshot*, 9 Wall. 129; *Pratt* v. *Reed*, 19 How. 359; *The Lady Franklin*, 1 Bissell, 557; *Williamson* v. *Hogan*, 46 Illinois, 504; *The Rapid Transit*, 11 Fed. Rep. 322. In the opinion in the latter case it is said: "It seems to me a fair implication that whenever a State attaches a lien to a maritime contract to be enforced in the admiralty, whatever would operate under the maritime law of that court to waive, forfeit or postpone a lien of like character, whether considered in its relation to liens of another grade or in its relation to other liens in the same grade, should have the same effect on the lien created by the State, and that it is intended that the strict letter of the statute should be so construed."

II. The appellants have no lien other than the one given by the Illinois Statute of 1874, and such lien is subject to the prior mortgage of appellees.

Being a statutory and not a maritime lien, the question of its effect and extent depends, in a very great measure, upon

the statute creating it. The statutes of the various States differ materially in their several requirements necessary to create a lien, and also in the extent and effect of the lien created. These different requirements have been recognized by the Supreme Court of the United States in the case of *The Lottawanna*, 21 Wall. 558, where the requirement of the Louisiana statute for the recording of a lien not having been complied with, it was held that no lien was obtained. And in the case of *The Edith*, 94 U. S. 518, it was held that the rights of the parties under the New York statute were governed and limited by the provisions of that statute. See also *The Marcelia Ann*, 34 Fed. Rep. 142.

In 1869, Judge Drummond, in deciding *The Grace Greenwood*, 2 Bissell, 131, said that, under the Illinois Statutes, such a mortgage as that of appellees would be "a valid and binding security upon the property, and one which the claims of material-men, under the state law, cannot supersede or override, and that the mortgage took precedence over supplies in the home port."

Judge Drummond again decided the same question in the same way in the case of *The Skylark*, 2 Bissell, 251, and said: "I wish it distinctly understood that I shall not hold, unless told to do so by the Supreme Court of the United States, that every claim which a state legislature may declare to be a lien against a vessel, shall override a mortgage properly recorded under the law of Congress."

In the case of *The Kate Hinchman*, Judge Blodgett, in the District Court, decided the same way. On appeal to the Circuit Court, Judge Drummond affirmed the decree of the District Court, and said, that although a lien existing only by the state law could be enforced in admiralty, "it by no means follows that, because a law of the State gave a lien, it is superior to a mortgage. . . . It seems to me, as between these different liens existing in this case, that of the mortgage is paramount." 7 Bissell, 238.

Since the first decision of Judge Drummond in 1869, the question has been decided repeatedly in the Seventh Circuit in the same way, in spite of the numerous times when the

proctors, for negligent material-men, have endeavored to obtain the adoption of a contrary decision. Appeals have been taken from the District Court and argued four times in the Circuit Court of the Seventh Circuit, on one occasion before Justice Harlan, but the judges hearing such appeals have invariably refused to reverse the former decisions.

Upon two occasions the question has been passed upon by the Supreme Court of Illinois, and decided in the same way. In the case of *The Great West* (*No. 2*) v. *Oberndorf*, 57 Illinois, 168, the court held that the lien of the material-men upon vessels for supplies furnished in the home port was inferior to that of a prior mortgage. This decision was followed by that of *The Hilton* v. *Miller*, 62 Illinois, 230, in which the court says, that a prior mortgage of a vessel has precedence of the lien of a material-man subsequently acquired, is settled by the case of the *Barque Great West* (*No. 2*) v. *Oberndorf*, 57 Illinois, 168. The Illinois law, at the time of these decisions, was construed in the case last mentioned to create a lien on the vessel, which is all that the present statute of 1874 does.

The liens given in the various States are given by widely different statutes. The rule in Louisiana, for instance, is essentially different from that of Illinois. The lien given by the Illinois statute is a secret one, existing for the period of nine months without requiring any notice to be given of it to any person, or the filing or recording of any such notice. The statute of Louisiana on the contrary, provides that such lien shall have no preference over third persons, unless it has been recorded in the parish where the vessel is, on the day when the contract was entered into. In the case of *The Lottawanna*, already cited, this recording was held essential to obtaining any lien.

The statutes of many other States also require, as a condition to the maintenance of a lien in similar cases, the filing or recording of a notice of the lien.

In North Carolina notice of the lien has to be filed in the same manner as notices of other statutory liens are.

In Massachusetts the lien is conditioned upon the filing of

a sworn statement of the claim with the clerk of the city or town where the vessel was, within four days after the vessel departs from port.

In South Carolina a similar statement has to be filed with the clerk of the Court of Common Pleas within the same time.

In Maryland also a statement of the claim must be filed under oath with the clerk of the Circuit Court.

In New York specifications of any such claim must be filed in the office of the clerk of the county in which the debts were contracted, and in the office of the auditor of the canal department, within thirty days after the debt was contracted.

In Pennsylvania the lien continues only between the contracting of such debts and the time when the vessel proceeds on her next voyage.

In Mississippi the case of *The Josephine Spangler*, 9 Fed. Rep. 773, held, that materials and supplies furnished at the home port are only liens, by force of the State's statutes, and therefore do not stand on the same footing with maritime liens, so that their priority depends upon whether they attach before or after the mortgage lien commenced. This position is sustained by Judge Drummond in *The Grace Greenwood*, which was followed by Judge Blodgett in *The Kate Hinchman*, and again by Judge Woods in *The John T. Moore*, 3 Woods, 61. This is still the rule in Mississippi and Maryland. *The Marcelia Ann*, above cited. See also as to the law of Ohio, *Scott's Case*, 1 Abbott U. S. 336.

Not only do the various state statutes differ in regard to the giving of notice of the lien claim, but they also differ materially in the effect and scope of the lien.

In Maryland the lien is not entitled to priority over a prior mortgage or bill of sale. In Vermont it has "precedence of all other claims and liens." In Pennsylvania it is to be "in preference to any other debt due from the owners" of the vessel. In New York it is provided that it shall be preferred to all other liens thereon, except mariner's wages. *The Canada*, 7 Fed. Rep. 730. In Massachusetts the lien is "preferred to all others on such vessel except that for mariner's wages." And so also in South Carolina. *The Island City*, 1 Lowell,

375. In Missouri such liens shall have precedence of all other liens and claims against such boat or vessel. In Kentucky the statute of 1852 gave the local lien preference over all other liens of like character, for work done out of the State (Kentucky), thus preferring them to maritime liens for supplies. *The Rapid Transit*, 11 Fed. Rep. 332. In Oregon the liens have precedence over all other liens and claims against such boat or vessel. In California they have preference over all other demands. *The Harrison*, 1 Sawyer, 353.

The statute of Illinois simply gives "a lien," so that no decision can be properly considered as contrary to the decisions in Illinois unless it appears that it was rendered upon a state statute in all respects similar to that of Illinois, giving a simple secret lien.

In 1872 the same question was presented for decision, in the Privy Council on appeal from the High Court of Admiralty, in the case of *The Two Ellens*, L. R. 4 P. C. 161. In an interesting opinion Lord Justice Mellish then said, p. 166: "There have been several cases in the Court of Admiralty on this point, and the decisions are to a certain extent conflicting. . . . The question has to be determined by their lordships, and it may be said, perhaps, that as far as authority is concerned, the authorities are very equally balanced." After a full discussion of the English cases the court decided in favor of the priority of the mortgage over claims for repairs and supplies.

In 1884 the question was again presented to the Privy Council, and decided in the same way, in the case of *The Rio Tinto*, 9 App. Cas. 356, so that the law of England as settled by the court of last resort is now that the claim of the mortgagee is superior to that of the domestic lien holder.

III. By repeated decisions in the Seventh Circuit, the priority of a prior mortgage over home supplies has become established, as the *lex fori*, and such priority is a right of property. *The Lottawanna* and *The Madrid*, above cited.

Whether one lien is entitled to priority over another depends upon the *lex fori*. *The Union*, Lush. 128; *The Selah*, 4 Sawyer, 40. The priority of liens in admiralty is according

to that given by the *lex fori*, and is regulated by that law exclusively. *Graf Klot Trautvetter*, 8 Fed. Rep. 833.

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

By the admiralty law, maritime liens or privileges for necessary advances made, or supplies furnished, to keep a vessel fit for sea, take precedence of all prior claims upon her, unless for seamen's wages or salvage. It is upon this ground, that such advances or supplies, made or furnished in good faith to the master in a foreign port, are preferred to a prior mortgage, or to a forfeiture to the United States for a precedent violation of the navigation laws. *The St. Jago de Cuba*, 9 Wheat. 409, 416; *The Emily Souder*, 17 Wall. 666, 672.

In *The St. Jago de Cuba*, Mr. Justice Johnson, in delivering judgment, and speaking of the lien of material-men and other implied liens under maritime contracts, said: "The whole object of giving admiralty process and priority of payment to privileged creditors is to furnish wings and legs to" the vessel, "to get back for the benefit of all concerned; that is, to complete her voyage." "In every case, the last lien given will supersede the proceeding. The last bottomry bond will ride over all that precede it; and an abandonment to a salvor will supersede every prior claim. The vessel must get on; this is the consideration which controls every other; and not only the vessel, but even the cargo, is *sub modo* subjected to this necessity." 9 Wheat. 416.

In *The Yankee Blade*, 19 How. 82, 89, 90, Mr. Justice Grier, speaking for this court, said: "The maritime privilege or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a *jus in re*, without actual possession or any right of possession. It accompanies the property into the hands of a *bona fide* purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in

the state courts, though by analogy loosely termed proceedings *in rem*, are evidently not within the category." "These principles will be found stated, and fully vindicated by authority, in the cases of *The Young Mechanic*, 2 Curtis C. C. 404, and *The Kiersage*, 2 Curtis C. C. 421."

Both the decisions of Mr. Justice Curtis, thus referred to, depended on a statute of Maine, giving in general terms a lien upon a vessel for labor performed or materials furnished in her construction or repair, without undertaking to fix the comparative precedence of such liens.

In *The Young Mechanic*, after elaborate discussion of the nature of such a lien, it was held to be a *jus in re*, a right of property in the thing itself, existing independently of possession; "an appropriation made by the law, of a particular thing, as security for a debt or claim; the law creating an incumbrance thereon, and vesting in the creditor what we term a special property in the thing, which subsists from the moment when the debt or claim arises, and accompanies the thing even into the hands of a purchaser." "Though tacitly created by the law, and to be executed only by the aid of a court of justice, and resulting in a judicial sale, it is as really a property in the thing, as the right of a pledgee, or the lien of a bailee for work;" and is not "only a privilege to arrest the vessel for the debt, which, of itself, constitutes no incumbrance on the vessel, and becomes such only by virtue of an actual attachment." 2 Curtis C. C. 406, 410, 412.

In *The Kiersage*, Mr. Justice Curtis held that the lien for labor and materials in the home port had precedence over a prior mortgage; and, after observing that, as he had held in *The Young Mechanic*, this lien "was, in substance, a tacit hypothecation of the vessel, as security for the debt;" "a *jus in re*, constituting an incumbrance on the property by operation of law;" he added: "And there can be no doubt that it takes effect wholly irrespective of the state of the title to the vessel. Whether the vessel belongs to one or more persons — whether the title has been so divided that one is a special and another a general owner, and however it may be incumbered, the law gives the lien on the thing. The mortgagees can have

no claim to be preferred over the lien-holder because of their priority in time; for their interest in the vessel is as much subject to the statute lien, as the interest of any other party. It is not in the power of the owner, by his voluntary act, to withdraw any part of the title from the operation of the lien; if he could, he might altogether defeat it." 2 Curtis C. C. 422, 423.

It was assumed in each of those cases that a lien, given by the local law, for building a ship, stood on the same ground as a lien, under the same law, for repairing her. It has since been decided, and is now settled, that a contract for building a ship, being a contract made on land and to be performed on land, is not a maritime contract, and that a lien to secure it, given by local statute, is not a maritime lien, and cannot, therefore, be enforced in admiralty. *The Jefferson*, 20 How. 393; *The Capitol*, 22 How. 129; *Edwards* v. *Elliott*, 21 Wall. 532. That fact, however, does not affect the strength of the reasoning, or the justness of the conclusions, of Mr. Justice Curtis, as regards liens for repairs and supplies; and, in relation to such liens, his view has been generally accepted in the admiralty courts of the United States.

"A maritime lien, unlike a lien at common law, may," said Mr. Justice Field, speaking for this court, "exist without possession of the thing upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing, that he may subject it to condemnation and sale to satisfy his claim or damages." "The only object of the proceedings *in rem* is to make this right, where it exists available — to carry it into effect. It subserves no other purpose." *The Rock Island Bridge*, 6 Wall. 213, 215. And in *The Lottawanna*, Mr. Justice Bradley, speaking of a lien given by a statute of Louisiana for repairs and supplies, said "a lien is a right of property, and not a mere matter of procedure." 21 Wall. 558, 579.

In the admiralty and maritime law of the United States, as declared and established by the decisions of this court, the following propositions are no longer doubtful:

1st. For necessary repairs or supplies furnished to a vessel

in a foreign port, a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty. *The General Smith*, 4 Wheat. 438, 443; *The St. Jago de Cuba*, 9 Wheat. 409, 417; *The Virgin*, 8 Pet. 538, 550; *The Laura*, 19 How. 22; *The Grapeshot*, 9 Wall. 129; *The Lulu*, 10 Wall. 192; *The Kalorama*, 10 Wall. 204.

2d. For repairs or supplies in the home port of the vessel, no lien exists, or can be enforced in admiralty, under the general law, independently of local statute. *The General Smith*, and *The St. Jago de Cuba*, above cited; *The Lottawanna*, 21 Wall. 558; *The Edith*, 94 U. S. 518.

3d. Whenever the statute of a State gives a lien, to be enforced by process *in rem* against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States. *The Planter*, 7 Pet. 324; *The St. Lawrence*, 1 Black, 522; *The Lottawanna*, 21 Wall. 558, 579, 580; Rule 12 in Admiralty, as amended in 1872, 13 Wall. xiv.

4th. This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States, sitting in admiralty. *The Moses Taylor*, 4 Wall. 411; *The Hine*, 4 Wall. 555; *The Belfast*, 7 Wall. 624; *The Lottawanna*, 21 Wall. 558, 580; *Johnson* v. *Chicago Elevator Co.*, 119 U. S. 388, 397.

The fundamental reasons on which these propositions rest may be summed up thus: The admiralty and maritime jurisdiction is conferred on the courts of the United States by the Constitution, and cannot be enlarged or restricted by the legislation of a State. No State legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a State, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right according to their

own rules of procedure. See, in addition to the cases above cited, *The Orleans*, 11 Pet. 175, 184; *Ex parte McNiel*, 13 Wall. 236, 243; *The Corsair*, 145 U. S. 335, 347.

The settled rules of jurisdiction and practice on this subject were stated by Mr. Justice Bradley in *The Lottawanna* as follows: "So long as Congress does not interpose to regulate the subject, the rights of material-men furnishing necessaries to a vessel in her home port may be regulated in each State by state legislation. State laws, it is true, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts so as to enable them to proceed *in rem* for the enforcement of liens created by such state laws, for it is exclusively conferred upon the District Courts of the United States. They can only authorize the enforcement thereof by common law remedies, or such remedies as are equivalent thereto. But the District Courts of the United States, having jurisdiction of the contract as a maritime one, may enforce liens given for its security, even when created by the state laws." 21 Wall. 580.

By the Revised Statutes of Illinois of 1874, c. 12, § 1, every sailing vessel, steamboat or other water craft of above five tons burthen, used or intended to be used in navigating the waters of the State, or used in trade and commerce between ports and places within the State, or having her home port in the State, "shall be subject to a lien thereon" for all debts contracted by her owner or master on account of supplies and provisions furnished for her use, or of work done or services rendered on board of her "by any seaman, master or other employé thereof," or "of work done or materials furnished by mechanics, tradesmen or others, in or about the building, repairing, fitting, furnishing or equipping such craft," and also for sums due for wharfage, towage, or the like, or upon contracts of affreightment, and damages for injuries to persons or property. By §§ 3, 4, the lien may be enforced by a petition filed in a court of record in the county where the vessel is found, within five years, but cannot be enforced "as against

or to the prejudice of any other creditor, or subsequent incumbrancer or *bona fide* purchaser," unless the petition is filed within nine months after the debt accrues or becomes due. By §§ 5–8, upon the filing of the petition, and of a bond from the petitioner to the owner of the vessel to prosecute the suit with effect, or, in case of failure to do so, to pay all costs and damages caused to the owner or other persons interested in the vessel by the wrongful suing out of the attachment, a writ of attachment is to issue to the sheriff to seize and keep the vessel. By §§ 10, 11, notice is to be given to the owners in person, and by publication to all other persons interested, and they may intervene to protect their interests. By §§ 15–17, the vessel may be delivered up to the owner, or to any other person interested, upon his giving bond, or making a deposit of money. By § 19, the owner and other claimants are to file answers. By §§ 21–27, upon judgment for the petitioner, the vessel, if remaining in custody, is to be sold by the sheriff; and the proceeds (deducting certain costs) are to be applied, first, to the wages due to seamen, including the master, for certain periods, and then to all other claims, filed before the distribution, on which judgment has been rendered in favor of the claimant, and to any balance due to seamen; and any remnant is to be applied, first, to all other liens enforceable under the statute before distribution; second, to all mortgages or other incumbrances of the vessel by the owner, "in proportion to the interest they cover and priority;" third, to judgments at law or decrees in chancery against the owner; and any surplus to the owner.

It thus appears that, for all supplies or provisions furnished for the use of a vessel, or for work done and materials furnished in repairing her, in her home port, the statute gives a lien upon the vessel, to be enforced by proceedings *in rem*, analogous to such proceedings in admiralty.

In the present case, the District Court has found and adjudged that the sums claimed by the appellants for supplies, repairs and services were due to them; and the Circuit Court of Appeals has stated in its certificate that for these supplies, repairs and services there was a lien upon the vessel under the

laws of the State of Illinois; and has certified to this court the single question "whether a claim arising upon a vessel mortgage is to be preferred to the claim for supplies and necessaries furnished to a vessel in its home port in the State of Illinois subsequently to the date of the recording of the mortgage."

It must be assumed, therefore, for the purpose of deciding this question, that all the claims of the appellants for supplies and repairs were contracted under such circumstances, that a lien upon the vessel for their payment existed under the statute of Illinois, and should be enforced in admiralty by the courts of the United States against the proceeds of the vessel, unless the mortgagees are entitled to priority in the distribution.

An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it, or to assert either title or right of possession under it. *The John Jay*, 17 How. 399; *The Eclipse*, 135 U. S. 599, 608. But it has jurisdiction, after a vessel has been sold by its order, and the proceeds have been paid into the registry, to pass upon the claim of the mortgagee, as of any other person, to the fund, and to determine the priority of the various claims, upon petitions such as were filed by the mortgagees and the material-men in this case. *The Globe*, 3 How. 568, 573; *The Angelique*, 19 How. 239; *The Lottawanna*, 21 Wall. 558, 582, 583; Rule 43 in Admiralty.

The appellees rely on section 4192 of the Revised Statutes of the United States, which substantially reënacts the act of July 29, 1850, c. 27, § 1, (9 Stat. 440,) and is as follows: "No bill of sale, mortgage, hypothecation or conveyance of any vessel, or part of any vessel, of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation or conveyance is recorded in the office of the collector of the customs where such vessel is registered or enrolled. The lien by bottomry on any vessel, created during her voyage, by a loan of money or

materials, necessary to repair or enable her to prosecute a voyage, shall not, however, lose its priority, or be in any way affected by the provisions of this section."

The appellees contend that no lien created by the legislature of a State can override a prior mortgage recorded under this act of Congress.

But that enactment is a mere registry act, intended to prevent mortgages and other conveyances of vessels from having any effect (which they might have had before) against persons other than the grantor or mortgagor, and those claiming under him, or having actual notice thereof, unless recorded as therein provided. *White's Bank* v. *Smith*, 7 Wall. 646; *Aldrich* v. *Ætna Co.*, 8 Wall. 491. It manifests no intention to confer upon the mortgagee any new right, or to make the mortgage a maritime contract, or the lien created thereby a maritime lien, or in any way to interfere with maritime contracts or liens, or with the jurisdiction and procedure in admiralty. The only mention of any other lien on the vessel is of a bottomry bond, in the latter part of the section, originally inserted in the form of a proviso, and with the obvious purpose of precluding the possibility of construing such a bond to be an hypothecation, within the meaning of the previous clause, and therefore required to be recorded. And, as was well observed in *The William T. Graves*, 14 Blatchford, 189, 195, by Judge Johnson: "If this proviso be construed to mean that such a lien only is out of the purview of the statute, and that all other liens are postponed to that of a mortgagee, then the claims of salvors, and all those having other strictly maritime liens, would be thus postponed, to the subversion of the whole principle upon which efficacy is given to such claims, and the overthrow of the best settled and most salutary principles of the maritime law. Indeed, any principle, upon which this statute can be expounded to give such a priority to a recorded mortgage, would also extend to bills of sale and other conveyances recorded under the same law, and thus practically overthrow the whole scheme of maritime law upon the subject of maritime liens."

In *The Lottawanna*, the mortgage was preferred to the

claim of the material-men in the home port, only because the latter had not recorded their lien as required by the law of the State to make it valid; and it was clearly implied in the opinion of the court, delivered by Mr. Justice Bradley, as well as distinctly asserted in the dissenting opinion of Mr. Justice Clifford, that their lien, if valid, would take precedence of the mortgage. 21 Wall. 578, 579, 582, 608. And, as already stated at the outset of this opinion, the same rule was laid down in the opinion of Mr. Justice Curtis in *The Kiersage*, 2 Curtis C. C. 421, approved by this court in *The Yankee Blade*, 19 How. 82.

The appellees rely on a line of cases in the courts of the United States held in Illinois, beginning with a decision of Judge Drummond in 1869, and upon similar cases in the Supreme Court of the State, as establishing, as a rule of property, that a mortgage takes precedence of a lien for supplies afterwards furnished to a vessel in her home port under the statute of Illinois. *The Grace Greenwood*, (1869) 2 Bissell, 131; *The Skylark*, (1870) 2 Bissell, 251; *The Kate Hinchman*, (1875) 6 Bissell, 367, and (1876) 7 Bissell, 238; *The Great West No. 2* v. *Oberndorf*, (1870) 57 Illinois, 168; *The Hilton* v. *Miller*, (1871) 62 Illinois, 230.

But the question in controversy depends upon principles of general jurisprudence, and upon the true construction of an act of Congress, and arises in the courts of the United States exercising the admiralty and maritime jurisdiction exclusively vested in them by the Constitution. Upon such a question, neither the decisions of the highest court of a State, nor those of the Circuit and District Courts of the United States, can relieve this court from the duty of exercising its own judgment. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 443; *Andrews* v. *Hovey*, 124 U. S. 694, 717.

Moreover, the rule preferring the lien for repairs or supplies in a home port to a prior mortgage was recognized, even in the Seventh Circuit, by Judge Dyer in the District Court of the United States for the Eastern District of Wisconsin in 1874, in *The J. A. Travis*, 7 Chicago Legal News, 275; and it appears to prevail in every other judicial circuit of the United States.

It has been upheld in the First Circuit, by Mr. Justice Curtis in *The Kiersage*, (1855) 2 Curtis C. C. 421, already cited, and by Judge Lowell in *The Island City*, (1869) 1 Lowell, 375, 379; in the Second Circuit, by Judge Wallace, and by Judge Johnson on appeal, in *The William T. Graves*, (1876) 8 Benedict 568, and (1877) 14 Blatchford, 189; in the Third Circuit, by Judge McCandless, and by Mr. Justice Grier on appeal, in *The Collier*, (1861) 2 Pittsburgh Rep. 304, 318, 320, and by Judge Acheson in *The Venture*, (1885) 26 Fed. Rep. 285; and in the Fourth Circuit, by Judge Hughes in *The Raleigh*, (1876) 2 Hughes, 44, and by Judge Seymour in *Clyde* v. *Steam Transportation Co.*, (1888) 36 Fed. Rep. 501. In *The Marcelia Ann*, (1887) 34 Fed. Rep. 142, Judge Bond gave priority to the mortgage, because the statute of Maryland expressly so provided.

In the Fifth Circuit, Mr. Justice Woods, then Circuit Judge, while admitting that the lien of a mortgage duly recorded was inferior to all strictly maritime liens, yet held that it was superior to any subsequent lien for supplies in the home port, given by the legislation of a State. *The John T. Moore*, (1877) 3 Woods, 61; *The Bradish Johnson*, (1878) 3 Woods, 582. His ruling was followed by Judge Hill, who had previously decided otherwise in *The Emma*, (1876) 3 Central Law Journal, 285; and, with much doubt of its soundness, by Judge Pardee. *The Josephine Spangler*, (1881) 9 Fed. Rep. 773, and 11 Fed. Rep. 440; *The De Smet*, (1881) 10 Fed. Rep. 483. But in a very recent case, Mr. Justice Lamar, upon full consideration, and with the concurrence of Judge Pardee, overruled those decisions in a clear and convincing opinion. *The Madrid*, (1889) 40 Fed. Rep. 677.

In the Sixth Circuit, Judge Sherman, sitting in bankruptcy, held that a mortgage must be preferred to a subsequent lien for supplies under a state statute. *Scott's Case*, (1869) 1 Abbott, (U. S.) 336. But the opposite rule has since been recognized as clearly established in admiralty in that circuit by decisions of Judge Withey in *The St. Joseph*, (1869) Brown Adm. 202, and *The Alice Getty*, (1877) 2 Flippin, 18; of Judge Hammond in *The Illinois*, (1879) 2 Flippin, 383, 433; of Mr.

Justice Brown, then District Judge, in *The City of Tawas*, (1880) 3 Fed. Rep. 170; of Judge Swing in *The Guiding Star*, (1881) 9 Fed. Rep. 521 and of Mr. Justice Matthews and Judge Baxter in the same case on appeal, (1883) 18 Fed. Rep. 263, 269.

The decisions in the Eighth Circuit, by Judge Thayer in *The Wyoming*, (1888) 35 Fed. Rep. 548; and in the Ninth Circuit, by Judge Hoffman in *The Harrison*, (1870) 1 Sawyer, 353, and *The Hiawatha*, (1878) 5 Sawyer, 160, and by Judge Deady in *The Canada*, (1881) 7 Sawyer, 173, are to the same effect.

According to the great preponderance of American authority, therefore, as well as upon settled principles, the lien created by the statute of a State, for repairs or supplies furnished to a vessel in her home port, has the like precedence over a prior mortgage, that is accorded to a lien for repairs or supplies in a foreign port under the general maritime law, as recognized and adopted in the United States. Each rests upon the furnishing of supplies to the ship, on the credit of the ship herself, to preserve her existence and secure her usefulness, for the benefit of all having any title or interest in her. Each creates a *jus in re*, a right of property in the vessel, existing independently of possession, and arising as soon as the contract is made, and before the institution of judicial proceedings to enforce it. The contract in each case is maritime, and the lien which the law gives to secure it is maritime in its nature, and is enforced in admiralty by reason of its maritime nature only. The mortgage, on the other hand, is not a maritime contract, and constitutes no maritime lien, and the mortgagee can only share in the proceeds in the registry after all maritime liens have been satisfied.

It would seem to follow that any priority given by the statute of a State, or by decisions at common law or in equity, is immaterial; and that the admiralty courts of the United States, enforcing the lien because it is maritime in its nature, arising upon a maritime contract, must give it the rank to which it is entitled by the principles of the maritime and admiralty law.

As was forcibly said by Mr. Justice Matthews, in *The Guiding Star*, above cited, "In enforcing the statutory lien in maritime causes, admiralty courts do not adopt the statute itself, or the construction placed upon it by courts of common law or of equity, when they apply it. Everything required by the statute, as a condition on which the lien arises and vests, must, of course, be regarded by courts of admiralty; for they can only act in enforcing a lien when the statute has, according to its terms, conferred it; but beyond that the statute, as such, does not furnish the rule for governing the decision of the cause in admiralty, as between conflicting claims and liens. The maritime law treats the lien, because conferred upon a maritime contract by the statute, as if it had been conferred by itself, and consequently upon the same footing as all maritime liens; the order of payment between them being determinable upon its own principles." 18 Fed. Rep. 268.

It is unnecessary, however, in this case, to dwell upon that consideration, inasmuch as the lien in question is given precedence over mortgages, by the express terms of the statute of Illinois, as well as by the principles of the maritime law and the practice in admiralty.

The decisions in the Privy Council of England in *The Two Ellens*, L. R. 4 P. C. 161, and *The Rio Tinto*, 9 App. Cas. 356, cited by the appellees, in which the claims of prior mortgagees were preferred to claims of material-men in the home port, cannot affect our conclusion. Those decisions proceeded upon the ground that the material-men had no *jus in re*, because there was, by the law of England, no maritime lien for supplies, and because the acts of Parliament were construed as having given no lien for them until the arrest of the ship by admiralty process. The essential difference, in its very nature, between the right of material-men in a court of admiralty, under the law and statutes of England as judicially declared and expounded, and their right, by virtue of a local statute giving a maritime lien and a *jus in re*, as recognized in our own jurisprudence, is yet more clearly brought out in a later case, in which the Court of Appeal and the House of

Lords held that, even for supplies furnished in an English port to a foreign vessel, there was no lien, but a mere right to seize her upon process in admiralty. *The Heinrich Bjorn*, 10 P. D. 44, and 11 App. Cas. 270.

No question as to the lien of the master, or as to the comparative rank of various maritime liens *inter sese*, is presented by this case, in which the only question certified by the Circuit Court of Appeals, or within our jurisdiction to consider, as the case stands, is whether a claim arising under a mortgage of the vessel is to be preferred to the claim for supplies and necessaries furnished in her home port in the State of Illinois since the mortgage was recorded. This question must, for the reasons above stated, be

Answered in the negative.

MOELLE *v.* SHERWOOD.

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

No. 103. Submitted January 4, 1893. — Decided March 6, 1893.

Where no appeal lies from a decree of a Circuit Court to this court, the Circuit Court may, under the 88th rule in equity, allow a petition for a rehearing, and may rehear the cause after the adjournment of the court for the term in which the original decree was rendered.

After such a petition is filed, and a hearing had on it in the court below, it is too late to file affidavits and to claim that the amount in controversy exceeded the jurisdictional sum, so that an appeal could have been taken.

The receipt of a quit claim deed does not of itself prevent a party from becoming a *bona fide* holder; and the doctrine expressed in many cases that the grantee in such a deed cannot be treated as a *bona fide* purchaser does not rest upon any sound principle.

THIS was a suit in equity, commenced in June, 1885, in the Circuit Court of the United States for the District of Nebraska, to quiet the title of the complainant to certain real property

Statement of the Case.

described in the bill as the southeast $\frac{1}{4}$ of section No. 31, township No. 3 north, of range 8 east, of the 6th principal meridian, in Nuckolls County, State of Nebraska, to which the defendant, a citizen of that State, claimed some adverse interest and title. The bill alleged that the complainant was a citizen of New York, and that, at the commencement of the suit, and for a long time prior thereto, he was the owner in fee simple, and entitled to the possession of the described premises. His chain of title was as follows:

1. A patent of the land in controversy and of other land from the United States, dated November 1, 1871, issued to George L. Bittinger, and recorded in Nuckolls County, December 31, 1883.

2. A deed bearing date on the 22d of August, 1882, executed by Bittinger and his wife to L. P. Dosh, of Scott County, Iowa, reciting a consideration of one hundred dollars, by which they sold, conveyed, and quitclaimed all their "right, title and interest in and to" the premises in controversy. This deed was recorded September 19, 1882.

3. A warranty deed, dated October 27, 1882, of the premises, by L. P. Dosh and his wife to J. R. Dosh, of Guthrie County, Iowa, reciting a consideration of $1513. This deed was recorded November 20, 1882.

4. A warranty deed of the premises, dated June 30, 1883, by J. R. Dosh and his wife to the complainant, James K. O. Sherwood, reciting a consideration of $1800. This deed was recorded April 24, 1885.

The bill alleged that the complainant purchased the premises in question, that is, the southeast quarter of section 31 of the township named, at their full value, in the regular course of business, but that the defendant claimed that, by some secret and unrecorded deed from Bittenger, he had acquired a superior title to the premises, which claim so affected the title of the complainant as to render its sale or disposition impossible, and disturbed him in his right of possession, but of the nature of the claim, except as above stated, he was ignorant. He therefore prayed that the defendant might disclose the nature of his estate, interest and claim in the

premises, that the title of the complainant therein might be quieted, and that the defendant might be decreed to have no estate or interest therein, and be enjoined from asserting any.

The defendant in his answer denied that the complainant had any estate in or title to the premises, and set up that on the 23d day of June, 1870, George L. Bittinger, the patentee of the United States, and his wife, by a warranty deed, conveyed the premises for a valuable consideration to one Guthrie Probyne; that such deed was recorded August 20, 1883; that on the 24th day of August, 1883, Probyne and wife, for a valuable consideration, by a warranty deed, conveyed the premises to the defendant; and that the same was recorded August 28, 1883.

The defendant also, by leave of the court, filed a cross-bill in which he alleged that, at the commencement of the suit and a long time prior thereto, he was the owner in fee simple and in possession of the premises in controversy, and that his ownership of the estate rested upon the following muniments of title, namely: The patent mentioned from the United States of the described premises to Bittinger, dated November 1, 1871; the warranty deed of the premises by Bittinger and wife to Guthrie Probyne, dated June 23, 1870, and the warranty deed of Probyne and wife to the defendant, Theodore J. Moelle. The cross-bill also referred to an alleged tax deed of the premises by the treasurer of Nuckolls County, Nebraska, to one Ferdinand Faust, and a quitclaim from him to L. P. Dosh, but no notice is taken of the tax deed, as it is conceded to be invalid. The prayer in the cross-bill is that the title of the complainant, the defendant in the original bill, may be adjudged perfect and valid.

The answer to the cross-bill set up the various conveyances under which the complainant in the original suit claimed title to the premises, and, whilst admitting that the alleged deed to Probyne from Bittinger and wife, dated June 23, 1870, of the land in controversy was placed on record August 20, 1883, it charged that no such deed of the premises was ever signed, acknowledged or delivered by the grantors named, but averred that the deed signed, acknowledged and delivered by them to

him on the day designated conveyed different property from the premises embraced in the deed recorded August 20, 1883, being part of a different quarter section of the township, viz., the southwest quarter of section thirty-two and not the southeast quarter of section thirty-one, and was recorded June 3, 1871, with this different description. It alleged that subsequent to the record the deed was changed so as to read the southeast quarter of section thirty-one instead of the southwest quarter of section thirty-two, and in such changed condition was recorded August 20, 1883.

The depositions taken in the case established the alteration made in the deed to Probyne as set forth in the answer to the cross-bill. It is to be observed also that the date of the execution of the alleged deed to him by the patentee is more than a year prior to the issue of the patent. The testimony of the complainant Sherwood was taken in the case, and was to the effect that before purchasing the property he examined an abstract of title to it, and found a regular chain of conveyances from the United States to J. R. Dosh; that he also found from the records of certain tax sales a regular chain of conveyances from the grantee of the tax deed to the same party; that no other instrument affecting the title appeared of record; and that he was satisfied that the title was perfect. He then had the land examined, and it was reported to him to be a fair quantity of wild prairie lying vacant and unoccupied, and never had been occupied, and he paid eighteen hundred dollars cash for the property. In answer to a question he stated that at the time he believed he was getting a good title, and had no idea that any such controversy as now exists would arise. The land was unoccupied, the price of the land a reasonable one, and he believed that he was getting a valuable piece of property, with a perfect title, for a fair consideration.

The case was heard at the January term of the Circuit Court, 1888, and on the 9th of March, which was in the same term, a decree was rendered dismissing the bill. At the following term of the court, on the 18th of May, the complainant made a motion for leave to file a petition for a rehearing, representing to the court that, at the hearing of the cause and

when the decree was rendered, it was believed by him that the property in controversy was of sufficient value to give jurisdiction to the Supreme Court of the United States, and that an appeal would lie from the decree, but that since then he had become assured that no appeal would lie by reason of the fact that the premises in dispute were in value less than five thousand dollars. The petition was accompanied by the affidavit of one of the solicitors of the complainant that the allegations were made after careful investigation, and believed to be true. On the 29th of October, which was during the May term, the cause was submitted with the petition for a rehearing, and both were decided on the same day, and a decree rendered in favor of the complainant quieting his title as prayed. 36 Fed. Rep. 478. From that decree the present appeal was taken.

Mr. N. S. Harwood and *Mr. John H. Ames* for appellant.

I. The Circuit Court had no jurisdiction to grant or entertain an application for a rehearing, or to vacate or set aside the decree of the 9th of March, 1888, after the lapse of the term at which it was signed and entered. *Cameron* v. *McRoberts*, 3 Wheat. 590; *McMicken* v. *Perin*, 18 How. 507.

II. A grantee in a quitclaim deed is not to be regarded as a purchaser in any sense. *Pleasants* v. *Blodgett*, 32 Nebraska, 427.

The quitclaim deed from Bittenger and wife to L. P. Dosh, does not purport to convey the land, but only "all the right, title and interest" of the grantor "in and to the same." And it contains no covenants of warranty, even of that which it purports to convey. It purports upon its face to convey less than the fee. What interest or title, if any, it did convey was necessarily left to be ascertained by parol, or by other muniments of title. It would not even have prevented the grantor, Bittenger, from acquiring the title of his former grantee, Probyne, and setting it up adversely to his own grantee by quitclaim, L. P. Dosh. This point was expressly ruled by this court in *Hanrick* v. *Patrick*, 119 U. S. 156.

See also *White* v. *Brocaw*, 14 Ohio St. 339, 343; *Adams* v. *Ross*, 1 Vroom, (30 N. J. Law,) 505, 509; *S. C.* 82 Am. Dec. 237; *Blanchard* v. *Brooks*, 12 Pick. 47; *Brown* v. *Jackson*, 3 Wheat. 449, 452; *Oliver* v. *Piatt*, 3 How. 333; *May* v. *Le Claire*, 11 Wall. 217.

Mr. C. S. Montgomery for appellee.

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

The appellant asks for a reversal of the decree below on two grounds: *first*, that the petition for a rehearing was allowed and a rehearing had after the adjournment of the court for the term in which the original decree was rendered; and *second*, that the decree as finally rendered was against the settled law as to the effect of the quitclaim deed through which the complainant claims.

As a general thing, the jurisdiction of a court over its decrees terminates with the close of the term at which they were rendered. An exception to this doctrine is allowed by the 88th rule in equity, in cases where no appeal lies from the decree to the Supreme Court of the United States. It was on that ground that the motion was made for leave to file the petition for a rehearing in this case, and the allegations of the insufficiency of the amount involved, as the reason that no appeal from the decree would lie, does not appear to have been controverted by the defendant, but to have been conceded as true. The petition was, therefore, properly allowed; and, the case being submitted with such petition, there was no error in the court's considering its merits on the legal propositions presented. Although the appellant has by affidavits since filed shown that the amount involved exceeds the sum of five thousand dollars, it is too late for him on that account to object to the rehearing granted. His concession, upon which the petition was heard, cannot now be recalled. He should have shown that the land in controversy was sufficient at the time the motion was argued, instead of conceding its insufficiency as alleged.

Of the merits of the decree rendered in favor of the com-

plainant and sustaining his title, we have no doubt. His title is traced directly from the patentee of the United States, by various intermediate conveyances. The quitclaim by him to Dosh, bearing date on the 22d of August, 1882, was executed while the title still remained in him. The deed to Probyne, bearing date, as it would seem, prior to the issue of the patent, and on which the defendant relies, does not cover the premises in controversy, but only property situated in a different section of the township. Even if it be conceded that the parties intended that the conveyance should embrace the premises in controversy, they did not carry out their intention, and in its original condition the deed was placed on record and there allowed to remain, giving notice to all parties interested in section thirty-one of township number three that the conveyance to Probyne of June 23, 1870, did not affect them. The change in the description of the property, made after the delivery of the deed to the grantee and its record in the register's office of the county, did not give operation and force to the deed with the changed description as a conveyance of the premises in controversy. An alteration in the description of property embraced in a deed, so as to make the instrument cover property different from that originally embraced, whether or not it destroys the validity of the instrument as a conveyance of the property originally described, certainly does not give it validity as a conveyance of the property of which the new description is inserted. The old execution and acknowledgment are not continued in existence as to the new property. To give effect to the deed as one of the newly described property it should have been reëxecuted, reacknowledged and redelivered. In other words, a new conveyance should have been made.

But if the deed as altered in its description of the property conveyed be deemed valid as between the parties from the time of the alteration, though not reëxecuted, it could not take effect and be in force as to subsequent purchasers without notice, whose deeds were already recorded, but as to them, by the statute of Nebraska, it was void. The statute of that State upon the subject is as follows:

"All deeds, mortgages and other instruments of writing which are required to be recorded, shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages and other instruments shall be first recorded; *Provided*, That, such deeds, mortgages or instruments shall be valid between the parties." Sec. 16, c. 73, Compiled Stats. of Neb. 1891, p. 647.

The form of the quitclaim to Dosh on the 22d of August, 1882, did not, therefore, prevent the passing of the title of Bittinger to the grantee. Until then the title was in him. The deed previously executed to Probyne, if effectual for any purpose when it was altered without reëxecution, was inoperative as against the grantee in the quitclaim by force of the above statute.

The doctrine expressed in many cases that the grantee in a quitclaim deed cannot be treated as a *bona fide* purchaser does not seem to rest upon any sound principle. It is asserted upon the assumption that the form of the instrument, that the grantor merely releases to the grantee his claim, whatever it may be, without any warranty of its value, or only passes whatever interest he may have at the time, indicates that there may be other and outstanding claims or interests which may possibly affect the title of the property, and, therefore, it is said that the grantee, in accepting a conveyance of that kind, cannot be a *bona fide* purchaser and entitled to protection as such; and that he is in fact thus notified by his grantor that there may be some defect in his title and he must take it at his risk. This assumption we do not think justified by the language of such deeds or the general opinion of conveyancers. There may be many reasons why the holder of property may refuse to accompany his conveyance of it with an express warranty of the soundness of its title or its freedom from the claims of others, or to execute a conveyance in such form as to imply a warranty of any kind even when the title is known

to be perfect. He may hold the property only as a trustee or in a corporate or official character, and be unwilling for that reason to assume any personal responsibility as to its title or freedom from liens, or he may be unwilling to do so from notions peculiar to himself; and the purchaser may be unable to secure a conveyance of the property desired in any other form than one of quitclaim or of a simple transfer of the grantor's interest. It would be unreasonable to hold that, for his inability to secure any other form of conveyance, he should be denied the position and character of a *bona fide* purchaser, however free, in fact, his conduct in the purchase may have been from any imputation of the want of good faith. In many parts of the country a quitclaim or a simple conveyance of the grantor's interest is the common form in which the transfer of real estate is made. A deed in that form is, in such cases, as effectual to divest and transfer a complete title as any other form of conveyance. There is in this country no difference in their efficacy and operative force between conveyances in the form of release and quitclaim and those in the form of grant, bargain and sale. If the grantor in either case at the time of the execution of his deed possesses any claim to or interest in the property, it passes to the grantee. In the one case, that of bargain and sale, he impliedly asserts the possession of a claim to or interest in the property, for it is the property itself which he sells and undertakes to convey. In the other case, that of quitclaim, the grantor affirms nothing as to the ownership, and undertakes only a release of any claim to or interest in the premises which he may possess without asserting the ownership of either. If in either case the grantee takes the deed with notice of an outstanding conveyance of the premises from the grantor, or of the execution by him of obligations to make such conveyance of the premises, or to create a lien thereon, he takes the property subject to the operation of such outstanding conveyance and obligation, and cannot claim protection against them as a *bona fide* purchaser. But in either case if the grantee takes the deed without notice of such outstanding conveyance or obligation respecting the property, or notice of facts which,

if followed up, would lead to a knowledge of such outstanding conveyance or equity, he is entitled to protection as a *bona fide* purchaser, upon showing that the consideration stipulated has been paid and that such consideration was a fair price for the claim or interest designated. The mere fact that in either case the conveyance is unaccompanied by any warranty of title, and against incumbrances or liens, does not raise a presumption of the want of *bona fides* on the part of the purchaser in the transaction. Covenants of warranty do not constitute any operative part of the instrument in transferring the title. That passes independently of them. They are separate contracts, intended only as guaranties against future contingencies. The character of *bona fide* purchaser must depend upon attending circumstances or proof as to the transaction, and does not arise, as often, though, we think, inadvertently, said, either from the form of the conveyance or the presence or the absence of any accompanying warranty. Whether the grantee is to be treated as taking a mere speculative chance in the property, or a clear title, must depend upon the character of the title of the grantor when he made the conveyance: and the opportunities afforded the grantee of ascertaining this fact and the diligence with which he has prosecuted them, will, besides the payment of a reasonable consideration, determine the *bona fide* nature of the transaction on his part.

In the present case every available means of ascertaining the character of the title acquired, both at the time of his own purchase and at the time the purchases of his predecessors in interest were made, were pursued by the complainant. When he looked at the records of the county where the property was situated, he saw that the only deed executed by the patentee, the original source of title, was for property other than the premises in controversy. No mere speculative investment in the chance of obtaining a good title could therefore properly be imputed to him.

Decree affirmed.

UNITED STATES *v.* CALIFORNIA AND OREGON LAND COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 1073. Argued January 10, 11, 1893. — Decided March 6, 1893.

The former decision in this case, 140 U. S. 599, imported that the pleas were sufficient in law, and remanded the case only for an inquiry as to their truthfulness.

A defendant in equity may let the facts averred in the bill go unchallenged, and set up some special matter by plea sufficient to defeat the recovery; and in such case no fact is in issue at the hearing but the matter so specially pleaded.

In these suits those defendants who were not the original wrongdoers had the right to set up any special matter of defence which constituted a defence as to them, and then the inquiry was limited to such matter as between them and the government.

The essential elements which go to make a *bona fide* purchaser of real estate are: (1) a valuable consideration: (2) an absence of notice of fraud or defect: (3) presence of good faith.

It is again decided that when a statute of the United States delegates to a tribunal or officer full jurisdiction over a subject in which the United States are interested, his or its determination within the limit of his authority is conclusive, in the absence of fraud.

A person holding under a quitclaim deed may be a *bona fide* purchaser. *Oliver* v. *Piatt*, 3 How. 333; *Van Rensselaer* v. *Kearney*, 11 How. 297; *May* v. *Le Claire*, 11 Wall. 217; *Villa* v. *Rodriguez*, 12 Wall. 323; *Dickerson* v. *Colgrove*, 100 U. S. 578; *Baker* v. *Humphrey*, 101 U. S. 494; and *Hanrick* v. *Patrick*, 119 U. S. 156, questioned on this point.

A deed by which the grantor aliens, releases, grants, bargains, sells and conveys the granted estate to the grantee, his heirs and assigns, to have and to hold the same and all the right, title and interest of the grantor therein, is a deed of bargain and sale, and will convey an after acquired title.

On July 2, 1864, Congress passed an act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the eastern boundary of the State. 13 Stat. 355, c. 213. A proviso to the first and granting section was: "That the lands hereby granted shall be ex-

clusively applied in the construction of said road, and shall be disposed of only as the work progresses; and the same shall be applied to no other purpose whatever." The third and fourth sections read:

"SEC. 3. *And be it further enacted*, That said road shall be constructed with such width, graduation, and bridges as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

"SEC. 4. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of only in the following manner, that is to say: that a quantity of land not exceeding thirty sections for said road may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any ten continuous miles of said road are completed, then another quantity of land hereby granted, not to exceed thirty sections, may be sold, and so from time to time until said road is completed; and if said road is not completed within five years, no further sales shall be made, and the land remaining unsold shall revert to the United States."

On October 24, 1864, the legislature of Oregon in its turn granted these lands to the Oregon Central Military Road Company, for the purpose of aiding it in constructing the road. Laws of Oregon, 1864, p. 36. On June 18, 1874, Congress enacted:

"CHAP. 305. An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases.

"Whereas certain lands have heretofore, by acts of Congress, been granted to the State of Oregon to aid in the construction of certain military wagon-roads in said State, and there exists no law providing for the issuing of formal patents for said lands: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the governor of the State of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon as fast as the

same shall, under said grants, be selected and certified, unless the State of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: *Provided*, That this shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled." 18 Stat. 80.

On March 2, 1889, Congress passed an act, 25 Stat. 850, c. 377, entitled "An act providing in certain cases for the forfeiture of wagon-road grants in the State of Oregon," which commenced with this recital:

"Whereas the United States have heretofore made various grants of public lands to aid in the construction of different wagon-roads in the State of Oregon, and upon the condition that such roads should be completed within prescribed times; and

"Whereas said grants were transferred by said State to sundry corporations, who were authorized by the State to construct such wagon-roads and to receive therefor the grants of lands thus made; and

"Whereas the Department of the Interior certified portions of said lands to the State of Oregon upon the theory that said roads had been completed as required by the granting acts of Congress, and upon the certificate of the governor of the State of Oregon as to such completion; and

"Whereas the legislature of the State of Oregon has memorialized Congress and therein alleged that certain of said wagon-roads, in whole or in part, were not so completed, and that to the extent of the lands coterminous with unconstructed portions the certifications thereof by the Department of the Interior were unauthorized and illegal: Therefore" . . . ; and directed the Attorney General of the United States within six months to institute suits in the Circuit Court of the United States for the District of Oregon against all firms, persons or corporations claiming to own or have an interest in lands

granted to the State of Oregon by certain enumerated acts of Congress — among others, the act above referred to, of July 2, 1864 — "to determine the questions of the reasonable and proper completion of said roads in accordance with the terms of the granting acts, either in whole or in part, the legal effect of the several certificates of the governors of the State of Oregon of the completion of said roads, and the right of resumption of such granted lands by the United States, and to obtain judgments, which the court is hereby authorized to render, declaring forfeited to the United States all of such lands as are coterminous with the part or parts of either of said wagon-roads which were not constructed in accordance with the requirements of the granting acts, and setting aside patents which have issued for any such lands, saving and preserving the rights of all *bona fide* purchasers of either of said grants, or of any portion of said grants, for a valuable consideration, if any such there be. Said suit or suits shall be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are therein tried, with right to writ of error or appeal by either or any party as in other cases."

In pursuance of this act, on August 30, 1889, a bill was filed in the Circuit Court of the United States for the District of Oregon against the Oregon Central Military Road Company, the California and Oregon Land Company, and certain named individuals. The bill, it may be said in a general way, charged that the road was not in fact constructed; that certificates of construction were fraudulently obtained from the governors of the State; that, in pursuance of such false certifications, a large number of tracts had been certified or patented to the State of Oregon for the benefit of the Oregon Central Military Road Company; that thereafter these lands were conveyed to certain of the individuals named as defendants, and by them finally to the California and Oregon Land Company; and, further, that these parties received the deeds with full knowledge of the fact that the road was not constructed, as required by the act, and that the certificates were false and fraudulently obtained. To this bill, on October 24, 1889, the

Argument for Appellants.

California and Oregon Land Company filed two pleas and an answer in support thereof. The case was set down for hearing on the pleas, and on February 18, 1890, they were sustained and the bill dismissed. From such decree of dismissal the United States appealed to this court. On May 25, 1891, the decision of the Circuit Court was reversed, (140 U. S. 599,) and the case remanded for further proceedings. The opinion of this court was announced by Mr. Justice Blatchford, and in that opinion will be found a full history of all the matters affecting the litigation up to that time. The conclusion reached was, that the Circuit Court erred in not permitting the United States to reply to the pleas, and in dismissing the bill absolutely. After the mandate had been filed in the Circuit Court, issue was joined on the pleas, testimony taken, and on December 7, 1891, a decree was again entered sustaining the second plea and dismissing the bill of complaint, as to the defendant, the California and Oregon Land Company. From this decree an appeal was taken to the Circuit Court of Appeals, by which court, on March 10, 1892, that decree was affirmed, (7 U. S. App. 128,) and from this decree of affirmance the United States appealed to this court.

Mr. Assistant Attorney General Parker for appellants.

The court erred in holding that none of the provisions of the act of Oregon of 1862 applied to the road authorized by Congress. It may be fairly inferred that the act of Congress was left indefinite because of the knowledge possessed that the State prescribed a special manner of construction.

It may also fairly be inferred that the State, in transferring the grant to the wagon-road company without special conditions, relied upon the statute of October 14, 1862, subject to which the company was incorporated, as providing valid and sufficient requirements for the construction of the highways.

Congress, in using the words "may prescribe," cannot be held to have excluded existing laws; it should be held, rather, that the legislation was in view of existing law, and that the real intent was that specifications as to the construction should

be subject to the State, and that the construction should be in accordance with the laws of the State in force at the time the obligation to construct should become binding. Congress did not point to some future enactment, it pointed merely to the law of the State as it should actually exist; and the fact that such law continued, instead of being afterward created, does not exempt the road company from its requirements.

Although the national and state acts, when accepted by the road company, may be held to constitute a contract, this contract must — nothing appearing to the contrary — be held to be made subject to the provisions of existing law.

These land grants were to be exclusively applied to the constructing of the road, and their application to any other purpose was prohibited. The grant was only upon these conditions; the state acts continued, as they must have done, the conditions and limitations, and the act of 1874 has not waived or changed them, and all deeds were subject to these conditions and limitations.

It is submitted that any purchaser receiving such a title of land so granted was bound, at his peril, to know that the conditions had been fulfilled and that the limitations had not been overstepped. He was bound, at his peril, to know whether the constructing company had built the road as required. He was bound to ascertain, at his peril, whether the certificate of the governor was fraudulent or otherwise.

Any person purchasing the land involved was not at liberty to merely look at or have an attorney examine the governor's certificate, but it was his duty to ascertain whether the original acts had been complied with, whether the land had actually been earned, and whether the required road had in fact been built.

It is manifest that the court below coöperated in excluding from the trial the questions which Congress intended should be tried, and the questions which this court may well have anticipated would be tried when the case was sent back for the filing of replies and for a new trial.

The order in which these proceedings of the court appear in the record indicates that the court excluded the evidence

offered first, and then, with a view to protect the defendant, struck out upon their request, that portion of their plea, which alleged that the certificates were honestly made and that they were procured without fraudulent intent or false representation.

It is respectfully submitted to this court that the trial below was so managed as to avoid and evade those tests which Congress and this court expected and intended should be applied in the trial of this case.

Mr. A. B. Browne and *Mr. John F. Dillon* for appellee. *Mr. A. T. Britton* was on *Mr. Browne's* brief.

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

The burden of complaint in this case is, that the Circuit Court erred in restricting the scope of the inquiry. The government sought to introduce testimony to show that the road was never in fact constructed, as required by the act of Congress; and also that the certificates of the governors, made as provided by section 4 of the act of 1864, were obtained by fraud and misrepresentation, as averred in the bill. But all of this testimony was excluded, and the inquiry limited to the single question whether the Land Company was a *bona fide* purchaser.

The first plea of the Land Company recited the fact that three several certificates had been issued by governors of the State of Oregon, to the effect that the road had been completed as required by the act of Congress, and added, "that each of said several certificates was made honestly and in good faith and without any fraudulent intent or procurement or false representation by any person whomsoever." But upon application to the Circuit Court this clause in the plea was stricken out, leaving it to contain simply an averment of the certificates of the governors; and as these had been set out at length in the bill, there was no issue of fact presented by this plea. The other plea was that the Land Company was a

purchaser in good faith, and to that question, as heretofore stated, the inquiry was restricted.

There was no error in this ruling. The decision of this court, as reported in 140 U. S. 599, was that "the decree of the Circuit Court, so far as it dismisses the bill, must be reversed and the case be remanded to that court with a direction to allow the plaintiffs to reply to and join issue on the pleas," and the mandate which was sent to the Circuit Court recited this direction. That decision was the law of this case for the subsequent proceedings in that court. There was no adjudication that the pleas were insufficient in law; on the contrary, the plain implication of the opinion was that they were sufficient, and the question which was remanded to that court for inquiry was as to their truthfulness. There was no adjudication of insufficiency and no rehearing ordered on that question. If the government was not satisfied with the decision, it should have called our attention to it, and have sought a modification or enlargement of the decree. The Circuit Court properly construed it, and proceeded in obedience thereto to permit the government to join issue on the pleas, and to entertain an inquiry as to their truthfulness, and that was the only matter open for inquiry.

Indeed, that would have been the rule if there had been no decision of this court, and if in the first instance issue had been joined on the pleas. It is true that the statute directed that these suits be brought "to determine the questions of the seasonable and proper completion of said roads," and "the legal effect of the several certificates of the governors;" and upon that counsel for the government insists that its mandate was that there should be full inquiry as to these matters; but that statute also provided "that said suit or suits shall be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are therein tried;" and the unquestionable right of a defendant in an equity suit is to let the facts averred in the bill go unchallenged, and by plea set up some special matter, which, if established and sufficient, will defeat any recovery. Even if it were within the competency of Congress to compel every

party named as defendant to a suit in equity brought by it, to bear all the expenses and submit to all the delay of a prolonged inquiry into the truth of the facts averred in the bill, it is obvious from the language we have quoted from the statute that Congress did not intend to deprive any party of the rights ordinarily vested in defendants in suits in equity. If the sole purpose were to ascertain by judicial investigation whether the roads were in fact completed as required, that purpose could have been accomplished by making defendants only the original parties, the wrongdoers. If other parties than they were made defendants, as is the fact here, such parties, within the terms of the statute, had the right by plea to set up any special matter which as to them constituted a full defence; and as between such parties and the government, the inquiry, by settled rules of equity, was then limited to such matter.

In *Farley* v. *Kittson*, 120 U. S. 303, 314, 315, 316, the nature and functions of a plea were fully discussed. It was said: "But the proper office of a plea is not, like an answer, to meet all the allegations of the bill; nor like a demurrer, admitting those allegations, to deny the equity of the bill; but it is to present some distinct fact, which of itself creates a bar to the suit, or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large. Mitford Pl. (4th ed.) 14, 219, 295; Story Eq. Pl. §§ 649, 652.

"The plaintiff may either set down the plea for argument, or file a replication to it. If he sets down the plea for argument, he thereby admits the truth of all the facts stated in the plea, and merely denies their sufficiency in point of law to prevent his recovery. If, on the other hand, he replies to the plea, joining issue upon the facts averred in it, and so puts the defendant to the trouble and expense of proving his plea, he thereby, according to the English chancery practice, admits that, if the particular facts stated in the plea are true, they are sufficient in law to bar his recovery; and if they are proved to be true, the bill must be dismissed, without reference to the equity arising from any other facts stated in the bill. Mitford

Pl. 302, 303; Story Eq. Pl. § 697. That practice in this particular has been twice recognized by this court. *Hughes* v. *Blake*, 6 Wheat. 453, 472; *Rhode Island* v. *Massachusetts*, 14 Pet. 210, 257."

And again: "In a case so heard, decided by this court in 1808, Chief Justice Marshall said: 'In this case the merits of the claim cannot be examined. The only questions before this court are upon the sufficiency of the plea to bar the action, and the sufficiency of the testimony to support the plea as pleaded.' *Stead* v. *Course*, 4 Cranch, 403, 413. In a case before the House of Lords a year afterwards, Lord Redesdale 'observed, that a plea was a special answer to a bill, differing in this from an answer in the common form, as it demanded the judgment of the court, in the first instance, whether the special matter urged by it did not debar the plaintiff from his title to that answer which the bill required. If a plea were allowed, nothing remained in issue between the parties, so far as the plea extended, but the truth of the matter pleaded.' 'Upon a plea allowed, nothing is in issue between the parties but the matter pleaded, and the averments added to support the plea.' 'Upon argument of a plea, every fact stated in the bill, and not denied by answer in support of the plea, must be taken for true.' *Roche* v. *Morgell*, 2 Sch. & Lef. 721, 725–727."

The right, therefore, of this defendant, the California and Oregon Land Company, to avail itself of a plea cannot be doubted; and the plea which it made in this case, that of a *bona fide* purchaser, is one favored in the law. In the act directing these suits was a clause "saving and preserving the rights of all *bona fide* purchasers of either of said grants, or of any portion of said grants, for a valuable consideration, if any such there be." In Story's Equity Jurisprudence, section 411, the author says: "Indeed, purchasers of this sort [*bona fide* purchasers] are so much favored in equity, that it may be stated to be a doctrine now generally established, that a *bona fide* purchaser for a valuable consideration, without notice of any defect in his title at the time of his purchase, may lawfully buy in any statute, mortgage or other encumbrance upon the same estate for his protection. If he can

defend himself by any of them at law, his adversary will have no help in equity to set these encumbrances aside; for equity will not disarm such a purchaser; but will act upon the wise policy of the common law, to protect and quiet lawful possessions, and strengthen such titles." And the reason of this is given in *Boone* v. *Chiles*, 10 Pet. 177, 210, as follows: "This leads to the reason for protecting an innocent purchaser, holding the legal title, against one who has the prior equity; a court of equity can act only on the conscience of a party; if he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction. . . . Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser, who has put himself in peril by purchasing a title, and paying a valuable consideration, without notice of any defect in it, or adverse claim to it." See, also, *Lea* v. *Polk County Copper Co.*, 21 How. 493, 497, 498; *Croxall* v. *Shererd*, 5 Wall. 268.

In *United States* v. *Burlington &c. Railroad Co.*, 98 U. S. 334, 342, it was said: "It [the United States] certainly could not insist upon a cancellation of the patents so as to affect innocent purchasers under the patentees." And, again, in *Colorado Coal Company* v. *United States*, 123 U. S. 307, 313: "It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the preëmption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defence of a *bona fide* purchaser for value without notice is perfect."

The Land Company, therefore, had a right to set up a special plea, and the plea which it did set up, that of a *bona fide* purchaser, was sufficient if true. And this brings us to an inquiry as to whether this plea was sustained by the testi-

mony. The purchase was made by a party of gentlemen living in California, in the spring and fall of 1874, the first purchase being of an undivided one-half, and the second of the remaining moiety. Ten persons were named as grantees in the first deed, and eleven in the second, some of whom were also grantees in the first. The title remained thus distributed among these several individuals until 1877, when, for convenience in the care and sale of the property, they all united in a conveyance of their respective interests to the California and Oregon Land Company, of which they were the stockholders. The price for these lands, $200,000, was paid, and paid in cash, the several purchasers each contributing his respective proportion. Since the purchase they have expended in the care of the property, including taxes, $140,000, while their receipts for sales and rentals amount to only about $23,000. More than half of the parties interested in the purchase died before the taking of testimony in this suit. The survivors were all called as witnesses, and each for himself testified, as strongly as language can express it, that his purchase was made in good faith; that he had no knowledge of any defect in the title, or of anything wrong in the actions of the Military Road Company, or of any failure on its part to fully construct the road. There was no opposing testimony; and if the question be one simply of fact, there can be no doubt that these parties were *bona fide* purchasers within the rule laid down in 2 Pomeroy Eq. Jur., § 745, to wit: "The essential elements which constitute a *bona fide* purchase are, therefore, three: a valuable consideration, the absence of notice, and presence of good faith." Indeed, counsel for the government does not seriously dispute that this is the necessary conclusion from the testimony. In this connection it is worthy of notice that the purchasers, when their attention was called to the fact that this property was for sale, sent an agent to Oregon to examine into the matter. While such agent is dead, and what he ascertained is, therefore, not affirmatively shown, yet it does appear that, to the survivors, at least, of the purchasers, he brought no intimation or suggestion of any defect in the title of the land. On the contrary, an abstract of title was presented to them,

showing the certificates of the governors of the completion of the work, together with an opinion from the firm of Mitchell & Dolph, two of the leading lawyers in the State of Oregon, that the title of the Road Company was perfect.

Further, the significance of the certificates of the governors, as an independent matter in this inquiry, must not be overlooked. Under the decision in *Land Company* v. *Courtright*, 21 Wall. 310, the title to the first thirty sections did not depend on the completion of the road, and with respect to the residue of the land, the fourth section of the act of 1864 gave to the governor of the State the power to determine when it should be fully earned; for it reads that "when the governor of said State shall certify to the Secretary of the Interior that any continuous ten miles of said road are completed, then another quantity of land hereby granted, not to exceed thirty sections, may be sold, and so from time to time until said road is completed." And because there was no express provision for the issue of former patents, the act of 1874, which took effect intermediate the first and second deeds from the Road Company, provided, that when the roads were "shown by the certificate of the governor of the State of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the State" or its grantee. Now, it is familiar law that when jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive. Thus in the case of *United States* v. *Arredondo*, 6 Pet. 691, 729, this court said: "It is a universal principle, that, where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether ex-

ecutive, (1 Cranch, 170, 171,) legislative, (4 Wheat. 423; 2 Pet. 412; 4 Pet. 563,) judicial, (11 Mass. 227; 11 S. & R. 429; adopted in 2 Pet. 167, 168,) or special, (20 Johns. 739, 740; 2 Dow P. C. 521, etc.,) unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law." See also the following cases: *Foley* v. *Harrison*, 15 How. 433, 448; *Johnson* v. *Towsley*, 13 Wall. 72, 83; *Smelting Company* v. *Kemp*, 104 U. S. 636, 640; *Shepley* v. *Cowan*, 91 U. S. 330, 340; *Moore* v. *Robbins*, 96 U. S, 530, 535; *Quinby* v. *Conlan*, 104 U. S. 420, 426; *Steel* v. *Smelting Co.*, 106 U. S. 447, 450; *Lee* v. *Johnson*, 116 U. S. 48, 51; *Wright* v. *Roseberry*, 121 U. S. 488, 509.

It is true that the bill alleges that these certificates were procured by the Road Company by and through the false and fraudulent representations of its officers, agents, etc., and also true that the averment in the first plea, that the certificates were made honestly and in good faith, was stricken out, and testimony offered to show the way in which the certificates were obtained was rejected. Therefore, as the inquiry is now presented, it must be in the light of the uncontested allegation that the certificates were obtained through the fraudulent acts of the Road Company. It may be that, in view of this situation of affairs, the Road Company could not avail itself of such determinations by the governors as decisive of its title, and it may also be that the purchasers are likewise precluded from claiming that these determinations are in and of themselves conclusive in their favor, but at the same time they are significant with respect to that element of good faith, which consists in diligence. The testimony shows that the purchasers knew of nothing wrong in respect to the title, or the proceedings of the Road Company, or any officials connected with the transfer of title. They knew that determination of the question as to the completion of the road was committed by the statute to the governor of the State. They saw his adjudication upon that question, and it may well be held that they took all the active measures which under the circumstances they could be required to take when they ascertained that the authorized official, and that official the chief executive

of the State, the grantee named in the Congressional act, had officially determined that the road was completed, there being nothing in any of the circumstances surrounding the parties to suggest a suspicion of wrong. Can it be that they must be adjudged derelict in diligence because they did not make a personal examination of the road, and determine for themselves whether it was in its entire length completed so as to satisfy all of the terms of the grant? If a patent from the government be presented, surely a purchaser from the patentee is not derelict, and does not fail in such diligence and care as are required to make him a *bona fide* purchaser, because he relies upon the determination made by the land officers of the government in executing the patent, and does not institute a personal inquiry into all the anterior transactions upon which the patent rested.

As against these evidences and conclusions of good faith but a single proposition is raised, one upon which the dissenting judge in the Circuit Court of Appeals rested his opinion, and that is the proposition that the conveyances from the Road Company were only quitclaim deeds, and that a purchaser, holding under such a deed cannot be a *bona fide* purchaser, and in support of this proposition reference is made to the following cases in this court: *Oliver* v. *Piatt*, 3 How. 333, 410; *Van Rensselaer* v. *Kearney*, 11 How. 297; *May* v. *Le Claire*, 11 Wall. 217, 232; *Villa* v. *Rodriguez*, 12 Wall. 323, 339; *Dickerson* v. *Colgrove*, 100 U. S. 578; *Baker* v. *Humphrey*, 101 U. S. 494; *Hanrick* v. *Patrick*, 119 U. S. 156. The argument, briefly stated, is that he who will give only a quitclaim deed in effect notifies his vendee that there is some defect in his title, and the latter, taking with such notice, takes at his peril. It must be confessed that there are expressions in the opinions in the cases referred to which go to the full length of this proposition. Thus, in *Baker* v. *Humphrey*, 101 U. S. 494, 499, Mr. Justice Swayne, in delivering the opinion of the court, uses this language: "Neither of them was in any sense a *bona fide* purchaser. No one taking a quitclaim deed can stand in that relation." Yet it may be remarked that in none of these cases was it necessary to go to the full extent of

denying absolutely that a party taking a quitclaim deed could be a *bona fide* purchaser; and in the later case of *McDonald* v. *Belding*, 145 U. S. 492, it was held, in a case coming from Arkansas, and in harmony with the rulings of the Supreme Court of that State, that while ordinarily a person holding under a quitclaim deed may be presumed to have had knowledge of imperfections in his vendor's title, yet that the rule was not universal, and that one might become a *bona fide* purchaser for value although holding under a deed of that kind; and in that case the grantee so holding was protected as a *bona fide* purchaser: while in the case of *Moelle* v. *Sherwood*, just decided, *ante*, 21, the general question was examined, and it was held that the receipt of a quitclaim deed does not of itself prevent a party from becoming a *bona fide* holder, and the expressions to the contrary, in previous opinions, were distinctly disaffirmed.

But, further, and even if the doctrine were now recognized to be as heretofore stated, this fact would take the case out from the reach of the rule. The title passed from the Road Company to the purchasers by four conveyances: two from the Road Company to one Pengra, its agent and superintendent; and two from Pengra to the purchasers. Now, the deeds from Pengra are not quitclaims; they do not purport to be merely releases of his right, title and interest; but are strictly deeds of bargain and sale. The granting clause is in these words: "The said parties of the first part have aliened, released, granted, bargained, sold, and by these presents they do alien, release, grant, bargain, sell and convey unto the said parties of the second part, their heirs and assigns, in proportions hereafter specified, the equal undivided one-half ($\frac{1}{2}$) of all and singular the lands lying and being in the State of Oregon, granted or intended to be granted to the State of Oregon by act of Congress," etc. And the *habendum* is: "To have and to hold all and singular the lands and premises hereby conveyed, to wit, said undivided one-half of all the above-described grant of lands listed and to be listed, and all the right, title and interest of the party of the first part therein."

Such a deed is clearly something more than one of quit-

claim and release; it is a deed of bargain and sale, and will convey an after-acquired title. Such is the ruling of the Supreme Court of Oregon. *Taggart* v. *Risley*, 4 Oregon, 235. Now, even in those courts in which the rule was announced, that one who takes under a quitclaim deed cannot be a *bona fide* purchaser, it was sometimes limited to the grantee in such a deed, and not extended to those cases in which a quitclaim was only a prior conveyance in the chain of title. *Snowden* v. *Tyler*, 21 Nebraska, 199. And this is certainly a most reasonable limitation, because the rule is obviously, at the best, arbitrary and technical; for a party who receives a quitclaim deed may act in the utmost good faith, and in fact be ignorant of any defect in the title, and this, although he has made the most complete and painstaking investigation, and only takes the quitclaim deed because the grantor, for expressed and satisfactory reasons, declines to give a warranty. It would be unfortunate, in view of the fact that in so many chains of title there are found quitclaim deeds, to extend a purely arbitrary rule so as to make the fact of such a deed notice of any prior defect in the title.

It may be said that the real transaction was between the Road Company and the purchasers; that the agent and superintendent of the Road Company was merely a go-between, a conduit through which the title passed from the Road Company to the purchasers; and that the spirit, if not the letter of the rule, requires that the form of conveyance used by the Road Company should be controlling as to the *bona fides* of the purchasers. But as it is, wherever enforced, a merely technical and arbitrary rule, justice requires that it should not be carried beyond its express terms, nor used to disprove the good faith which, in this case, all the other testimony shows in fact existed in the purchasers. And in this respect it is well to consider the obvious reason for the unwillingness of the Road Company to itself execute a warranty deed. The original act of 1864 said nothing about patents; it simply granted the lands to the State, and authorized their sale; and only after the arrangement had been made for the purchase of one-half of these lands, and the

conveyances made therefor, was the act of 1874 passed, providing in terms for patents. The claim of the Road Company was, that their title was a perfect legal title, even without a patent; and yet there being a doubt in respect thereto — a doubt which was solved only by the act of 1874 — it was not strange that it preferred to quitclaim its interest in the granted lands rather than to formally convey them by a warranty of the legal title. But it is not to be inferred therefrom, as a matter of law, that the Road Company in any way doubted its full equitable title, or that, by the fact of a quitclaim, it notified the purchasers of any other matter than this omission in the statute. On the contrary, the plain import of the language used in the conveyance from the Road Company to Pendra was that it intended to convey the lands which it had received under the grant, and to which it believed it then had a full equitable, if not legal, title. Our conclusions, therefore, are that the decision of the Circuit Court and the Court of Appeals was correct.

Before closing this opinion, we think it proper to notice one matter which, though of no significance in determining the legal rights of the parties, may throw light upon the transaction, and perhaps relieve the original donee of the grant by the State, the Road Company, from the imputation of wrong cast upon it by the filing of this bill. The grant was made in 1864, and the last certificate of the governor of Oregon was dated the 12th of January, 1870. The memorial of the legislature of the State of Oregon was adopted in 1885, that memorial which induced the act of Congress and this litigation. In other words, the State of Oregon and its citizens, including those living along this road, remained silent for fifteen years after its alleged completion. The terms of the original grant were limited to the construction of the road, and imposed no duty of thereafter keeping it in good condition. Having earned the grant by constructing the road, it may well be that the Road Company took no further interest in it, and an ordinary wagon-road, uncared for during fifteen years, particularly that part of it which runs through mountainous country, would be almost completely destroyed by the

Names of Counsel.

action of the elements; and so it may be that those, who in 1884 and 1885 investigated the matter, found little semblance of a road, and hence concluded, though erroneously, that none was ever constructed, and from this the complaint, the memorial, and the litigation proceeded; and this is consistent with the fact that the Road Company fully discharged its duty and fairly earned the lands. Of course, this is a mere suggestion; but it has the probabilities in its favor, and relieves all parties from condemnation. But whether this be true or not, for the reasons we have heretofore stated, our conclusion is clear that the title of the purchasers and the Land Company is beyond challenge.

The decree is affirmed.

UNITED STATES *v.* DALLES MILITARY ROAD COMPANY. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. No. 1159, argued with No. 1073.

BREWER, J. The questions in this case are substantially the same as those in No. 1073, *United States* v. *California & Oregon Land Company*. It is unnecessary, therefore, to state the facts in detail, and it is sufficient to say that the same decree of affirmance will be entered.

Mr. Assistant Attorney General Parker for appellants.

Mr. James K. Kelly for appellees.

COMMERCIAL BANK OF PENNSYLVANIA *v.* ARMSTRONG.

ARMSTRONG *v.* COMMERCIAL BANK OF PENNSYLVANIA.

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

Nos. 76, 77. Argued December 5, 6, 1892. — Decided March 6, 1893.

A bank in Ohio contracted with a bank in Pennsylvania, to collect for it at par at all points west of Pennsylvania, and to remit the 1st, 11th and 21st of each month. In executing this agreement the Pennsylvania bank stamped upon the paper forwarded for collection, with a stamp prepared for it by the Ohio Bank, an endorsement "Pay to" the Ohio Bank "or order for collection for" the Pennsylvania Bank. The Ohio bank failed, having in its hands, or in the hands of other banks to which it had been sent for collection, proceeds of paper sent it by the Pennsylvania Bank for collection. A receiver being appointed, the Pennsylvania Bank brought this action to recover such proceeds. *Held*,

(1) That the relation between the banks as to uncollected paper was that of principal and agent, and that the mere fact that a subagent of the Ohio Bank had collected the money due on such paper was not a commingling of those collections with the general funds of the Ohio Bank, and did not operate to relieve them from the trust obligation created by the agency, or create any difficulty in specially tracing them;

(2) That if the Ohio Bank was indebted to its subagent, and the collections, when made, were entered in their books as a credit to such indebtedness, they were thereby reduced to possession, and passed into the general funds of the Ohio Bank;

(3) That by the terms of the arrangement the relation of debtor and creditor was created when the collections were fully made, the funds being on general deposit with the Ohio Bank, with the right in that bank to their use until the time of remittance should arrive.

On the 23d of November, 1887, the Commercial National Bank of Pennsylvania filed its bill of complaint in the Circuit Court of the United States for the Southern District of Ohio,

against David Armstrong, receiver of the Fidelity National Bank of Cincinnati, the purpose of which bill was to charge the defendant, as trustee of the plaintiff, for $17,460.32, certain funds in his possession. To this bill of complaint the defendant duly appeared and answered. After the taking of testimony, the case was submitted on pleadings and proofs, and on the 8th of June, 1889, a decree was entered in favor of the plaintiff, directing the defendant to pay to it the sum of $7209.59, which he was adjudged to hold as trustee, and also whatever sums he might thereafter receive from the receiver of the Fifth National Bank of St. Louis, Missouri, as dividends upon the sum of $1577.89, the amount of paper transmitted to that bank for collection. From this decree both parties appealed to this court. The opinion of the Circuit Court was delivered by Jackson, Circuit Judge, and will be found in 39 Fed. Rep. 684.

The transactions between the two banks originated in the following letter, sent by the Fidelity National Bank to the plaintiff:

"U. S. Depository.

"The Fidelity National Bank.

"Capital, $1,000,000.

"Briggs Swift, president; E. L. Harper, vice-president; Ammi Baldwin, cashier; Benjamin E. Hopkins, ass't cashier.

"CINCINNATI, 2, 12, 1887.

"Com'l Nat. B'k, Philada., Pa.

"GENTLEMEN: Enclosed herewith we hand you our last statement, showing us to be the second bank in Ohio in deposits in the tenth month of our existence. We should be pleased to serve you, and trust you will find it to your advantage to accept one of the following propositions:

"No. 1. We will collect all items at par and allow 2½% interest on daily balances, calculated monthly. We will remit any balance you have above $2000 in New York draft, as you direct, or ship currency at your cost for expressage.

"No. 2. Will collect at par all points west of Pennsylvania and remit the 1st, 11th, and 21st of each month.

"No. 3. We will collect at par Ohio, Indiana, and Kentucky items, and remit balance every Monday by draft on New York.

"We do not charge for exchange on propositions No. 1, 2 and 3.

"No. 4. Will collect Cincinnati items and remit daily at 40 cents per thousand, or 20 cents for $500 or less.

"National banks not in a reserve city can count all they have with us as reserve.

"Your early reply will oblige, respectfully yours,

"E. L. Harper, *V. P.*"

To this letter the plaintiff replied on February 18, accepting proposition No. 2; and thereafter, from time to time, forwarded paper for collection. The Fidelity Bank caused to be made and sent to the plaintiff a rubber stamp, for use in endorsing paper thus forwarded. This stamp read as follows:

"Pay Fidelity National Bank of Cincinnati, O., or order, for collection for Commercial Bank of Philadelphia, Pa.

"E. P. Graham, *Cashier.*"

Business was carried on between the two banks under this arrangement until June 20, 1887, when the Fidelity Bank failed, having in its hands, or in the hands of other banks to which the same had been sent by it for collection, proceeds of paper forwarded by plaintiff after June 4, amounting to $16,851.92. The only correspondence which took place during this time between the parties, which can be considered as throwing any light upon the arrangement between them, was a letter from the plaintiff of May 25, as follows: "We don't wish to complain, but would like to understand why your remittance to us of May 21 only included items sent you up to May 14 and received by you on the 16th. We have to explain these things to our depositors, and wish to act intelligently on the subject." And a reply in these words: "We collect at par and include in our remittances everything collected to date."

Mr. Hoadly's Argument for Commercial Bank.

The conclusions of the Circuit Judge were, that the relation between the two banks was that of principal and agent; a relation which continued not only while the paper was held by the Fidelity Bank, but after the moneys had been collected thereon; but that in order to enforce a trust in favor of the plaintiff, as to any of the moneys so collected, they must be specifically traceable, and that it was not sufficient to show that by collection they had passed into the general funds of the bank. This paper had substantially all passed into the hands of other banks, to whom it had been sent by the Fidelity Bank, as its subagents, and the Circuit Judge held that if the Fidelity was indebted to these local banks, subagents, and the collections, when made, were entered in their books as a credit to such indebtedness, they must be considered as reduced to possession and as having passed into the general funds of the Fidelity; but that, on the other hand, if the Fidelity was not indebted to the subagent banks, and the collections remained in their hands to be subsequently remitted to the Fidelity, and in fact were paid to the receiver after his appointment, they were specifically traceable, and were therefore subject to the trust created by the relationship between the two banks, and payment thereof could be enforced out of the funds in the hands of the receiver.

Mr. George Hoadly, Jr., for the Commercial Bank. *Mr. Edward Colston, Mr. John Sparhawk and Mr. Judson Harmon* were with him on the brief.

As to the appeal of the Commercial Bank, the Fidelity Bank received from it for collection, as its agent, the paper, the proceeds of which are here in controversy. Thereafter, the same having come into the hands of subagencies of the Fidelity Bank, which subagencies had from the form of the endorsement actual notice of complainant's rights, respondent, without the knowledge or consent of complainant, converted the same to his own use, by consenting that said subagencies should apply the same in payment of debts due to them from the Fidelity Bank. There was in cash in the Fidelity at the

date of its failure $110,000, which came to the hands of respondent as its receiver. We claim that under the circumstances thus detailed complainant is entitled to a charge on the funds in the Fidelity Bank for the amount of its claim.

The Fidelity Bank having received complainant's paper upon trust to collect the same and remit the proceeds, might collect it in many ways. If, for example, the paper were the check of one of its customers, on his account, it would simply charge the check to his account, and thereupon the proceeds would be a part of the cash in its hands, not actually distinguished, but entirely capable of being so by taking out that amount of money. So if being indebted to a correspondent it paid its debt with complainant's paper. At the time it did so it collected that paper, at least as against complainant, and complainant had a right to assert that it had that amount of cash in its treasury. That being so, there was no lawful way of getting it out except by paying it to complainant, and the rule of *Knatchbull* v. *Hallett*, 13 Ch. D. 696, that drafts will always be applied to that which may lawfully be drawn out, applies, and the complainant's money in both the foregoing cases was in the Fidelity Bank at the time of its failure, and came to the defendant as a trustee for complainant. *Peak* v. *Ellicott*, 30 Kansas, 156; *People* v. *Rochester City Bank*, 96 N. Y. 32; *McLeod* v. *Evans*, 66 Wisconsin, 401.

Upon the authorities cited and for the reasons given we submit that the decree of the Circuit Court, so far as it denied complainant the relief sought in the bill, should be reversed, and that a decree should be rendered in this court requiring respondent to pay to complainant the amount of its claims in full, with interest and costs.

Mr. John W. Herron for Armstrong, receiver.

I claim that from the manner in which it was sent and received, being sent for credit, and being at the time charged to the Fidelity National, and being credited by the Fidelity as it was received, that amounted, as between the two banks, to a collection. The paper became the property of the Fidelity

with the endorsement on it of the Commercial, which endorsement enabled the Fidelity to hold the Commercial for repayment, if it was not paid and properly protested. I, however, regard this as in the present case immaterial. It was certainly collected, when the payer of it paid it to the bank which held it, which bank had received it from the Fidelity for collection. And if such payment was made before the failure of the Fidelity, as was the case as to almost all the paper in question, it was a collection of the paper by the Fidelity. The report of the master gives a list of the paper so paid; and the dates of payment. The last statement of account was forwarded by the Fidelity on June 11th, and included all items received to June 8th, inclusive. The first credits not included in that statement and remitted for were made June 9th, and other collections were made on each succeeding day until the 20th, the day preceding the closing of the bank. The collection by the correspondent banks was a collection by the Fidelity Bank. The collecting bank was the agent of the Fidelity, and not of the Commercial. And, therefore, these payments are to be regarded precisely as if on those days these sums had been paid directly to the Fidelity Bank. They had all been credited to the Commercial Bank before the failure; they had been charged before the failure to the corresponding banks, and credited by the corresponding banks to the Fidelity National. No notice of the payment was necessary or usual.

If this paper had been collected by the Fidelity prior to its failure, and the Fidelity had become the debtor to the Commercial for the amount, it is contrary to the intent of the banking act to pay this one creditor in full, in advance of other creditors. See *Reeves* v. *State Bank of Ohio*, 8 Ohio St. 465; *Hoover* v. *Wise*, 91 U. S. 308; *Bank of Crown Point* v. *Bank of Richmond*, 76 Indiana, 561; *Butchers' & Drovers' Bank* v. *Hubbell*, 117 N. Y. 384.

Admitting that the paper was sent for collection merely, and that until the collection was made the relation of principal and agent existed, that relation did not continue after the collection of the paper and the credit of the proceeds in account on the books of the several parties. *Smedes* v. *Utica*

Bank, 20 Johns. 372; *Jockuch* v. *Towsey*, 51 Texas, 129; *Marine Bank* v. *Fulton Bank*, 2 Wall. 252; *People* v. *Rochester City Bank*, 93 N. Y. 582; *Marine Bank* v. *Rushmore*, 28 Illinois, 463; *Tinkham* v. *Duckworth*, 31 Illinois, 519; *Planters' Bank* v. *Union Bank*, 16 Wall. 483; *In re Bank of Madison*, 5 Bissell, 515; *Manufacturers' Bank* v. *Continental Bank*, 148 Mass. 553; *Freeman's Bank* v. *Nat. Tube Works Co.*, 151 Mass. 413.

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

We agree with the Circuit Judge that the relation created between the banks as to uncollected paper was that of principal and agent, and that the mere fact that a subagent of the Fidelity Bank had collected the money due on such paper, was not a mingling of those collections with the general funds of the Fidelity, and did not operate to relieve them from the trust obligation created by the agency of the Fidelity, or create any difficulty in specifically tracing them. As to such paper, the transaction may be described thus: The plaintiff handed it to the Fidelity, the Fidelity handed it to a subagent, the subagent collected it and held the specific money in hand to be delivered to the Fidelity; then the failure of the Fidelity came, and the specific money was handed to its receiver. That money never became a part of the general funds of the Fidelity; it was not applied by the subagent in reducing the indebtedness of the Fidelity to it, but it was held as a sum collected, to be paid over to the Fidelity, or to whomsoever might be entitled to it. The Fidelity received the paper as agent, and the endorsement "for collection" was notice that its possession was that of agent and not of owner. In *Sweeny* v. *Easter*, 1 Wall. 166, 173, in which there was an endorsement "for collection," Mr. Justice Miller said: "The words 'for collection' evidently had a meaning. That meaning was intended to limit the effect which would have been given to the endorsement without them, and warned the party that, contrary to the purpose of a general or blank endorsement,

this was not intended to transfer the ownership of the note or its proceeds." And in *White* v. *National Bank*, 102 U. S. 658, 661, where the endorsement was "for account," the same Justice, speaking of the endorsement, said: "It does not purport to transfer the title of the paper, or the ownership of the money when received." The plaintiff, then, as principal, could unquestionably have controlled the paper at any time before its payment, and this control extended to such time as the money was received by its agent, the Fidelity. *Butchers' &c. Bank* v. *Hubbell*, 117 N. Y. 384; *Manufacturers' Bank* v. *Continental Bank*, 148 Mass. 553; *Freeman's Bank* v. *National Tube Works*, 151 Mass. 413; *Armstrong* v. *National Bank of Boyerstown*, 14 S. W. Rep. 411, (Court of Appeals of Kentucky); *Crown Point National Bank* v. *Richmond National Bank*, 76 Indiana, 561. In those cases the suits were against subagent banks. It is true, that in most of them the collection was made by the subagent after the avowed insolvency of the agent, but that fact, we cannot think, is decisive. If, before the subagent parts with the money or credits it upon an indebtedness of the agent bank to it, the insolvency of the latter is disclosed, it ought not to place the funds which it has collected, and which it knows belong to a third party, in the hands of that insolvent agent or its assignee; and, on the other hand, such insolvent agent has no equity in claiming that this money, which it has not yet received, and which belongs to its principal, should be transferred to and mixed with its general funds in the hands of its assignee, for the benefit of its general creditors, and to the exclusion of the principal for whom it was collected. Whether it be said that such funds are specifically traceable in the possession of the subagent, or that the agent has never reduced those funds to possession, or put itself in a position where it could rightfully claim that it has changed the relation of agent to that of debtor, the result is the same. The Fidelity received this paper as agent. At the time of its insolvency, when its right to continue in business ceased, it had not fully performed its duties as agent and collector; it had not received the moneys collected by its subagent. They

were traceable as separate and specific funds, and, therefore, the plaintiff was entitled to have them paid out of the assets in the hands of the receiver, for when he collected them from these subagents he was in fact collecting them as the agent of the principal. No mere book-keeping between the Fidelity and its subagent could change the actual status of the parties or destroy rights which arise out of the real facts of the transaction.

We also agree with the Circuit Court, in its conclusions as to those moneys collected by subagents to whom the Fidelity was in debt, and which collections had been credited by the subagents upon the debts of the Fidelity to them, before its insolvency was disclosed, for there the moneys had practically passed into the hands of the Fidelity, the collection had been fully completed. It was not a mere matter of book-keeping between the Fidelity and its agents; it was the same as though the money had actually reached the vaults of the Fidelity. It was a completed transaction between it and its subagents, and nothing was left but the settlement between the Fidelity and the principal — the plaintiff. The conclusions of the Circuit Court were based upon the idea that these collections could not be traced, because they had passed into the general fund of the bank. We think, however, a more satisfactory reason is found in the fact that, by the terms of the arrangement between the plaintiff and the Fidelity, the relation of debtor and creditor was created when the collections were fully made. The agreement was to collect at par, and remit the first, eleventh, and twenty-first of each month. Collections intermediate those dates were, by the custom of banks and the evident understanding of the parties, to be mingled with the general funds of the Fidelity, and used in its business. The fact that the intervals between the dates for remitting were brief is immaterial. The principle is the same as if the Fidelity was to remit only once every six months. It was the contemplation of the parties, and must be so adjudged according to the ordinary custom of banking, that these collections were not to be placed on special deposit and held until the day for remitting. The very fact that col-

lections were to be made at par shows that the compensation for the trouble and expense of collection was understood to be the temporary deposit of the funds thus collected, and the temporary use thereof by the Fidelity. The case of *Marine Bank* v. *Fulton Bank*, 2 Wall. 252, is in point, though it may be conceded that the facts in that, tending to show the relation of debtor and creditor, are more significant than those here. In the spring of 1861, the Fulton Bank of New York sent two notes for collection to the Marine Bank of Chicago; there being some trouble about currency, the Fulton Bank requested the Marine Bank to hold the avails of the collection subject to order, and advise amount credited. Afterwards the Marine Bank sought to pay in the currency which it had received on the collection, then largely depreciated, but its claim in this respect was denied, Mr. Justice Miller, speaking for the court, saying: "The truth undoubtedly is, . . . that both parties understood that, when the money was collected, plaintiff was to have credit with the defendant for the amount of the collection, and that defendant would use the money in its business. Thus the defendant was guilty of no wrong in using the money, because it had become its own. It was used by the bank in the same manner that it used the money deposited with it that day by city customers; and the relation between the two banks was the same as that between the Chicago bank and its city depositors. It would be a waste of argument to attempt to prove that this was a debtor and creditor relation. All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. The case before us is not of the former class. It must be of the latter."

That reasoning is applicable here. Bearing in mind the

custom of banks, it cannot be that the parties understood that the collections made by the Fidelity, during the intervals between the days of remitting, were to be made special deposits, but on the contrary, it is clear that they intended that the moneys thus received should pass into the general funds of the bank, and be used by it as other funds, and that when the day for remitting came, the remittance should be made out of such general funds.

The conclusions, therefore, reached by the Circuit Court were correct, and the judgment is

Affirmed.

MAY *v.* TENNEY.

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

No. 99. Argued December 22, 1892. — Decided March 6, 1893.

A chattel mortgage of the stock of goods in a store in Colorado, given to secure the mortgagees for their liability as endorsers of notes of the mortgagor, is held to be a chattel mortgage, and not a general assignment for the benefit of creditors.

In Colorado a general transfer of property by a debtor for the benefit of a preferred creditor, does not, if found to be in violation of the policy of the State as expressed in its legislation, become a general assignment for the benefit of all creditors, without preferences, but is entirely void.

On March 24, 1887, Samuel Rich, a clothing merchant of Leadville, Colorado, executed to the appellants, May and Hirsch, an instrument conveying certain personal property, which instrument was called a chattel mortgage, and was duly acknowledged and recorded. The instrument sets forth, in separate paragraphs, nine notes to the Carbonate Bank of Leadville, the payment of eight of which were endorsed or guaranteed by May or Hirsch, severally. On the first note neither May nor Hirsch's name appears. After this description, which is full and specific as to each note, the instrument goes on further to recite:

"And whereas said notes are all now due, and, except as

hereinbefore stated, unpaid; and whereas the said Samuel Rich is legally liable to pay the whole amount due on said notes, and is unable to pay the same or any part thereof; and whereas the said the Carbonate Bank of Leadville, Colorado, threatens to commence suit by attachment against the said Samuel Rich on the note first hereinbefore mentioned, and to attach the property hereinafter mentioned of the said Samuel Rich; and whereas the said A. Hirsch and David May have assumed the payment of said note and have become liable and responsible therefor to said bank; and whereas the said David May and A. Hirsch are legally liable and responsible for the amount due on the residue of said notes, each for a certain portion thereof, and have agreed to take up and pay the same: Now, therefore, in consideration of the premises, and in consideration of the sum of one dollar ($1.00) to the said Samuel Rich in hand paid by the said David May and A. Hirsch, the receipt whereof is hereby acknowledged, the same Samuel Rich has granted, bargained and sold and by these presents does grant, bargain and sell, unto the said David May and A. Hirsch, all that certain stock of men's, boys' and children's clothing, hats, caps and gents' furnishing goods, being and contained in that certain store-room, in the city of Leadville, county of Lake and State of Colorado, known as No. 313 Harrison Avenue, together with all and singular the show-cases, counters, shelving, chandeliers and all other property of every kind in said room pertaining to the business of the said Samuel Rich, which said stock of goods is the property of the said Samuel Rich, and now in his possession in said place: To have and to hold all and singular the said goods and chattels unto the said David May and A. Hirsch, their heirs, administrators and assigns forever."

And then after a covenant of title, it adds:

"The said David May and A. Hirsch shall take the immediate possession of all said goods and chattels and of the said room in which they are contained as aforesaid, and shall proceed to sell and dispose of the same with reasonable diligence at private or public sale, as they may deem best, and out of

the proceeds of such sale of said goods and chattels pay: 1st. The amount due on said notes, with the interest thereon, and the costs and expenses of such sale; 2d. Rendering the surplus, if any, to the said Samuel Rich, his executors, administrators or assigns: *Provided, however*, That if the said Samuel Rich shall, at any time before a sufficient quantity of said goods and chattels shall be so sold to realize a sum sufficient to pay said amount due and said expenses, pay to the said David May and A. Hirsch, or their assigns, the amount due on said notes or the balance which may be due thereon after deducting the net amount realized from such sale, then these presents shall be void and the residue of said goods remaining unsold shall be delivered to the said Samuel Rich and possession thereof restored to him.

"In witness whereof the said Samuel Rich has hereunto set his hand and seal this twenty-fourth day of March, A.D. 1887.

"(Signed) SAM. RICH. [SEAL.]"

The grantees in this conveyance took possession of the property, and, after a very brief attempt to sell it at retail, sold it in bulk to one Joseph Shoenberg for $20,100.00. A portion of this, $2113, they were compelled to pay in satisfaction of a claim for goods wrongfully taken possession of and sold. The amount of the indebtedness of Rich to the bank, assumed by May and Hirsch, was about $18,400.00, including interest. It was admitted on the trial that this sum was owing by Rich to them. The appellee, Tenney, is a trustee for several creditors of Samuel Rich, in whose behalf he obtained judgment on April 25, 1887, for the sum of $13,665.00. Upon a hearing before the Circuit Court, this instrument was adjudged in effect an assignment for the benefit of creditors; and an accounting was ordered before a master as to the value of the property received by May and Hirsch under it, as well as the names of the various creditors of Rich, and the amounts due to them. Upon the report of the master a final decree was entered —

"That the chattel mortgage mentioned in the defendants'

answer herein, given by the said Rich to the said May & Hirsch on March 24, 1887, is in legal effect an assignment for the benefit of the creditors of the defendant Rich; that the defendants May & Hirsch took the property conveyed by said mortgage as the assignees or trustees of the said defendant Rich, and as such assignees or trustees of the said Rich shall account to the said creditors for the value of said property as determined and found by the said master in chancery."

And then after an adjudication of the amounts due to the various creditors of Rich, there followed:

"It is further ordered, adjudged and decreed that the value of the property transferred, as aforesaid, on March 24, A.D. 1887, by the said Rich to the said May & Hirsch, and for which the said May & Hirsch are answerable and responsible as assignees for the benefit of the creditors of the said Rich by virtue of the said transfer, is the sum of $31,387, which sum of $31,387 the said defendants, May & Hirsch, are hereby ordered to distribute and pay to the parties in interest herein in the following proportions, to wit."

And the distribution and payment ordered are to the various creditors in proportion to the amounts thus adjudged due to them. From this decree, May & Hirsch appealed to this court.

Mr. C. S. Thomas for appellants.

Mr. Solicitor General for appellee.

Mr. D. K. Tenney and *Mr. William E. Church* filed a brief for appellee.

MR. JUSTICE BREWER delivered the opinion of the court.

The principal question in this case is whether the conveyance from Rich to May and Hirsch was, in legal effect, a general assignment or only a chattel mortgage. The Circuit Court held it to be the former, following in this a series of decisions under the statutes of Missouri, commencing with

Martin v. *Hausman*, 14 Fed. Rep. 160, in which Judge Krekel ruled that "A debtor in Missouri, under its legislation and adjudications thereon, may, though he be insolvent at the time, prefer one or more of his creditors by securing them; but he cannot do it by an instrument conveying the whole of his property to pay one or more creditors. Instruments of the latter class will be construed as falling within the assignment laws, and as for the benefit of all creditors, whether named in the assignment or not," and continued in *Dahlman* v. *Jacobs*, 16 Fed. Rep. 614; *Kelloy* v. *Richardson*, 19 Fed. Rep. 70; *Clapp* v. *Dittman*, 21 Fed. Rep. 15; *Perry* v. *Corby*, 21 Fed. Rep. 737; *Kerbs* v. *Ewing*, 22 Fed. Rep. 693; *Freund* v. *Yaegerman*, 26 Fed. Rep. 812, and 27 Fed. Rep. 248; *State* v. *Morse*, 27 Fed. Rep. 261. Since the decision of this case by the Circuit Court, in *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S. 223, the several cases in Missouri, above referred to, were reviewed and disapproved. That case, however, cannot be cited as decisive of this, for the matter of assignments is one of local law. As was said in the opinion there delivered, and with a view of distinguishing between it and *White* v. *Cotzhausen*, 129 U. S. 329, in which a seemingly different conclusion had been reached under the statutes of Illinois, "the question of the construction and effect of a statute of a State, regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the State, establishing a rule of property, are of controlling authority in the courts of the United States. *Brashear* v. *West*, 7 Pet. 608, 615; *Allen* v. *Massey*, 17 Wall. 351; *Lloyd* v. *Fulton*, 91 U. S. 479, 485; *Sumner* v. *Hicks*, 2 Black, 532, 534; *Jaffray* v. *McGehee*, 107 U. S. 361, 365; *Peters* v. *Bain*, 133 U. S. 670, 686; *Randolph's Executor* v. *Quidnick Co.*, 135 U. S. 457. The decision in *White* v. *Cotzhausen*, 129 U. S. 329, construing a similar statute of Illinois in accordance with the decisions of the Supreme Court of that State as understood by this court, has, therefore, no bearing upon the case at bar. The fact that similar statutes are allowed different effects in different States is immaterial. As observed by Mr. Justice Field, speaking for this court, 'The interpretation within the

jurisdiction of one State becomes a part of the law of that State, as much so as if incorporated into the body of it by the legislature. If, therefore, different interpretations are given in different States to a similar local law, that law in effect becomes by the interpretations, so far as it is a rule for our action, a different law in one State from what it is in the other.' *Christy* v. *Pridgeon*, 4 Wall. 196, 203. See also *Detroit* v. *Osborne*, 135 U. S. 492."

We must, therefore, examine the statutes and decisions of Colorado. Before doing that, it may be well, however, to consider how the instrument would be regarded at common law and independently of any local statute or decision. And, first, it does not purport to be a transfer of all the grantor's property, but only of a certain described stock of goods, together with the show-cases and store fixings used in connection with that stock. On the face, therefore, there is no general assignment, or general conveyance, but only a specific conveyance of particular property. Whether the grantor was in fact possessed of other property, and to what extent, may not be certain from the testimony. When the case was first submitted for decision the matter had not been a subject of investigation, and the court said in its opinion: "The question was not asked directly of any witness put upon the stand, either on the part of complainants or of defendants. Counsel seem to have ignored that as a question in the case." And the interlocutory order, which after argument was entered, gave to the parties "time to take further testimony before the master of this court, or any notary public, on the question as to whether the chattel mortgage mentioned in the complainant's bill covered all or substantially all of the property of Rich, at the time of the execution of said mortgage." From the testimony taken under this order it would seem probable that he had other property, though of small value, a few hundred dollars or such a matter.

Again, the form of the instrument is unquestionably that of a mortgage. It is called in the acknowledgment a chattel mortgage. The complainant, in his bill, constantly speaks of it as a mortgage. And the burden of his complaint is that it

was void because fraudulently entered into, the facts claimed to show the fraud being specifically stated. It is true, there is in the bill a claim that it be adjudged an assignment, but the language of the averments in this respect shows that the claim was only that the legal effect of an assignment should be imputed to that which was in form a chattel mortgage, for, after asserting the insolvency of Rich, it alleges —

"That it became and was necessary for him to suspend payment of his indebtedness, being insolvent, and thereupon it was his duty to have made an assignment for the equal benefit of his creditors, and so he proposed to the defendants May and Hirsch, but by reason of their persuasions and promises aforesaid he gave the chattel mortgage aforesaid instead; that said chattel mortgage was a full and complete disposition of all the property of the said defendant Rich in view of the insolvency, which was well known to the mortgagees.

"And your orator claims and insists that the said mortgage constitutes in law an assignment for the benefit of creditors, giving preference to the claims of the mortgagees, and that the same, being preferential, is void as to your orator and all other of the creditors of Samuel Rich."

And in the order of the court, heretofore referred to, the instrument was described as "the chattel mortgage mentioned in the complainant's bill." Obviously, it was the understanding and the concession that this was in form a mortgage, and the effort was to prove that it covered all the property of Rich, in order to bring the case within the rule stated by Judge Krekel in *Martin* v. *Hausman*, *supra*.

Not only that, the conveyance is for the sole benefit of the grantees named in it — May and Hirsch. No other creditor is to receive any benefit therefrom. But an assignment contemplates the intervention of a trustee. "A voluntary assignment for the benefit of creditors implies a trust and contemplates the intervention of a trustee. Assignments directly to creditors, and not upon trust, are not voluntary assignments for the benefit of creditors." Burrill on Assignments, 5th ed. sec. 3. "The transfer by a creditor of all his property does not of itself make what is termed a general assignment, but it must

also be conveyed to trustees, to be held by them in trust for other creditors." Burrill on Assignments, 5th ed. sec. 122. Counsel urge that May and Hirsch were in fact trustees, the real creditor being the Carbonate Bank, because, as appears on the face of the paper, May and Hirsch had not at the time paid the bank, and had only assumed Rich's indebtedness to it. But this instrument proceeds upon the assumption that the burden of this indebtedness to the bank was transferred from Rich, the grantor, to May and Hirsch, the grantees, parties who were solvent, and whose assumption of liability was accepted by the bank, and the conveyance was to them and for their protection and benefit. Out of the proceeds of sales they were to pay these notes and interest and return the surplus to Rich. No other creditors were in terms interested in this conveyance. And, further, the defeasance clause provided for payment, not to the Carbonate Bank, but to May and Hirsch or their assigns. The conveyance was not for the benefit of the Carbonate Bank, but for that of May and Hirsch, who had assumed Rich's liabilities to that bank. Suppose, the day after this instrument had been executed, May and Hirsch had been paid by Rich the full amount due on these notes to the Carbonate Bank, can it be doubted that all rights under this conveyance would have been discharged? Could the Carbonate Bank have held May and Hirsch responsible for a breach of trust in surrendering the property under those circumstances to Rich? It is suggested by the Circuit Court, in its opinion, that there was no future day of payment named in the instrument, and that the mortgagees were to take possession and sell at once. But as the debts for the securing of which this conveyance was made were then due, the naming of a future day of payment was not to be expected, and might have suggested a suspicion as to the *bona fides* of the transaction, and the duty of immediate sale cast by this instrument upon the grantees was the duty cast upon chattel mortgagees. Within accepted definitions and settled rules of construction, this instrument was in form, at least, that which the parties, the counsel, and the court called it, a chattel mortgage.

Is there anything in the statutes or decisions of Colorado

which transforms the character or denies validity to such an instrument, securing and intended to secure only one of many creditors? In 1881, there was passed by the legislature of Colorado (Laws 1881, p. 35,) an act to regulate assignments for the benefit of creditors. It consisted of but a single section, which provided that, "Whenever any person or corporation shall hereafter make an assignment of his or its estate for the benefit of creditors," the assignee should be required to pay certain specified debts in full; and then followed this clause: "All the residue of the proceeds of such estate shall be distributed ratably among all other creditors, and any preference of one creditor over another, except as above allowed, shall be entirely null and void, anything in the deed of assignment to the contrary notwithstanding." A case under that statute came before the Supreme Court, *Campbell* v. *Colorado Coal &c. Co.*, 9 Colorado, 60, 64, and it was held that the word "estate" meant all the debtor's property, and hence that the statute was designed to cover general assignments; and in the opinion pronounced by Mr. Justice Helm it was said:

"A fundamental principle underlying this subject is that, so long as the debtor retains dominion over his property, in the absence of statute and of fraud, he may do with it as he pleases. He may transfer the whole of his estate in payment or in security of a single *bona fide* debt. He may assign, mortgage, or otherwise encumber his estate, or a part thereof, in favor of some of his creditors, excluding the rest; or he may make an assignment for the benefit of all his creditors, and therein give preferences to a selected few. It is only when, either by a general assignment or otherwise, the debtor has parted with the dominion over his property, that, in the absence of statute or fraud, the foregoing privilege is forfeited. . . . To hold that debtors may not give preferences among their *bona fide* creditors, so long as they control their property, would greatly embarrass the transaction of nearly all kinds of business. Some of the authorities go so far as to say that such a rule would prevent the carrying on of business altogether."

The statute of 1881 was superseded by that of 1885, which

was that in force at the time of these transactions. This statute may be found in the Laws of 1885, p. 43, and in the first volume of Mills' Annotated Statutes, p. 453. The only portions of that statute having any bearing on the matters here in controversy are sections 1 and 3 and the last half of section 18, which are as follows:

"Any person may make a general assignment of all his property, for the benefit of his creditors, by deed, duly acknowledged, which, when filed for record in the office of the clerk and recorder of the county where the assignor resides, or, if a non-resident, where his principal place of business is, in this State, shall vest in the assignee the title to all the property, real and personal, of the assignor, in trust, for the use and benefit of such creditors."

"No such deed of general assignment of property by an insolvent, or in contemplation of insolvency for the benefit of creditors, shall be valid, unless by its terms it be made for the benefit of all his creditors, in proportion to the amount of their respective claims."

". . . But nothing in this act contained shall invalidate any conveyance or mortgage of property, real or personal, by the debtor before the assignment, made in good faith, for a valid and valuable consideration."

This statute, so far as we are advised, has not been before the Supreme Court of Colorado for construction; at least, not for any question involved in this case. The first section, it will be perceived, gives permission to make a general assignment. There is no compulsion. There is neither in terms nor by implication any duty cast upon an insolvent to dispose of his property by a general assignment, or anything which prevents him from paying or securing one creditor in preference to others. On the contrary, the last half of section 18 plainly recognizes the right of a debtor to prefer by payment or security; and, in the light of this statute, the quotation which we have made from the Supreme Court of Colorado becomes pertinent, which clearly affirms the right of a debtor to do with his property as he pleases, except as in terms restrained by statute; and a statute which simply permits a debtor to

make a certain disposition of his property works no destruction of his otherwise unrestrained dominion over it.

And, further, when we look at section 3 we find that when a conveyance is made which is a general assignment, it is void unless by its terms it is made for the benefit of all creditors. The rule thus declared is not that the preferences fail and the assignment stands, but that the assignment itself fails unless it be in terms free from preferences. So, if this conveyance were in form unquestionably a general assignment, as it contemplated the payment only of May and Hirsch, it was not only not for the benefit of all creditors, but avowedly for the benefit of these two, and it would, therefore, have to be adjudged a void instrument, and could not be upheld under that rule which prevails in some jurisdictions of, in such cases, upholding the conveyance and avoiding the preferences. So it follows that either this is a chattel mortgage given as security to two creditors for their debts, a transaction in no manner forbidden by the statutes of Colorado, or, if it be a general assignment, then it was an assignment with preferences, which preferences by those statutes, avoid the conveyance. We think, therefore, the Circuit Court erred in the conclusions which it reached, so far at least as this aspect of the case is concerned.

As we have heretofore noticed, the burden of the complaint was that this conveyance was fraudulent and void because, as alleged, made in pursuance of a conspiracy between Rich, May, and Hirsch; a conspiracy by which Rich was to go east and buy goods, and, when those goods had been purchased and brought to Leadville, transfer them to May and Hirsch. So far as this charge is concerned, we agree with the Circuit Court that it is not established by the testimony. Rich evidently would like to convey that idea, and yet he does not directly testify to it; and May and Hirsch clearly deny it. Obviously there was no conspiracy between the parties, and all talk between them was only to the effect that, if Rich should succeed in buying what he talked of buying, May and Hirsch would help him to carry the burden. He largely failed in that; and they, when he became pressed by the bank,

Names of Counsel.

simply took measures for their own protection. It being conceded, as it is, that the debts from Rich to May and Hirsch were *bona fide*, the transaction amounted to this, and this only: that the debtor used his property to prefer certain *bona fide* creditors. This, the laws of Colorado allowed, and therefore it cannot be avoided at the instance of the unpreferred creditors.

The decree of the Circuit Court is reversed, and the case remanded, with instructions to dismiss the bill.

LEHNEN *v.* DICKSON.

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

No. 125. Argued February 2, 3, 1893. — Decided March 6, 1893.

When the record shows that the case was tried below by the court without a jury, and there is no special finding of facts, and no agreed statement of facts, but only a general finding, this court must accept that finding as conclusive, and limit its inquiry to the sufficiency of the complaint and of the rulings, if any be preserved, on questions of law arising during the trial.

No mere recital of the testimony, whether in the opinion of the court or in a bill of exceptions, can be deemed a special finding of facts within the scope of the statute.

In Missouri in an action of unlawful detainer, the defendant put in evidence a lease of the property by the then owner, who had since died, which had been assigned to him. The plaintiff offered evidence of a judgment cancelling and setting aside that lease, which was admitted under objection, and the admission excepted to. *Held*, that the ruling was right.

THE case is stated in the opinion.

Mr. D. P. Dyer, (with whom was *Mr. David Goldsmith* on the brief,) for plaintiff in error.

Mr. James O. Broadhead for defendant in error.

Opinion of the Court.

Mr. Justice Brewer delivered the opinion of the court.

On February 6, 1886, defendant in error commenced an action of unlawful detainer, before a justice of the peace in Montgomery County, Missouri. The complaint charged an unlawful detention by the defendant, since January 2, 1886, of a tract of land of 800 acres situated in that county. By *certiorari*, under the provisions of the state statute, the case was removed to the Circuit Court of Montgomery County, and thereafter, upon application of the defendant, on the ground of diverse citizenship, from that to the Circuit Court of the United States for the Eastern District of Missouri. There the case was tried without the intervention of a jury, and, on January 30, 1889, a judgment was entered in favor of the plaintiff for the restitution of the premises, for double damages, amounting to $5940, and for $220 per month, double rent, from and after the entry of judgment. The opinion of Judge Thayer is found in 37 Fed. Rep. 319. To reverse such judgment the defendant sued out a writ of error from this court.

The first matter to be considered is, whether the record is in such shape as to present any question for determination. The case was tried by the court without a jury, and the journal entry shows simply a general finding that the defendant is guilty in manner and form as charged in the complaint, the amount of damages sustained by the plaintiff, and the value of the monthly rents and profits, and thereon the judgment for restitution of the premises, double damages and double rent. There is no special finding of facts, and no agreed statement of facts. Obviously, therefore, inquiry in this court must be limited to the sufficiency of the complaint and the rulings, if any be preserved, on questions of law arising during the trial. Sections 648 and 649 of the Revised Statutes, while committing generally the trial of issues of fact to a jury, authorize parties to waive a jury and submit such trial to the court, adding that "the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." But the verdict of a jury settles all questions of fact. As said by Mr. Justice Blatchford, in *Lan-*

caster v. *Collins*, 115 U. S. 222, 225: "This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered." The finding of the court, to have the same effect, must be equally conclusive and equally remove from examination in this court the testimony given on the trial. *Insurance Co.* v. *Folsom*, 18 Wall. 237; *Cooper* v. *Omohundro*, 19 Wall. 65. Further, section 700 provides that "when an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special, the review may extend to the sufficiency of the facts found to support the judgment." Under that, the rulings of the court in the trial, if properly preserved, can be reviewed here, and we may also determine whether the facts as specially found support the judgment; but if there be no special findings, there can be no inquiry as to whether the judgment is thus supported. We must accept the general finding as conclusive upon all matters of fact, precisely as the verdict of a jury. *Martinton* v. *Fairbanks*, 112 U. S. 670.

It is true, if there be an agreed statement of facts submitted to the trial court and upon which its judgment is founded, such agreed statement will be taken as the equivalent of a special finding of facts. *Supervisors* v. *Kennicott*, 103 U. S. 554. Doubtless, also, cases may arise in which, without a formal special finding of facts, there is presented a ruling of the court, which is distinctly a ruling upon a matter of law, and in no manner a determination of facts, or of inferences from facts, in which this court ought to and will review the ruling. Thus, in *Insurance Company* v. *Tweed*, 7 Wall. 44, where on the argument in this court counsel agreed that certain recitals of fact made by the trial court in its opinion or "reasons for judgment," as it was called, were the facts in the case, and

might be accepted as facts found by the court, it was held that, as they could have made such agreement in the court below, it would be accepted and acted upon here, and the facts thus assented to would be regarded as the facts found or agreed to upon which the judgment was based; and upon an examination it was further held that they did not support the judgment, and it was reversed. But still, as was ruled in *Flanders* v. *Tweed*, 9 Wall. 425, this court is disposed to hold parties to a reasonably strict conformity to the provisions of the statute prescribing the proceedings in the case of a trial by the court without a jury; and no mere recital of the testimony, whether in the opinion of the court or in a bill of exceptions, can be deemed a special finding of facts within its scope. *Norris* v. *Jackson*, 9 Wall. 125. See also the case of *The City of New York*, 147 U. S. 72, in which the rule, as applicable to suits in admiralty, was reviewed and similar conclusions were reached.

Beyond the ordinary matters of the record, which, for the reasons above stated, present no matter for consideration here, there was duly prepared and allowed a bill of exceptions, which recites all the testimony given at the trial, certain requests for declarations of law and the action of the court thereon, the opinion filed in deciding the case, the motion for a new trial, and the opinion on the overruling of such motion. By this bill of exceptions one ruling, in respect to the admission of testimony, is clearly preserved. In order to fully understand the question, a brief recital of the transactions as shown by the testimony is necessary.

On September 24, 1877, Edwin H. Farnsworth, the owner of the premises, made a written lease thereof to Thomas R. Summers, for a term of eight years, commencing January 1, 1878, and ending January 1, 1886. The lessee transferred this lease, with the approval of the lessor, to Godfrey Lehnen, the father of the defendant. The defendant took possession during the running of this lease, with the consent of his father. Farnsworth died on April 27, 1879, having devised this property to his only child, the wife of the plaintiff. The lease having expired the first of January, 1886, on the 23d of

January, in that year, plaintiff served notice upon the defendant that he demanded the possession of the premises, and on the 6th of February the suit was brought. The defendant, to justify his holding over the 1st of January, 1886, introduced in evidence what purported to be a copy of a lease made by Farnsworth, April 7, 1879, twenty days before his death, to Sarah A. Kempinski, for a term of ten years, commencing January 1, 1886, and a lease from Kempinski to the defendant Lehnen and his father, dated October 15, 1885, for a term of fourteen months, also commencing January 1, 1886. In rebuttal, plaintiff offered a certified copy of the record of a suit commenced in the Circuit Court of Montgomery County, Missouri, by Barbara Dickson and Newton Dickson, her husband, against Sarah A. Kempinski and A. Kempinski, her husband, in which suit there was a decree of the Circuit Court ordering and adjudging that the lease made by Farnsworth to Sarah A. Kempinski be cancelled, set aside, and held for naught, which decree, on review by the Supreme Court of the State, was affirmed. To the admission of this testimony the defendant objected, on the ground that it was incompetent, irrelevant and immaterial, which objection was overruled, and exceptions were taken. This objection was based upon this section of the forcible entry and detainer statute: "The merits of the title shall in nowise be inquired into, on any complaint which shall be exhibited by virtue of the provisions of this chapter." Rev. Stat. 1879, sec. 2443; 2d Rev. Stat 1889, sec. 5111.

But if the lease is competent evidence to defeat the landlord's right of recovery, testimony tending to show that that lease is of no validity ought surely to be competent in rebuttal. And it has been held in Missouri that the tenant may defeat an action for unlawful detainer brought by the landlord after the expiration of the lease, by proof that the title since the execution of the lease has passed away from the landlord to some other party to whom the tenant has attorned. Thus in *Pentz* v. *Kuester*, 41 Missouri, 447, 449, the court ruled that, "though the tenant could not dispute the title of the landlord, nor set up a paramount title or an adverse possession

against either the grantor or grantee, nor the court inquire into the matter of title in general, it was still competent for the defendant, under the statute, to show that the plaintiff's title and right of possession had been transferred to himself since the demise." The same doctrine was affirmed in *Gunn* v. *Sinclair*, 52 Missouri, 327; *Kingman* v. *Abington*, 56 Missouri, 46; *Higgins* v. *Turner*, 61 Missouri, 249. Not only are these decisions in point, but, turning to the forcible entry and detainer statute, we find, after sections giving to heirs, devisees, grantees, assigns, executors and administrators the same remedies as the ancestor, devisor, grantor, assignor or intestate was entitled to by virtue of the statute, this section: "Evidence for proof of rights under derivative titles, provided for by this chapter, shall be admissible in actions instituted under this chapter." Rev. Stat. 1879, § 2457; 2d Rev. Stat. 1889, § 5123. In other words, these various persons can, in an action of unlawful detainer, offer evidence to establish their derivative titles from the original lessor. On the same principle, these decisions referred to permit the tenant who has attorned to parties claiming such a derivative title to introduce evidence of the transfer and attornment to defeat an action brought by the original landlord; and, surely, if he may offer testimony to prove a transfer of title away from the landlord, the latter may introduce testimony to show that the alleged transfer was of no validity, a mere pretence. Suppose, after the execution of a lease, the landlord dies, and at the termination of the lease his only son and heir at law should bring an action of unlawful detainer, and the tenant in defence should introduce what purported to be a will made by the landlord, devising the real estate to some third party, and the record of the proper court probating that will, together with an attornment to such devisee — within the cases cited such testimony would be competent. Would it not also be clearly competent for the heir, in rebuttal, to introduce a final decree from a competent court, in a suit between himself and the devisee, adjudging that will a forgery, and setting aside its probate? None of this testimony impeaches the lease, or challenges any rights created

by or under it. It is simply "evidence for proof of rights under a derivative title," evidence which in terms is authorized by the section last quoted. There was no error in admitting this testimony.

To obviate the objection that there is no finding of facts, or agreed statement thereof, counsel for plaintiff in error insist that there is really no dispute as to the facts, no conflict in the testimony as to any substantial question, the only difference being as to a subordinate and unimportant matter, and that, therefore, it is the same as though the facts had been agreed upon or found. Further, they suggest that in the opinion delivered by the trial judge there is a narration of the facts we have heretofore recited, together with others, and then this statement preliminary to the discussion of the legal questions: "Thayer, District Judge, after stating the facts as above," and claim that such statement is equivalent to a finding of the facts as previously recited.

But the burden of the statute is not thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony. It may be an easy thing in one case for this court, when the testimony consists simply of deeds, mortgages or other written instruments, to make a satisfactory finding of the facts, and in another it may be difficult when the testimony is largely in parol, and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the ease in determining the facts, or rigorously enforced in another, because of the difficulty in such determination. The duty of finding the facts is placed upon the trial court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts. Neither in this case can that be said to be wholly an inconsequential matter upon which the witnesses differ. It may not be of controlling importance, yet it bears largely on the question of the good faith of Lehnen in taking the lease from Kempinski. With reference to the language of Judge Thayer, it is obvious that no such significance as is claimed can be given to the words "after stating the facts as above." Reading the prior state-

ment, it would seem to be only a succinct recital of the material testimony in the case. *Norris* v. *Jackson*, 9 Wall. 125.

But even if we waive all these objections, and take this statement as intended for and equivalent to a special finding of facts, or regard the declaration of law asked by the defendant, that the court declares the law to be that under the evidence the plaintiff is not entitled to recover, as bringing properly before us the question whether there was any evidence to sustain the general finding for the plaintiff, and thus enter into an examination of the testimony, still we see no error in the conclusion of the court based thereon. The decree of the state circuit court, affirmed as it was by the Supreme Court, conclusively establishes the nullity of the lease from Farnsworth to Kempinski, at least, as between the plaintiff and Kempinski. It will be noticed, from the allegations in the complaint, that the lease was not set aside and cancelled by reason of anything transpiring since its execution. The defects existed in the inception of the instrument, defects which rendered it void from the beginning, and which, when presented to the court, compelled an adjudication of its invalidity. The charge in the complaint was "that the said Farnsworth at the time of the execution of said agreement was not capable of entering into said contract or any contract, and was incapable of transacting his ordinary business or managing his property by reason of weakness and imbecility of mind produced by disease and old age, and that defendant, A. Kempinski, fraudulently took advantage of the imbecility and helpless mental condition of said Farnsworth, and induced and procured him to execute the said lease to his (the said Kempinski's) wife."

And the conclusion of the Supreme Court was, that the lease was "either the product of a mind incapable of comprehending its force and meaning, or of a weak one imposed upon." It is true, the last alternative stated by the court suggests an instrument only voidable; but in view of the charge in the complaint, and the testimony as disclosed in the opinion of the Supreme Court, it cannot be held that there was any error in the conclusion reached by Judge Thayer, that the

"lease in question never was a valid instrument." Being in itself invalid, a nullity from the beginning, it could not be a foundation for a right in Lehnen, the defendant, as against his landlord. Nor can it be held that, because the decree in the Circuit Court was appealed to the Supreme Court, and a supersedeas bond given, pending such appeal, the lease to Kempinski had force and vitality. Whatever effect the appeal and supersedeas may have had upon the decree, they did not give validity to a void instrument. Though in form a lease, the writing was in fact no contract. That was its condition before the suit was begun, and there never has been a time when it had any life and force. The decree did not create, it only established the fact of its invalidity, and the affirmance of the decree reached back to the very inception of the instrument, and was a final adjudication that from the first it was not binding.

Neither can the contention of the plaintiff in error be sustained, that he was holding over under the *bona fide* belief that he had a right to do so, and, therefore, that such holding over was not wilful, within the meaning of the statute, for there is no finding or suggestion in the opinion of the trial court to the effect that Lehnen was acting in good faith in what he did. On the contrary, the testimony tends to show that he was cognizant of the fraud perpetrated by Kempinski, for he was a witness on the trial in the state Circuit Court, and that he knowingly took the lease with the view of assisting in the accomplishment of the intended wrong. Certainly, in the absence of a finding to the contrary, we should not feel warranted, from an examination of the testimony, in coming to the conclusion that the acts of Lehnen, the defendant, were characterized by good faith; nor are we satisfied that good faith would take the case out of the scope of the Missouri statute, for by section 2433, Rev. Stat. 1879; section 5102, 2d Rev. Stat. 1889, it is provided that "the complainant shall not be compelled to make further proof of the forcible entry or detainer than that he was lawfully possessed of the premises, and that the defendant unlawfully entered into and detained, or unlawfully detained the same." And that would seem to

be the legislative interpretation of what was meant by wilfully holding over.

It is unnecessary to comment further upon the testimony. We see nothing in it justifying us in holding that the Circuit Court erred in its conclusions, and, therefore, the judgment is

Affirmed.

ASTIAZARAN *v.* SANTA RITA LAND AND MINING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 43. Submitted December 8, 1892. — Decided March 6, 1893.

By the acts of July 22, 1854, c. 103, § 8, and July 15, 1870, c. 292, a private claim to land in Arizona under a Mexican grant, which has been reported to Congress by the surveyor general of the Territory, cannot, before Congress has acted on his report, be contested in the courts of justice.

THE case is stated in the opinion.

Mr. Rochester Ford for appellants.

Mr. A. T. Britton and *Mr. A. B. Browne* for appellees.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a complaint filed June 25, 1887, in a district court of the Territory of Arizona and county of Pima, by Dolores G. Astiazaran and others, against the Santa Rita Land and Mining Company and the New Mexico and Arizona Railroad Company, to quiet the plaintiffs' title in three tracts of land, known as ranchos Tumacacori, Calabasas and Huevavi, granted by the Mexican government to Francisco Alejandro Aguilar in 1844.

The plaintiffs claimed title as or under the heirs of Aguilar. The defendants claimed under alleged conveyances from

Aguilar to Manuel Maria Gandara in 1856 and 1869, from Gandara to Charles P. Sykes in 1877, from Sykes of an undivided interest to John Curry in 1878, and from Sykes and Curry on December 18, 1879, of the whole interest to the Calabasas Land and Mining Company, whose title had since vested in the defendants.

On June 9, 1864, Gandara presented a petition to the surveyor general for the Territory of Arizona for a survey of the lands, in order that the title might be reported on and confirmed, in accordance with the treaty of Guadalupe Hidalgo of 1848 and the Gadsden treaty of 1853, and the laws of the United States.

On December 15, 1879, Curry and Sykes presented a similar petition to the surveyor general, who on January 7, 1880, made a report to Congress, recommending a confirmation of their title. Congress never took final action upon this recommendation.

The district court gave judgment for the defendants, which was affirmed by the Supreme Court of the Territory on January 19, 1889. 20 Pacific Rep. 189. The plaintiffs appealed to this court.

By article 8 of the treaty of Guadalupe Hidalgo, and article 5 of the Gadsden treaty, the property of Mexicans, within the territory ceded by Mexico to the United States, was to be "inviolably respected," and they and their heirs and grantees were "to enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States." 9 Stat. 929, 930; 10 Stat. 1035.

Undoubtedly, private rights of property within the ceded territory were not affected by the change of sovereignty and jurisdiction, and were entitled to protection, whether the party had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title. But the duty of providing the mode of securing these rights, and of fulfilling the obligations imposed upon the United States by the treaties, belonged to the political department of the government; and Congress might either itself discharge that duty, or delegate it

to the judicial department. *De la Croix* v. *Chamberlain*, 12 Wheat. 599, 601, 602; *Chouteau* v. *Eckhart*, 2 How. 344, 374; *Tameling* v. *United States Freehold Co.*, 93 U. S. 644, 661; *Botiller* v. *Dominguez*, 130 U. S. 238.

For the adjustment and confirmation of claims under grants from the Mexican government of land in New Mexico, and in Arizona, which was formerly a part of it, Congress had not, when this case was decided below, established a judicial tribunal, as it had done in California, and as it has since done in New Mexico and Arizona by the act of March 3, 1891, c. 539, 26 Stat. 854.

But Congress reserved to itself the determination of such claims; and enacted that the surveyor general for the Territory, under the instructions of the Secretary of the Interior, should ascertain the origin, nature, character and extent of all such claims; and for this purpose might issue notices, summon witnesses, administer oaths and do all other necessary acts; and should make a full report on such claims, with his decision as to the validity or invalidity of each under the laws, usages and customs of the country before its cession to the United States; and that his report should be laid before Congress for such action thereon as might be deemed just and proper, with a view to confirm *bona fide* grants, and to give full effect to the treaty of 1848 between the United States and Mexico. Acts of July 22, 1854, c. 103, § 8, 10 Stat. 309; July 15, 1870, c. 292, 16 Stat. 304.

In *Tameling* v. *United States Freehold Co.*, above cited, it was therefore held that the action of Congress, confirming, as recommended by the surveyor general for the Territory, a private land claim in New Mexico, was conclusive evidence of the claimant's title, and not subject to judicial review; and Mr. Justice Davis, in delivering the opinion of the court, said: "No jurisdiction over such claims in New Mexico was conferred upon the courts; but the surveyor general, in the exercise of the authority with which he was invested, decides them in the first instance. The final action on each claim, reserved to Congress, is, of course, conclusive, and therefore not subject to review in this or any other forum. It is obvi-

ously not the duty of this court to sit in judgment upon either the recital of matters of fact by the surveyor general, or his decision declaring the validity of the grant. They are embodied in his report, which was laid before Congress for its consideration and action." 93 U. S. 662. See also *Maxwell Land Grant Case*, 121 U. S. 325, 366, and 122 U. S. 365, 371.

The action of Congress, when taken, being conclusive upon the merits of the claim, it necessarily follows that the judiciary cannot act upon the matter while it is pending before Congress; for if Congress should decide the same way as the court, the judgment of the court would be nugatory; and if Congress should decide the other way, its decision would control.

There is nothing in *Pinkerton* v. *Ledoux*, 129 U. S. 346, cited by the appellant, inconsistent with this conclusion. The point there decided was that the report of the surveyor general, not acted on by Congress, was no evidence to support ejectment upon a grant from the Mexican government, known as the Nolan grant; and Mr. Justice Bradley, in delivering judgment, said: "The surveyor general's report is no evidence of title or right to possession. His duties were prescribed by the act of July 22, 1854, before referred to, and consisted merely in making inquiries and reporting to Congress for its action. If Congress confirmed a title reported favorably by him, it became a valid title; if not, not." And he guardedly added: "This case seems to have been very perfunctorily tried and discussed. There is a question which may be entitled to much consideration, whether the Nolan title has any validity at all without confirmation by Congress. The act of July 22, 1854, before referred to, seems to imply that this was necessary." 129 U. S. 351, 352, 355.

The case is one of those, jurisdiction of which has been committed to a particular tribunal, and which cannot, therefore, at least while proceedings are pending before that tribunal, be taken up and decided by any other. *Johnson* v. *Towsley*, 13 Wall. 72; *Smelting Co.* v. *Kemp*, 104 U. S. 636; *Steel* v. *Smelting Co.*, 106 U. S. 447; *New Orleans* v. *Paine*, 147 U. S. 261.

In this case, Congress has constituted itself the tribunal to

finally determine, upon the report and recommendation of the surveyor general, whether the claim is valid or invalid. The petition to the surveyor general is the commencement of proceedings, which necessarily involve the validity of the grant from the Mexican government under which the petitioners claim title; the proceedings are pending until Congress has acted; and while they are pending, the question of the title of the petitioners cannot be contested in the ordinary courts of justice.

Upon this short ground, without considering any other question, the judgment of the Supreme Court of the Territory of Arizona is

Affirmed.

MR. JUSTICE BREWER concurred in the result.

UNITED STATES *v.* FLETCHER.

FLETCHER *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 918, 919. Submitted December 12, 1892. — Decided March 6, 1893.

The proceedings, findings and sentence of a military court-martial being transmitted to the Secretary of War, that officer wrote upon the record the following order, dating it from the "War Department," and signing it with his name as "Secretary of War:" "In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President. The proceedings, findings and sentence are approved, and the sentence will be duly executed." *Held*, that this was a sufficient authentication of the judgment of the President and that there was no ground for treating the order as null and void for want of the requisite approval.

When a court-martial has jurisdiction, errors in its exercise cannot be reviewed in an action against the United States by the officer court-martialed to recover salary.

Runkle v. *United States*, 122 U. S. 543, questioned upon the ground that the report of that case shows that the circumstances were so exceptional as to render it hardly a safe precedent in any other.

Statement of the Case.

THE claimant filed an amended petition in the Court of Claims, December 16, 1890, as a substitute for his original petition filed December 11, 1889, seeking to recover from the United States a certain amount of money as arrears of pay alleged to be due him as captain on the retired list of the army, to which the government filed a general traverse December 22, 1890. Thereupon due proceedings were had, and the court, on June 8, 1891, found, in substance, the following facts:

Bird L. Fletcher, the claimant, was, on December 27, 1859, enlisted as a private in the general mounted service of the United States Army. After successive promotions, by which he became corporal and second lieutenant, he was brevetted first lieutenant on May 10, 1863, for gallant and meritorious service in the cavalry action at Franklin, Tennessee. He was made first lieutenant on October 12, 1864, in which rank he served until August 25, 1867, when he was promoted captain. On June 19, 1868, he was placed on the retired list of the army, by order of General Grant, upon the finding of a board of examination that he was incapacitated for active service, and that his incapacity was the result of sickness and exposure incident to the service. The order retiring him directed that his name be placed upon the list of retired officers of the class provided for by the act of Congress of August 3, 1861, in which the disability results from long and faithful service, or from some injury incident thereto.

A court-martial was held in Philadelphia, Pennsylvania, July 10, 1872, before which Fletcher was brought for trial upon a charge of conduct unbecoming an officer and a gentleman, and upon this charge, which was supported by the averments of six specifications, he was tried. He was not represented by counsel on the trial, but conducted his case in person, and to the charge and all the specifications pleaded not guilty.

The specifications related to the incurring and non-payment of certain indebtedness, and Fletcher was found guilty of all of them, some parts of the first, second and fifth excepted, and guilty of the charge, and sentenced to be dismissed the service.

The proceedings, findings and sentence of the court-martial were transmitted to the Secretary of War, who wrote upon the record the following order:

"War Department, *July 24th*, 1872.

"In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President.

"The proceedings, findings and sentence are approved, and the sentence will be duly executed. Wm. W. Belknap,

"*Secretary of War.*"

From the date of this order, July 24, 1872, Fletcher received no pay as an officer of the army.

He did not dispute at the War Department the validity of the dismissal, in pursuance of the sentence of the court-martial, for the period of nearly sixteen years, but did promptly petition Congress for redress, and urge his restoration to the retired list; and he made application for pay to the accounting officers of the Treasury after March 1, 1888. His complaint stated that March 27, 1888, he addressed a petition to the President of the United States, and this resulted in a report of the judge advocate-general to the Secretary of War, April 17, 1888, that, in accordance with *Runkle* v. *United States*, 122 U. S. 543, there was no evidence that the proceedings in Fletcher's case had been laid before, or approved by, the President, and that the case was still subject to the President's action. The Secretary of War then transmitted the report and the original record to the President, stating that the proceedings of the court-martial awaited his action, as it appeared from the facts in the report that Fletcher was still undoubtedly an officer of the army, and recommending that the sentence be approved. On July 5, 1888, the President made an order approving the proceedings, findings and sentence of the court-martial.

In his amended petition in the Court of Claims, the claimant alleged that the proceedings, findings and sentence of the

court-martial, and the orders approving the same, were void, for the reason that the charge and specifications upon which he was tried and sentenced stated no offence within any of the articles of war, and because the order of the Secretary of War in 1872 was not the act of the President.

The Court of Claims held that the said charge and specifications stated an offence within the articles of war, but that the sentence of the court-martial did not take effect until acted upon by the President on July 5, 1888. The court therefore allowed the claimant all pay claimed by him, except such as was barred by the statute of limitations, up to the date of the last order approving the sentence of the court-martial, and gave judgment for the claimant for $9654. 26 Ct. Cl. 541.

From this judgment both parties appealed.

Mr. Solicitor General and *Mr. Assistant Attorney General Parker* for the United States.

Mr. George A. King for Fletcher.

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

The claimant's suit was for arrears of pay claimed to be due him as a retired officer of the army of the United States, accruing from December 1, 1883, to November 30, 1890, at the rate of two thousand one hundred dollars per annum, and amounting to the sum of fourteen thousand seven hundred dollars. This claim was met by a finding and sentence of a court-martial, held on the 10th of July, 1872, in the city of Philadelphia, whereby Fletcher was found guilty of "conduct unbecoming an officer and a gentleman," and sentenced to be dismissed the service.

By Article 65 of the act of April 10, 1802, 2 Stat. 359, 367, c. 20, establishing rules and regulations for the government of the armies of the United States, it was provided that "no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before

the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial, in time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval, and orders, in the case." And Article 83 read thus: "Any commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed the service."

These articles, and the provisions of the act of May 29, 1830, 4 Stat. 417, c. 179, amending the 65th Article, were carried forward into Articles 72 and 106 of section 1342 of the Revised Statutes.

Upon the record of the proceedings, findings and sentence of the court-martial which tried Captain Fletcher, the Secretary of War endorsed that: "In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President. The proceedings, findings and sentence are approved, and the sentence will be duly executed."

Was this order void on the ground that it does not appear that the President personally approved the proceedings and directed the execution of the sentence?

By the first section of the act of August 7, 1789, 1 Stat. 49, establishing an Executive Department to be denominated the Department of War, now in substance section 216 of the Revised Statutes, the Secretary of War is to perform and execute such duties as shall be enjoined on, or entrusted to him by the President, relative to the land or naval forces or to such other matters respecting military or naval affairs as the President shall assign to the department, and to conduct the business of the department in such manner as the President shall from time to time order or instruct. And we have held that while the action required of the President in respect

of the proceedings and sentences of courts-martial is judicial, yet that such action need not be evidenced under his own hand.

Under Article 65, the proceedings of this court-martial were not forwarded to the Secretary of War for individual action by him, but to enable him to lay them before the President, so that the latter might take action as prescribed. There is nothing to indicate that the Secretary of War assumed to confirm or disapprove, or issue orders in the case, and as his endorsement showed that he was proceeding under that article, and that he had received the record for the purpose of being acted on by the President, the approval and the direction for the execution of the sentence were manifestly the acts of the President. The presumption is that the Secretary and the President performed the duties devolved upon them respectively, and it would be unreasonable to construe the Secretary's endorsement as meaning that he had received the proceedings for the action of the President in conformity with Article 65, and had approved them himself and ordered execution of the sentence in contravention of the article.

As we said in *United States* v. *Page*, 137 U. S. 673, 678, 680: "Undoubtedly the action required of the President under this article is judicial action. He decides personally, and the judgment is his own personal judgment, and not an official act, presumptively his. But that judgment need not be attested by his sign manual in order to be effectual." There the endorsement read that the proceedings had been forwarded to the Secretary of War, and by him submitted to the President; and we inquired: "By what process of reasoning can the conclusion be justified that, although these proceedings were laid before the President for his confirmation or disapproval, yet the findings and sentence were approved by some one else, who had no authority to act in the premises?" While in the case in hand it is not said that the proceedings were submitted to the President, it is stated that they had been forwarded to the Secretary of War for the action of the President, and as that is followed by an approval and the direction of the execution of the sentence, which approval and sentence could only ema-

nate from the President, the conclusion follows that the action taken was the action of the President.

The views of the Judge Advocate General, and the action of the Secretary in 1888 upon a reference of the subject in answer to the petition of Captain Fletcher, presented to the President, March 27 of that year, were induced by the case of *Runkle* v. *United States*, 122 U. S. 543, and the present decision of the Court of Claims was based upon it. Reference to the report of that case shows that the circumstances were so exceptional as to render it hardly a safe precedent in any other.

It appeared therein that the proceedings, findings and sentence of the court-martial were transmitted to the Secretary of War, who, on January 16, 1873, wrote upon the record an order approving the proceedings, with certain exceptions, and the findings and sentence, together with the further statement that in view of the unanimous recommendation by the members of the court that the accused should receive executive clemency, and other facts, the President was pleased to remit all of the sentence except so much as directed cashiering; and that, thereupon, the Secretary issued a general order announcing the sentence, as thus modified. It further appeared that thereafter, and on the same day, Major Runkle presented to President Grant a petition insisting that the proceedings had not been approved by him as required by law; that the conviction was unjust; that the record was insufficient to warrant the issuing of the order, and asking its revocation and annulment; whereupon, in pursuance of the petition, the record of the official action theretofore had was, by direction of the President, referred to the Judge Advocate General for review and report; that this report was subsequently made, and with the petition was found by President Hayes awaiting further and final action thereon, and being taken up by him as unfinished business, the conviction and sentence were disapproved, and the order of January 16, 1873, revoked.

This court was of opinion that the order was capable of division into two separate parts, one relating to the approval of the proceedings and sentence, and the other to the execu-

tive clemency which was invoked and exercised, and that under the circumstances, which are recapitulated, it could not be said that it positively and distinctly appeared that the proceedings had ever, in fact, been approved or confirmed by the President as required by the articles of war.

The facts that there was no reference to Article 65 in the Secretary's endorsement; that the objection that President Grant had not personally examined and approved of the proceedings, was taken and urged upon President Grant himself immediately upon the promulgation of the sentence; and that he entertained the objection, thereby recognizing the contention, seemed to make it a matter of argument whether he had personally acted in the premises.

If it had been affirmatively stated that the proceedings were submitted, perhaps the action of President Grant in the matter of the application might have been ascribed to some other ground than doubt as to his examination of the proceedings; but as the record stood, this court apparently thought that the presumptions conflicted, and, therefore, felt constrained to the conclusion announced.

We regard the certificate of the Secretary in this case, in 1872, as a sufficient authentication of the judgment of the President, and perceive no ground upon which the order of that date can be treated as null and void for want of the required approval.

It is insisted, however, on behalf of the claimant that the court-martial had no jurisdiction to try and convict Captain Fletcher, because the charge and specifications stated no offence whatever "within any Rules and Articles of War, or known to the military law and custom of the United States." We do not feel called upon to set forth the specifications on which the court-martial acted. They related to the incurring by the accused of certain indebtedness and the non-payment thereof, and while it is argued that the non-payment of debts does not justify conviction of conduct unbecoming an officer and a gentleman, we think that the specifications went farther than that, and contained the element that the circumstances under which the debts were contracted and not

paid were such as to render the claimant amenable to the charge. The evidence is not before us in any form, nor are there findings of fact in respect to the conduct and behavior forming the subject of inquiry. The specifications were not objected to for insufficiency, and cannot properly be held to be, on their face, incapable of sustaining the charge. As the court-martial had jurisdiction, errors in its exercise, if any, cannot be reviewed in this proceeding. *Dynes* v. *Hoover*, 20 How. 65; *Keyes* v. *United States*, 109 U. S. 336; *Smith* v. *Whitney*, 116 U. S. 167.

The judgment is reversed, and the cause remanded, with a direction to dismiss the petition.

ST. LOUIS *v.* WESTERN UNION TELEGRAPH COMPANY.

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

No. 94. Argued December 16, 1892. — Decided March 6, 1893.

In this case it appears by the bill of exceptions that there was an application at the close of the trial for an instruction that the plaintiff was entitled to judgment for the sum claimed, which was refused and exception taken, and this is *held* to present a question of law for the consideration of this court, although there were no special findings of fact.

When the trial court, in a case where some facts are agreed and there is oral testimony as to others, makes a ruling of law upon a point not affected by the oral testimony, this court may consider it notwithstanding the fact that there was only a general finding of facts.

A municipal charge for the use of the streets of the municipality by a telegraph company, erecting its poles therein, is not a privilege or license tax.

A telegraph company has no right, under the act of July 24, 1865, c. 230, 14 Stat. 221, to occupy the public streets of a city without compensation.

This case presents no question of estoppel.

Whether such tax is reasonable is a question for the court.

Statement of the Case.

On February 25, 1881, the city of St. Louis passed an ordinance, known as ordinance No. 11,604, authorizing any telegraph or telephone company duly incorporated according to law, doing business or desiring to do business in the city of St. Louis, to set its poles, pins, abutments, wires and other fixtures along and across any of the public roads, streets and alleys of the city, subject to certain prescribed regulations. Sections six, eight and nine read as follows:

"Sec. 6. Every telegraph or telephone company doing business in this city shall keep on deposit with the treasurer the sum of fifty dollars, subject to the order of the street commissioner, to be used by him in restoring any sidewalk, gutter, street or alley pavement displaced or injured in the erection, alteration or removal of any pole of such company, when said company refuses or fails to make such restoration to the satisfaction of such commissioner. Any company failing to make such deposit within thirty days after the passage of this ordinance, or within five days after commencing business, if a new company, or which shall fail to make good the amount when any portion of it has been expended as herein provided, within five days after notice so to do has been sent by the street commissioner, shall be deemed guilty of a misdemeanor and punished as hereinafter provided."

"Sec. 8. Any company erecting poles under the provision of this ordinance shall, before obtaining a permit therefor from the board of public improvements, file an agreement in the office of the city register permitting the city of St. Louis to occupy and use the top cross-arm of any pole erected, or which is now erected, for the use of said city for telegraph purposes free of charge.

"Sec. 9. Nothing contained in this ordinance shall be so construed as to in any manner affect the right of the city in the future to prescribe any other mode of conducting such wires over or under its thoroughfares."

On March 22, 1884, another ordinance, known as ordinance No. 12,733, was passed. This ordinance was entitled "An ordinance to amend ordinance number 11,604," etc., and

amended that ordinance by adding certain sections, of which section 11 reads as follows:

"SEC. 11. From and after the first day of July, 1884, all telegraph and telephone companies, which are not by ordinance taxed on their gross income for city purposes, shall pay to the city of St. Louis, for the privilege of using the streets, alleys and public places thereof, the sum of five dollars per annum for each and every telegraph or telephone pole erected or used by them in the streets, alleys and public places in said city."

This section continued in force and was incorporated into and became a part of an ordinance of the city, entitled "An ordinance in revision of the ordinances of the city of St. Louis, and to establish new ordinance provisions for the government of said city," approved April 12, 1887, and numbered 14,000, the section being in said revised ordinance known as section 671 of article 8 of chapter 15.

The Western Union Telegraph Company being one of the companies designated in section 671, not taxed on its gross income for city purposes, and failing to pay the sum of five dollars per annum for each telegraph pole, as required by said section, on April 7, 1888, there was filed in the office of the clerk of the Circuit Court of the city of St. Louis a petition, setting forth these various ordinances, alleging that the telegraph company had during the three years last past held, owned and used in the streets and public places of the city of St. Louis 1509 telegraph poles, and praying to recover the sum of $22,635 therefor. This suit was removed by the telegraph company to the United States Circuit Court for the Eastern District of Missouri, and on February 16, 1889, an amended answer was filed by the company, admitting its use of the streets of the city of St. Louis as charged, and that it was not taxed on its gross income for city purposes, but denying the validity of the said ordinance, and the authority of the city to pass it. It also set up as defences that it was a corporation chartered, created and organized under the laws of the State of New York; that it owned, controlled and used lines of telegraph in various parts of the United States, which con-

nected with its lines in the city of St. Louis; that on the 5th of June, 1867, it duly filed with the Postmaster General of the United States a written acceptance of the restrictions and obligations required by law under and in accordance with the act of Congress of the United States, approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," and that it had ever since been subject to and complied with the terms of such act; that the streets and public places of the city of St. Louis were established post roads of the United States, under and in pursuance of the laws of the United States, and of the authorized rules and regulations of the officers and departments of the United States, made, passed and adopted in pursuance of said laws; that it has constructed, operated and maintained its lines of telegraph in the city of St. Louis under and by virtue of the authority of said acts of Congress; that while the city of St. Louis claims compensation from the defendant in the sum of five dollars per annum on account of each and every telegraph pole in the streets, alleys and public places in the city, yet in fact the said sum so assessed and sought to be recovered from it is a privilege or license tax for the privilege of carrying on its business in the city of St. Louis; and that its assessment and attempted enforcement and collection are in violation of article I, section 8, paragraphs 3 and 7, of the Constitution of the United States.

The defendant also alleged that it had complied with all the terms of ordinance No. 11,604; and, further, that during the time set forth in the petition all its property within the city of St. Louis was assessed in pursuance of law for the purpose of taxation by the State and city, and that it had paid all taxes levied thereon; and, still further, that the ordinance set forth imposed upon defendant a burden and tax additional to the taxes regularly assessed upon the property of defendant, without any corresponding or special advantage to the defendant; and that, in so far as it attempted to exact five dollars per annum for each pole, it was unreasonable, unjust, oppressive and void. The case was tried by the court

without a jury, and on June 17, 1889, a judgment was entered in favor of the defendant, the court holding that the burden imposed was a tax, and imposed in such form that it could only be regarded as a privilege or license tax, which the city had no authority to impose. 39 Fed. Rep. 59. To reverse such judgment, the city sued out a writ of error from this court.

Mr. W. C. Marshall for plaintiff in error.

Mr. John F. Dillon, (with whom was *Mr. Rush Taggart* on the brief,) and *Mr. Elenious Smith*, (with whom were *Mr. Charles W. Wells*, *Mr. Willard Brown* and *Mr. George H. Fearons* on the brief,) for defendant in error.

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

At the threshold of the case we are met with the objection that there are no special findings of facts, and that, therefore, our inquiry is limited to questions arising upon the pleadings, or upon rulings made by the court during the progress of the trial. We have had occasion in a recent case, coming from the same court, to consider to what extent our inquiry may go in a case tried by the court without a jury, in which there are no special findings of facts, and it is, therefore, unnecessary to consider that question at length. *Lehnen* v. *Dickson*, *ante*, 71.

It is enough to say that in this case there was, as appears by the bill of exceptions, an application at the close of the trial for a declaration of law, that the plaintiff was entitled to judgment for the sum claimed, which instruction was refused, and exception taken; and this, as was held in *Norris* v. *Jackson*, 9 Wall. 125, presents a question of law for our consideration. Further, there was, as also appears in the bill of exceptions, an agreement as to certain facts, which though not technically such an agreed statement as is the equivalent of a special finding of facts, yet enables us to approach the consideration

of the declaration of law with a certainty as to the facts upon which it was based. It is true that, in addition to these agreed facts, there was some oral testimony, but as it appears from the opinion of the court that it made a distinct ruling upon a proposition of law not at all affected by the oral testimony, and which in its judgment was decisive of the case, we cannot avoid an inquiry into the matter thus determined. We, therefore, pass to a consideration of such questions as are distinctly presented and clearly involved.

And, first, with reference to the ruling that this charge was a privilege or license tax. To determine this question, we must refer to the language of the ordinance itself, and by that we find that the charge is imposed for the privilege of using the streets, alleys and public places, and is graduated by the amount of such use. Clearly, this is no privilege or license tax. The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city — that which may properly be called rental. "A tax is a demand of sovereignty; a toll is a demand of proprietorship." *State Freight Tax Case*, 15 Wall. 232, 278. If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section would no longer have any application to it. That by it the city receives something which it may use as revenue, does not determine the character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes. Supposing the city of St. Louis should find its city hall too small for its purposes, or too far removed from the centre of business, and should purchase or build another more satisfactory in this respect; it would not thereafter be forced to let the old remain vacant or to immediately sell it, but might derive revenue by renting its various rooms. Would an ordinance fixing the price at which those rooms could be occupied be in any sense one imposing a tax? Nor is the character of

the charge changed by reason of the fact that it is not imposed upon such telegraph companies as by ordinance are taxed on their gross income for city purposes. In the illustration just made in respect to a city hall, suppose that the city, in its ordinance fixing a price for the use of rooms, should permit persons who pay a certain amount of taxes to occupy a portion of the building free of rent, that would not make the charge upon others for their use of rooms a tax. Whatever the reasons may have been for exempting certain classes of companies from this charge, such exemption does not change the character of the charge, or make that a tax which would otherwise be a matter of rental. Whether the city has power to collect rental for the use of streets and public places, or whether, if it has, the charge as here made is excessive, are questions entirely distinct. That this is not a tax upon the property of the corporation, or upon its business, or for the privilege of doing business, is thus disclosed by the very terms of the section. The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent. While we think that the Circuit Court erred in its conclusions as to the character of this charge, it does not follow therefrom that the judgment should be reversed, and a judgment entered in favor of the city. Other questions are presented which compel examination.

Has the city a right to charge this defendant for the use of its streets and public places? And here, first, it may be well to consider the nature of the use which is made by the defendant of the streets, and the general power of the public to exact compensation for the use of streets and roads. The use which the defendant makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveller, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveller. This use is common to all members of the public, and it is a use open equally to citizens

of other States with those of the State in which the street is situate. But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public. By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of companies and for the transportation of messages.

We do not mean to be understood as questioning the right of municipalities to permit such occupation of the streets by telegraph and telephone companies, nor is there involved here the question whether such use is a new servitude or burden placed upon the easement, entitling the adjacent lot owners to additional compensation. All that we desire or need to notice is the fact that this use is an absolute, permanent and exclusive appropriation of that space in the streets which is occupied by the telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public. Now, when there is this permanent and exclusive appropriation of a part of the highway, is there in the nature of things anything to inhibit the public from exacting rental for the space thus occupied? Obviously not. Suppose a municipality permits one to occupy space in a public park, for the erection of a booth in which to sell fruit and other articles; who would question the right of the city to charge for the use of the ground thus occupied, or call such charge a tax, or anything else except rental? So, in like manner, while permission to a telegraph company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental. We do not understand it to be

questioned by counsel for the defendant that, under the constitution and laws of Missouri, the city of St. Louis has the full control of its streets, and in this respect represents the public in relation thereto.

It is claimed, however, by defendant, that under the act of Congress of July 24, 1866, c. 230, 14 Stat. 221, and by virtue of its written acceptance of the provisions, restrictions and obligations imposed by that act, it has a right to occupy the streets of St. Louis with its telegraph poles. The first section of that act contains the supposed grant of power. It reads: "That any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads." By sec. 3964, Rev. Stat. U. S.: "The following are established post roads: . . . All letter-carrier routes established in any city or town for the collection and delivery of mail matters." And the streets of St. Louis are such "letter-carrier routes." So also by the act of March 1, 1884, 23 Stat. 3: "All public roads and highways, while kept up and maintained as such, are hereby declared to be post routes."

It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a fran-

chise from the Federal government to a corporation, State or national, to construct interstate roads or lines of travel, transportation or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the state-house grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State. While for purposes of travel and common use they are open to the citizens of every State alike, and no State can by its legislation deprive the citizens of another State of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another State, or a corporation of the national government, it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general pub-

lic for being deprived of the common use of the portion thus appropriated.

This is not the first time that an effort has been made to withdraw corporate property from state control, under and by virtue of this act of Congress. In *Western Union Telegraph Company* v. *Massachusetts*, 125 U. S. 530, the telegraph company set up that act as a defence against state taxation, but the defence was overruled. Mr. Justice Miller, on page 548, speaking for the court, used this language: "This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal government, carries with it any exemption from the ordinary burdens of taxation. While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

If it is, as there held, simply a permissive statute, and nothing in it which implies that the permission to extend its lines along roads not built or owned by the United States carries with it any exemption from the ordinary burdens of taxation, it may also be affirmed that it carries with it no exemption from the ordinary burdens which may be cast upon those who would appropriate to their exclusive use any portion of the public highways.

Again, it is said that by ordinance No. 11,604 the city con-

tracted with defendant to permit the erection of these poles in consideration of the right of the city to occupy and use the top cross-arm of any pole for its own telegraph purposes, free of charge; and in support of that proposition the case of *New Orleans* v. *Southern Telephone & Telegraph Co.*, 40 La. Ann. 41, is cited. But in that case it appeared that the telephone company had set its poles and constructed its lines under and by virtue of the grant made by the ordinance, and hence the conditions named therein were held part of the contract between the city and the telephone company, which the former was not at liberty to disregard. As stated in the opinion, page 45: "Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous considerations therein. Such has been the well-recognized doctrine of the authorities since the *Dartmouth College Case*, 4 Wheat. 518." The same principle controlled the cases of *Commonwealth* v. *New Bedford Bridge*, 2 Gray, 339; *Kansas City* v. *Corrigan*, 86 Missouri, 67; *Chicago* v. *Sheldon*, 9 Wall. 50.

But the difficulty of the application of that doctrine in this case is that there is nothing to show that a single pole was erected under or by virtue of ordinance No. 11,604. The only statement in the agreed facts is that they were erected prior to July 1, 1884. If we turn to the oral testimony, there is nothing tending to show that any were erected after the 25th of February, 1881, the date of the passage of ordinance No. 11,604. On the contrary, that testimony shows that the company had been engaged in the telegraph business in the city of St. Louis for 15 years or more prior to 1881. There is nothing, either, in the agreed facts, as to the use of the top cross-arm of any poles by the city of St. Louis, and the testimony tends to show that they were so used prior to 1881.

Whatever, therefore, of estoppel might arise if anything had been done by the telegraph company under the ordinance to change its position, as the case now stands none can be invoked, and all that can be said of the ordinance is that, in

its application to the facts as they appear, there is simply a temporary matter of street regulation, and one subject to change at the pleasure of the city. It is unnecessary, however, to consider these matters at length, for on a new trial the facts in respect thereto can be more fully developed. It is true that in cases tried by the court, where all the facts are specifically found or agreed to, it is within the power of this court, in reversing, to direct the judgment which shall be entered upon such findings. At the same time if for any reasons justice seems to require it, the court may simply reverse and direct a new trial. Indeed, this has been done, under special circumstances, in cases where there were no findings of facts or agreed statement, or where that which was presented was obviously defective. *Graham* v. *Bayne*, 18 How. 60; *Flanders* v. *Tweed*, 9 Wall. 425.

Another matter is discussed by counsel which calls for attention, and that is the proposition that the ordinance charging five dollars a pole per annum is unreasonable, unjust and excessive. Among other cases cited in support of that proposition is *Philadelphia* v. *Western Union Tel. Co.*, 40 Fed. Rep. 615, in which an ordinance similar in its terms was held unreasonable and void by the Circuit Court of the United States for the Eastern District of Pennsylvania. We think that question, like the last, may be passed for further investigation on the subsequent trial. *Prima facie*, an ordinance like that is reasonable. The court cannot assume that such a charge is excessive, and so excessive as to make the ordinance unreasonable and void; for, as applied in certain cases, a like charge for so much appropriation of the streets may be reasonable. If within a few blocks of Wall Street, New York, the telegraph company should place on the public streets 1500 of its large telegraph poles, it would seem as though no court could declare that five dollars a pole was an excessive annual rental for the ground so exclusively appropriated; while, on the other hand, a charge for a like number of poles in a small village, where space is abundant and land of little value, would be manifestly unreasonable, and might be so excessive as to be void. Indeed, it may be observed, in

the line of the thoughts heretofore expressed, that this charge is one in the nature of rental; that the occupation by this interstate commerce company of the streets cannot be denied by the city; that all that it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated; and it follows in the nature of things that it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open in the courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city.

We think that this is all that need be said in reference to the case as it now stands. For the reasons given, the judgment is

Reversed and the case remanded for a new trial.

Mr. Justice Brown dissenting.

The tax in this case cannot be considered, and does not purport to be a tax upon the property of the defendant. The gross disparity of the tax to the value of such property is of itself sufficient evidence of this fact — the total valuation of all of defendant's property in the city of St. Louis in 1884, as fixed by the state board of equalization, being but $17,064.63, while the tax of $5 upon 1509 poles amounted to $7545, or more than 44 per cent of the entire value of the property.

If it be treated as a tax upon the franchise then it is clearly invalid within the numerous decisions of this court, which deny the right of a State or municipality to impose a burden upon telegraph and other companies engaged in interstate commerce for the exercise of their franchises. *Leloup* v. *Mobile*, 127 U. S. 640; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Moran* v. *New Orleans*, 112 U. S. 69; *Harmon* v. *City of Chicago*, 147 U. S. 396; *Western Union Telegraph Co.* v. *Alabama*, 132 U. S. 472; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339.

If this tax be sustainable at all it must be upon the theory adopted by the court that the municipality has the right to

tax the company for the use of its streets. While I have no doubt of its right to impose a reasonable tax for such use, the tax must be such as to appear to have been laid *bona fide* for that purpose. It seems to me, however, that the imposition of a tax of $5 upon every pole erected by the company throughout the entire municipality is so excessive as to indicate that it was imposed with a different object. In the city of St. Louis alone the tax amounts, as above stated, to $7545. A similar tax in the city of Philadelphia amounted to $16,000, while the facts showed that, at the most, only $3500 per year was required to cover every expenditure the city was obliged to make upon this account. *Philadelphia* v. *W. U. Tel. Co.*, 40 Fed. Rep. 615. A like tax imposed by every city through which the defendant company carries its wires would result practically in the destruction of its business. While, as stated in the opinion of the court, $5 per pole might not be excessive if laid upon poles in the most thickly settled business section of the city, the court will take judicial notice of the fact that all the territory within the boundaries of our cities is not densely populated, that such cities include large areas but thinly inhabited, and that a tax which might be quite reasonable if imposed upon a few poles would be grossly oppressive if imposed upon every pole within the city. In my opinion the tax in question is unreasonable and excessive upon its face, and should not be upheld. The fact that it was nominally imposed for the privilege of using the streets is not conclusive as to the actual intent of the legislative body. As was said by this court in the *Passenger Cases*, 7 How. 283, 458: "It is a just and well-settled doctrine established by this court, that a State cannot do that indirectly which she is forbidden by the constitution to do directly. If she cannot levy a duty or tax from the master or owner of a vessel engaged in commerce graduated on the tonnage or admeasurement of the vessel, she cannot effect the same purpose by merely changing the ratio, and graduating it on the number of masts, or of mariners, the size and power of the steam engine, or the number of passengers which she carries. We have to deal with things, and we cannot change them by changing their names."

The tax in question seems to me to indicate upon its face that it was not imposed *bona fide* for the privilege of using the streets, but was intended either as a tax upon the franchise of the company, or for the purpose of driving its wires beneath the ground. While the latter object may be a perfectly legitimate one, I consider it a misuse of the taxing power to seek to accomplish it in this way. I am, therefore, constrained to dissent from the opinion of the court.

VIRGINIA *v.* PAUL.

ORIGINAL.

No. 7. Original. Submitted January 30, 1893. — Decided March 6, 1893.

Under section 643 of the Revised Statutes, the jurisdiction of the state court is not taken away, until a petition for removal is filed in the Circuit Court of the United States, and a writ of *certiorari* or of *habeas corpus cum causa* issued by the clerk of that court, and served upon the state court or its clerk.

A prosecution of a crime against the laws of a State, which must be prosecuted by indictment, is not commenced, within the meaning of section 643 of the Revised Statutes, before an indictment is found; and cannot be removed into the Circuit Court of the United States by a person arrested on a warrant from a justice of the peace with a view to his commitment to await the action of the grand jury.

Mandamus lies in behalf of a State to compel the remanding to one of its courts of a criminal prosecution there commenced, and of which the Circuit Court of the United States has assumed jurisdiction, at the defendant's suggestion, without due proceedings for removal.

Mandamus does not lie to review an order on a writ of *habeas corpus*, under sections 751–753 of the Revised Statutes, discharging a prisoner from commitment under authority of a State, on the ground of his being in custody for an act done in pursuance of a law of the United States.

This was a petition by the Commonwealth of Virginia to this court for a writ of mandamus to the Honorable John Paul, District Judge of the United States for the Western District of Virginia, and holding the Circuit Court of the United States for that district, to command him to remand

to the county court of Smyth County in Virginia an indictment against Joseph H. Carrico for the murder of James M. Nelson, found by the grand jury of the county, and by them returned into the county court, and of which the Circuit Court of the United States had assumed jurisdiction; and also to command him to restore the body of Carrico to W. D. Wilmore, the jailor of the county, from whose custody he had been taken upon a writ of *habeas corpus* issued by said judge.

Annexed to the petition was a copy of the record of the District Court of the United States in the proceedings for a *habeas corpus*, as well as a copy of the record of the Circuit Court of the United States in the proceedings concerning the indictment.

The record of the District Court set forth the following proceedings: On December 18, 1891, in vacation, Carrico presented to Judge Paul a petition, addressed to him as "Judge of the United States Circuit Court," alleging "that, on December 12, 1891, one Kirk, a justice of the peace of Smyth County, Virginia, issued his warrant in the name of the Commonwealth of Virginia, addressed to constable Scott of the said county, commanding him to arrest your petitioner, and bring his body before said justice for wilfully, premeditatedly and of malice aforethought, killing and murdering one James M. Nelson, in the said county of Smyth, on December 11, 1891; and upon said warrant the said constable Scott did arrest your petitioner, late on Saturday evening, December 12, 1891, and delivered him to W. D. Wilmore, the jailor of Smyth County, Virginia; and your petitioner is now confined in the jail of Smyth County, at Marion, awaiting a trial before said justice upon the said charge of murder." The petition further alleged that no murder was committed, but that the killing was done by the petitioner in self-defence, in the performance of his duty as a deputy of the marshal of the district, acting by and under the authority of the internal revenue laws of the United States, and in attempting to arrest Nelson while violating those laws by having in his possession and selling illicit ardent spirits. "In view of these facts, under section 643 of the Revised Statutes of the United States," the petition prayed that "said

cause may be removed from the jurisdiction of the said Kirk, justice of the peace of said county of Smyth, and from the county court of said county, to the Circuit Court of the United States for the Western District of Virginia, for trial;" that a writ of *habeas corpus cum causa* might be awarded, and a duplicate thereof delivered to the clerk of the county court, and that by virtue thereof the marshal of the district or one of his deputies might take the body of the petitioner into his custody, to be dealt with in the cause according to law, and according to the order of the Circuit Court, or of a judge thereof in vacation; and, "upon the removal of said prosecution, that a copy of the record and proceedings before said justice and by said constable" might be brought into the Circuit Court. The petition was verified by the oath of the petitioner, taken before a United States commissioner on December 12; and annexed to it was a certificate of counsel of the same date, in the form required by said section of the statutes.

Upon that petition, and on the same day, Judge Paul made an order, entitled "In the District Court of the United States for the Western District of Virginia, in vacation," and signed by him as District Judge, granting a writ of *habeas corpus* in common form to the jailor, returnable before him on December 23, at Abingdon.

On December 19, that petition was filed, and the order granting the writ of *habeas corpus* recorded, in the clerk's office of the District Court, and the writ was issued accordingly, tested by Judge Paul as judge of the District Court, and under its seal.

On December 22, the writ of *habeas corpus*, as appeared by the marshal's return thereon, was executed by delivering copies thereof to the jailor, and to the clerk of the county court.

On December 23, at a special term of the District Court, held at Abingdon, the jailor brought in the body of Carrico; and returned that the causes of his detention were a warrant of commitment, a copy of which, marked Exhibit A, was annexed to and made part thereof, "and the proceedings of the county court of Smyth and Commonwealth of Virginia, marked Exhibit B, and made part and parcel of this return."

The only exhibit annexed to the jailor's return was marked Exhibit A, and was as follows:

"Virginia, Smyth County, to wit: To William Scott, constable of said county, and to the keeper of the jail of said county:

"These are to command you, the said constable, in the name of the Commonwealth of Virginia, forthwith to convey and deliver into the custody of the keeper of said jail, together with the warrant, the body of Joseph H. Carrico, charged before me, John J. Kirk, a justice of the said county, on the oath of R. W. Nelson, with a felony by him committed, in this, that the said Joseph H. Carrico, on the 11th day of December, 1891, in the said county, feloniously and of his malice did kill and murder one James M. Nelson; and you, the said keeper of the said jail, are hereby required to receive the said Joseph H. Carrico into your jail and custody, that he may be examined for the said offence by the county court of the said county, and him there safely keep until he shall be discharged by due course of law. Given under my hand and seal this, the 14th day of December, 1891.

"John J. Kirk, *J. P.*"

The prisoner was thereupon admitted to bail with sureties for his appearance on January 8, 1892, and the case was continued to that day, and again to January 9, when the jailor was permitted by the court to amend his return by adding Exhibit B, therein referred to, which was a transcript of an indictment against Carrico for the murder of Nelson, returned into the county court by a grand jury of the county on December 21, and of an order made the same day by that court, directing that Carrico, who had been removed to the jail of another county for safekeeping, be conveyed by the sheriff to the jail of Smyth County, that he might be tried in the county court on the indictment. This transcript appeared to have been certified by the county clerk on January 7, and was endorsed by the clerk of the District Court of the United States as filed in that court on May 17, 1892.

The case was continued from January 9 to January 12,

when the District Court, held by Judge Paul, made the following order:

"In this cause, the court having heard the testimony introduced on behalf of the petitioner, as well as that introduced on behalf of the respondent, W. D. Wilmore, sheriff of Smyth County, Virginia, and the arguments of counsel for the petitioner and respondent, and it appearing to the court that the petitioner is in custody for an act done in pursuance of a law of the United States, and is held in custody contrary to law by the jailor of Smyth County, Virginia, and that he has a right to have removed into the Circuit Court of the United States for the Western District of Virginia the prosecution pending against him in the county court of Smyth County, Virginia: It is therefore ordered that the petitioner be recognized in the sum of one thousand dollars for his appearance before the Circuit Court for this district on the first day of the next regular term thereof, to answer the indictment found against him by a grand jury of the county court of Smyth County, Virginia." Thereupon Carrico entered into a recognizance accordingly. The record set forth the testimony introduced at that hearing, as well as the opinion then delivered, and published in 51 Fed. Rep. 196.

On May 14, 1892, the jailor moved the District Court to amend its order of January 12, so as to allow him an appeal to this court; and to certify that the question of the jurisdiction of the District Court to hear and determine the writ of *habeas corpus* in the manner it did was alone involved and to be reviewed. The motion was granted, upon the grounds that the order of January 12, taking the petitioner from the custody of the respondent, and holding him to answer to the indictment in the United States Court, was a final order, from which the respondent might appeal to this court, as if it had been an order for the absolute discharge of the prisoner from his custody; and that the writ of *habeas corpus* was not merely ancillary to the petition for the removal, under section 643 of the Revised Statutes, of the prosecution of Carrico by the State of Virginia, but was a distinct and different proceeding, in a different court, and under a different statute, and

was not issued by the clerk, as provided in that section, but by the District Judge, and on December 18, 1891, "whereas," the judge said, "the petition for removal, as shown by record evidence used in the discussion of this motion, was not filed in the clerk's office of the Circuit Court until December 19, 1891." His opinion on this motion is in the record, and is published in 51 Fed. Rep. 200. The appeal from the order of January 12 does not appear to have been prosecuted.

The copy of the record of the Circuit Court of the United States, annexed to the petition for a mandamus, was of the proceedings at the regular May term 1892 of that court, at Abingdon, held by Judge Paul, in the case entitled "Commonwealth of Virginia *v.* Joseph H. Carrico, Indictment for murder from Smyth County court;" and began, under date of Saturday, May 14, with the following memorandum:

"Be it remembered that heretofore the said Joseph H. Carrico presented a petition for the removal of the case aforesaid, and herein charging him with the murder of James M. Nelson, from the county Court of Smyth County, Virginia, to the Circuit Court of the United States for the Western District of Virginia, at Abingdon, Virginia, (and for a writ of *habeas corpus*,) to the Judge of the District Court of the United States for the Western District of Virginia; and upon return of W. D. Wilmore, jailor of Smyth County, Virginia, and upon the hearing of the evidence and arguments of counsel, an order was entered in the said District Court of the United States for the Western District of Virginia, on January 12, 1892, removing the said prosecution of the Commonwealth of Virginia *v.* Joseph H. Carrico into the Circuit Court of the United States for the Western District of Virginia, in the Fourth Circuit, at Abingdon, Virginia, for further proceedings and trial; and said indictment, with the endorsements thereon, is in the words and figures following, viz:"

Then followed a copy of the indictment, with the endorsement "a true bill," by the foreman of the grand jury, and also endorsed as "a transcript from the record," by the clerk of the county court. The record of the Circuit Court further showed that on May 14 the attorney general of Virginia and

the county attorney came in, and that the prisoner appeared, as required by his recognizance, was arraigned upon the indictment, pleaded not guilty, was tried by a jury, and on Monday, May 16, found guilty of voluntary manslaughter; and that on May 17 the court, upon his motion, set aside the verdict and granted a new trial, continued the case to the next term, and admitted him to bail upon his own recognizance.

Upon motion of the Commonwealth of Virginia on the first day of this term, and before any further proceedings were had in the Circuit Court, this court gave leave to file the petition for a mandamus, and granted a rule to Judge Paul to show cause why a writ of mandamus should not issue as prayed for.

The judge, in his return to the rule, referred to the petition for removal and for a writ of *habeas corpus*, and the proceedings concerning the *habeas corpus* and those upon the indictment, as appearing in the copies of records annexed to the petition for a mandamus; set forth the grounds of his action substantially as in his opinions above mentioned; and specifically stated that the writ of *habeas corpus* was issued, not under section 643 of the Revised Statutes, but under section 753, which authorizes the writ when a prisoner "is in custody for an act done or omitted in pursuance of a law of the United States."

It was alleged in the petition for a mandamus, and in the brief for the petitioner, and was not denied in the judge's return, or in the brief of his counsel, that when the case of the indictment was called for trial in the Circuit Court of the United States, a motion was made by the Commonwealth of Virginia to remand the case to the county court, because the Circuit Court had no jurisdiction over the crime charged in the indictment, and because the removal of the prosecution from the county court was not authorized by law, but was contrary to the constitution and laws of Virginia, and to the Constitution and laws of the United States; and that this motion was denied by the Circuit Court.

Mr. R. Taylor Scott, Attorney General of the State of Virginia, for the petitioner.

Mr. Assistant Attorney General Maury opposing.

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

The prosecution and punishment of crimes and offences committed against one of the States of the Union appropriately belong to the courts and authorities of the State, and can be interfered with by the Circuit Court of the United States so far only as Congress, in order to maintain the supremacy of the Constitution and laws of the United States, has expressly authorized either a removal of the prosecution into the Circuit Court of the United States for trial, or a discharge of the prisoner by writ of *habeas corpus* issued by that court or by a judge thereof. *Tennessee* v. *Davis*, 100 U. S. 257; *Virginia* v. *Rives*, 100 U. S. 313; *Davis* v. *South Carolina*, 107 U. S. 597; *In re Neagle*, 135 U. S. 1; *Huntington* v. *Attrill*, 146 U. S. 657, 672, 673.

In the case at bar, Joseph H. Carrico, having been arrested under a warrant from a justice of the peace of the county of Smyth on a charge of murder, was discharged by the District Judge on writ of *habeas corpus* from the commitment under state process; and having afterwards been indicted by the grand jury of the county for that offence, and committed by order of the county court for trial upon the indictment, the prosecution against him was assumed to have been removed into the Circuit Court of the United States for trial, and was there tried.

The State of Virginia, by petition for a writ of mandamus, questions the validity both of the removal and of the discharge, and it will be convenient to consider the two separately, beginning with the removal.

It is contended by the respondent that the prosecution was rightly removed into the Circuit Court of the United States under section 643 of the Revised Statutes, (the constitutionality of which was affirmed in *Tennessee* v. *Davis*, and in *Davis* v. *South Carolina*, above cited,) authorizing the removal into the Circuit Court of the United States for trial of "any

civil suit or criminal prosecution" "commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office, or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law."

It is important, therefore, to consider whether the conditions of that section have been complied with.

By that section, it is only when the suit or prosecution has been "commenced in any court of a State," and "at any time before the trial or final hearing thereof," that it "may be removed for trial into the Circuit Court," "upon the petition of such defendant to said Circuit Court, and in the following manner:" The petition must set forth the nature of the suit or prosecution, and be verified by affidavit, and supported by certificate of counsel. It "shall be presented to the said Circuit Court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office." "The cause shall thereupon be entered on the docket of the Circuit Court, and shall proceed as a cause originally commenced in that court." The clerk of the Circuit Court is required, when the case is commenced in the state court otherwise than by capias, to issue a writ of *certiorari* to the state court for the record; and, when it is commenced by capias, to "issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the state court or left at his office by the marshal;" "and thereupon it shall be the duty of the state court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the Circuit Court, and any further proceedings, trial or judgment therein in the state court shall be void."

The removal of the case out of the jurisdiction of the state court and into the exclusive jurisdiction of the Circuit Court of the United States takes place, without any order of the Circuit Court, as soon as the state court, by the service upon it, or

upon its clerk, of the appropriate process, whether *certiorari* or *habeas corpus cum causa*, has notice of the filing of the petition in the Circuit Court. But it is only after such formal notice has been given, that the jurisdiction is transferred from the state court to the national court. The proceedings under this section differ from those under section 641, in which the petition for removal is required to be filed in the state court, and is of itself notice to that court, and therefore, "upon the filing of such petition, all further proceedings in the state court shall cease," and, if the petition shows a sufficient ground for removal, the case is in legal effect removed. *Virginia* v. *Rives*, 100 U. S. 313, 316. But under either section the jurisdiction of the state court is not taken away until it has notice, in one form or other, of the petition for removal; under section 641, by the petition filed in that court; under section 643, by notice from the clerk of the Circuit Court of the petition there filed.

The records of the District Court and of the Circuit Court, copies of which are annexed to the petition for a mandamus, present a curious and complicated condition of things, in which some of the confusion may be owing to the facts, that not only is the District Judge a judge of either court, but that in the Western District of Virginia both courts are held at the same times and places and have the same clerk. Rev. Stat. §§ 572, 609, 622, 658; Act of September 25, 1890, c. 922, 26 Stat. 474.

The petition for removal, praying also for a writ of *habeas corpus cum causa*, was evidently framed under section 643 of the Revised Statutes, and was addressed to the District Judge as "Judge of the United States Circuit Court;" and it is said, in his opinion delivered on allowing an appeal to this court from his order of January 12 upon the *habeas corpus*, that "the petition for removal, as shown by record evidence used in the discussion of this motion, was not filed in the clerk's office of the Circuit Court until December 19, 1891." 51 Fed. Rep. 202.

But that record evidence, all of which is in the record now before us, shows only that the petition was filed in the clerk's

office of the District Court on that day, being the same day on which the order granting the writ of *habeas corpus* was recorded in, and the writ issued from, that office. Indeed, the very ground assigned by the judge in his opinion, just referred to, for allowing an appeal from his order on the *habeas corpus*, was that the writ of *habeas corpus* issued by him was not ancillary to the petition for a removal, nor issued by the clerk of the Circuit Court as provided in that section; his return to this petition for a mandamus expressly states that it was not issued under section 643, but under section 753; and the memorandum, inserted at the beginning of the record of the proceedings in the Circuit Court on the indictment, describes that order as an order of the District Court, removing the prosecution of the Commonwealth of Virginia against Carrico into the Circuit Court.

The single petition, addressed to Judge Paul as Judge of the Circuit Court, and praying for a removal of the cause into that court, and for a writ of *habeas corpus cum causa* to complete the removal, (which, so far as appears on the records of either court, was the only petition, either for a removal or for a *habeas corpus*,) appears to have been treated by the judge as if it had been, or had included, two separate petitions; the one a petition for an ordinary writ of *habeas corpus*, under section 753, which might be granted by the District Court or District Judge; the other a petition for a removal of the cause, under section 643, which could only be addressed to and filed in the Circuit Court.

If the petition for removal had been duly filed in the Circuit Court of the United States, and a writ of *habeas corpus cum causa* had been duly issued by the clerk of that court, and served on the clerk of the county court, no order of removal would have been necessary. If the petition was not so filed, and neither such a writ of *habeas corpus*, nor a writ of *certiorari* to bring in the record, was so issued and served, no order, even of the Circuit Court, for the removal of the cause, could have any effect. In any aspect, the District Court had no authority to order the prosecution to be removed into the Circuit Court.

The inference appears to be inevitable that the only foundation of the exercise of jurisdiction by the Circuit Court over this indictment was a petition filed in the District Court and orders made and recorded in that court; and that no petition for removal was ever filed in the clerk's office of the Circuit Court, and no writ of *certiorari* or *habeas corpus cum causa* was ever issued by the clerk, as clerk of that court, and served on the state court, as required by section 643 of the Revised Statutes, in order to take away the jurisdiction of the state court.

But there is a more serious objection to the exercise of jurisdiction by the Circuit Court of the United States over the indictment found in the state court.

By the law of Virginia, murder or other felony must be prosecuted by indictment found in the county court; and a justice of the peace, upon a previous complaint, can do no more than to examine whether there is good cause for believing that the accused is guilty, and to commit him for trial before the court having jurisdiction of the offence. Virginia Code of 1887, §§ 3990, 4016, 3955–3971.

The petition for removal, which was sworn to on December 12, 1891, alleged that Kirk, a justice of the peace of Smyth County, had that day issued his warrant to a constable to arrest the petitioner and bring him before the justice on a charge of the murder of Nelson, and that the petitioner had been arrested by the constable on that warrant, and was now confined in the county jail, as the petition alleged, "awaiting a trial before said justice upon the said charge of murder," which can only mean an examination before the justice with a view to a commitment to await the action of the grand jury; and prayed that "said cause" might be removed from the jurisdiction of the justice and of the county court into the Circuit Court of the United States for trial, and, "upon the removal of said prosecution, that a copy of the record and proceedings before said justice and by said constable" might be brought into the Circuit Court.

When that petition was signed and sworn to, there had been no proceedings, except before the justice of the peace and by

the constable; there was no case pending in the county court, and the justice had not even committed the prisoner to await the action of that court; and no indictment was found, or other action taken, in the county court, until after the petition had been filed in the Federal court.

By the terms of section 643, it is only after "any civil suit or criminal prosecution is commenced in any court of a State," and "before the trial or final hearing thereof," that it can "be removed for trial into the Circuit Court next to be holden in the district where the same is pending," and "shall proceed as a cause originally commenced in that court."

Proceedings before a magistrate to commit a person to jail, or to hold him to bail, in order to secure his appearance to answer for a crime or offence, which the magistrate has no jurisdiction himself to try, before the court in which he may be prosecuted and tried, are but preliminary to the prosecution, and are no more a commencement of the prosecution, than is an arrest by an officer without a warrant for a felony committed in his presence.

We are aware that under this section the opposite view has prevailed in some cases in the Circuit Courts. *Georgia* v. *Port*, 4 Woods, 513; *Georgia* v. *Bolton*, 11 Fed. Rep. 217; *North Carolina* v. *Kirkpatrick*, 42 Fed. Rep. 689. But the only authorities there cited, which afford any color for that conclusion, were English decisions that the preliminary arrest upon the warrant of a justice of the peace took a case out of the statute of limitations, defining the time after the commission of the offence within which "the prosecution shall be commenced." *Rex* v. *Willace*, 1 East P. C. 186; *The Queen* v. *Brooks*, 1 Denison, 217; *S. C.* 2 Car. & K. 402. The question whether the government has taken such action, as will stop the running of a statute of limitations, is quite different from the question when a prosecution can be deemed to be commenced, within the meaning of the acts of Congress authorizing removals from the state courts into the courts of the United States for trial.

A grand jury, whether of the State or of the United States, is empanelled and sworn to inquire into and present offences

against that government only, under whose authority it is summoned. Story on the Constitution, § 1784. The grand jury summoned and empanelled under the authority of a State is the only appropriate body to inquire into any offence against the State, and to find or to ignore an indictment therefor. The duty of the grand jury attending a court of the United States is limited to inquiring into and presenting offences against the laws of the United States, and its proper advisers in matters of law are the court and the attorney of the United States.

In a criminal case removed from the state court into the Circuit Court of the United States after indictment found, the Circuit Court of the United States tries the case upon the accusation presented by a grand jury of the State, and framed with the assistance of the law officers of the State. *Tennessee* v. *Davis*, 100 U. S. 257, 271.

But if a person arrested to await the finding of an indictment may remove the case before an indictment is found, the accusation is not framed and presented by the officers and the grand jury of the State whose criminal law has been violated, but by the officers and grand jury of another government; and the Circuit Court of the United States has not only to try the defendant, but also to charge its own grand jury as to the accusation against him on behalf of the State; and this too in a case in which the very ground of removal into the Circuit Court is the defendant's suggestion that he needs the protection of the Constitution and laws of the United States against the prosecution by the State.

We cannot believe that such was the intention of Congress in the statutes enacted to secure a fair and impartial trial between the State seeking to vindicate its public justice, on the one hand, and a defendant claiming the protection of the Constitution and laws of the United States, on the other.

In any case falling within the purview of the acts of Congress, the defendant is adequately protected against danger of unlawful oppression from the courts or authorities of the State, by the right to remove it into the Circuit Court of the United States, as soon as a prosecution has been commenced

against him; and by the right to apply to any court or judge of the United States for a writ of *habeas corpus* under sections 751–753, whenever he "is in custody for an act done or omitted in pursuance of a law of the United States."

The true rule on this subject, as it appears to us, was forcibly and accurately expressed by Mr. Justice Grier, in a case removed from the court of quarter sessions of Bucks County in the State of Pennsylvania, before indictment found, into the Circuit Court of the United States for the Eastern District of Pennsylvania, under the act of Congress of March 3, 1863, c. 81, § 5, (12 Stat. 756,) since incorporated in section 641 of the Revised Statutes, and which, though differing from the statute now in question in requiring the petition for removal to be originally filed in the state court, yet, in substantial accord with this statute, provides that, "if any suit or prosecution, civil or criminal, has been or shall be commenced in any state court against any officer, civil or military, or against any other person," for any such act as is therein described, done by virtue or under color of authority of the United States, the defendant may file a petition "for the removal of the cause for trial at the next Circuit Court of the United States to be holden in the district where the suit is pending." Mr. Justice Grier, after quoting these words, ordered the case to be remanded to the state court, for the following reasons: "The petition of the defendants brings their case fully within the provisions of this section, but the removal is premature. The prosecution has not been commenced in the state court. A warrant has been issued by a justice of the peace, and the defendants have been arrested preparatory to the commencement of a prosecution in the state court, but the attorney for the Commonwealth has not sent a bill to the grand jury. We do not know, therefore, whether the Commonwealth of Pennsylvania intends to prosecute the defendants for the alleged offence, or whether the grand jury will find a bill, without which the prosecution cannot be said to be 'commenced in the state court.' The act contemplates the removal of a prosecution 'pending' that a 'trial' may be had in the Circuit Court. If the attorney of the United States were required to send a

bill of indictment before a grand jury of the United States court for a breach of the peace of the State, it would present a truly anomalous proceeding. Yet without it there would be no case to try in the Circuit Court. If a bill of indictment had been found in the state court, it would have presented such a case; but, until this is done, there is no case pending in the court of Bucks County, which can be removed to this court for trial." *Commonwealth* v. *Artman*, 3 Grant, 436; *S. C.* 5 Phila. 304.

It appearing upon the face of the petition for removal, as well as by the copies of records laid before this court, that no prosecution had been commenced in the state court, within the meaning of section 643 of the Revised Statutes, when the petition for removal was drawn up and sworn to, nor even when it was filed in the Federal court, the prosecution subsequently commenced by the presentment of an indictment in the state court was never lawfully removed into the Circuit Court of the United States; for, in all cases of removal from the state courts, the jurisdiction of the Circuit Court of the United States rests and depends upon the statements made in the petition for removal, and verified by the oath of the petitioner. *Virginia* v. *Rives*, 100 U. S. 313, 316; *Crehore* v. *Ohio & Mississippi Railway*, 131 U. S. 240; *Graves* v. *Corbin*, 132 U. S. 571, 590.

The result is that the Circuit Court of the United States has, without authority of law, assumed jurisdiction of an indictment found in the courts of the State of Virginia for a crime against the laws of the State, and that the State is entitled to have the prosecution remanded to its courts to be there dealt with according to law. For aught that appears on this record, the State is not bound to commence or to carry on the prosecution in the courts of another government, but is entitled to resume its own rightful jurisdiction and authority, and to try the offender in its own courts. If the case should be allowed to proceed in the Circuit Court of the United States, and should finally result in an acquittal of the charge, in whole or in part, the State could not have a writ of error to review the judgment. *United States* v. *Sanges*, 144 U. S.

310. A stronger case for issuing a writ of mandamus can hardly be imagined. The writ may be directed to the judge who has unlawfully assumed jurisdiction of the prosecution; and no previous motion to him to remand the case was necessary. The case is governed in every particular by *Virginia* v. *Rives*, 100 U. S. 313, 316, 323, 324.

If any delay on the part of the State, in a case of this kind, could justify a denial of the writ of mandamus, no unreasonable delay is here shown. So far as appears by the copies of records submitted to us by both parties, the Circuit Court of the United States first took jurisdiction of the indictment on Saturday, May 14, 1892. It is alleged by the petitioner, and not denied by the respondent, (although the fact does not appear of record,) that on that day a motion to remand the case to the state court was made by the State, and denied by the Circuit Court. The accused was found guilty of voluntary manslaughter on Monday, May 16, the very day on which October term 1891 of this court was finally adjourned. On the next day, the District Judge set aside the verdict, continued the case to October term 1892 of the Circuit Court, and admitted the accused to bail on his own recognizance. On the first day of the present term of this court, and before any further proceedings in the Circuit Court, the State applied to this court for leave to file the petition for a mandamus.

The necessary conclusion is that the State of Virginia is entitled to a writ of mandamus to compel the respondent to remand the indictment and prosecution against Carrico to the county court in which the indictment was found.

The matter of the discharge of the prisoner by the District Judge upon the writ of *habeas corpus* may be more briefly disposed of. If that writ had been a writ of *habeas corpus cum causa*, issued by the clerk of the Circuit Court, as ancillary to a removal of the prosecution into that court, under section 643, the remanding of the cause would carry with it the right to the custody of the prisoner. But being, as appears by the records annexed to the petition for a mandamus, as well as by the return to the rule to show cause, an ordinary writ of *habeas corpus*, issued by the District Judge upon the ground

that the prisoner was in custody for an act done in pursuance of a law of the United States, the question whether good cause was shown for his discharge was to be judicially determined by the judge, in the exercise of the jurisdiction vested in him by sections 751–753 of the Revised Statutes. His determination might have been reviewed, on the facts as well as the law, by appeal. Rev. Stat. §§ 763–766; Acts of March 3, 1885, c. 353, 23 Stat. 437; March 3, 1891, c. 517, §§ 5, 6, 26 Stat. 827, 828; *In re Neagle*, 135 U. S. 1; *Horner* v. *United States*, 143 U. S. 570, 576. But it cannot be reviewed or controlled by writ of mandamus. *Ex parte Schwab*, 98 U. S. 240; *Ex parte Perry*, 102 U. S. 183; *Ex parte Morgan*, 114 U. S. 174; *Ex parte Morrison*, 147 U. S. 14, 26.

It follows that, as to the discharge on the writ of *habeas corpus*, no order can properly be made upon this petition; but that, for the reasons above stated, there must be a

Writ of mandamus to remand the indictment and prosecution of the Commonwealth of Virginia against Joseph H. Carrico to the county court of Smyth County.

UNITED STATES *v.* POST.

APPEAL FROM THE COURT OF CLAIMS.

No. 1061. Submitted March 6, 1893. — Decided March 13, 1893.

Under the act of May 24, 1888, c. 308, (25 Stat. 157,) which provides "that hereafter eight hours shall constitute a day's work for letter-carriers in cities or postal districts connected therewith, for which they shall receive the same pay as is now paid as for a day's work of a greater number of hours. If any letter-carrier is employed a greater number of hours per day than eight he shall be paid extra for the same in proportion to the salary now fixed by law," reference is not had only to letter-carrier service, and a claimant is not required to show not only that he has performed more than eight hours of service in a day, but also that such eight hours of service related exclusively to the free distribution and collection of mail matter, and that the extra service for which he claims compensation was of the same character.

Opinion of the Court.

Under § 647 of the Regulations of the Post-office Department, of 1887, and the act of 1888, a claim for extra service and pay may include an employment of the letter-carrier not only in the delivery and collection of mail matter, but also in the post-office, during the intervals between his trips, in such manner as the postmaster directs, but not as a clerk.

Such extra service is not an extra service within the meaning of §§ 1764 and 1765 of the Revised Statutes, payment for which is not authorized by law.

THE case is stated in the opinion.

Mr. Henry M. Foote and *Mr. Attorney General* for appellant.

Mr. Charles King, *Mr. George A. King* and *Mr. William B. King* for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit brought in the Court of Claims, by Aaron S. Post against the United States, by an original petition filed March 26, 1891. A traverse of the petition was filed May 23, 1891, and an amended petition January 11, 1892. In the latter it is set forth that the claimant was, from May 24, 1888, to December 31, 1889, a letter-carrier in the post office at the city of Salt Lake City, in the Territory of Utah, of the class entitled to a salary of $850 a year; that, during that period, he was, from time to time, actually and necessarily employed in excess of eight hours a day in the performance of the duties assigned to him as such carrier, aggregating an excess of a specified number of hours; that by the act of Congress of May 24, 1888, c. 308, (25 Stat. 157,) entitled "An act to limit the hours that letter-carriers in cities shall be employed per day," he became entitled to extra pay for all the time during which he was so employed in excess of eight hours a day, and that he had applied to the Post Office Department for payment of the same, and it had not been paid, and he claimed judgment for a specified amount and costs. A traverse of the amended petition was filed February 21, 1892. Eight other cases were before the Court of Claims and tried at the same time, with

petitions in the same form and claiming various amounts, the claimants serving for various periods, and their classes and salaries being various.

The Court of Claims found that Post was a letter-carrier at the post-office at Salt Lake City, between May 24, 1888, and December 21, 1889, of the second class, at a salary of $850 a year. The other findings were as follows:

"2. During their aforesaid terms of service said claimants were actually employed in the performance of their duties more than eight hours a day, the excess over such eight hours being shown in the following finding:

"3. The manner, time and nature of their employment was generally as follows:

"They were required to report for duty at the post-office at 7 A.M. From 7 to 7.30 they were employed within the post-office in the distribution of mail matter, that is to say, in taking letters and papers from newly-arrived pouches, assorting them, and placing them in the boxes for box and general delivery.

"From 7.30 to 8 they were severally engaged in arranging their own mail matter for carrier delivery by streets and numbers, and where the residence of a person was not expressed in the direction of a letter and was not known or remembered, in looking it up in the directory.

"From 8 to 11 they were occupied on their routes in delivering and collecting mail matter.

"From 11 to 11.30 they were engaged within the post-office building in making returns of persons not found and other things connected with their route delivery.

"From 11.30 to 1 they were employed within the post-office in the general distribution of mail matter.

"From 1 to 2 they were absent and off duty.

"From 2 to 3.30 they were again employed on the post-office work of distributing general mail matter.

"From 3.30 to 4 they were severally engaged in arranging their own mail matter for delivery.

"From 4 to 6 they were again occupied on their routes in delivering and collecting mail matter and in making their returns.

"From 6 to 7 they were again absent and off duty.

"From 7 to 8 they were again employed on the post-office work of distributing general mail matter.

"The above statement represents an ordinary or average day's employment. The time of going out and the time of being out on the routes in fact varied with the size of the mail, as did the time of their being relieved from duty at night. But their reporting for duty at 7 in the morning, at 2 in the afternoon, and at 7 in the evening was constant.

"The above statement does not apply to Sundays. On Sundays the carriers made no deliveries. They were employed, however, in the office; but the time of employment did not exceed eight hours. During the time covered by this claim there were 9 carriers and 3 clerks employed in said post-office.

"4. The carriers, by one of their number, remonstrated against the performance of work not connected with their duties as carriers. The postmaster, however, held that 'under the regulations the postmaster could use them in that service.' He therefore required them to perform it.

"5. During the time embraced within the present claims the following regulations of the Post Office Department were in force, all under the general title, 'Free-Delivery Service.' Postal Laws and Regulations, 1887, pp. 259, 261, 266, 268, 269:

"'SEC. 628. Postmasters to supervise carrier service. — Postmasters will supervise their carrier service, and are specially enjoined —

"'1. To see that superintendents, carriers and clerks connected with this service are fully informed as to their responsibilities and duties. . . .

"'3. To frequently visit the stations and see that the regulations are there observed and proper order and discipline maintained.

"'4. To issue all necessary orders and instructions necessary to carry out the regulations and promote the efficiency of the service.

"'5. To reprimand the carriers for irregularities or report them for removal to the Superintendent of Free Delivery, as the nature of the offence may require. See section 642.

"'SEC. 642. Reprimand, suspension and removal. — The due performance of their duty by carriers, and the observance of law, regulations and orders prescribed for their conduct, will be enforced by reprimand for slight offences; by suspension with loss of pay for more serious ones, not, however, to exceed thirty days; and by suspension and recommendations for removal for grave offences, or persistent disregard of the rules herein prescribed, or of the orders of the postmaster not inconsistent herewith. In all other cases of recommendation for removal, carriers should not be suspended, but postmasters should await the action of the Department.'

"All the following are under the sub-title, 'General Duties of Carriers.'

"'SEC. 647. *Duties generally.* — Carriers shall be employed in the delivery and collection of mail matter, and during the intervals between their trips may be employed in the post office in such manner as the postmaster may direct, but not as clerks.

"'The delivery and collection by them must be frequently tested at irregular intervals, to determine their efficiency.

"'SEC. 648. *Delivery of matter.* — The mails must be assorted and the carriers started on their first daily trip as early as practicable. They must proceed to their routes with expedition and by the most direct way. A schedule of the order of delivery of each route should be made in a legible hand by names of streets and numbers of houses, and the mail delivered according to such schedule. Mail matter directed to box numbers must be delivered through the boxes. Mail matter addressed to street and number must be delivered by carriers unless otherwise directed. Mail matter addressed neither to a box-holder nor to a street and number must be delivered by carrier if its address is known or can be ascertained from the city directory; otherwise, at the general delivery.

"'SEC. 649. *Care in delivery of mail.* — Carriers will exercise great care in the delivery of mail to the persons for whom it is intended, or to some one known to them to be authorized to receive it. They will, in case of doubt, make respectful inquiry with the view to ascertain the owner. Failing in this,

they will return the mail to the office, to be disposed of as the postmaster may direct.'

"'SEC. 651. *Directory to be used to ascertain addresses.* — Where a directory is published it must be used when necessary to ascertain the address of persons to whom letters are directed, and it should also be used in the case of transient newspapers and other matter of the third and fourth classes, where the error in or omission of street address is evidently the result of ignorance or inadvertence; but when circulars, printed postal cards, or other matter, except letters, shall arrive at any post office in large quantities, apparently all sent by the same person or firm, and from which the street addresses have been purposely omitted, the directory need not be used to supply such omission, and all of such circulars, etc., which cannot readily be delivered through boxes or by carriers, shall be sent to the general delivery to await call.'

"6. In the case of Aaron S. Post, the claimant, between the 24th day of May, 1888, and the 31st day of December, 1889, was employed by order of the postmaster in excess of eight hours a day, as follows:

"Before 7 A. M., the regular hour when the carriers reported for duty, he arrived at the office and opened the eastern mail, which came at about 5 in the morning, in order to prepare the same for the southern mail. This was done so that it would not have to lie over twenty-four hours. The time thus employed was two hundred and forty-six and one-half hours.

"During intervals between 7 A. M., when carriers reported for duty, and 6 P. M., when their work as carriers ended, he was employed in the office in opening the mail, stamping it, and distributing the same as hereinbefore stated, in excess of eight hours, nine hundred and eighty-six hours.

"After his last trip and his returns as carrier were made — *i. e.*, after 7 P. M. — he was employed on the post office work of distributing general mail matter in the office four hundred ninety-three hours."

On such findings of fact, the court found as a conclusion of law that Post was entitled to recover for 1725½ hours of extra work, amounting, at the rate of 29.1 cents per hour, to $502.12.

The opinion of the court in the nine cases, including that of Post, is found in 27 Ct. Cl. 244. A judgment was entered in favor of Post, on March 10, 1892, for $502.12, from which judgment the United States appealed to this court.

The act of May 24, 1888, reads as follows: "That hereafter eight hours shall constitute a day's work for letter-carriers in cities or postal districts connected therewith, for which they shall receive the same pay as is now paid as for a day's work of a greater number of hours. If any letter-carrier is employed a greater number of hours per day than eight he shall be paid extra for the same in proportion to the salary now fixed by law."

The contention of the United States is, that the statute has reference only to letter-carrier service, and that the claimant, to bring himself within its provisions, must show not only that he has performed more than eight hours of service in a day, but also that such eight hours of service related exclusively to the free distribution and collection of mail matter, and that the extra service for which he claims compensation was of the same character.

In this connection, reference is made to §§ 1764 and 1765 of the Revised Statutes. Section 1764 provides as follows: "No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department: and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law." Section 1765 provides as follows: "No officer in any branch of the public service, or any other person whose salary, pay or emoluments are fixed by law or regulation, 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 whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

Referring to § 647 of the Postal Laws and Regulations of

1887, which were in force during the time embraced within the claim in question, under the head of "Free-Delivery Service," (and which § 647 is set forth in finding 5 of the Court of Claims,) under the sub-title "General Duties of Carriers," it providing as follows: "Carriers shall be employed in the delivery and collection of mail matter, and, during the intervals between their trips, may be employed in the post office in such manner as the postmaster may direct, but not as clerks," it is contended for the United States that the duties of letter-carriers are a necessary incident to the creation of the free-delivery service; that the statute necessarily defines their services to be a distribution and collection of mail, and such other duties as are necessarily incident thereto, such as receiving the mail allotted to them by clerks in the post office, arranging it for distribution, and making a proper disposition of it, when not delivered, upon their return to the post office; and that any other service which a carrier may perform is not contemplated by the act of May 24, 1888, and is an extra service within the meaning of §§ 1764 and 1765 of the Revised Statutes, payment for which is not authorized by law.

For the claimant, it is contended that, under § 647 of the regulations of the Department, as set forth in finding 5 of the Court of Claims, the extra service for which the claim is made was an employment of the letter-carrier, not only in the delivery and collection of mail matter, but also in the post office, during the intervals between his trips, in such manner as the postmaster directed, but not as a clerk.

It is not stated in the findings that the claimant was so employed as a clerk, nor does it appear what the duties of a clerk in the post office in question were, but merely that, during the time covered by the claim, there were nine carriers and three clerks employed in that post office. It is also found, by finding 4, that the carriers remonstrated against the performance of work not connected with their duties as carriers; but that the postmaster held that, under the regulations, he could use them in that service, and therefore required them to perform it. This, in view of the provision of § 647 of the

regulations, is substantially a finding that they were not employed as clerks.

The whole contention on the part of the United States amounts to this, that the Court of Claims has substantially found that none of the extra work for which compensation is claimed was incident to the general duties of the claimant as a letter-carrier, and that the statute in regard to extra service relates exclusively to that which is connected with the general duties of the claimant as a letter-carrier, and not to compensation for extra service, when he is not employed for eight hours a day in the performance of his general duties as a letter-carrier.

The statute of 1888 provides that eight hours shall constitute a day's work "for letter-carriers" in cities or postal districts connected therewith. It does not state what duties the letter-carriers shall perform during such day's work, but merely that they shall receive for such day's work of eight hours the same pay that was then paid for a day's work of a greater number of hours. It further provides that, if a letter-carrier is employed a greater number of hours per day than eight, he shall be paid extra for such greater number of hours in proportion to the salary fixed by law for his compensation. This extra pay is given to him by the statute distinctly for his being employed a greater number of hours per day than eight. The statute does not say how he must be employed, or of what such employment is to consist. It is necessary only that he should be a letter-carrier, and be lawfully employed in work that is not inconsistent with his general business under his employment as a letter-carrier. The employment authorized by § 647 of the regulations is defined to be an employment in the post office in such manner as the postmaster may direct, during the intervals between the carrier's trips in delivering and collecting mail matter, provided that he be not employed in the post office as a clerk therein.

The Court of Claims, in its opinion, arrived at the following conclusions: (1) That the letter-carriers were entitled to recover, not only for all work done by them on the street, in delivering and collecting mail matter, but also for all work

done in the post office, in receiving and arranging the letters of their routes; (2) that, as to the distribution of mail matter for the boxes and general delivery, as found in finding 3, during the times intervening between one trip and another in the same day, the regulations of the Department, set forth in finding 5, could properly be construed as permitting such services; and (3) that, as to the services of the same character rendered after the termination of the last trip for the day of the carrier in delivering and collecting mail matter, they were services fairly within the power of the postmaster to prescribe.

We are of opinion that, in respect of all such services, the letter-carrier, if employed therein a greater number of hours than eight per day, was entitled to be paid extra. To hold otherwise, would be to say that the carrier was employed contrary to the regulations of the Department, when it clearly appears that he was employed in accordance with such regulations. The statute was manifestly one for the benefit of the carriers, and it does not lie in the mouth of the government to contend that the employment in question was not extra service, and to be paid for as such, when it appears that the United States, in accordance with the regulations of the Post Office Department, actually employed the letter-carriers the extra number of hours per day, and it is not found that they were so employed as clerks. The postmaster was the agent of the United States to direct the employment, and if the letter-carriers had not obeyed the orders of the postmaster, they could have been dismissed. They did not lose their legal rights under the statute by obeying such orders.

Judgment affirmed.

MR. JUSTICE JACKSON took no part in the decision of this case.

UNITED STATES *v.* GATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 1060. Submitted February 6, 1893. — Decided March 13, 1893.

Under the act of May 24, 1888, c. 308, (25 Stat. 157,) providing for extra pay to letter-carriers in cities or postal districts connected therewith, who are employed a greater number of hours per day than eight, a letter-carrier whose salary is $1000 a year, and who is employed, in a period of a little more than two months, 165 hours and 9 minutes more than eight hours a day, is not required to deduct therefrom the deficit of less than eight hours a day worked by him on Sundays and holidays.

THE case is stated in the opinion.

Mr. Solicitor General for appellant.

Mr. Charles King, *Mr. George A. King* and *Mr. William B. King* for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

In this case, Frank Gates filed a petition in the court of Claims, May 27, 1891, setting forth that from May 24, 1888, to July 31, 1888, he was a letter-carrier in the post office at the city of New York, of the class entitled to a salary of $1000 a year; that during that period he was, from time to time, actually and necessarily employed in excess of eight hours a day, in the performance of the duties assigned to him as such carrier, aggregating a specified excess; that by the act of May 24, 1888, (set forth in case No. 1061, just decided, *ante*, 124,) he became entitled to extra pay for all the time during which he was so employed in excess of eight hours a day; that he had applied to the Post Office Department for payment and it had not been paid; and that he claimed judgment for a specified amount, besides costs. A traverse of the petition was filed July 14, 1891, and the case was heard by the Court of Claims, which, on the evidence, found the facts to be as follows:

"1. The claimant was, during the months of May, June and July, 1888, a letter-carrier of the first class, salary $1000 a year, in the city of New York, in the State of New York.

"2. From May 24, 1888, to July 31, 1888, he was actually and necessarily employed in the performance of his duties more than eight hours a day, the excess over such eight hours being as follows:

	Hrs.	*Min.*
May, 1888	16	53
June, 1888	78	58
July, 1888	69	18
Total	165	9

"He has received no extra pay for the excess.

"3. For the said period of time claimant performed only fifteen hours of service on the ten Sundays, and four hours and thirty minutes on Decoration Day, and the same time on the 4th day of July."

On such findings of fact, the court found as a conclusion of law that Gates was entitled to recover for the 165 hours and 9 minutes of extra work performed by him, without being required to deduct therefrom the deficit of less than eight hours a day worked on Sundays and holidays, as shown by finding 3, amounting, at 34.2 cents per hour, to $56.48; and for that amount a judgment was entered for him, to review which the United States has appealed.

In the opinion of the Court of Claims, reported in 27 Ct. Cl. 244, 259, it is stated that No. 1061 (just decided) embraced, with a single exception, all the questions presented by the present case, No. 1060, besides many more questions; and that No. 1060 presented one question which was not presented in the other cases. That question is stated in the opinion as follows: "On week days the carriers were employed more than eight hours, but on Sundays less, and the deficit of the latter nearly equals the excess of the former. The Post Office Department, by its circular February 19, 1891, has directed postmasters 'To determine the time a letter-carrier may have

been required to work during any month in excess of eight hours per day, as follows:

"'Ascertain the aggregate hours worked during the month. Multiply the number of days worked during the month by eight, and subtract the product thus obtained from the aggregate number of hours worked, and the remainder will be the extra time for which the carrier is entitled to pay at the following rates:

Salary.	First quarter.	Second quarter.	Third and fourth quarters.	Average quarter.
$600	20⅞ cents per hour.	20⅝ cents per hour.	20⅜ cents per hour.	20⅝ cents per hour.
800	27¾ cents per hour.	27½ cents per hour.	27⅓ cents per hour.	27⅝ cents per hour.
850	29½ cents per hour.	29¼ cents per hour.	28⅞ cents per hour.	29$\frac{5}{24}$ cents per hour.
1000	34¾ cents per hour.	34⅜ cents per hour.	34 cents per hour.	34½ cents per hour.

"'The time necessarily consumed in the performance of the service between "Report for duty" and "End of duty" is the "actual time" to be allowed, and the interim between deliveries is the carrier's own time, and cannot in any case be charged against the United States.'

"The carrier's eight-hour law declares 'that hereafter eight hours shall constitute a day's work,' but it allows compensation to continue in the form of an annual salary, and requires no deduction to be made if the duties of the day do not extend through the prescribed time. It also declares that 'if any letter-carrier is employed a greater number of hours per day than eight he shall be paid extra for the same.' To sustain the interpretation given to the act by the department, it will be necessary to read in it by construction the words 'on an average,' *i.e.*, if any letter-carrier is employed on an average a greater number of hours per day than eight, he shall be paid extra for the same. This the court is not at liberty to do. The carrier is entitled to eight hours' work, and to his pay if work is not furnished to him. For any excess on any day he is entitled to extra pay. The only set-off that can be maintained is when he is absent from duty without leave. The department is at liberty to keep a carrier employed eight hours

every day, but not to give him a deficit of work one day and an excess another."

In the brief of the Solicitor General in the present case, it is stated that in his opinion the decision of the Court of Claims was correct; that he is prevented from dismissing the appeal only by the fact that another department of the government has differed from that view and declines to follow it until the question is decided authoritatively by this court; and that justice to the letter-carriers seems, therefore, to require that the case be submitted to this court for its determination, which he does without argument.

The conclusions which we have reached in No. 1061 cover the same questions arising in this case which are presented in that; and, as the appellant does not challenge the decision of the Court of Claims as to the question presented in this case which is not presented in No. 1061, it is sufficient to say that we concur with the views of that court, above stated, as to that question.

Judgment affirmed.

MR. JUSTICE JACKSON took no part in the decision of this case.

BIER *v.* McGEHEE.

ERROR TO THE COURT OF APPEALS FOR THE PARISH OF ORLEANS AND STATE OF LOUISIANA.

No. 1254. Submitted February 6, 1893. — Decided March 13, 1893.

After the adoption of Article 233 of the constitution of Louisiana, declaring certain designated state bonds void, the Treasurer of that State fraudulently put them into circulation, and absconded. Payment having been refused by the State to an innocent holder of such a bond, which he had purchased for value, *Held*, in a suit brought by him to recover back the purchase money, that such refusal by the State raised no Federal question.

Statement of the Case.

THIS was a motion to dismiss a writ of error upon the ground that no Federal question was involved.

Suit was begun by a petition filed by McGehee in the civil district court of the parish of Orleans, December 10, 1889, setting forth that in May, 1888, petitioner had purchased of defendant Bier a certain state bond numbered 788, "denominated and represented to be a consolidated bond of the State of Louisiana," for the sum of $1000, issued January 1, 1874, under authority of act number 3 of the state legislature of 1874. That after the purchase of said bond and payment therefor, it was claimed by the State of Louisiana, through the attorney general, as its property, and that it had been stolen by one Burke from the state treasurer, and the return of said bond with $60 received in payment of the coupons attached thereto was demanded by the attorney general. The petitioner further averred that the bond was purchased by him under the full belief that Bier was the lawful owner thereof, but that he was not at the time of the sale by him, or since, the owner thereof, and that he had good reason to believe and so charged that the bond was then the lawful property of the State of Louisiana, and part of the Mechanical and Agricultural College fund held by the State; that said bond was worthless in his hands; that the defendant refused to repay the purchase price. He prayed for a judgment rescinding the sale of the bond, and that the defendant be condemned to take back the same, and return the amount paid therefor.

Defendant, in his supplemental answer, denied that he was ever the holder of the bond, or that he had ever sold the same to the plaintiff; and averred that he had never purchased or acquired any such bond that was not acquired in good faith, in open market, before maturity, in the due and regular course of trade, as commercial paper; and that any law of the State of Louisiana supposed to affect or alter the contract contained in the consolidated bonds of the State, issued under the act of 1874, was repugnant to the Constitution of the United States.

Upon the trial it was proved, and not denied by Bier, that he had purchased the bond after the adoption of the constitu-

tion of the State in 1879. The state treasurer's report of 1879 was put in evidence to show that the State was the owner of the bond at that time. The court decreed that the sale of the bond be rescinded, and that the defendant Bier be compelled to take back the bond, with the coupons attached, and the sum of $60, received for the coupons paid in error, etc. Defendant appealed to the Court of Appeals of the Parish of Orleans, which affirmed the judgment, and thereupon he sued out a writ of error from this court, which defendant in error, McGehee, moved to dismiss.

Mr. Frank L. Richardson for the motion.

Mr. Henry L. Lazarus opposing.

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

Plaintiff in error invokes the jurisdiction of this court upon the ground that article 233 of the constitution of the State of Louisiana, which declared that the consolidated bonds of the State, held for the Agricultural and Mechanical College and the Louisiana Seminary fund, were null and void, was repugnant to section 10, Article I, of the Constitution of the United States, prohibiting States from passing laws impairing the obligation of contracts.

The article in question declares the debt due by the State to the agricultural and mechanical fund to be $182,313.03, being the proceeds of the sales of lands and land scrip granted by the United States to the State for the use of a college for the benefit of agriculture and the mechanical arts; directs that said amounts shall be placed to the credit of said fund on the books of the auditor and treasurer as a perpetual loan; that the State shall pay an annual interest of five per cent on said amount from January 1, 1880, for the use of said college; and that the consolidated bonds of the State, then held by the State for the use of said fund, were to be null and void after January 1, 1880, "and the general assembly shall never make any provision for their payment, and

they shall be destroyed in such manner as the General Assembly may direct."

That the constitution of a State is a *law* of the State within the meaning of the Constitution of the United States, prohibiting States from passing laws impairing the obligation of contracts, is not denied, and the plaintiff in error assumed the position that it is beyond the power of the State to annul or cancel bonds outstanding and presumably in the hands of *bona fide* purchasers. If Bier had been a holder for value of this bond when the constitution of 1879 was adopted, it would evidently be beyond the power of the State, by act of the legislature, or by an amendment to its constitution, to nullify such bond in his hands. But if, when the constitutional amendment was adopted, the bond was still in the possession of the State, there was then no contract with Bier upon which such amendment could operate, and hence no contract subject to impairment. *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79. There was no objection to the State declaring bonds still in its possession to be null and void. The amendment was practically an inhibition against issuing bonds of the State for a certain purpose.

The court found that there was no material difference between the facts of this case and those of a prior case against the same defendant, arising from the purchase of another of the same issue of bonds, and, in its opinion in such prior case, (*Aycock* v. *Lee*,) the Court of Appeals of Orleans held that it would take judicial notice of the fact that the bonds, while in the possession of one Burke, then treasurer of the State, had become and were null and void by the operation and effect of article 233 of the constitution; and that Burke, having fraudulently reissued and put such bonds in circulation, absconded from the State, and became and still was a fugitive from justice. The court further found that defendants received from the plaintiff $913.75 for a paper represented to be a consolidated bond of the State, which the State had declared to be null and void, and which was the lawful property of the State, and that defendants were never owners of said bond; that plaintiff did not know such facts when he purchased; and that

said bond was valueless in his hands. The court further found that these bonds were never put in circulation by the State, but that, while they were held by the State in trust for the use of the Agricultural and Mechanical College fund, they were annulled by the constitution of 1879, and their destruction ordered; that the claim made that innocent holders were entitled to exemption from inquiry into the equities between the original parties was wholly inapplicable to these bonds, which never were issued and put in circulation by the State; that there was no equitable estoppel against the State, from the fact that the General Assembly failed to have the bond destroyed as required by the constitution, or from the fact that coupons attached to it were paid from the state funds set apart for the payment of the interest on the state debt; and that the negligence of the General Assembly, the crime of the state treasurer, and the erroneous payment of said coupons could not singly or operating together give validity to the bonds whose nullity had been declared, and whose destruction had been ordered. The court further held that what the plaintiff covenanted to purchase and what defendants covenanted to sell was a legal bond of the State; that there was an implied warranty on their part that the bond belonged to them, and that it was a genuine legally outstanding and negotiable bond of the State; that what the plaintiff received was a bond of no validity; and that "for this error of fact and of law as well regarding the essential quality of the bond sold, and without which plaintiff would not have purchased it, the contract may be rescinded."

It is quite evident from this statement that there was no Federal question involved in the case. The only such question which could possibly have arisen related to the power of the State to annul by constitutional amendment its own obligations; but that could only be raised upon the theory that the obligation had been put in circulation, and that there was a contract on the part of the State to pay the holders. If the bonds were still in possession of the State, (and the court found that they were,) there was no contract to be impaired. The real questions involved were, whether the bonds which

had been stolen by the former treasurer were valid obligations of the State in the hands of McGehee, the plaintiff; and, secondly, whether the defendant Bier was liable for money received by him upon a consideration which had failed.

In the case of *Sage* v. *Louisiana*, 144 U. S. 647, 650, it was said by this court, speaking of this same issue of bonds, that the Supreme Court of Louisiana had decided "that the governor, as the chief executive officer of the State, had no power whatever to deal with those bonds or to dispose of them, except in the precise manner and for the distinct purpose pointed out by the law; and that any act of his in contravention of its provisions in that regard would be void, and could not confer on any person or holder of the bonds a right to recover them or to enforce their liquidation or payment." This decision was held not to have raised a Federal question, and the writ of error was dismissed.

It is true that article 233 did not identify the bonds beyond describing them as "the consolidated bonds of the State for the use of the said fund," (agricultural and mechanical,) but the treasurer, in whose possession they were, could not fail to know what bonds were intended; and whether such bonds, subsequently stolen by him and put in circulation, were, though not identified as belonging to this fund, valid obligations of the State, in the hands of innocent holders, was not a Federal question.

The writ of error will, therefore, be

Dismissed.

ROSENTHAL *v.* COATES.

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

No. 3. Submitted February 6, 1893. — Decided March 13, 1893.

When this case was reached it was dismissed under rule 10 because the record was not printed; but, upon a representation that the parties had stipulated under rule 32 that it should not be printed, the court vacated the order and permitted the case to be restored to the docket on payment of costs and printing the record.

Statement of the Case.

Under the act of March 3, 1875, 18 Stat. 470, c. 137, a cause could not be removed from a state court unless the application was made before or at the term at which it could first be tried.

A cause could be removed on the ground of local prejudice, under Rev. Stat. § 639, sub-div. 3, only where all the parties to the suit on one side were citizens of a different State from those on the other.

In a suit by an assignee under an assignment for the benefit of creditors to disencumber a fund in his possession of alleged liens in favor of several different creditors, the fact that each defendant had a separate defence did not create a separable controversy as to each.

The removal acts do not contemplate that a party may experiment on his case in the state court, and, upon an adverse decision, then transfer it to the Federal court.

In the call of the docket this case was reached on the 17th of October, 1892, and was then dismissed pursuant to the tenth rule, on the ground that the record was not printed. Thereupon, on the 19th of December, 1892, the following motion was submitted on behalf of the appellant, entitled in the cause:

"Now comes Max Rosenthal, appellant, by *George Hoadly*, his attorney, and moves the court to set aside the order made herein on Monday, October 17th, 1892, dismissing this cause under the tenth rule, 'on the ground that the record was not printed;' for the following reasons, to wit: (1) That this is an appeal under Section 5 of the Act of March 3d, 1875, and is governed by Rule 32 of this court: (2) That Section 4 of Rule 32 reads as follows: 'As soon as such a case is docketed and advanced, the record shall be printed, unless the parties stipulate to the contrary, and file their stipulation with the Clerk:' (3) That on November 26th, 1889, appellant filed a stipulation signed by counsel for appellee and appellant, 'agreeing that the record need not be printed,' and in the agreed statement of what the record contains, on file in this court and printed with appellant's brief, it is therein again stipulated by both parties that 'the record need not be printed:' (4) That the agreed statement of what the record contains, embodied in appellant's brief, contains everything that could in any wise bear on the question now before this court.

"Yet, if your Honors construe Section 4 of Rule 32 as requiring the record to be printed, or if your Honors desire it printed, appellant will gladly have it done.

"Wherefore, appellant prays your Honors to set aside your said order and reinstate this cause upon the docket, subject to such conditions as to printing the record as your Honors may consider proper:

"Wherefore, appellant prays your Honors to sustain his said motion."

On the 3d of the following January the court ordered the decree of dismissal to be vacated on payment of costs, and printing of record; the case to be submitted on printed briefs on or before February 3d, next. The case being submitted, the court, in delivering its opinion, made the following statement of the case:

On August 3, 1878, the Mastin Bank of Kansas City failed, and also executed a deed of general assignment to Kersey Coates for the benefit of all creditors. Coates accepted and administered the trust. At the time of the failure the Mastin Bank had on deposit in the Metropolitan Bank of New York a large sum — $50,000 and over — that bank being its New York correspondent. It had, prior to August 3, and in the regular course of business, drawn and sold drafts on the Metropolitan Bank to different parties. One of the parties holding such drafts was Rosenthal, the appellant. He brought suit in New York City, to secure payment from the Metropolitan Bank out of the funds in its hands, but the decision of Mr. Justice Blatchford, then Judge of the Circuit Court of the United States for the Southern District of New York, into which court the case had been removed, was adverse to his right to appropriate any portion of that fund to the payment of his draft. *Rosenthal* v. *Mastin Bank*, 17 Blatchford, 318. It would seem from the opinion that the case proceeded no further than to sustain a demurrer to the bill, with leave to the plaintiff to move on notice, etc., for an amendment. What orders, if any, were entered thereafter in that case are not disclosed by this record.

Statement of the Case.

On June 23, 1881, Coates, as assignee of the Mastin Bank, filed in the Circuit Court of Jackson County, Missouri, a petition, in which he set forth the failure of the bank; the assignment; his acceptance of the trust; the amount of the deposit in the Metropolitan Bank to the credit of the Mastin Bank at the time of the failure, which deposit had subsequently passed into his hands; the fact that various drafts had been drawn by the latter on the former bank prior to the failure, which drafts were outstanding and unpaid; and that the holders of these drafts claimed the right to have that fund appropriated specially to the payment of their drafts. The holders of the drafts were made parties defendant, and the prayer was, substantially, that their rights in this fund be determined; to which petition Rosenthal, among other defendants, answered. He admitted the charge made in the petition that a decree adverse to his claim of payment out of that fund had been rendered in the Circuit Court of the United States for the Southern District of New York, but, nevertheless, claimed the benefit of a different line of decisions obtaining at that time in the trial courts of Missouri. This case came on regularly for hearing in the state trial court, and a decree was there entered directing Coates, the assignee, to pay all the other holders of drafts in full out of that fund, it being conceded to be sufficient in amount, but denying Rosenthal any right therein by reason of the prior adjudication in New York City. From such decree Coates and Rosenthal both appealed; Coates, however, gave no supersedeas bond. When the case reached the Supreme Court, the question involved having been recently theretofore presented in another case and decided adversely to the right of the holders of these drafts to payment out of such fund, that court simply entered an order reversing the decree of the Circuit Court, and remanding the case for further proceedings. No special notice seems to have been taken of the fact that the decree of the trial court was adverse to Rosenthal, and, in accordance with the conclusions of the Supreme Court, should have been affirmed. When the case returned to the Circuit Court, and before it was reached for further hearing, Coates had paid all the other holders of

drafts. Thereupon Rosenthal filed a petition for removal to the Circuit Court of the United States for the Western District of Missouri, he being a citizen of New York and Coates a citizen of Missouri. This petition for removal was filed on February 10, 1885. The record having been transmitted to the Federal court, a motion was made to remand, and, on October 25, 1886, it was sustained, and from this order remanding the case to the state court Rosenthal has appealed to this court.

Mr. George Hoadly for appellant.

Mr. T. A. Frank Jones for appellee.

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

The motion to remand was properly sustained. No removal could be had under the act of March 3, 1875, 18 Stat. 470, c. 137, because the application was not made before or at the term at which said cause could be first tried. The case had been once tried in the Circuit Court, and thereafter reversed on appeal by the Supreme Court of the State.

Neither could it be removed on the ground of local prejudice, which is one of the grounds set forth in the petition for removal, because such removal can be had only where all the parties to the suit on one side are citizens of a different State from those on the other. *Jefferson* v. *Driver*, 117 U. S. 272. Here, several of the defendants were citizens of Missouri, the same State that Coates was a citizen of. Neither did the payment by Coates to the other defendants change the status of the suit. The petition did not disclose a separable controversy between Coates the assignee, and Rosenthal or any other holder of a draft, but a single controversy between him and all the defendants. Looking back of the form to the substance, it will be seen to have been one between all the creditors of the Mastin Bank as a body, represented by Coates, the assignee, as plaintiffs, and the defendants as another body; and the question was whether this fund should

be applied solely to the payment of the claims of the latter, or distributed generally among all of the former. Whether the fund was sufficient to pay all of the draft holders in full or not, was, therefore, immaterial. It was not enough to pay all the creditors, and they collectively and as represented by the assignee, Coates, were the real party in interest on the other side. The suit was, in effect, one by the assignee to disencumber this fund in his possession of alleged liens, and the fact that each defendant had a separate defence to this claim did not create a separable controversy as to him. *Fidelity Insurance Co.* v. *Huntington*, 117 U. S. 280; *Graves* v. *Corbin*, 132 U. S. 571, 586; *Young* v. *Parker*, 132 U. S. 267. Nor did any defendant create a separable controversy, by simply petitioning in his answer for payment out of that fund.

The appellant relies on the case of *Yulee* v. *Vose*, 99 U. S. 539. But in that case there was a separable controversy, and one in fact separated by the decision of the Court of Appeals of the State of New York. The case of *Brooks* v. *Clark*, 119 U. S. 502, is more in point. See also *Shainwald* v. *Lewis*, 108 U. S. 158; *Torrence* v. *Shedd*, 144 U. S. 527. The other defendants, although they have received the amounts due on their drafts, are not necessarily eliminated from this suit. Payments were made by Coates pending an appeal, under a mistaken notion of the law. He may be entitled to a decree declaring that they have no recourse upon this special fund, and then, perhaps, pursue some remedy to recover what he has erroneously paid. It is unnecessary to speculate what may be done. It is enough that they are still parties to the record, against whom some relief may be had, and that there is no separable controversy between the assignee and any defendant.

Further, to sustain this removal would certainly violate the spirit of the removal acts, which do not contemplate that a party may experiment on his case in the state court, and, upon an adverse decision, then transfer it to the Federal court. Here, Rosenthal has gone through the state trial and appellate courts, and his rights have been finally declared by the Supreme Court of the State; and though as yet no formal

decree has been entered in the trial court, it is none the less true that he has experimented with the state courts and been beaten, and now seeks a different forum. *Jifkins* v. *Sweetzer*, 102 U. S. 177.

The order to remand is

Affirmed.

INDIANA *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 1162. Argued January 13, 1893. — Decided March 13, 1893.

The State of Indiana is not entitled, under the act of April 19, 1816, c. 57, and the act of March 3, 1857, c. 104, to be paid by the United States the two per cent of the net proceeds of sales by Congress of lands within the State, which the United States agreed by the former act to apply "to the making of a road or roads leading to the said State," and have actually applied to the making of the Cumberland road.

This was a petition, filed in the Court of Claims on October 23, 1889, by the State of Indiana against the United States, to recover the sum of $412,184.97, alleged to be due to the State of Indiana out of moneys received by the United States from sales of public lands in that State. The Court of Claims dismissed the petition. 28 C. Cl. ——. The petitioner appealed to this court. The facts found by the Court of Claims, and the material provisions of the statutes bearing upon the claim of the petitioner, were as follows:

In the act of April 30, 1802, c. 40, for the admission of the State of Ohio into the Union, one of the propositions offered by Congress, and accepted by the State, was that one twentieth part of the net proceeds of lands within the State, afterwards sold by Congress, should "be applied to the laying out and making public roads, leading from the navigable waters emptying into the Atlantic, to the Ohio, to the said State, and through the same, such roads to be laid out under the authority of Congress, with the consent of the several States through which the road shall pass;" and it was provided that the propositions so offered were on condition that the State

should provide, by ordinance irrevocable without the consent of Congress, that all lands sold by Congress should be exempt from taxation under authority of the State for five years after sale. 2 Stat. 175. By the act of March 3, 1803, c. 21, § 2, it was enacted that three per cent of these proceeds should be paid, from time to time, to the State, to be applied to the laying out, opening and making roads within it. 2 Stat. 226.

By the act of March 29, 1806, c. 19, for building a road from Cumberland in Maryland to the State of Ohio, (since known as the Cumberland or National road,) and by subsequent acts passed before the admission of the State of Indiana into the Union, Congress appropriated for the building of that road various sums amounting to $710,000, to be reimbursed out of the two per cent fund. 2 Stat. 357, 555, 661, 730, 829; 3 Stat. 206, 282. The expenses upon the road during that period largely exceeded the moneys credited to that fund.

The act of April 19, 1816, c. 57, for the admission of the State of Indiana into the Union, likewise provided that five per cent of the net proceeds of the sale by Congress of lands in the State should be reserved for the making of public roads and canals, of which three fifths should be applied to those objects by the State, and two fifths "to the making of a road or roads leading to the said State, under the direction of Congress." 3 Stat. 290. And by the act of April 11, 1818, c. 49, the Secretary of the Treasury was directed to pay the three per cent, from time to time, to the State of Indiana. 3 Stat. 424.

Similar provisions were contained in the acts for the admission into the Union of Mississippi in 1817, of Illinois in 1818, of Alabama in 1819, and of Missouri in 1820. 3 Stat. 348, 428, 489, 545.

By the act of May 15, 1820, c. 123, Congress directed the road to be continued from Cumberland to Wheeling in the State of Virginia: provided, however, "that nothing in this act contained, or that shall be done in pursuance thereof, shall be deemed or construed to imply any obligation on the part of the United States to make, or to defray the expense of

making, the road hereby authorized to be laid out, or of any part thereof." 3 Stat. 604.

In 1822 the road had been finished from Cumberland to Wheeling. In the same year, an act ordering the erecting of toll gates and the imposition of tolls on the road was passed by both houses of Congress, but was vetoed by President Monroe.

A continuance of the road was laid out, graded, bridged and made a highway from the Ohio River opposite Wheeling to the seat of government of the State of Missouri, and upon it was transported the government mail, and it was opened and used by the public. But this was not accomplished until after toll gates had been erected and tolls imposed upon it by the States of Ohio and Virginia, as authorized by the acts of Congress of March 2, 1831, c. 97, and March 2, 1833, c. 79. 4 Stat. 483, 655. By successive acts, passed from 1829 to 1856 inclusive, and collected in the opinion of the Court of Claims, Congress surrendered the road, as fast as completed, to the States through which it ran.

By the act of September 4, 1841, c. 16, § 16, the two per cent of the net proceeds of the lands sold by the United States in the State of Mississippi, and reserved by former acts for the making of a road or roads leading to that State, was relinquished to the State of Mississippi, to be applied to the making of a railroad from Brandon in that State to the boundary line of Alabama; and by § 17, the like fund was relinquished to the State of Alabama, to be applied to the construction of certain lines of internal improvements in that State. 5 Stat. 457, 458.

By the act of March 2, 1855, c. 139, entitled "An act to settle certain accounts between the United States and the State of Alabama," it was enacted "that the Commissioner of the General Land Office be, and he is hereby, required to state an account between the United States and the State of Alabama, for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled, under the sixth section of the act of March 2, 1819, for the admission of Alabama into the Union; and that he be required to include in said account the several reservations under the various

treaties with the Chickasaw, Choctaw and Creek Indians within the limits of Alabama, and allow and pay to the said State five per centum thereon, as in case of other sales." 10 Stat. 630.

The act of March 3, 1857, c. 104, entitled "An act to settle certain accounts between the United States and the State of Mississippi and other States," required the Commissioner of the General Land Office, by § 1, "to state an account between the United States and the State of Mississippi, for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled, on account of the public lands in said State, and upon the same principles of allowance and settlement as prescribed in the" act of March 2, 1855, c. 139, and to include in like manner the reservations under Indian treaties; and further provided, in § 2, that "the said commissioner shall also state an account between the United States and each of the other States upon the same principles, and shall allow and pay to each State such amount as shall thus be found due, estimating all lands and permanent reservations at one dollar and twenty-five cents per acre." 11 Stat. 200.

On December 4, 1872, the Commissioner of the General Land Office stated an account between the United States and the State of Indiana, in which he found that, by accounts referred to, there appeared to be due to the State the following sums:

Balance due December 31, 1856, on account of three per cent fund	$47 12
Amount of two per cent on net proceeds of sales of public lands from December 1, 1816, to December 31, 1856, (the expenses incident to sales since that date being in excess of the gross receipts)	413,568 61
Amount of five per cent on the cash value, at $1.25 per acre, of lands within permanent Indian reservations	6,333 73
	$419,949 46

The Commissioner also referred to a table of the acts of Congress making appropriations for the construction of the Cumberland road, which showed that the sums appropriated from 1818 to 1837, under acts requiring them to be reimbursed out of the two per cent reserved for the laying out and making roads in the States of Ohio, Indiana and Illinois, amounted to $2,502,900.45; and that the additional sums appropriated from 1825 to 1836, under acts requiring them to be reimbursed out of the two per cent reserved for laying out and making roads in those three States and Missouri, amounted to $1,555,000. The Commissioner then stated that it would thereby be seen that the proportion of the sums from time to time appropriated for the construction of the Cumberland road, which, by law, were to be replaced in the Treasury out of the five per cent accruing in Ohio, Indiana, Illinois and Missouri, would more than absorb the entire amount of the two per cent which had accrued upon the sales of lands in Indiana; and that, therefore, in the absence of special legislation upon the subject, nothing would appear to be at present payable to the State of Indiana, except the sums of $47.12 on the three per cent account and $6333.73 for Indian reservations.

On January 25, 1873, the Comptroller of the Treasury certified the balance, consisting of those two sums, and amounting to $6380.85, to be due to the State of Indiana. On February 10, 1873, the Secretary of the Treasury, under the authority given him by the act of March 30, 1868, c. 36, (15 Stat. 54,) referred the account to the Comptroller for reëxamination, and he thereupon vacated the former certificate. On February 5, 1874, the Comptroller reaffirmed the former decision and certificate, as to the sum of $6380.85; but reserved for future consideration the question as to the further claim made by the State. This amount of $6380.85 was paid to the State, but was not accepted by it as a final settlement of its demands.

It did not appear, either from that account or from the evidence in the case, what part of the expenditures upon the National road was properly chargeable to "making a road

to the said State," or what proportion of such expenditures for making a road to the State of Indiana was properly chargeable to the States of Ohio, Illinois and Missouri.

On October 17, 1889, the State of Indiana made a formal demand upon the Commissioner of the General Land Office to state an account between the United States and the State of Indiana, in accordance with the act of March 3, 1857. But no further account than that above mentioned has been stated by the Commissioner of the General Land Office.

Mr. William E. Earle for appellant.

Mr. Assistant Attorney General Parker for appellees.

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

By each of the acts of Congress, successively admitting the States of Ohio, Indiana, Illinois and Missouri into the Union, Congress agreed that five per cent of the net proceeds of public lands within the State, sold by Congress, should be applied to the making of a road or roads leading to the State; and by those and other acts it was provided that, of this five per cent fund, three per cent should be disbursed by the States, and two per cent by the United States. The general purpose was to promote the construction of a national highway connecting the new States in the interior with the old States on the Atlantic seaboard.

In the act for the admission of Indiana, the original obligation assumed by Congress in this respect did not define the termini of the road or roads to be built, or bind Congress to complete any road, or require the two per cent of the proceeds of the sales of lands in Indiana to be expended within the State; but the only obligation was to apply this two per cent fund "to the making of a road or roads leading to the said State, under the direction of Congress." It was for Congress to decide on what part of the road leading to Indiana this fund should be expended; and Congress had the right to

treat the road as a whole, constructed for the benefit of all the States through which it passed.

It is unnecessary to determine whether this obligation was in the nature of a contract only, or whether it can be considered as in any sense constituting a trust; because, in either aspect, the contract has been performed, or the trust executed, by applying the fund in question to the making of a road "leading to the said State" of Indiana.

It appears by the statement of the account between the United States and the State of Indiana by the Commissioner of the General Land Office, (which there is nothing in the case to control,) that the sums appropriated to the construction of the Cumberland road leading to the State of Indiana greatly exceeded the whole amount of the two per cent fund from sales of lands in the State; and that, therefore, in the absence of special legislation upon the subject, nothing was payable to the State of Indiana on account of this fund.

Congress having a general authority to apply this fund to any part of the road leading to the State of Indiana, the presumption is that this authority was honestly and fairly exercised, and there is nothing whatever in the record which has any tendency to rebut this presumption. Such being the case, the statement in the findings of fact, that it did not appear, from that account or otherwise, what part of the expenditures upon the road was properly chargeable to "making a road to the said State," or what proportion of such expenditures for making a road to the State of Indiana was properly chargeable to the States of Ohio, Illinois and Missouri, is wholly immaterial; and it was so treated by both parties at the argument.

As appears by the definition of the petitioner's position at the beginning of the brief of its counsel, the failure of the United States to build the National road was not made the foundation of the claim, but "was only suggested in argument as a motive, by way of incidental explanation" of the act of March 3, 1857, c. 104, § 2, upon which he relied, and under which he contended that "it was immaterial what moneys had been expended by the government toward the

construction of the National turnpike." The decision of the case, therefore, turns upon the interpretation and effect of this act.

The argument for the appellant is based upon the following enactments: By the act of September 4, 1841, c. 16, §§ 16, 17, the United States relinquished to the States of Alabama and Mississippi the two per cent fund accruing from sales of lands in those States. By the act of March 2, 1855, c. 139, the Commissioner of the General Land Office was required to state an account between the United States and the State of Alabama, "for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled," under the act of 1819 admitting that State into the Union, and to include in that account the reservations under treaties with Indians within the limits of Alabama, "and allow and pay to the said State five per centum thereon, as in case of other sales." By the act of March 3, 1857, c. 104, § 1, the commissioner was required to state an account between the United States and the State of Mississippi "upon the same principles of allowance and settlement as prescribed in" the act of 1855; and by section 2 of the act of 1857, "said commissioner shall also state an account between the United States and each of the other States upon the same principles, and shall allow and pay to each State such amount as shall thus be found due, estimating all lands and permanent reservations at one dollar and twenty-five cents per acre."

It is argued for the appellant that, as by the act of 1857 the account between the United States and the other States is to be settled "upon the same principles" as prescribed in that act with relation to Mississippi, and in the act of 1855 with relation to Alabama, and as by the act of 1841 the two per cent fund had been relinquished to Alabama and to Mississippi, therefore the payment to the State of the whole two per cent is one of the principles on which the account with each of the other States is to be settled.

But the premises relied on do not support the conclusion. Neither the act of 1857, nor the act of 1855, refers to the act of 1841. The act of 1857 requires the account with each

State to be settled on "the same principles of allowance and settlement as prescribed" in the act of 1855. The principles of allowance and settlement prescribed in the act of 1855 are that the account with Alabama be stated "for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled," under the act for its admission into the Union, and including five per cent on the Indian reservations within the State, "as in case of other sales." The principles of settlement are that the United States shall be charged with the sums due, treating Indian reservations as sales. They may not be limited to Indian reservations, and may well include any unpaid balance of the three per cent fund which Congress had agreed should be disbursed by the States, as well as any part of the two per cent fund which had not been applied by the United States to the making of a road or roads according to their original obligation. But there is nothing, in any of the acts upon the subject, which warrants the inference that Congress intended that, because the United States held themselves to be liable to Alabama and to Mississippi for the two per cent fund which they had never applied as they had agreed, they should therefore be liable to the other States for the like two per cent fund which had been fully appropriated and expended in accordance with their obligations to those States.

These views being conclusive against the right of the State of Indiana to recover anything in this case, it is unnecessary to consider the other questions discussed in the opinion of the Court of Claims and argued in this court.

Judgment affirmed.

In re SCHNEIDER, Petitioner. (No. 1.)

ORIGINAL.

No number. Submitted March 13, 1893. — Decided March 14, 1893.

A writ of error from this court does not lie to a judgment of the Supreme Court of the District of Columbia, dismissing the petition of a convict for a writ of *habeas corpus*.

THE petitioner, a prisoner confined in the jail of the District of Columbia, under a sentence of death, by his attorneys, moved for a writ of error from this court to review a judgment of the Supreme Court of the District of Columbia, refusing to issue a writ of *habeas corpus*, which had been prayed for in a petition to that court. The substance of the averments in the petition is printed in the margin.[1]

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[1] The petition of Howard J. Schneider and of J. M. Wilson, William F. Mattingly and A. A. Hoehling, Jr., his attorneys, and in his behalf, respectfully represents:

1. That the petitioner, Howard J. Schneider, is a citizen of the United States and a resident of the District of Columbia, and that he is unlawfully restrained of his liberty by the above-named respondent, Jerome B. Burke, in the District of Columbia.

2. Your petitioners further say that the facts concerning the detention of petitioner Schneider by the said respondent, and the claim or authority under and by virtue of which said petitioner is so detained, are as follows:

That on the 11th day of February, A.D. 1892, said petitioner was indicted by the grand jury of the Supreme Court of the District of Columbia, holding a criminal term, on the charge of having murdered Amanda M. Schneider; that, thereafter, such proceedings were had in said court as that said petitioner was arraigned and tried on said indictment, and a verdict of guilty as charged in said indictment was returned against him on the 9th day of April, A.D. 1892, upon which verdict the judgment of the court was thereafter had, and sentence of death pronounced on, to wit the 7th day of May, A.D. 1892.

That, thereafter, an appeal was taken from the said judgment to the said Supreme Court of the District of Columbia, holding a general term, and, afterwards, to wit, on the 9th day of January, A.D. 1893, the said judgment was, by said Supreme Court of the District of Columbia, holding a general term, affirmed; and the said petitioner, under and in pursuance of the pro-

Argument for Petitioner.

Mr. William F. Mattingly, *Mr. Jeremiah M. Wilson* and *Mr. A. A. Hoehling, Jr.*, for the petitioner.

This is an application for writ of error to review the judgment of the Supreme Court of the District of Columbia in

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ceedings hereinbefore set forth, was committed to the custody of the said Jerome B. Burke, warden of the jail of the District of Columbia, and who now holds the said petitioner in custody under and pursuant to said commitment; and to execute said sentence of death on March 17th, A.D. 1893.

3. Your petitioners further aver that said judgment and the said order of commitment, and the said detention of petitioner Schneider by the said warden, pursuant thereto, was, and each of them is, unlawful and void, and that your petitioner is now restrained of his liberty under or by color of the authority of the United States, in violation of the Constitution and laws of the United States, in this, that the right of petitioner, secured and guaranteed him by the Constitution of the United States, to a trial by an impartial jury was denied him, as will more fully appear by reference to the record of said case, and all the proceedings in said trial, and of the hearing before the said general term, as announced by Mr. Justice Cox, all of which are filed herewith and prayed to be taken and read as a part of this petition.

4. Your petitioners further say that, among other reasons why said petitioner Schneider is unlawfully detained, in violation of his rights under the Constitution and laws of the United States, are the following, to wit:

(*a*) That the said petitioner Schneider, by the proceedings of said court (as will more fully and at large appear by reference to said record), was deprived of his constitutional right to be tried by an impartial jury.

(*b*) That by the laws of the District of Columbia, under and pursuant to which the said proceedings were had, your petitioner Schneider was entitled to have twenty peremptory challenges, to be exercised at his will and according to his own discretion in respect to persons who were legally competent to sit as jurors in said case, of which right he was deprived, as in said record more fully appears, and to which reference is hereby made.

(*c*) That during the course of the selection of the jury in said case the following named jurors, who had been summoned as such and examined on their *voir dire* were severally challenged for cause by your petitioner [here follow the names] each one of which said several challenges for cause was by the court overruled, and exception noted by the petitioner to the action of the court in holding said several so challenged for cause to be competent.

(*d*) That said petitioner exercised each one of the said twenty peremptory challenges allowed him by law, and, when he had so exhausted his twenty peremptory challenges, there still remained on the jury two jurors, as to each of whom your said petitioner had been by the court overruled,

dismissing the petition of Howard J. Schneider in that court for a writ of *habeas corpus*, based upon the averment that, in his trial, he was denied the right and privilege, secured him

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and said jurors, over the objection of the petitioner, were held to be competent, and sat in the trial of the said case.

(*e*) That among other of the jurors so challenged for cause by petitioner, and by the court held to be competent against the objection of petitioner, was one Charles W. Morris, who, being examined on his *voir dire* touching his competency to sit as a juror, testified as follows: [Here follows the testimony and a statement that a full and complete record of the case is attached.]

5. Your petitioners aver that in and by the action of the court in the matter of the selection of the jury, and over the objection of the petitioner Schneider, holding to be competent as jurors to sit in the trial of said case said several jurors so challenged for cause, he was deprived of his right to a trial by an impartial jury, secured him by the Constitution of the United States.

And your petitioners further say that in consequence of said jury, by which said petitioner Schneider was tried, not being such an impartial jury as he was entitled to have under the Constitution of the United States, for the reasons hereinbefore given, said court holding a criminal term was without jurisdiction and power to proceed with said trial, and to award judgment on said verdict, and that all said proceedings based thereon were null and void.

Wherefore your petitioners pray that the writ of *habeas corpus* may issue, directed to said Jerome B. Burke, commanding him to produce your petitioner Schneider before your honorable court, and that such proceedings may be had as may be in accordance with law.

Your petitioners, the above-named attorneys, state and aver that the reasons for uniting in this petition are the following:

That the said Howard J. Schneider has refused to read or to permit to be read to him, or to execute a petition similar to the foregoing, in his individual name. That, in their opinion, he was unable to comprehend either the purport or the necessity for the petition, and that his mental condition is such that, in the opinion of these petitioners, he is unable to intelligently comprehend and make affidavit to the same.

HOWARD J. SCHNEIDER,
By J. M. WILSON,
His Attorney.

J. M. WILSON,
WM. F. MATTINGLY,
A. A. HOEHLING, Jr.,
Attorneys for Howard J. Schneider.

by the Constitution of the United States, to be tried by an impartial jury.

Under section 846 of the Revised Statutes of the District of Columbia, this court has jurisdiction, upon writ of error or appeal from the Supreme Court of the District of Columbia, in the same cases, and in like manner, as provided by law in reference to the final judgments, orders and decrees of the Circuit Courts of the United States.

Section 847 of the Revised Statutes of the District of Columbia provides that "no cause shall be removed from the Supreme Court of the District of Columbia to the Supreme Court of the United States by appeal or writ of error unless the matter in dispute shall be of the value of one thousand dollars, or upward, exclusive of costs, except in the cases provided for in the following section."

The cases provided for in the following section (sec. 848) are cases in which the matter in dispute shall be of the value of one hundred dollars and less than one thousand dollars, involving questions of law of such extensive interest and operation as to render the final decision of them by the Supreme Court of the United States desirable.

Section 847 was amended February 27, 1877, "by striking out the last words in the following section," and inserting the words "authorized by law;" so that, as amended, that section would read: "No cause shall be removed from the Supreme Court of the District of Columbia to the Supreme Court of the United States by appeal or writ of error unless the matter in dispute in such case shall be of the value of one thousand dollars or upward, exclusive of costs, except in the cases provided for authorized by law."

What cases are provided for, authorized by law?

By section 699 of the Revised Statutes of the United States, a writ of error may be allowed to review any final judgment at law, and an appeal shall be allowed from any final decree in equity hereinafter mentioned, without regard to the sum or value in dispute. Omitting clauses 1, 2 and 3, the section continues:

"Fourth. Any final judgment at law or decree in equity of

any Circuit Court, or of any District Court acting as a Circuit Court, in any case brought on account of the deprivation of any right, privilege or immunity secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States."

This proceeding in the court below for the writ of *habeas corpus* is a civil case, brought on account of the deprivation of the right and privilege to be tried by an impartial jury secured the petitioner by the Constitution of the United States, and on which the judgment of the court below was final, denying the writ and dismissing the petition.

The act of March 3, 1885, 23 Stat. 443, c. 355, provides: That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or in the Supreme Court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.

SEC. 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute.

It may be claimed that the above act is a repeal or a substitute for section 847 of the Revised Statutes of the District; but we submit that repeals by implication of law are not favored, nor permitted, where the two acts can stand together. See *Chew Heong* v. *United States*, 112 U. S. 536, 549, 550, and cases cited.

If this act of 1885 is a repeal of said section 847, then, inasmuch as the act of 1885 also includes the Territories, upon the same principle it would involve the repeal of section 1909, which gives this court jurisdiction on writs of error and appeal from the final decisions of the supreme courts of certain named Territories, where the value of the property or the amount in controversy exceeds one thousand dollars, or upon writs of *habeas corpus* involving the question of personal freedom.

That section 1909 has not been considered by this court as repealed by said act of 1885, is manifest from the decisions of this court upon questions of *habeas corpus* from those Territories. *Hans Nielsen, Petitioner*, 131 U. S. 176.

THE CHIEF JUSTICE: The application for a writ of error or appeal is denied upon the authority of *Cross* v. *Burke*, 146 U. S. 82; *In re Heath, Petitioner*, 144 U. S. 92; *Cross, Petitioner*, 146 U. S. 271; *Cross* v. *United States*, 145 U. S. 571. See also *Railroad Co.* v. *Grant*, 98 U. S. 398; *Dennison* v. *Alexander*, 103 U. S. 522; *United States ex rel. Trask* v. *Wanamaker*, 147 U. S. 149.

Writ denied.

In re SCHNEIDER, Petitioner. (No. 2.)

ORIGINAL.

No number. Submitted March 13, 1893. — Decided March 14, 1893.

Leave to file petitions for writs of *habeas corpus* and *certiorari* to the Supreme Court of the District of Columbia, or the officers of the District acting under a judgment of that Court, will be denied, when the ground of the application relates to an error in the proceedings of that Court, and does not go to its jurisdiction or authority.

THIS was a petition to this court by Howard J. Schneider, and Jeremiah M. Wilson, William F. Mattingly, and A. A. Hoehling, Jr., his attorneys, and in his behalf. The allegations in the petition were substantially identical with those in the petition set forth in the margin in *In re Schneider, Petitioner*, (No. 1) *ante*, 157. The prayer was as follows:

"Wherefore your petitioners pray that the writ of *habeas corpus* issue to Jerome B. Burke, the warden of the United States jail, in the District of Columbia, commanding him to produce the body of the petitioner, Schneider, in court forthwith, together with the cause of his detention as a prisoner by said warden, and that petitioner, Schneider, may be discharged and set at liberty; and petitioners furthermore pray

that the writ of *certiorari* may issue to John R. Young, clerk of the Supreme Court of the District of Columbia, commanding him to certify to this court all the proceedings of record of the United States against Howard J. Schneider in that court, to the end that the errors therein, as set forth in this petition, may be fully corrected by this court."

The same reasons were given as were given there for the action of the attorneys in uniting in the petition, and for its non-verification by Schneider.

Mr. Jeremiah M. Wilson, *Mr. William F. Mattingly* and *Mr. A. A. Hoehling, Jr.*, for the petitioner.

This is an application to this court for it to issue a writ of *habeas corpus* to the warden of the United States jail in this District, and a writ of *certiorari* to the Clerk of the Supreme Court of the District of Columbia to send up the record.

This application is based upon the averment that the petitioner was deprived of his right and privilege, secured him by the Constitution of the United States, to be tried by an impartial jury.

That this court has, in the exercise of its appellate jurisdiction, the right to issue this writ has been decided by it time and time again.

It has also been frequently decided by this court that its appellate jurisdiction in this connection, in contradistinction to its original jurisdiction under the Constitution, is the right which it has thus to review the decision of any inferior court of the United States, and does not mean that the case must be such as it would have appellate jurisdiction over.

This was decided very early in the history of this court in respect to the old Circuit Court of the District, which preceded the present Supreme Court of the District of Columbia. *Ex parte Burford*, 3 Cranch, 448; *Ex parte Bollman & Swartwout*, 4 Cranch, 75.

These two cases have been commented on and approved by this court in numerous decisions from that time to the present. See *Ex parte McCardle*, 6 Wall. 318, 324; *S. C.* 7 Wall. 506;

Ex parte Siebold, 100 U. S. 371, 376; *Hans Nielson, Petitioner*, 131 U. S. 176.

The claim in this case is that the petitioner, under the circumstances shown in the record, did not have an impartial jury, such as he was entitled to under the Constitution of the United States, and that, for that reason, the court below was without jurisdiction and power to proceed further with the trial and to enter judgment and sentence upon the verdict.

In *Ex parte Bain*, 121 U. S. 1, on *habeas corpus*, this court held that, where the indictment had been changed by the court below, in striking out a few words, alleged to be surplusage, there was no indictment by the grand jury, and that the proceedings were a nullity.

In *Ex parte Lange*, 18 Wall. 163, on *habeas corpus*, this court held that where the sentence passed by the court was not authorized by law, it was a nullity, and the prisoner was discharged. See, also, *Ex parte Yerger*, 8 Wall. 85, 102.

In *Ex parte Jackson*, 96 U. S. 727, where the petitioner had been indicted for sending prohibited matter through the mails, while the court held that the law under which he was indicted was constitutional, and denied the writ, within the opinion the court states that the constitutional guaranty of the people to be secured in their papers against unreasonable searches and seizures, extends to letters and sealed packages subject to letter postage in the mails; that there was no question before the court as to the evidence upon which the conviction was had, nor does it appear whether the envelope was sealed or left open for examination; the inference being that if the evidence had shown that the package had been sealed, bearing letter postage, and had been opened by a post office inspector, and the evidence secured in that manner upon which conviction was had, the petitioner would have been entitled to the writ on the ground of the infringement of his constitutional right.

Suppose the court below in this case had decided that the defendant should be tried by eleven jurors, clearly any verdict of such a jury, and judgment based thereon, would be void for want of jurisdiction and power in the court below to proceed,

and the prisoner would be entitled to be discharged on *habeas corpus.*

Suppose there were twelve jurors in the box, one of whom, upon his examination on his *voir dire* had declared that he had a fixed and decided opinion that the defendant was guilty; that he was satisfied that no evidence could be produced that could change that opinion, and that if he went into the jury box he would convict, and the court had decided, after all the peremptory challenges of the defendant had been exhausted, that he was a competent juror, and put him on the jury, would not, from that moment, the court have been without jurisdiction to proceed further in the case on the ground that the jury was not impartial?

In *Commonwealth* v. *Essex Company*, 15 Gray, 239, 253, Chief Justice Shaw, in what has become a leading case, puts, for the purpose of testing a leading principle, a case as extreme as the one we above put, and remarks that "extreme cases are allowable to test a legal principle."

The record shows that the petitioner was compelled to exhaust peremptory challenges upon incompetent jurors who were held to be competent by the court, men who declared that they had not only read the reports in the papers, but also the proceedings at the coroner's inquest; that they formed fixed and decided opinions, which they still entertained, and which it would require strong evidence to remove.

Charles W. Morris stated on his direct examination, in answer to the question of the District Attorney as to whether he could listen to the evidence given in court, and under the direction of the judge bring in a verdict based solely on the law and the evidence as he might hear it in court, answered, "No, sir; I don't know that I could." He stated on cross-examination that he had read all the proceedings; that he had formed a very decided opinion, which he still entertained, and that it would require certainly very positive evidence to change his mind, and that, if he took his seat in the jury box, he would be there with an opinion already formed, and which it would require strong evidence to remove.

The question decided by this court in the *Heath Case*, 144

U. S. 92, was that a writ of error to the Supreme Court of this District would not lie to review the judgment below, and that the act of March 3, 1891, providing for appeals and writs of error in capital cases from existing Circuit Courts, did not apply to this District.

In *Cross* v. *United States*, 145 U. S. 571, which was also a writ of error, the court held that under the act of February 6, 1889, to provide for writs of error in capital cases, the writ would not lie.

That case again came up on appeal from the court below denying the writ of *habeas corpus*. The court held that the act of March 3, 1885, extending its jurisdiction over cases from the Circuit Court to the United States did not enlarge its jurisdiction over the Supreme Court of this District, under its Circuit Court jurisdiction. *In re Cross, Petitioner*, 146 U. S. 271.

So that the question involved in the present case has not been decided by this court, and we respectfully request an opportunity to be heard in the premises.

The Chief Justice: Leave to file petition for writs of *habeas corpus* and *certiorari* is denied. The ground of the application does not go to the jurisdiction or authority of the Supreme Court of the District, and mere error cannot be reviewed in this proceeding. *Ex parte Parks*, 93 U. S. 18; *Ex parte Bigelow*, 113 U. S. 328; *Ex parte Wilson*, 114 U. S. 417; *Nielsen, Petitioner*, 131 U. S. 176.

ROGET *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 80. Argued December 7, 1892. — Decided March 6, 1893.

The pay of a retired officer of the Navy is fixed by statute at a certain percentage of the active service pay of the grade held by him at the time of his retirement: and there is nothing in the act of March 3, 1883, 22 Stat. 472, c. 97, to modify this rule.

An officer of the Navy who was retired in the first five years of service from a rank having longevity pay, but who was continued on active duty until he had passed into his second five years of service, is not entitled, under the act of March 3, 1883, to a greater rate of pay after active service ceased than seventy-five per centum of the pay of the grade or rank which he held at the time of retirement.

THE case is stated in the opinion.

Mr. Robert B. Lines, (with whom was *Mr. John Paul Jones* on the brief,) for appellant.

Mr. Attorney General for appellee.

MR. JUSTICE SHIRAS delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims, finding in favor of the United States and dismissing the petition of the claimant, Eugenia A. Roget, executrix of Edward A. Roget, deceased. Edward A. Roget was a professor of mathematics in the United States navy, having been commissioned July 8, 1864, to rank from May 21, 1864. On August 1, of that year, being then sixty-two years of age, he was placed upon the retired list, in accordance with the act of Congress approved December 21, 1861, 12 Stat. 329, c. 1, which contains the following provisions:

"That whenever the name of any naval officer now in the service, or who may hereafter be in the service of the United States, shall have been borne on the Naval Register forty-five years, or shall be of the age of sixty-two years, he shall be

retired from active service, and his name entered on the retired list of officers of the grade to which he belonged at the time of such retirement.

"SEC. 2. *And be it further enacted*, That the President of the United States be, and he is hereby, authorized to assign any officer who may be retired under the preceding section of this act to shore duty, and such officer thus assigned shall receive the full shore pay of his grade while so employed."

"SEC. 5. *And be it further enacted*, That all officers retired under the provisions of this act shall receive the retired pay of their respective grades as fixed by law."

Under the same act he was continued on active duty until June 30, 1873.

On July 15, 1870, a naval appropriation act was approved, (16 Stat. 321, 331, c. 295,) the third section of which contains, among other provisions, the following:

"That from and after the thirtieth day of June, eighteen hundred and seventy, the annual pay of the officers of the Navy on the active list shall be as follows:

* * * * *

"Professors of mathematics and civil engineers, during the first five years after date of appointment, when on duty, two thousand four hundred dollars; on leave or waiting orders, one thousand five hundred dollars; during the second five years after such date, when on duty, two thousand seven hundred dollars; on leave or waiting orders, one thousand eight hundred dollars; during the third five years after such date, when on duty, three thousand dollars; on leave or waiting orders, two thousand one hundred dollars; after fifteen years from such date, when on duty, three thousand five hundred dollars; on leave or waiting orders, two thousand six hundred dollars."

While performing active service Professor Roget received the full shore pay of his grade, including the increase after five years' service at the rate so provided for. On June 30, 1873, he was relieved from active service in accordance with the naval appropriation act of March 3, 1873, 17 Stat. 547, c. 230, which provides, in the first section, "that no officer on

the retired list of the navy shall be employed on active duty except in time of war."

The same section of that act contains the following provision:

"That those officers on the retired list, and those hereafter retired, who were, or who may be, retired after forty years' service, or on attaining the age of sixty-two years, in conformity with section one of the act of December, eighteen hundred and sixty-one, and its amendments, dated June twenty-fifth, eighteen hundred and sixty-four, or those who were or may be retired from incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, from sickness or exposure therein, shall, after the passage of this act, be entitled to seventy-five per centum of the present sea pay of the grade or rank which they held at the time of their retirement."

From the time Professor Roget was relieved from duty until November 9, 1887, when he died, he was paid at the rate of $1800 a year.

It was contended by the claimant that under the naval appropriation act, approved March 3, 1883, 22 Stat. 472, c. 97, her testator should have been credited with the time of his active service, from May 21, 1864, to March 3, 1873, and should have received the difference between the pay of a retired professor of mathematics who has been retired within his first five years of service, and the pay of such officer who has been retired within his second five years, or $225 per annum, from July 1, 1873, to the date of his death, being 14 years and 122 days. She therefore asked for a judgment against the United States in the sum of $3200. The Court of Claims, in dismissing the petition, decided that "an officer in the navy who was retired in the first five years of service from a rank having longevity pay, but who was continued on active duty until he had passed into his second five years of service, is not entitled, under the act of March 3, 1883, to a greater rate of pay after active service ceased than seventy-five per centum of the pay of the grade or rank which he held at the time of retirement." 24 C. Cl. 165.

The portion of the act of March 3, 1883, relied upon by the claimant is as follows:

"And all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular navy in the lowest grade having graduated pay held by such officer since last entering the service: *Provided*, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: *Provided further*, That nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer army or navy."

Prior to the approval of the act containing the foregoing provisions there had been three statutes operating to affect the pay of professors of mathematics retired at the age of sixty-two years, namely, the said acts of 1861, 1870 and 1873. The first gave authority for the assignment of any retired officer to shore duty, and provided that such officer thus assigned should receive the full shore pay of his grade while so employed; the second provided for longevity pay for officers on the active list, including professors of mathematics: and the third fixed the pay of officers so retired at seventy-five per centum of the sea pay of the grade or rank which they held at the time of their retirement. The precise effect of these acts may be readily seen by a brief examination of certain terms employed in them. By the act of March 3, 1835, (4 Stat. 756,) professors of mathematics were regarded as being subject to sea duty, the language used in fixing their pay being as follows: "When attached to vessels for sea service, or in a yard, one thousand two hundred dollars." They are so regarded also by the act of August 31, 1842, (5 Stat. 576, c. 276,) which provides that they "shall be entitled to live and mess with the lieutenants of seagoing and receiving vessels;" and by the act of August 3, 1848, § 12, (9 Stat. c. 121, pp. 266, 272,) providing that they "shall perform such duties as

may be assigned them by order of the Secretary of the Navy, at the Naval School, the Observatory, and on board ships of war, in instructing the midshipmen of the navy, or otherwise." Though the act of June 1, 1860, sec. 3, (12 Stat. 23, 27, c. 67,) declares that "no service shall be regarded as sea service but such as shall be performed at sea under the orders of a department, and in vessels employed by authority of law," the same statute, as well as others, in fixing the pay of professors of mathematics, provided for but one rate of pay for such officers while on duty. It may, therefore, be considered that a professor of mathematics assigned after his retirement to shore duty would be entitled to the highest pay of his grade while so employed, which would be as well his sea pay as his shore pay. The grade of an officer in the navy is his official station, by which are regulated his powers, duties and pay. His pay may be further governed by his time of service within a grade, either in fact rendered within the grade, or constructively performed therein through the force of statutes. That the office of professor of mathematics is a grade, is recognized by the act of April 17, 1866, sec. 7, (14 Stat. 38, c. 45,) which provides, "That hereafter no vacancy in the grade of professor of mathematics in the navy shall be filled."

The operation of the statutes of 1861, 1870 and 1873, in the case of Professor Roget was to give him pay during the time he performed active service, as though he were on the active list, including the longevity increase provided for by the act of 1870, and, after his active service ended, to give him seventy-five per cent of the sea pay, (which was also, in his case, the shore pay,) provided for by the act of 1873, attached to the grade which he held at the time of his retirement. This being unquestionably the legal effect of the acts approved prior to 1883, the single question involved is whether, under the act of March 3 of that year, he was entitled to have active service credited in regulating his pay as a retired officer after his active service ceased.

Ever since the retired list of the navy was established, the pay of a retired officer, as such, has been fixed by statute at a

certain per centum of the active service pay of the grade held by such officer at the time of his retirement. His active service pay at that time has always been taken as the basis in ascertaining his future pay, and we are unable to discover in the act in question any design to modify this persistent rule.

It would appear not only that Congress has manifested no intention by the act of 1883 to change the laws governing the pay of retired officers, but that it has, in at least one instance, shown the contrary purpose. By a provision in the fifth section of the act of July 15, 1870, no officer promoted upon the retired list "shall, in consequence of such promotion, be entitled to any increase of pay."

It can hardly be the intention of counsel to assume that the amount of pay in question in this case should be calculated as though Professor Roget was retired in 1873 instead of in 1864. The retirement of an officer is a proceeding that can only take place in a prescribed manner, and it is not pretended that such proceeding occurred, with reference to that officer, more than once.

The Court of Claims was right in dismissing the petition of the claimant, and the judgment of that court is

Affirmed.

MARX *v.* HANTHORN.

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

No. 123. Argued January 19, 20, 1893. — Decided March 6, 1893.

To make a tax sale valid, observance of every safeguard to the owner created by statute is imperatively necessary.

When not modified by statute, the burden of proof is on the holder of a tax deed to maintain his title, when questioned, by showing that the provisions of the statute have been complied with.

It is competent for a legislature to declare that a tax deed shall be *prima facie* evidence, not only of the regularity of the sale, but also of all prior proceedings, and of title in the purchaser; but as the legislature cannot deprive one of his property by making his adversary's claim to it conclu-

Statement of the Case.

sive of its own validity, it cannot make a tax deed conclusive evidence of the holder's title to the land.

The reasonable meaning of the Oregon statutes regulating notices and sales of property for taxes, (Gen. Laws, ed. 1874, 767, §§ 90, 93; Hill's Ann. Laws, 1309,) is that such notice and advertisement should give the correct names of those whose property is to be sold.

Notice in Oregon that the property of Ida J. Hawthorn was to be sold was not only not notice that the property of Ida J. Hanthorn was to be sold, but was actually misleading, and such want of notice or misleading notice vitiated the sale.

This action was brought by the plaintiff, a subject of the Emperor of Germany, against the defendant, a citizen of Oregon, to recover the possession of lots 3 and 4, in block E, in the town of Portland.

The action was originally brought against B. Campbell, the party in possession, who, having answered that he was in possession as the tenant of Ida J. Hanthorn, the latter was substituted for him as defendant.

It is alleged in the complaint that the plaintiff is the owner of the premises, and that the defendant wrongfully withholds from him the possession thereof.

The answer contains a denial of the allegations of the complaint and a plea of title in the defendant, with a right to the possession, and the replication denies the plea.

The defendant claims the premises under a deed of August 28, 1878, from W. W. Chapman and Margaret F., his wife, the latter being the patentee of the United States, under the donation act of 1850, of a tract of land including said block E. The plaintiff claims under two deeds, one from ex-Sheriff Sears of July 29, and the other from Sheriff Jordan of July 30, 1886, each purporting to be made in pursuance of a sale of the property for taxes by the former on June 30, 1884.

By a stipulation filed in the cause it is admitted that the defendant was the owner in fee of the premises at the time of the assessment and sale of the same for taxes, and that she is still such owner, unless such sale and the conveyance thereon had the effect to pass the title to the purchaser thereat, and that the property is worth $6000.

The case was tried by the court without the intervention

of a jury, and on the trial the proceedings, constituting the assessment, levy of taxes, and the sale of the property and the conveyance thereon, were received in evidence, subject to objection for want of competency and materiality. From these it appears that on August 27, 1883, the premises were listed by the assessor of Multnomah County, on the assessment-roll thereof, for taxation in that year as the property of Ida F. Hanthorn, and valued at $2200; that on October 17, 1883, the entry on the assessment-roll concerning said property was transcribed on to the tax-roll of said county by the clerk thereof, and on the same day the taxes for school, state and county purposes, amounting to $34.32, were levied on said property and extended on said tax-roll by the county court of said county, and the sheriff thereof commanded, by a warrant endorsed thereon, signed by the county clerk and sealed with the seal of said court, to collect said taxes by demanding payment of the same and making sale of the goods and chattels of the persons charged therewith; that the sheriff, George C. Sears, to whom said warrant was directed, having returned that the tax levied on said property was unpaid and delinquent, the latter was, on April 22, 1884, entered on the delinquent tax-roll of said county by the clerk thereof as the property of Ida F. Hawthorne, and a warrant endorsed thereon, signed by said clerk and sealed with the seal of said county, commanding said sheriff to levy on the goods of the delinquent taxpayer, and in default thereof on the real property mentioned in said tax-list, or sufficient thereof to satisfy said taxes, charges and expenses; that afterward said sheriff returned that he received said delinquent tax-list and warrant on April 22, 1884, and, in pursuance thereof and in default of personal property, he levied on said lots three and four, and advertised and sold the same on June 18, 1884, as the property of Ida J. Hawthorn, to J. E. Bennett for $37.51, the amount of said delinquent tax and costs and expenses thereon; that on July 29, 1886, George C. Sears, as ex-sheriff of said Multnomah County, executed and delivered to said Bennett a deed for the premises, in which the proceedings concerning the assessment of said property,

the levy of the taxes thereon, the non-payment and delinquency of the same, and the sale of the property therefor were substantially recited, except that it does not thereby appear that the premises were entered on the delinquent tax-list or advertised or sold as the property of Ida F. Hawthorn, but as that of Ida F. Hanthorn; and that on July 30, 1886, Thomas A. Jordan, as sheriff of said Multnomah County, by A. W. Witherell, deputy, executed and delivered to said Bennett a deed of the premises, containing the same recitals as the one from Sears. Each deed was acknowledged on the day of its execution and afterwards admitted to record. The original Jordan deed was put in evidence and also a certified copy of the record; but the execution of the original was not otherwise proved, and it is contended that the acknowledgment is not legal, and that therefore it cannot be read in evidence without direct proof of its execution.

On July 31, 1886, Bennett and his wife, Alvira F., in consideration of $500, as recited in the deed, quitclaimed the premises to the plaintiff.

The statute of the State of Oregon, in relation to the validity and effect of tax deeds, provides as follows:

"SEC. 90. After expiration of two years from the date of such certificate, if no redemption shall have been made, the sheriff shall execute to the purchaser, his heirs or assigns, a deed of conveyance, reciting or stating a description of the property sold, the amount bid, the year in which the tax was levied, that the tax was unpaid at the time of the sale, and that no redemption has been made; and such deed shall operate to convey a legal and equitable title to the purchaser, sold in fee simple to the grantee named in the deed; and upon the delivery of such deed all the proceedings required or directed by law, in relation to the levy, assessment and collection of the taxes, and the sale of the property, shall be presumed regular, and to have been had and done in accordance with law; and such deed shall be *prima facie* evidence of title in the grantee, and such presumption and such *prima facie* shall not be disputed or avoided except by proof of either (1) fraud in the assessment or collection of the tax;

(2) payment of the tax before sale or redemption after the sale; (3) that the payment or redemption was prevented by the fraud of the purchaser; (4) that the property was sold for taxes for which the owner of the property at the time of the sale was not liable, and that no part of the tax was levied or assessed upon the property sold."

"SEC. 93. All sales made for delinquent taxes . . . must be made as is otherwise made in selling real estate upon an execution, at the court-house door between the hours of ten o'clock A.M. and four P.M., in the daytime; and notice of such sale shall be given in some public newspaper, published in the county where the property is situated, or in case no paper is published in the county, then in the paper published nearest the place of sale, and in general circulation in the county, by advertisement for four consecutive weeks before such sale, describing accurately the lots or lands to be sold, and that they are to be sold for taxes due thereon." General Laws of Oregon, c. 57, p. 767, ed. 1874.

On March 23, 1887, the defendant, Ida J. Hanthorn, commenced a suit in equity in the Circuit Court of the United States against E. Marx, the plaintiff in this suit, for the purpose of determining his claim to the premises, alleging that the tax deed under which the plaintiff claims title to the same was void, for certain reasons, and brought into court and tendered him the sum of $50.60 in payment of what was due him thereon.

On February 21, 1887, after the present case had been submitted to the court below for decision, the legislature of Oregon amended said section 90 of the tax law so as to make a tax deed only *prima facie* evidence of title in the grantee, and requiring the party claiming to be the owner as against the holder of the tax title to tender and pay into court, with his answer, the amount of the taxes for which the land was sold, with interest thereon at the rate of 20 per cent per annum from the sale to the date of the deed, together with any taxes the purchaser may have paid, with interest thereon, for the benefit of the holder of the tax deed, his heirs or assigns, in case the same should be held invalid.

Argument for Plaintiff in Error.

The court below found and adjudged that the alleged tax sale was illegal and void; that the plaintiff was not entitled to recover; that the defendant was the owner of the premises and entitled to the possession thereof, 30 Fed. Rep. 579; and from this judgment the plaintiff brought his writ of error to this court.

Mr. John H. Mitchell and *Mr. John M. Gearin* for plaintiff in error.

The names "Hawthorn" and "Hanthorn" are so nearly alike that the rule *idem sonans* applies. This rule may be thus stated: Absolute accuracy in spelling names is not required in legal documents or proceedings, either civil or criminal; but if the name as spelled in the document, though different from the correct spelling thereof, conveys to the ear when pronounced according to commonly accepted methods a sound practically identical with the sound of the correct name as commonly pronounced, the name as thus given is a sufficient designation of the individual referred to, and no advantage can be taken of the clerical error. *State* v. *Havely*, 21 Missouri, 498, (Havely *and* Haverly); *Robson* v. *Thomas*, 55 Missouri, 581, (Mathews *and* Mather); *State* v. *Scurry*, 3 Rich, (Law,) 68, (Anthorn *and* Antrum); *McLaughlin* v. *State*, 52 Indiana, 476, (McLaughlin *and* McGloflin); *Williams* v. *Ogle*, 2 Strange, 889, (Segrave *and* Seagrave); *Ward* v. *The State*, 28 Alabama, 53, (Chambles *and* Chambless); *State* v. *Hutson*, 15 Missouri, 512, (Hutson *and* Hudson); *Fletcher* v. *Conly*, 2 Greene, (Iowa,) 88, (Conly *and* Conolly); *Gahan* v. *The People*, 58 Illinois, 160, (Danner *and* Dannaher); *Colburn* v. *Bancroft*, 23 Pick. 57, (Coburn *and* Colburn); *Commonwealth* v. *Jennings*, 121 Mass. 47, (Gigger *and* Jiger); *Tibbetts* v. *Kiah*, 2 N. H. 557, (Kiah *and* Currier); *The State* v. *Timmens*, 4 Minnesota, 325, (Fourai *and* Forrest).

But conceding for the sake of this argument that Hanthorn is not sufficiently like Hawthorn to warrant us in invoking the rule of *idem sonans*, appellant insists that the error, if

error there be, in the notice of sale is immaterial and does not avoid the deed. The name of the owner or the person against whom the tax is assessed is not a part of the statutory notice. The statute is complied with if the lots or lands are accurately described. And, even if the statute had required that the name of the owner should be inserted in the published notice, the failure to do so would not avoid the sale. A statutory provision requiring notice of sale on execution to be given is directory. If a defective notice is given it does not affect the title of the purchaser.

Smith v. *Randall*, 6 California, 47; *S. C.* 65 Am. Dec. 475; *Harvey* v. *Fisk*, 9 California, 93; *Wood* v. *Moorehouse*, 45 N. Y. 368; *Hudgens* v. *Jackson*, 51 Alabama, 514; *Lenox* v. *Clarke*, 52 Missouri, 115; *Hendrick* v. *Davis*, 27 Georgia, 167; *S. C.* 73 Am. Dec. 726; *Curd* v. *Lackland*, 49 Missouri, 451; *Perkins* v. *Spaulding*, 2 Michigan, 157; *Osgood* v. *Blackmore*, 59 Illinois, 261; *Jackson* v. *Spink*, 59 Illinois, 404; *McRea* v. *Davneir*, 8 Oregon, 63.

Legislative acts intended to cure and preclude inquiry into defective attempts to exercise the power of taxation have been enacted in many of the States. The power to pass such laws has been uniformly sustained. In *Williams* v. *Albany*, 122 U. S. 154; *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Wright* v. *Young*, 6 Oregon, 87; *Mathews* v. *Eddy*, 4 Oregon, 225; *Dolph* v. *Barney*, 5 Oregon, 191; *McRae* v. *Davneir*, 8 Oregon, 63.

The proceedings leading up to the tax sale in this case, including the Sheriff's advertisement of the delinquent tax list, were in all respects regular. But even if they were irregular in the matter of the publication of the delinquent tax list, the deed precluded inquiry into that fact, and the conclusive presumption provided for by statute operated in favor of plaintiff in error.

The tax sale in this case took place July 18, 1884. The tax deed was executed July 29, 1886. Complaint was filed August 3, 1886, and the case tried October 22, 1886. The decision of the Court was filed April 22, 1887.

On March 23, 1887, the defendant in error began a suit in

Counsel for Defendant in Error.

equity in the court below against plaintiff in error, setting up this statute and seeking relief under it. That suit, as appears from the opinion of the court in this case, was decided adversely to defendant in error, and no appeal has ever been taken from such decision. Judge Deady, in passing upon the question, says: "I have considered whether this section 90, as amended, is applicable as a rule of evidence to the case under consideration. When the State sold these lots to Bennett it entered into a contract with him the obligation of which it cannot impair by any subsequent legislation."

If any claim should be made here that defendant in error is benefited by the act of 1887, we answer that such cannot be the case, for two reasons:

(1) This act does not operate on plaintiff's tax deed. It does not purport to, and cannot if it did, affect a deed made before its passage. *Von Hoffman* v. *Quincy*, 4 Wall. 535; *Murray* v. *Charleston*, 96 U. S. 432; *Green* v. *Biddle*, 8 Wheat. 1; *Ogden* v. *Saunders*, 12 Wheat. 213; *Walker* v. *Whitehead*, 16 Wall. 314; *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Edwards* v. *Kearzey*, 96 U. S. 595; *Green* v. *Barry*, 15 Wall. 610.

(2) But conceding that this law of 1887 is constitutional and applicable to the present case, of what benefit can it be to the defendant in error? It substitutes a *prima facie* presumption for a *conclusive* presumption. But a *prima facie* presumption in the absence of attack is as good as a conclusive presumption. No attack was attempted to be made upon the regularity of these proceedings, except as to the publication of the *name* in the delinquent list — something not required by the statute. The record is all here, and it is not pretended that any irregularity can be shown but this. And the authorities hereinbefore referred to conclusively show that this, even if open to attack, would not vitiate the sale. On the record as made we need no presumption, either conclusive or *prima facie*.

Mr. J. N. Dolph, (with whom was *Mr. George H. Durham* on the brief,) for defendant in error.

Opinion of the Court.

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

As there must be express statutory authority for selling lands for taxes, and as such sale is in the nature of an *ex parte* proceeding, there must be, in order to make out a valid title, a substantial compliance with the provisions of the law authorizing the sale. A statutory power, to be validly executed, must be executed according to the statutory directions. It is, no doubt, true that there may be provisions in tax laws that are made in the interest of the public, and which do not concern the taxpayer; and a failure to punctiliously observe them may furnish him with no just ground of complaint. But the well established rule is, as above stated, that observance of every safeguard to the owner created by the statute is imperatively necessary. So, too, it is the rule, when not modified by statute, that the burthen of proof is on the holder of a tax deed to maintain his title by affirmatively showing that the provisions of the law have been complied with.

We do not perceive that these general rules have been materially modified by the statutes of Oregon, to which our attention has been called. It is true that, as to certain preliminary and directory conditions of tax sales, the Oregon statute, dated December 18, 1865, and cited as section 90 of the general laws, declares that upon delivery of a tax deed "all the proceedings required or directed by law in relation to the levy, assessment and collection of the taxes and the sale of the property shall be presumed regular, and to have been had and done in accordance with law; and such deed shall be *prima facie* evidence of title in the grantee, and such presumption and such *prima facie* shall not be disputed or avoided, except by proof of either; (1) fraud in the assessment or collection of the tax; (2) payment of the tax before sale, or redemption after sale; (3) that the payment or redemption was prevented by the fraud of the purchaser; (4) that the property was sold for taxes for which the owner of the property at the time of the sale was not liable, and that no part of the tax was levied or assessed upon the property sold." But

by the amendatory act of February 21, 1887, (2 Hill's Annotated Laws, 1309, ed. 1892,) the provision respecting the evidential effect of the deed was changed so as to read as follows: "Upon the delivery of such deed all the proceedings required or directed by law in relation to the levy, assessment and collection of the taxes, and the sale of the property, shall be presumed regular, and such deed shall be *prima facie* evidence of title in the grantee."

At the trial the plaintiff, the holder of the tax deed, was given the benefit of this legislation, as his deed was treated as making out a *prima facie* right to recover, and the evidence upon which the questions in the case arose was put in by the defendant.

It was, indeed, contended by the plaintiff in the court below and likewise in this court, that the irregularities or disregard of law which, in the opinion of that court, invalidated the tax sale, had to do with proceedings which the act of 1865 protected from inquiry, and in respect to which it made the tax deed absolute evidence; and that, therefore, the subsequent legislation declaring the effect of the tax deed, as evidence, to be merely *prima facie*, was unconstitutional and ineffective so far as the plaintiff was concerned, he having received his deed before the enactment of the latter law.

Courts of high authority have held that mere rules of evidence do not form part of contracts entered into while they are in force, and that it is competent for the legislature to, from time to time, change the rules of evidence, and to make such change applicable to existing causes of action. *Rich* v. *Flanders*, 39 N. H. 304; *Howard* v. *Moot*, 64 N. Y. 262; *Kendall* v. *Kingston*, 5 Mass. 524; *Commonwealth* v. *Williams*, 6 Gray, 1; *Goshen* v. *Richmond*, 4 Allen, 458.

"It must be evident that a *right to have one's controversies determined by existing rules of evidence is not a vested right.* These rules pertain to the remedies which the State provides for its citizens; and, generally, in legal contemplation, they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the

remedy, they must, therefore, at all times be subject to modification and control by the legislature; and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those States in which retrospective laws are forbidden." Cooley's Constitutional Limitations, 457, 4th ed. 1878.

But as the court below held that, if and so far as the legislature had the power to and did make the tax deed conclusive evidence of title, the legislature had no power, as against a purchaser under that law, to make the deed, by a subsequent enactment, *prima facie* only, it is not necessary for this court to consider whether we can adopt that view of the question.

The court held that even if the act of 1887 could not constitutionally avail, as against the plaintiff, to change the evidential effect of the tax deed, yet that the act of 1865 could not operate to prevent the defendant from showing that she had no notice, actual or constructive, of the tax sale. *Forster* v. *Forster*, 129 Mass. 559.

The view of the court was that notice of the sale was an essential part of the proceedings; that the legislature did not have the power to make the tax deed conclusive evidence of the fact; that there must be an opportunity given for investigation and trial; and that the legislature cannot, under the pretence of prescribing rules of evidence, preclude a party from making proof of his right by arbitrarily and unreasonably declaring that on some particular circumstance being shown by the other party the controversy is closed by a conclusive presumption in favor of the latter.

Without going at length into the discussion of a subject so often considered, we think the conclusion reached by the courts generally may be stated as follows: It is competent for the legislature to declare that a tax deed shall be *prima facie* evidence not only of the regularity of the sale, but of all prior proceedings, and of title in the purchaser, but that the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity, and it cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land.

Mr. Cooley sums up his examination of the cases on this

subject in the following statement: "That a tax deed can be made conclusive evidence of title in the grantee we think is more than doubtful. The attempt is a plain violation of the great principle of Magna Charta, which has been incorporated in our bill of rights, and, if successful, would in many cases deprive the citizen of his property by proceedings absolutely without warrant of law or of justice; it is not in the power of any American legislature to deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity. It cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land, or of the possible jurisdictional facts which would make out title. But the legislature might doubtless make the deed conclusive evidence of . . . everything except the essentials." Cooley on Taxation, 521, 5th ed. 1886.

This brings us to a consideration of the matters put in evidence by the defendant, going to overthrow the *prima facie* presumptions created by the tax deed. There were two. The land in question was admitted to belong to Ida J. Hanthorn, and that fact was found by the court below; but on the delinquent tax roll the property is alleged to belong to Ida F. Hawthorne, and it further appears by the return of the sheriff that the property was advertised and sold as the property of Ida F. Hawthorn.

It was the opinion of the court below that due and reasonable notice of the sale of property for a delinquent tax is necessary for the validity of such sale, and that the fair meaning of the Oregon statutes regulating judicial sales and sales for taxes is that the name of the owner of the lands to be sold shall appear in the notice of sale; and the court was further of the opinion that to give notice that the property of Ida F. Hawthorn was to be sold was not only not notice that the property of Ida J. Hanthorn was to be sold, but was actually misleading, and that such want of notice or misleading notice vitiated the sale.

It is contended, on behalf of the plaintiff, that the statute does not require that the notice should name the owner or name him correctly; that it is sufficient to correctly describe

the property which is to be sold; and that, at any rate, the notice in the present case was sufficient within the meaning of the rule of *idem sonans*.

We agree with the court below in thinking that the reasonable meaning of the statutes regulating notices and sales of property for taxes, is that such notice and advertisement should give the correct names of those whose property is to be sold. While the statutes do not in terms say that the names of the owners should be published, yet such would seem to be the fair presumption, and the present case shows that such was the construction adopted by the officials, as they did name, though incorrectly, an owner in the notice.

These questions have been determined, so far as the laws and constitution of Oregon are concerned, by a recent decision of the Supreme Court of that State in the case of *Strode* v. *Washer*, 17 Oregon, 50. In that case it is held that in an action to determine the title to land claimed under a tax deed, evidence can be received to show that the assessment claimed to have been made was void, in that the property in dispute had been assessed with other property not owned by the defendants, and the value of all fixed at a gross sum, and that it was error to exclude such evidence, even under a statute making a tax deed evidence of the regularity of an assessment; and it was further held that the amendment of 1887, changing that feature of the act of 1865 which made a tax deed conclusive evidence of the regularity of the levy, assessment, collection of taxes, and sale of the property, did not impair the obligation of contracts as to purchases made prior to the amendment, but simply changed the rule of evidence.

This decision was not made till after the trial of the present case in the Circuit Court of the United States; but, in the absence of any previous decision by the Supreme Court of Oregon to the contrary, we regard it as a conclusive construction of the meaning and effect of the state statutes in question. We also concur with the court below in thinking that, by no reasonable application of the rule of *idem sonans*, can the name of Ida J. Hawthorn be deemed equivalent to that of Ida J. Hanthorn.

Opinion of the Court.

Another particular in which, it is claimed on behalf of the defendant, there was a disregard of law invalidating the sale, is found in the assessment of the two lots 3 and 4 in block E as one parcel. The statute prescribes that the assessor shall set down in the assessment, in separate columns, "a description of each tract or parcel of land to be taxed, specifying, under separate heads, the township, &c., or, if divided into lots and blocks, then the number of the lot and block;" and the contention is that grouping the lots and fixing the valuation in a gross sum was not a valid assessment. Such a question was considered by the Supreme Court of Oregon in the case of *Strode* v. *Washer*, heretofore cited. There an assessment was held to be a nullity which included several lots of land belonging to different owners in one valuation; and the court said "what the effect would be where the lots so assessed all belong to the same party, we express no opinion."

The effect of this irregularity does not seem to have been considered by the court below, and in view of the expression of the Supreme Court of the State, just quoted, withholding any opinion as to the effect of this defective mode of assessment, we do not feel disposed to base our decision upon it.

As, however, we think that the court below did not err in permitting the defendant to impugn the tax title by showing that the name of the owner was wrongly given in the delinquent tax roll, and in the notice and publication, and in holding that the sale was thereby invalidated, it follows that its judgment should be

Affirmed.

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

UNITED STATES *v.* ALEXANDER

APPEAL FROM THE COURT OF CLAIMS.

No. 552. Submitted January 9, 1893. — Decided March 6, 1893.

The owner of a well, on land near to but not on the line of the Washington aqueduct, which was destroyed in the construction of that work, may recover its value from the United States in the Court of Claims under the provisions of the act of July 15, 1882, 22 Stat. 168, c. 294.

Acton v. *Blundell*, 12 M. & W. 324, distinguished from this case.

THE case is stated in the opinion.

Mr. Assistant Attorney General Cotton for appellants.

Mr. Job Barnard and *Mr. George A. King* for appellees.

MR. JUSTICE SHIRAS delivered the opinion of the court.

The facts of this case, as found by the Court of Claims, (25 Ct. Cl. 87, 329,) are as follows:

Since February 28, 1880, the appellees have been the owners of a tract of land in the District of Columbia, known as lot 11 of original lot 2 of the subdivision made by the heirs of John Little of parts of tracts called "James Parks" and "Mt. Pleasant," and containing about eight acres. On the 21st day of August, 1883, the said ground was improved by a dwelling-house and other buildings and a valuable well of water, necessary to supply water for family use and other purposes, the said property being occupied by the owners as a dwelling.

On that day proceedings were begun by the publication of a notice, under the act of Congress of July 15, 1882, to increase the water supply of the city of Washington, (22 Stat. 168, c. 294,) to condemn a right of way for a tunnel in the neighborhood of this ground, and the government afterwards constructed such tunnel by blasting and digging at a depth of 150 to 170 feet below the surface in the immediate neighbor-

hood of said property, and about 500 feet distant from the said well.

The well had been used for many years before the construction of the tunnel. There was no direct evidence as to the effect of the tunnel on the well, but during the process of construction and blasting, about one hundred and fifty yards from the premises, the well became dry and it has so remained. It does not appear that there was any other cause affecting the well. By reason of the construction of the tunnel, as the Court of Claims finds, the well was drained and destroyed, to the damage of the owners in the sum of fifteen hundred dollars, no portion of which has been paid or tendered by the government.

This well, at the time of its destruction, was sixty feet deep, and it does not appear that it was supplied by a distinct vein of water running into it. The tunnel is impervious to water, and water from the outside does not soak into it. The land on which the well was located is not embraced in the map and survey of lands to be taken under the act of Congress.

Upon these facts the court below adjudged that the plaintiffs, the owners of said land, were entitled to recover the sum of fifteen hundred dollars, and judgment was entered for that amount.

Whether, under the constitutional provisions of the United States and of the several States, which declare that private property shall not be taken for public use without just compensation, it is necessary that property should be absolutely taken in the narrowest sense of that word to bring the case within the protection of the provision, is a question that has often arisen, and upon which there has not been entire uniformity of decision.

"There may be," said this court, in the case of *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, (syllabus,) "such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution." "The cases which hold that remote and consequential injury to private property by reason of authorized public improvements is not taking such property for public use have

many of them gone to the utmost limit of that principle, and some beyond it, though the principle is a sound one in its proper application to many injuries so originating."

We do not find it necessary to consider on which side of the line thus suggested the present case would fall, for we agree with the court below in thinking that, in the act of Congress, under which this public work was done, are found provisions giving an express remedy for property damaged though not actually taken. The first section of the act is in the following terms:

"That the Secretary of War shall cause to be made a survey and map of the land necessary to extend the Washington Aqueduct from its present eastern terminus to the high ground north of Washington near Sixth Street extended, and of the land necessary for a reservoir at that point, the capacity of which shall not be less than three hundred million gallons; and a like survey and map of the land necessary for a dam across the Potomac River at the Great Falls, including the land now occupied by the dam, and the land required for the extension of said dam across Conn's Island to and upon the Virginia shore; and when surveys and maps shall have been made the Secretary of War and the Attorney General of the United States shall proceed to acquire to and for the United States the outstanding title, if any, to said land and water rights, and to the land on which the gate-house at Great Falls stands by condemnation.

"And in obtaining title to the right of way for the extension of said aqueduct, the Secretary of War and Attorney General may, in their discretion, secure title to a strip suitable for an avenue over such part of said aqueduct extended as they think proper: *Provided*, That at least one-half in value of such right of way shall be donated or dedicated by the owners to that public use: *And provided further*, That if it shall be necessary to resort to condemnation, the proceeding shall be as follows:

"When the map and survey are completed, the Attorney General shall proceed to ascertain the owners or claimants of the premises embraced in the survey, and shall cause to

be published, for the space of thirty days, in one or more of the daily newspapers published in the District of Columbia, a description of the entire tract or tracts of land embraced in the survey, with a notice that the same has been taken for the uses mentioned in this act, and notifying all claimants to any portion of said premises to file, within its period of publication, in the Department of Justice, a description of the tract or parcel claimed, and a statement of its value as estimated by the claimant. On application of the Attorney General, the Chief Justice of the Supreme Court of the District of Columbia shall appoint three persons, not in the employ of the government or related to the claimants, to act as appraisers, whose duty it shall be, upon receiving from the Attorney General a description of any tract or parcel the ownership of which is claimed separately, to fairly and justly value the same and report such valuation to the Attorney General, who thereupon shall, upon being satisfied as to the title to the same, cause to be offered to the owner or owners the amount fixed by the appraisers as the value thereof, and if the offer be accepted, then upon the execution of a deed to the United States in form satisfactory to the Attorney General, the Secretary of War shall pay the amount to such owner or owners from the appropriation made therefor in this act.

"In making the valuation the appraisers shall only consider the present value of the land without reference to its value for the uses for which it is taken under the provisions of this act.

"The appraisers shall each receive for their services five dollars for each day's actual service in making the said appraisements.

"Any person or corporation having any estate or interest in any of the lands embraced in said survey and map who shall for any reason not have been tendered payment therefor as above provided, or who shall have declined to accept the amount tendered therefor, and any person who, by reason of the taking of said land, or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, may, at any time within one year from

the publication of notice by the Attorney General as above provided, file a petition in the Court of Claims of the United States setting forth his right or title and the amount claimed by him as damages for the property taken or injury sustained; and the said court shall hear and adjudicate such claims in the same manner as other claims against the United States are now by law directed to be heard and adjudicated therein: *Provided*, That the court shall make such special rules in respect to such cases as shall secure their hearing and adjudication with the least possible delay.

"Judgments in favor of such claimants shall be paid as other judgments of said court are now directed to be paid; and any claimant to whom a tender shall have been made as hereinbefore authorized, and who shall have declined to accept the same, shall, unless he recover an amount greater than that so tendered, be taxed with the entire cost of the proceeding. All claims for value or damages on account of ownership of any interest in said premises, or on account of injury to a property right by the construction of said works, shall, unless a petition for the recovery thereof be filed within one year from the date of the first publication of notice by the Attorney General as above directed, be forever barred: *Provided*, That owners or claimants laboring under any of the disabilities defined in the statute of limitations of the District of Columbia may file a petition at any time within one year from the removal of the disability.

"Upon the publication of the notice as above directed, the Secretary of War may take possession of the premises embraced in the survey and map, and proceed with the constructions herein authorized; and upon payment being made therefor, or, without payment, upon the expiration of the times above limited without the filing of a petition, an absolute title to the premises shall vest in the United States."

By a subsequent act approved February 26, 1885, 23 Stat. 332, c. 163, the time for filing petitions in the Court of Claims was extended for one year from the passage of the act — that is, to February 26, 1886.

It is contended, on behalf of the United States, that the

legislature intended to restrict the right to sue exclusively to the parties holding land within the limits of the survey, and that hence the Court of Claims erred in recognizing the claim for damages to lands not embraced in the survey. We are unable to adopt this view of the meaning of the statute.

On the contrary, we think the plain meaning and intent of the legislature were to provide for the case of those whose lands or property rights were directly injured by the construction of the work proposed to be done, as well as for the case of those injured by the taking of their lands. This seems to us so clear as to require no elucidation. This very point, arising under the act in question, was decided by this court in *Great Falls Manufacturing Co.* v. *The Attorney General*, 124 U. S. 581, 596, where it was said: "While Congress supposed that a survey and map could be made with such accuracy as to embrace all the land necessary, under any circumstances, for the purposes indicated in the act of 1882, and while provision is made whereby the owners of lands, covered by such survey and map, can obtain just compensation, the act also opens the Court of Claims to every person who, by the construction of the works in question, has been injured in any property right, provided that, within a given time, such person file his petition in that court, setting forth his right or title and the amount claimed by him as damages."

Again, it is claimed for the government that, even if the statute be read to apply to the case of property not embraced in the survey, yet the case of a destruction of a well is not a "direct injury" within the contemplation of the statute.

It is difficult to see the force of this contention. An adequate supply of water for household and other purposes has always been regarded as an essential incident to a dwelling-house. A never-failing well or spring of water adds greatly to the market value as well as to the comfort of such property. How important and indispensable is a supply of water is seen in the very work in question, whose object is, as declared by the statute, to increase the water supply of the city of Washington.

It cannot be denied that a well of water is property recog-

nized by the law, any injury to which is redressible by law. To pollute or foul the water of a well is an actionable injury. *Ball* v. *Nye*, 99 Mass. 582.

We see no reason why we should disregard the finding of the court below, that "by reason of the construction of said tunnel the said well of water was drained and destroyed," and we regard such a finding as proof that the owners of the property suffered a direct injury within the meaning of the remedial provisions of the statute.

We regard the remedial features of this statute as coming within the suggestion of Chief Justice Gibson, in the noted case of *O'Connor* v. *Pittsburgh*, 18 Penn. St. 187, 190: "The constitutional provision for the case of private property *taken* for public use extends not to the case of property *injured* or *destroyed;* but it follows not that the omission may not be supplied by ordinary legislation."

Finally, an argument in favor of the government is based upon the finding of the court below, that it does not appear that the well was supplied "by a distinct vein of water running into it;" and the leading case of *Acton* v. *Blundell*, 12 M. & W. 324, and cognate cases are cited.

The doctrine of those cases substantially is, that the owner of land may dig therein and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action.

We recognize this as sound doctrine in the ordinary case of a question between adjoining owners of land. But in a case like the present, where the injury complained of is inflicted by the construction of a public work under authority of a statute, over land upon which the public authority has acquired a right of way only, and where the statute itself provides a remedy for such injury, the law has been held to be otherwise in cases whose reasoning demands our assent.

A Massachusetts statute provided that "every railroad cor-

poration shall be liable to pay all damages that shall be occasioned by laying out and making and maintaining their road, or by taking any land or materials." Construing that statute, in the case of *Parker* v. *Boston & Maine Railroad*, 3 Cush. 107, 114, the Supreme Judicial Court said:

"And so in regard to the well. The claim for damages on this ground does not depend on the relative rights of owners of land, each of whom has a right to make a proper use of his own estate, and sinking a well upon it is such proper use; and if the water, by its natural current, flows from one to the other, and a loss ensues, it is *damnum absque injuria*. But the respondents did not own land; they only acquired a special right to and usufruct in it, upon the condition of paying all damages which might be thereby occasioned to others."

In the quite recent case of *Trowbridge* v. *Brookline*, 144 Mass. 139, 141, another statute was under consideration by the same court, similar in every respect to the act of Congress now under consideration. The case of *Parker* v. *Boston & Maine Railroad* was fully recognized and its authority followed. We quote as follows from the opinion:

"The question presented is whether a town which lawfully takes land and constructs a common sewer therein, whereby a well upon land not taken, and not adjoining land taken, is made dry, the well being fed by water percolating through the soil, may be liable to pay damages therefor to the owner of the land in which the well is situated.

"The respondent is liable for 'damages occasioned by the laying, making or maintaining' the sewer. Pub. Stats. c. 50, § 3. The provision in the railroad act is similar: 'Damages occasioned by laying out, making, and maintaining its road.' Pub. Stats. c. 112, § 95. The provision in regard to public ways is: 'If damage is sustained by any persons in their property by the laying out,' etc. Pub. Stats. c. 49, §§ 14, 68. Section 16, which also applies to sewers, provides that, in estimating the damage, 'regard shall be had to all the damages done to the party, whether by taking his property or injuring it in any manner.' Under these provisions damages can be recovered for injuring land not taken and

not abutting upon land taken. *Dodge* v. *County Commissioners*, 3 Met. 380; *Parker* v. *Boston & Maine Railroad*, 3 Cush. 107; *Marsden* v. *Cambridge*, 114 Mass. 490.

"The respondent contends that it had the right of an owner of the land taken to make excavations in it, and thereby drain its neighbor's well; that its act without the authority and protection of the statute, was lawful, and invaded no right of the petitioner, and gave her no right of action; and that, in accordance with the decisions in England, the statute should be construed to intend only damages which, but for the protection of the statute, could be recovered by action. See *New River Co.* v. *Johnson*, 2 El. & El. 435; *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243. But the respondent does not stand, in this respect, in the position of a purchaser of the land, taking the rights of its grantor. It is not the absolute owner of the land, but it took and holds the right to occupy the land for certain purposes, and to do upon it certain acts authorized by the statute. In exercising its rights, the town acts, not under the title of the owner, but by virtue of the authority given by the statute, and under the obligation imposed by the statute to pay all damages occasioned thereby. The petitioner had a right to collect and keep the water in her well; and depriving her of it, so as to injure her land, was a damage to her. It is no answer that other landowners had the same right in respect to their lands, and that, if the petitioner's damages had been in consequence of the exercise of those rights in his land by a landowner, she could not have recovered damages from him. The respondent's rights in the land, and its authority to do the act which caused the damage, are given by the same statute which gives a remedy to the petitioner to recover the damages.

"The precise question presented here was decided, in regard to a railroad, in *Parker* v. *Boston & Maine Railroad*, *ubi supra*. In that case, damages were alleged to have been occasioned, in the construction of a railroad, to land not within or adjoining the location of the road, by changing the grade of a highway and by draining a well. It is not suggested

that either would be a cause of action at common law. Chief Justice Shaw says that the main question in the case is 'whether a party having land with buildings thereon, lying near the track of a railroad, but not crossed by it, can recover compensation for incidental damages caused to his land, by the construction of the railroad and the structures incident to and connected with it.' After discussing the question, he says: 'We are of opinion, therefore, that a party who sustains an actual and real damage, capable of being pointed out, described and appreciated, may sue a complaint for compensation for such damage.' In regard to the well he says: 'The claim for damages on this ground does not depend on the relative rights of owners of land, each of whom has a right to make a proper use of his own estate, and sinking a well upon it is such proper use; and if the water, by its natural current, flows from one to the other, and a loss ensues, it is *damnum absque injuria.* But the respondents did not own land; they only acquired a special right to and usufruct in it, upon the condition of paying all damages which might be thereby occasioned to others.'"

In *Wheatley* v. *Baugh*, 25 Penn. St. 528, 533, the case of *Parker* v. *Boston & Maine Railroad* is cited with approval.

We also regard our own case of *Great Falls Manufacturing Company* v. *Attorney General*, above cited, as, in effect, construing the statute as applicable to a claim like the present one.

Upon the whole, we are of opinion that the judgment of the Court of Claims is sustainable on principle and authority, and it is accordingly

Affirmed.

UNITED STATES *v.* TRUESDELL.

APPEAL FROM THE COURT OF CLAIMS.

No. 552. Submitted January 9, 1893. — Decided March 6, 1893.

This case is affirmed on the authority of *United States* v. *Alexander*, *ante*, 186.

THE case is stated in the opinion.

Mr. Solicitor General Cotton for appellants.

Mr. Job Barnard and *Mr. George A. King* for appellee.

MR. JUSTICE SHIRAS delivered the opinion of the court.

This suit was brought in the Court of Claims to recover damages for the loss of a well, occasioned by the construction of an extension of the Washington Aqueduct, and for compensation for a right of way across land of the complainant, taken for the purpose of constructing a tunnel, by virtue of an act of Congress of July 15, 1882, entitled "An act to increase the water supply of the city of Washington and for other purposes." 22 Stat. 168, c. 294.

So far as the recovery of the plaintiff below was based on the claim for compensation for land actually taken, the United States do not, in this appeal, complain. But they contend that the injury caused by the destruction of the well was *damnum absque injuria*. The liability of the United States, under the statute by virtue of which the work in question was done and the damages occasioned, has been declared in the opinion of this court in the case, just decided, of the *United States* v. *Alexander*, *ante*, 186, where the facts were similar, and we do not need to repeat what is therein said.

The judgment of the court below is accordingly

Affirmed.

PETTIBONE *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

No. 1241. Argued February 1, 2, 1893. — Decided March 6, 1893.

In a prosecution for conspiracy, corruptly and by threats and force to obstruct the due administration of justice in a Circuit Court of the United States, the combination of minds for the unlawful purpose and the overt act in effectuation of that purpose must appear charged in the indictment.

A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means.

When the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offence consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out.

An indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate, or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such.

A person is not sufficiently charged in such case with obstructing or impeding the due administration of justice in a court, unless it appear that he knew or had notice that justice was being administered in such court.

Plaintiffs in error were indicted under sections 5399 and 5440 of the Revised Statutes of the United States, (the latter as amended by the act of May 17, 1879, 21 Stat. 4, c. 8,) which are as follows:

"Sec. 5399. Every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness, or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both."

"SEC. 5440. If two or more persons conspire either to commit any offence against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court."

The indictment alleged that on May 28, 1892, suit was commenced in the United States Circuit Court for the District of Idaho, wherein the Bunker Hill and Sullivan Mining and Concentrating Company was complainant, and the Miners' Union of Wardner and others were defendants; that a writ of injunction was duly and regularly issued therein by the court, directed to plaintiffs in error and many others as defendants, which writ of injunction was set out in full in the indictment, and ordered as follows:

"In the meantime and until the further order of this court herein, the said defendants and each of them, their aiders, attorneys, officers, agents, servants and employés be, and they are hereby, severally restrained and enjoined from in any manner interfering with the complainant herein in any of its work in and upon or about its said mining claims, to wit, the Bunker Hill, the Sullivan, and the Small Hopes Lode mining claims mentioned in the complaint herein, or in any part thereof, and from in any manner by force or threats or otherwise making any attempts to intimidate any employé of the complainant herein, or from attempting to prevent by any force or intimidation any employé of the said complainant from proceeding to work for the said complainant in a peaceful, quiet, and lawful manner in and upon any part of the aforesaid mines or mining claims, or in or upon any works of the said complainant therein or thereabouts or at all, and that they, the said parties aforesaid, be, and they are hereby, further enjoined from intimidating or threatening or by any force, threats, or any intimidation trying to prevent any employé of the complainant herein from working in or upon the aforesaid mines mentioned in the complaint herein, or at the

mills of complainant, or in or upon any mining or other property of complainant, or from preventing any one from entering the service of the complainant herein, or in any unlawful manner interfering with the business of said complainant in employing persons to work upon its said property, or from going upon any part of the said complainant's property without permission from the complainant or its agents or employés so to do, or in any manner entering upon the works of the complainant, or within the buildings of the complainant, without its consent or the consent of its managers, agents, or employés, and reference is hereby had to the bill of complaint herein, to which your attention is hereby directed, until the further order of this court or the judge thereof; and the foregoing restraining order is also directed against the agents, servants, aiders, abettors, members, and associates of the defendants or either of them."

The indictment thereupon averred that the defendants, on July 11, 1892, and while the writ of injunction was in full force and effect, "at Shoshone County, within the Northern Division of the District of Idaho aforesaid, did unlawfully, corruptly, fraudulently, and feloniously conspire, combine, confederate, and agree together to commit an offence against the United States as follows, to wit," said defendants did, then and there, "unlawfully, corruptly, fraudulently, and feloniously conspire, combine, confederate, and agree together to intimidate, by force and threats of violence, the employés of the said Bunker Hill and Sullivan Mining and Concentrating Company, then working in and upon the mines of the said company and within and around the mill and other buildings of the said company in said Shoshone County, said mines, mill, and other buildings of said company being then and there the mines, mill, and other buildings mentioned and described in said writ of injunction, with the intent then and thereby on the part of the said" defendants (naming them) "to compel the employés of the said Bunker Hill and Sullivan Mining and Concentrating Company to abandon their work in and upon the mines, mill, and other buildings of the said mining company last mentioned;" that the defendants "did

then and there further unlawfully, fraudulently, corruptly, and feloniously conspire, combine, confederate, and agree together to intimidate, by force and threats of violence, the officers and agents of the said Bunker Hill and Sullivan Mining and Concentrating Company, with the intent then and there and thereby, by means of said force and threats of violence, to compel the officers and agents of said mining company to discharge and dismiss from the employ of the said mining company all employés (other than such persons as were members of what is called the Miner's Union) who were working either upon or within the mines of the said company and in the said company's mill and other buildings, which said last-mentioned mines, mill, and other buildings are the mines, mill, and other buildings mentioned and described in the aforesaid writ of injunction issued out of the said United States Circuit Court."

The indictment further averred that on July 12, 1892, the defendants, while the writ of injunction was in full force and effect and the suit in which the writ issued was still pending and undetermined, "in aid of and in furtherance of and for the purpose of effecting the object of the said unlawful and malicious combination and conspiracy formed and entered into as aforesaid and for the purpose and object aforesaid, did, on the said 12th day of July, 1892, at the county and State aforesaid, unlawfully, fraudulently, corruptly, wilfully, and feloniously, by force and violence and threats of violence, intimidate and compel the employés of the said Bunker Hill and Sullivan Mining and Concentrating Company, then and there working in and upon the mines of the said company and within and around the mill, property, and other buildings, all the property of said company, to cease and abandon work in and upon the mines and within and around the mill, property, and other buildings of said company, said mines, mill, and other buildings of said company being then and there the same mines, mill, property, and buildings mentioned and described in said writ of injunction, and said employés being then and there in the employ of said company, and did then and there unlawfully, corruptly, fraudulently, wilfully and feloniously compel

and force the said employés, by the intimidation and violence and threats of violence aforesaid, to abandon and leave and cease their said employment under said company and their work in and upon the mines, mill, and other buildings of the said mining company last mentioned." And the defendants did by intimidation and violence and threats of force and violence intimidate and compel the officers and agents of said Bunker Hill Company against their will and consent to discharge and dismiss from the service and employment of the company all its employés, other than such persons as were members of what was called the Miners' Union, who were then working in and upon the property of the company.

"And so the grand jurors aforesaid, upon their oaths aforesaid, do charge and say that the said" defendants (naming them) "at the said Shoshone County, within the said Northern Division of the District of Idaho, did, on the 11th day of July, 1892, unlawfully, wilfully, fraudulently, and feloniously conspire, combine, confederate, and agree together to commit an offence against the United States, to wit, to corruptly and by force and threats obstruct and impede the due administration of justice in the aforesaid United States Circuit Court for the Ninth Judicial Circuit, District of Idaho, and did, thereafter, on the 12th day of July, 1892, in pursuance of said unlawful and malicious combination and conspiracy, unlawfully, wilfully, and feloniously, in the manner and form aforesaid, corruptly and by force and threats of violence obstruct and impede the due administration of justice in the aforesaid United States Circuit Court. All of which is contrary to the form, force, and effect of the United States statutes in such cases made and provided and against the peace and dignity of the United States."

Motions to quash and demurrers were filed and overruled, and, after verdict, motions in arrest were made and denied. Plaintiffs in error were convicted and sentenced to imprisonment in the Detroit house of correction, George A. Pettibone for two years, John Murphy for fifteen months, and M. L. Devine and C. Sinclair for eighteen months each.

This writ of error was thereupon allowed.

Mr. Walter H. Smith and *Mr. Patrick Reddy* for plaintiffs in error.

Mr. Attorney General and *Mr. Charles W. Russell* for defendants in error.

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

Under section 5399, any person who corruptly endeavors to influence, intimidate or impede any witness or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, is punishable by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both; and under section 5440, if two or more persons conspire to commit an offence against or defraud the United States, and one or more of them do any act to effect the object of the conspiracy, all the parties are liable to a fine of not more than ten thousand dollars or to imprisonment for not more than two years, or to both. The confederacy to commit the offence is the gist of the criminality under this section, although to complete it some act to effect the object of the conspiracy is needed. *United States* v. *Hirsch*, 100 U. S. 33.

This is a conviction for conspiracy, corruptly and by threats and force to obstruct the due administration of justice in the Circuit Court of the United States for the District of Idaho, and the combination of minds for the unlawful purpose and the overt act in effectuation of that purpose must appear charged in the indictment.

The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offence must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital. *United States* v. *Hess*, 124 U. S. 483, 486. And in *United States* v. *Britton*, 108 U. S. 199, it was held, in an indictment for conspiracy

under section 5440 of the Revised Statutes, that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.

The courts of the United States have no jurisdiction over offences not made punishable by the Constitution, laws or treaties of the United States, but they resort to the common law for the definition of terms by which offences are designated.

A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means, and the rule is accepted, as laid down by Chief Justice Shaw in *Commonwealth* v. *Hunt*, 4 Met. 111, that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offence consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out.

This indictment does not in terms aver that it was the purpose of the conspiracy to violate the injunction referred to, or to impede or obstruct the due administration of justice in the Circuit Court; but it states, as a legal conclusion from the previous allegations, that the defendants conspired so to obstruct and impede. It had previously averred that the defendants conspired by intimidation to compel the officers of the mining company to discharge their employés and the employés to leave the service of the company, a conspiracy which was not an offence against the United States, though it was against the State. Rev. Stats. Idaho, § 6541. The injunction was also set out, and it was alleged that the defendants did intimidate and compel the employés to abandon work; but the indictment nowhere made the direct charge that the purpose of the conspiracy was to violate the injunction, or to interfere with proceedings in the Circuit Court.

The combination to commit an offence against the United States was averred to consist in a conspiracy against the State, and the completed act to have been in pursuance of such conspiracy; but the pleader carefully avoided the direct averment that the purpose of the confederation was the interruption of the course of justice in the United States court.

Nor did the indictment charge that the defendants were ever served with process or otherwise brought into court, or that they were ever in any manner notified of the issue of the writ or of the pendency of any proceedings in the Circuit Court.

That this omission was advisedly made is apparent from the statement in the bill of exceptions that there was no evidence given on the trial showing or tending to show that the writ of injunction mentioned and set forth in the indictment was served upon the defendants or either of them, or that they or either of them had any notice or knowledge of the issue thereof.

It was said in *United States* v. *Carll*, 105 U. S. 611, 612, by Mr. Justice Gray, delivering the opinion of the court: "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." That was the case of an indictment for passing a forged obligation of the United States, and it was held that by omitting the allegation that the defendant knew the instrument which he uttered to be forged, it had failed to charge him with any crime.

The construction that applies to the first branch of section 5399 must be applied to the second, and if it were essential that the person accused should know that the witness or officer

was a witness or officer in order to conviction of the charge of influencing, intimidating, or impeding such witness or officer in the discharge of his duty, so it must be necessary for the accused to have knowledge or notice or information of the pendency of proceedings in the United States court, or the progress of the administration of justice therein, before he can be found guilty of obstructing, or impeding, or endeavoring to obstruct or impede the same.

In *United States* v. *Bittinger*, 15 Am. L. Reg. (N. S.) 49, it was held that a person is a witness under section 5399 of the Revised Statutes who is designated as such, either by the issue of a subpœna or by the endorsement of his name on the complaint, but that before any one could be said to have endeavored to corruptly influence a witness under that section, he must have known that the witness had been properly designated as such. *United States* v. *Kee*, 39 Fed. Rep. 603.

In *United States* v. *Keen*, 5 Mason, 453, it was ruled by Mr. Justice Story and Judge Davis, that it was no defence to an indictment for forcibly obstructing or impeding an officer of the customs in the discharge of his duty that the object of the party was personal chastisement, and not to obstruct or impede the officer in the discharge of his duty, if he knew the officer to be so engaged.

In cases of that sort it is the official character that creates the offence and the *scienter* is necessary. *King* v. *Osmer*, 5 East, 304; *King* v. *Everett*, 8 B. & C. 114; *State* v. *Carpenter*, 54 Vermont, 551; *State* v. *Burt*, 25 Vermont, 373; *State* v. *Maloney*, 12 R. I. 251; *State* v. *Downer*, 8 Vermont, 424, 429; *Commonwealth* v. *Israel*, 4 Leigh, 675; *Yates* v. *People*, 32 N. Y. 509; *Commonwealth* v. *Kirby*, 2 Cush. 577; *State* v. *Hilton*, 26 Missouri, 199; *State* v. *Smith*, 11 Oregon, 205; *Horan* v. *State*, 7 Tex. App. 183; *Duncan* v. *State*, 7 Humph. 148; *State* v. *Hailey*, 2 Strobh. (Law), 73; *State* v. *Beasom*, 40 N. H. 367.

This is so whenever knowledge is an essential ingredient of the offence, and not implied in the statement of the act itself. Whart. Cr. Pl. & Pr. § 164.

Under section 5398, every person who knowingly and wil-

fully obstructs, resists or opposes any officer of the United States in serving or attempting to serve or execute any mesne process or warrant, or any rule of or order of any court of the United States, may be imprisoned and fined. It was held in *United States* v. *Tinklepaugh*, 3 Blatchford, 425, that an indictment under this section must distinctly state and charge that a legal process, warrant, etc., was issued by a court of the United States, and was in the hands of some officer of the United States for service who had authority to serve the same, and that after such process was in the hands of the officer for service some one knowingly and wilfully obstructed, resisted or opposed him in serving or attempting to execute the same. And in *United States* v. *Stowell*, 2 Curtis, 153, it was decided that an averment that the warrant resisted was issued by a commissioner was not good, but the facts constituting the due issue must be recited, and the absence of an averment that the commissioner who issued the warrant was thereto authorized, could not be aided by referring to the court records. *United States* v. *Wilcox*, 4 Blatchford, 391.

It seems clear that an indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such. And the reason is no less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court. Section 5399 is a reproduction of section 2 of the act of Congress of March 2, 1831, c. 99, 4 Stat. 487, "declaratory of the law concerning contempts of court," though proceeding by indictment is not exclusive if the offence of obstructing justice be committed under such circumstances as to bring it within the power of the court under section 725. *Savin, Petitioner*, 131 U. S. 267. In matters of contempt, persons are not held liable for the breach of a restraining order or injunction, unless they know or have notice, or are chargeable with

knowledge or notice, that the writ has been issued, or the order entered, or at least that application is to be made; but without service of process or knowledge or notice or information of the pendency of proceedings, a violation cannot be made out. 2 Dan. Chan. Pr. (4th Amer. ed.) 1684; 2 High on Injunctions, (3d ed.) §§ 1421, 1452; *Winslow* v. *Nayson*, 113 Mass. 411.

Undoubtedly it is a condition of penal laws that ignorance of them constitutes no defence to an indictment for their violation, but that rule has no application here. The obstruction of the due administration of justice in any court of the United States, corruptly or by threats or force, is indeed made criminal, but such obstruction can only arise when justice is being administered. Unless that fact exists, the statutory offence cannot be committed; and while, with knowledge or notice of that fact, the intent to offend accompanies obstructive action, without such knowledge or notice the evil intent is lacking. It is enough if the thing is done which the statute forbids, provided the situation invokes the protection of the law, and the accused is chargeable with knowledge or notice of the situation; but not otherwise.

It is insisted, however, that the evil intent is to be found, not in the intent to violate the United States statute, but in the intent to commit an unlawful act, in the doing of which justice was in fact obstructed, and that, therefore, the intent to proceed in the obstruction of justice must be supplied by a fiction of law. But the specific intent to violate the statute must exist to justify a conviction, and this being so, the doctrine that there may be a transfer of intent in regard to crimes flowing from general malevolence has no applicability. 1 Bish. Cr. Law, § 335. It is true that if the act in question is a natural and probable consequence of an intended wrongful act, then the unintended wrong may derive its character from the wrong that was intended; but if the unintended wrong was not a natural and probable consequence of the intended wrongful act, then this artificial character cannot be ascribed to it as a basis of guilty intent. The element is wanting through which such quality might be imparted.

In re Coy, 127 U. S. 731, illustrates this distinction. There the acts of Congress and the statutes of Indiana made it a criminal offence for an inspector of elections or other election officer to whom was committed the safekeeping and delivery to the board of canvassers of the poll books, tally sheets and certificates of the votes, to fail to perform this duty of safekeeping and delivery; and it was held that in an indictment in a United States court for a conspiracy to induce those officers to omit such duty, in order that the documents mentioned might come to the hands of improper persons, who tampered with and falsified the returns at an election which included a member of Congress, it was not necessary to allege or prove that it was the intention of the conspirators to affect the election of the member of Congress who was voted for at that place, the returns of which were in the same poll books, tally sheets and certificates with those for State officers, and that the danger which might arise from the exposure of the papers to the chance of falsification or other tampering was not removed because the purpose of the conspirators was to violate the returns as to state officers and not the returns as to the member of congress.

The general evil intent in tampering with the poll lists, tally sheets and certificates was included in the charge, and it was held that it was not necessary to show that that intent was specifically aimed at the returns of the vote for congressman. This was supported by the analogy of the example that where a man is charged with a homicide committed by maliciously shooting into a crowd for the purpose of killing some person against whom he bore malice and with no intent to injure or kill the individual who was actually struck by the shot, he cannot be held excused because he did not intend to kill that particular person and had no malice against him. There the result naturally followed from the act done, and it must be presumed to have been in the contemplation of the party. And so, as the persons accused in Coy's case desired and intended to interfere with the election returns, and purposed to falsify them, the felonious intent which exposed and subjected the evidences concerning the votes for congressman

to the opportunity for their falsification or to the danger of such changes or forgeries as might affect that election, dispensed with the necessity of an averment or proof that there was a specific intent or design to influence the congressional election.

Nor is this all. The unlawful act which the defendants are charged with conspiring to commit was not an offence against the United States, so that, if the defendants were held guilty of a conspiracy to violate the injunction or interfere with proceedings about which they knew nothing, such conviction would have to rest upon a conspiracy to commit an act unlawful in another jurisdiction, and in itself a separate and distinct offence therein.

While offences exclusively against the States are exclusively cognizable in the state courts, and offences exclusively against the United States are exclusively cognizable in the Federal courts, it is also settled that the same act or series of acts may constitute an offence equally against the United States and the State, subjecting the guilty party to punishment under the laws of each government. *Cross* v. *North Carolina*, 132 U. S. 131, 139. But here we have two offences, in the character of which there is no identity; and to convict defendants of a conspiracy to obstruct and impede the due administration of justice in a United States court, because they were guilty of a conspiracy to commit an act unlawful as against the State, the evil intent presumed to exist in the latter case must be imputed to them, although ignorance in fact of the pendency of the proceedings would have otherwise constituted a defence, and the intent related to a crime against the State.

The power of the United States court was not invoked to prohibit or to punish the perpetration of a crime against the State. The injunction rested on the jurisdiction to restrain the infliction of injury upon the complainant. The criminal character of the interference may have contributed to strengthen the grounds of the application, but could not and did not form its basis.

The defendants could neither be indicted nor convicted of a

crime against the State, in the Circuit Court, but their offence against the United States consisted entirely in the violation of the statute of the United States by corruptly, or by threats or force, impeding or obstructing the due administration of justice. If they were not guilty of that, they could not be convicted. And neither the indictment nor the case can be helped out by reference to the alleged crime against the State, and the defendants be punished for the latter under the guise of a proceeding to punish them for an offence which they did not commit.

The judgment is reversed, and the cause remanded, with instructions to quash the indictment and discharge the defendants.

Mr. Justice Brewer, (with whom concurred Mr. Justice Brown,) dissenting.

I dissent from the opinion and judgment in this case. The burden of the decision is, as I understand it, that the indictment is fatally defective, because it does not allege that the defendants knew of the injunction; and, also, that the conspiracy was to obstruct the administration of justice in the Federal court. In other words, the defendants cannot be convicted of obstructing the administration of justice in the Federal court, because they did not know that justice was being there administered, and that as they did not combine with the intent of obstructing the administration of justice, no such intent can in law be imputed to them. I insist that the true rule is, that where parties combine in an unlawful undertaking — and by that I mean an undertaking unlawful in and of itself, and not one simply forbidden by statute, one which is *malum in se*, as, distinguished from *malum prohibitum* — they are amenable to the bar of criminal justice for every violation of law they, in fact, commit, whether such violation is intended or not.

Take the familiar illustration: Parties combine to break into a house and commit burglary; while engaged in the commission of that offence, resistance being made, one of the party kills the owner of the house, can there be a doubt that

they are all guilty of murder, although murder was not the purpose of the combination, and was not in the thought of any but the single wrongdoer? In other words, they who did not intend murder, who did not know that murder was, in fact, being committed, are ruled to be chargeable with the intent to commit murder, and to be guilty of that offence, because they were engaged at the time in an unlawful undertaking, and the murder was committed in carrying that undertaking into execution. In 1 Hale P. C. 441, it is said, quoting from Dalton, 241: "If divers persons come in one company to do any unlawful thing, as to kill, rob or beat a man, or to commit a riot, or to do any other trespass, and one of them, in doing thereof, kills a man, this shall be adjudged murder in them all that are present of that party abetting him and consenting to the act, or ready to aid him, although they did but look on." Also in 1 East P. C. 257: "Where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it with violence, or in such a manner as naturally tends to raise tumults and affrays; as by committing a violent dissezin with great numbers, or going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, . . . they must, at their peril, abide the event of their actions." In *Weston* v. *Commonwealth*, 111 Penn. St. 251, it was held that if several persons are with firearms holding a forcible possession of lands claimed by others, all are guilty of a murder committed by any one of them therein. In *Williams* v. *The State*, 81 Alabama, 1, it appeared that several persons conspired to invade a man's household, and went to it with deadly arms to attack and beat him, and in carrying out this purpose one of the party got into a difficulty with the owner and killed him, and the others were held guilty of murder, although they did not mean it. So, in *State* v. *McCahill*, 72 Iowa, 111, a case in some respects like this, it appeared that certain persons combined to drive employés from the premises, and in carrying out this conspiracy committed a murder, and it was held that the rest, who did not intend it, were guilty. In that case, on page 117, the court thus stated the law: "But

where there is a conspiracy to accomplish an unlawful purpose, [as the forcible driving out of the new miners was,] and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged." See, also, *Hamilton* v. *The People*, 113 Illinois, 34; *Stephens* v. *The State*, 42 Ohio St. 150; *State* v. *Allen*, 47 Connecticut, 1.

Applying these authorities to this case, if, while these defendants were thus forcibly driving the employés of the mining companies away from their work, one of them had shot and killed a resisting employé, would not all be guilty of murder, although only the single party had a thought of murder in his heart? Of course, I do not mean to claim that if a number are engaged in a single unlawful undertaking, and one of them steps aside and commits an entirely independent crime, all are responsible for that; but I do insist, that if all are engaged in an unlawful undertaking, and while so engaged and in carrying out that undertaking one commits an additional offence, not within the actual thought and intent of his co-conspirators, all are guilty of that additional offence. And, in like manner, where parties conspire and combine to do an unlawful act, and in carrying that unlawful purpose into execution they do in fact violate a statute of whose terms they may be ignorant, and, therefore, one which they did not intend to violate, they are in law guilty of its violation, and may be punished accordingly. The law under those circumstances imputes to the wrongdoer the intent to violate every law which he does in fact violate. So, as these parties are guilty of this most unlawful act, this gross breach of the peace, this act which in and of itself was a flagrant wrong against the rights of individuals, both employers and employés, they should be chargeable with the intent to commit every violation of law, which they did in fact commit. And when parties stop injunctive process, they impede the administration of justice.

But it is said that this breach of the peace was a disturbance of only the peace of the State of Idaho, and that this unlawful

aggression was simply a violation of the statutes of that State, and involved in and of itself no infraction of Federal law; that before a conviction can be sustained it must be alleged and proved that there was an intent to violate the Federal law; and that an intent of wrong against one sovereignty cannot be imputed to one who commits a wrong against another sovereignty. The converse of that has already been settled by this court in the case of *In re Coy*, 127 U. S. 731. That was an indictment for a conspiracy, and the conspiracy charged was to induce, aid, counsel, procure and advise certain election officers of the State of Indiana to unlawfully neglect and omit to perform the duties of the election laws of that State. The indictment, it is true, described the election as one at which a congressman was to be elected, but did not charge any intent or conspiracy to do anything affecting the election of such congressman, and the point, and the main point presented, was that the indictment contained no averment of an intent and purpose of the defendants to affect in any manner the election of a member of congress, or to influence the returns relating to that office; but this court held that the objection was not well taken. Mr. Justice Field alone dissented from the opinion in that case, holding that, as it is insisted here, there should be a specific charge of a conspiracy to do something affecting the election of the Federal officer. I quote this from his opinion: "The indictment in this case charges a conspiracy to induce certain election officers appointed under the laws of Indiana to commit a crime against the United States, the crime being the alleged omission by them to perform certain duties imposed by the laws of that State respecting elections. But it contains no allegation that the alleged conspiracy was to affect the election of a member of congress, which, as said above, appears to me to be essential to bring the offence within the jurisdiction of the court. If the conspiracy was to affect the election of a state officer, no offence was committed cognizable in the District Court of the United States. If it had any other object than to affect the election of a member of Congress, it was a matter exclusively for the cognizance of the state courts." It seems to

me that in this opinion the court endorses the views expressed by Mr. Justice Field in that dissent, and then repudiated by a majority of the court.

I am authorized to say that MR. JUSTICE BROWN agrees with me in this dissent.

PASSAVANT *v.* UNITED STATES.

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

No. 1118. Submitted March 6, 1893. — Decided March 20, 1893.

The act of June 10, 1890, "to simplify the laws in relation to the collection of the revenue," 26 Stat. 131, c. 407, confers no jurisdiction upon Circuit Courts of the United States, on the application of dissatisfied importers, to review and reverse a decision of a board of general appraisers ascertaining and fixing the dutiable value of imported goods, when such board has acted in pursuance of law, and without fraud or other misconduct from which bad faith could be implied.

THE case is stated in the opinion.

Mr. Edwin B. Smith for appellant.

Mr. Assistant Attorney General Parker for appellees.

MR. JUSTICE JACKSON delivered the opinion of the court.

The principal question presented by the record in this case is whether, under the Customs Administrative Act of June 10, 1890, 26 Stat. c. 407, p. 131, the Circuit Courts of the United States have any jurisdiction to entertain an appeal by importers from a decision of the board of general appraisers, as to the *dutiable value* of imported merchandise; in other words, whether the Circuit Courts of the United States have, under the provisions of said act, any authority or jurisdiction, on the application of dissatisfied importers, to review and

reverse a decision of a board of general appraisers, ascertaining and fixing the *dutiable value* of imported goods, when such board has acted in pursuance of law, and without fraud, or other misconduct, from which bad faith could be implied.

The material facts of the case on which this question arises are the following: In November, 1890, and July, 1891, the appellants, Passavant & Co., imported into New York from France gloves of different classes or grades, which were entered by the importers at certain valuations. The collector of the port of New York, under the authority conferred by section 10 of said administrative act, caused the imported goods to be appraised, and upon such appraisal their value was advanced or increased by the appraiser to an amount exceeding by more than 10 per cent the value thereof as declared by the importers upon entry. The importers being dissatisfied with this advanced valuation, a reappraisement was made by one of the general appraisers, and on further objection by the importers to this valuation, the matter was sent to the board of general appraisers, under and in accordance with the provisions of section 13 of the Customs Administrative Act. This board after due notice, and examination of the question submitted, sustained the increased valuation of the merchandise. Thereupon the collector of the port levied and assessed upon the imported goods a duty of 50 per cent ad valorem, that being the rate of duty on the gloves under paragraph 458 of the tariff act of October 1, 1890, and in addition thereto a further sum equal to two (2) per cent of the total appraised value for each 1 per cent that such appraised value exceeded the value declared in the entry, under and by virtue of section 7 of said act of June 10, 1890, which provides and directs that "if the appraised value of any article of imported merchandise shall exceed by more than ten per centum the value declared in the entry, there shall be levied, collected and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to two per centum of the total appraised value for each one per centum that such appraised value exceeds the value declared in the entry; and the additional duties shall only apply to

the particular article or articles in each invoice which are undervalued."

The importers duly served upon the collector a protest against his appraisement of duty for any and all excess above 50 per cent ad valorem, and upon any greater value than the declared or entered value, for the alleged reasons that no legal reappraisement had been made; that the board of appraisers had declined to receive or entertain evidence offered by them as to the true market value of the merchandise; that the board had determined matters upon estimates or values furnished by agents of the Treasury; that evidence of persons who were not experts, and had no personal knowledge of the value of gloves in the markets of France, had been taken and acted on; that the importers were given no opportunity to controvert evidence against them; that the original invoice was correct; that the duties should not be assessed upon any greater amount, and that the action of the board was in all respects illegal. The collector duly transmitted this protest, with the papers in the case, to the board of general appraisers, who adhered to the increased valuation, affirmed the action of the collector, and held that the decision of the board as to such valuation was final and conclusive under section 13 of said act of June 10, 1890, and could not be impeached or reviewed upon protest. Thereupon and within due time the importers filed their application in the United States Circuit Court for the Southern District of New York for a review of the case, and a reversal of the decision of the board of appraisers and the action of the collector in assessing the duties on the basis of the increased valuation placed upon the imported merchandise, and in imposing the additional duty as provided by said section 7, above referred to.

The petitioners in their application set forth and complained of many alleged errors of law and fact on the part of the board of general appraisers, which need not be specially noticed, as they were manifestly not well founded and have been abandoned. The board of general appraisers, in pursuance of the usual order in such cases, returned to the Circuit Court the record and evidence taken by them, together with

a certified statement of the facts involved in the case, and their decision thereon, etc. From this return it appeared that the proceedings as to the appraisement of the merchandise and the determination of their *dutiable value* were in all respects regular; that the board of appraisers duly examined and decided the case after fixing a day and giving reasonable notice thereof to the importers, who were allowed the opportunity to introduce evidence, and to be heard on the matter submitted. It is stated in the opinion of the board, which forms part of said return, that "the appellants were served with reasonable notice of these several hearings after a day fixed therefor, and were cited to appear before this board, and offer evidence to sustain the contentions of fact alleged as the grounds of their protest. This they failed to do, and the board accordingly adjudges all of said issues against them as confessedly untrue. The decision of the collector in each case is affirmed."

Upon the record as thus presented the Assistant United States Attorney moved the court to dismiss the application or appeal for want of jurisdiction to entertain the same. This motion was sustained, and the Circuit Court thereupon certified to this court, under the fifth section of the act of March 3, 1891, 26 Stat. c. 517, pp. 826, 827, the question whether said court had any jurisdiction to enter upon, hear and decide the issues sought to be raised by the allegations of the petition, which are specially set out in the certificate, but need not be here enumerated, as they are embraced in the two general claims or propositions, hereinafter stated, which are relied on by appellants before this court.

In addition to the certification of the question of jurisdiction, the Circuit Court upon dismissing the petition allowed the importers an appeal from the order or judgment of dismissal, which was taken. But this appeal, although general in form, does not and could not bring up for review anything more than the question of jurisdiction certified by the lower court. An ordinary appeal from the final judgment of the Circuit Court lies, since the act of March 3, 1891, to the Court of Appeals, and not to this court. *Hubbard* v. *Soby*, 146 U. S.

56. The certificate and the appeal, therefore, present substantially the same question, and need not, for that reason, be separately considered. It is not claimed or alleged in either the protests made by the importers as to the appraisement of the merchandise, or in their application to the Circuit Court to review and reverse the decision of the board of general appraisers, that there was any wrongful or erroneous *classification* of the gloves, or improper *rate* of duty levied thereon under the tariff act of October 1, 1890; but the substantial complaint is that the *dutiable value* of the imported goods was not greater than the value mentioned in the invoice and declared in the entry, and that the advanced appraisement was, therefore, erroneous, and also that the merchandise was not liable for any additional or penal duty such as the collector levied and imposed thereon under section 7 of the act of June 10, 1890, by reason of the advanced or increased valuation placed upon the same by the appraisers.

Can a complaint of this character be entertained and considered by the Circuit Courts of the United States in a case like the present, where the board of general appraisers has, upon the appeal of the importers, ascertained and decided that the imported article actually possesses a value greater than that stated in the invoice or entry? Can the decision of the board on the question of the dutiable value of the merchandise be reviewed by the courts under the provisions of section 15 of the Customs Administrative Act? This is the real question presented, and we are clearly of the opinion that no such jurisdiction is conferred by this statute or any other provision of law. It is provided by section 15 of the act "that if the owner, importer, consignee or agent of any imported merchandise, or the collector or the Secretary of the Treasury, shall be dissatisfied with the decision of the board of general appraisers, as provided for in section 14 of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or either of them may, within thirty days next after such decision, and not afterwards, apply to the Circuit Court of the United States within the district in which

the matter arises, for a review of the questions of law and fact involved in such decision."

It was said by Mr. Justice Blatchford, speaking for the court in *In re Fassett*, 142 U. S. 479, 487, that "the appeal provided for in § 15 [of said act] brings up for review in court only the decision of the board of general appraisers as to the construction of the law, and the facts respecting the classification of imported merchandise and the rate of duty imposed thereon under such classification. It does not bring up for review the question of whether an article is imported merchandise or not, nor under § 15 is the ascertainment of that fact such a decision as is provided for. The decisions of the collector from which appeals are provided for by § 14 are only decisions as to 'the rate and amount' of duties charged upon imported merchandise, and decisions as to dutiable costs and charges, and decisions as to fees and exactions of whatever character."

The appeal to the court in the present case seeks to review no such decisions as are thus enumerated as falling within its jurisdiction under said sections. On the contrary, the decision of the board of general appraisers sought to be reviewed and corrected by this application to the court relates to the reappraisement of the imported goods. By section 13 of the act the decision of the board on that matter is declared to "be final and conclusive as to the *dutiable value* of such merchandise against all parties interested therein." On such valuation the collector, or the person acting as such, is required to ascertain, fix and liquidate the rate and amount of duties to be paid on such merchandise and the dutiable costs and charges thereon according to law.

It was certainly competent for Congress to create this board of general appraisers, called "legislative referees" in an early case in this court, (*Rankin* v. *Hoyt*, 4 How. 327, 335,) and not only invest them with authority to examine and decide upon the valuation of imported goods, when that question was properly submitted to them, but to declare that their decision "shall be final and conclusive as to the *dutiable value* of such merchandise against all parties interested therein."

In *Hilton et al.* v. *Merritt*, 110 U. S. 97, it was held that the valuation of merchandise made by the customs officers, under the statutes, for the purpose of levying duties thereon, was conclusive on the importer, in the absence of fraud on the part of the officers. In this case several sections of the Revised Statutes of the United States, relating to customs duties, were referred to, among them being section 2930, which prescribed the method of appraising imported merchandise, and provided that "the appraisement thus determined shall be final and deemed to be the true value, and the duties shall be levied thereon accordingly." Under that provision this court held that the valuation of imported merchandise made by the designated officials or appraisers was, in the absence of fraud on the part of such appraisers, *conclusive* on the importer. The same rule was reasserted in the recent case of *Earnshaw* v. *United States*, 146 U. S. 60, in which it was held that a reappraisement of imported merchandise under the provisions of section 2930, Revised Statutes, when properly conducted, was binding. The earlier decisions of this court cited and referred to in *Hilton* v. *Merritt*, and *Earnshaw* v. *United States*, establish the same general rule. The provisions of the Customs Administrative Act of June 10, 1890, as to the finality and conclusiveness of the decision of the board of general appraisers as to the valuation of imported merchandise, when that question has been regularly submitted to and examined by them, is expressed in clearer and more emphatic terms than in former statutes. The language is so explicit as to leave no room for construction. In the tariff legislation of the government, congress has generally adopted means and methods for a speedy and equitable adjustment of the question as to the market value of imported articles, without allowing an appeal to the courts to review the decision reached. If dissatisfied importers, after exhausting the remedies provided by the statute to ascertain and determine the fair dutiable value of imported merchandise, could apply to the courts to have a review of that subject, the prompt and regular collection of the government's revenues would be seriously obstructed and interfered with. The statute authorizes no

such proceeding, and the Circuit Court can exercise no such jurisdiction.

The appraised value of the merchandise having been conclusively ascertained in the manner provided by law, and being found to exceed by more than ten per centum the value declared in the entry, the collector, as a matter of mere computation, under the direction and authority of section 7 of said act, properly levied and collected, in addition to the ad valorem duty imposed by law on such merchandise, a further sum equal to two per centum of the total appraised value for each one per centum that such appraised value exceeded the value declared in the entry.

Section 7 of said act is substantially similar to section 8 of the act of Congress passed on the 30th of July, 1846, 9 Stat. 42, 43, c. 74, which declared that, if the appraised value of imports which have actually been purchased should exceed by ten per centum or more the value declared on the entry, then, in addition to the duties imposed by law on the same, there should be levied, collected and paid a duty of 20 per centum ad valorem on such appraised value. In *Sampson* v. *Peaslee*, 20 How. 571, that provision was sustained and enforced, except as to so much of the additional duty of 20 per centum as was levied upon the *charges* and *commissions*. The court there say that the ruling of the lower court, in confining the additional duty to the *appraised value* of the imports, was the correct interpretation of the section.

As stated by Mr. Justice Campbell, speaking for the court, in *Bartlett* v. *Kane*, 16 How. 263, 274, such additional duties "are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud." They are designed to discourage undervaluation upon imported merchandise and to prevent efforts to escape the legal rates of duty. It is wholly immaterial whether they are called additional duties or penalties. Congress had the power to impose them under either designation or character. When the dutiable value of the merchandise is finally ascertained to be in excess of the value declared in the entry by more than ten per centum this extra duty or penalty attaches, and the collector is directed

and required to levy and collect the same in addition to the ad valorem duty provided by law. The importers in this case cannot be heard to complain of this additional duty or penalty, which was a legal incident to the finding of a dutiable value in excess of the entry value to the extent provided by the statute. They had full notice of the proceedings before the board of general appraisers upon their appeal to said board, and ample opportunity to be heard on the question of the market value of the imported goods. It cannot, therefore, be properly said that they have been subjected to penalties without notice or an opportunity to be heard, or been deprived of their property without due process of law.

The judgment of the Circuit Court dismissing the importers' appeal to that court for want of jurisdiction must, therefore, be

Affirmed.

In re SANBORN, Petitioner.

ORIGINAL.

No. 11. Original. Argued March 7, 1893. — Decided March 20, 1893.

No appeal from findings of fact and of law and the decision of the Court of Claims thereon made upon a claim transmitted to it by the head of a Department with the consent of the claimant, and reported to that Department by the court under the provisions of the act of March 3, 1887, 24 Stat. 505, c. 359, lies to this court on the part of the claimant.

THE case is stated in the opinion.

Mr. George A. King, (with whom were *Mr. Charles King* and *Mr. William B. King* on the brief,) for petitioner.

Mr. Assistant Attorney General Maury opposing.

MR. JUSTICE SHIRAS delivered the opinion of the court.

A claim of John B. Sanborn, presented in the Department of the Interior, for certain fees under a contract with Sisseton

and Wahpeton Indians, of ten per cent of the amount appropriated for said Indians by section 27 of the Indian Appropriation Act of March 3, 1891, 26 Stat. 989, c. 543, was referred by the Secretary of that Department, with the consent of the claimant, to the Court of Claims, in pursuance of § 12 of the act of March 3, 1887, 24 Stat. 505, c. 359; 1 Sup. Rev. Stat. 2d ed. 561. That court having concluded that Sanborn was not entitled to recover, and having reported its findings of fact and conclusions of law to the department, Sanborn, on the 6th day of July, 1892, asked for the allowance of an appeal to the Supreme Court of the United States. This application, being made in a vacation of the Court of Claims, was heard and denied by the Chief Justice, but was renewed and argued before all the Judges on November 2, 1892, and was denied by the court, which adopted the opinion of the Chief Justice previously filed upon the motion before him.

Thereupon Sanborn filed, in this court, his petition praying that a writ of mandamus be allowed to the Chief Justice and Judges of the Court of Claims, commanding them to allow his appeal as prayed for.

The question for us to answer is whether, where a claim or matter is pending in one of the executive departments, which involves controverted questions of fact or law, and the head of such department, with the consent of the claimant, has transmitted the claim, with the vouchers, papers, proofs and documents pertaining thereto, to the Court of Claims, and that court has reported its findings of fact and law to the department by which it was transmitted, the claimant has a right by appeal to bring the action of that court before us for review.

The petitioner does not complain of any illegality on the part of the court below in dealing with his claim. He concedes that the action of that court had been invoked with his consent. What he complains of is the refusal of the court to allow his appeal; and we learn, from the opinion of the court, that its refusal to allow the appeal was not put upon any irregularity or defect in the claim, or in the application for the allowance of an appeal, but upon its view that the

proceedings before it were not the subject of appeal to this court.

We must find an answer to the question thus put to us by a construction of the act of March 3, 1887, read in the light of the previous legislation establishing the Court of Claims, and regulating the subject of appeals from its judgments to this court.

This subject came, for the first time, before this court in the case of *Gordon* v. *The United States*, 2 Wall. 561, wherein it was held that, as the law then stood, no appeal would lie from the Court of Claims to this court. The reasons for this conclusion are stated in the opinion of Chief Justice Taney, reported in the appendix to 117 U. S. 697, and interesting as his last judicial utterance. Briefly stated, the court held that as the so-called judgments of the Court of Claims were not obligatory upon Congress or upon the executive department of the government, but were merely opinions which might be acted upon or disregarded by Congress or the departments, and which this court had no power to compel the court below to execute, such judgments could not be deemed an exercise of judicial power, and could not, therefore, be revised by this court.

A similar question arose in this court as early as 1794, in the case of the *United States* v. *Yale Todd*, an abstract of which case appears in a note by Chief Justice Taney to the later case of the *United States* v. *Ferreira*, 13 How. 52, and wherein it was held that an act of Congress conferring powers on the Judges of the Circuit Court to pass upon the rights of applicants to be placed upon the pension lists, and to report their findings to the Secretary of War, who had the right to revise such findings, was not an act conferring judicial power, and was, therefore, unconstitutional.

The case of the *United States* v. *Ferreira*, was that of an appeal from the District Court of the United States for the District of Florida. The Judge of that court had acted in pursuance of certain acts of Congress, directing the Judge to receive, examine and adjust claims for losses suffered by Spaniards by reason of the operations of the American army in

Florida. It was decided that the Judge's decision was not the judgment of the court, but a mere award, with a power to review it conferred upon the Secretary of the Treasury, and that from such an award no appeal could lie to this court.

Afterwards, and perhaps in view of the conclusion reached by this court in these cases, on March 17, 1866, 14 Stat. 9, c. 19, Congress passed an act giving an appeal to the Supreme Court from judgments of the Court of Claims, and repealing those provisions of the act of March 3, 1863, which practically subjected the judgments of the Supreme Court to the re-examination and revision of the departments, and since that time no doubt has been entertained that the Supreme Court can exercise jurisdiction on appeal from final judgments of the Court of Claims. *United States* v. *Alire*, 6 Wall. 573; *United States* v. *O'Grady*, 22 Wall. 641; *United States* v. *Jones*, 119 U. S. 477.

Express provision for such appeals was made by section 707 of the Revised Statutes, as follows: "An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff, in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court."

Additions were made to the statutory law on this subject by the act of March 3, 1887, 24 Stat. 505, c. 359, (1 Sup. Rev. Stat. 2d ed. 559,) the 9th section of which is as follows: "That the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that case made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects and as near as may be to the statutes and rules of court governing appeals and writs of error in like causes."

The 12th section of the statute is in the following words: "That when any claim or matter may be pending in any of

the Executive Departments which involves controverted questions of fact or law, the head of such Department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court shall adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the Department by which it was transmitted."

With these statutory provisions and decisions of the Supreme Court before it, the court below held that a finding of fact and law made, at the request of a head of a department, with the consent of the claimant, and transmitted to such department, is not a judgment within the meaning of the 9th section of the act of March 3, 1887, or of the 707th section of the Revised Statutes, and is not, therefore, appealable to this court.

Such a finding is not made obligatory on the department to which it is reported — certainly not so in terms, — and not so, as we think, by any necessary implication. We regard the function of the Court of Claims, in such a case, as ancillary and advisory only. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made, by the statute, the final and indisputable basis of action either by the department or by congress.

It is, therefore, within the scope of the decision in *Gordon* v. *United States*. The provisions providing for appeals, in the 9th section of the act of 1887, have reference to cases under the prior sections of the act which treat of cases or suits brought against the United States, whether in the District Courts, Circuit Courts, or Court of Claims, and wherein final judgments or decrees shall be entered. This seems to be clear from the terms used — "the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the limitations and conditions therein contained." The reference here is to the 707th section of the Revised Statutes,

which, as already said, provides for an "appeal to the Supreme Court on behalf of the United States, from all judgments of the Court of Claims, adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars."

In the case before us there was, as held by the Court of Claims, no final judgment obligatory upon the Department of the Interior, or enforceable by execution from any court. Moreover, there was really *no suit* to which the United States were parties. The claimant did not pretend that the government owed him anything for property sold or services rendered. His effort was to get the Department of the Interior, which was paying money over to Indians under treaties, to withhold from them an agreed percentage thereof for services rendered by him to the Indians. While such a claim may be rightfully regarded as a matter pending in one of the executive departments, which involves controverted questions of fact or law, within the meaning of the 12th section of the act of 1887, we are unable to regard it as a suit brought against the United States, within the contemplation of the 9th section of that act. It is true that, by several statutes which appear in a compendious form in sections 2103, 2104 and 2105 of the Revised Statutes, the form and substance of contracts between Indians and agents or attorneys, for services to be performed in reference to claims by such Indians against the United States, are prescribed, and the approval of such contracts by the Secretary of the Interior and the Indian Commissioner is made necessary. But such enactments, intended to protect the Indians from improvident and unconscionable contracts, by no means create a legal obligation on the part of the United States to see that the Indians perform their part of such contracts.

Section 2104 provides that "the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and if not, it shall be paid in proportion to the services rendered under the contract."

Such a claim may be, as already said, a matter pending in

the Department of the Interior, within the meaning of the 12th section of the act of 1887, but it is plainly not a suit against the United States, with respect to which an appeal is provided for by the 9th section.

The application for a writ of mandamus must, therefore, be

Denied.

GAINES *v.* RUGG.

GAINES *v.* LATTA.

ORIGINAL.

Nos. 12 and 13 original. Argued March 7, 8, 1893. — Decided March 20, 1893.

This court, in *Goode* v. *Gaines*, (145 U. S. 141,) on an appeal by the defendant in a suit in equity, from a decree of the Circuit Court of the United States for the Eastern District of Arkansas, reversed the decree, and ordered that each party pay one-half of the costs in this court, and the mandate recited the decree of this court, and remanded the cause "for further proceedings to be had therein in conformity with the opinion of this court," and commanded that such further proceedings be had in the cause, "in conformity with the opinion and decree of this court, as, according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding." The Circuit Court had decreed that the title of the defendant to a lot of land be divested out of him, and be vested in the plaintiffs, and that a master take an account of rents on the lot, taxes paid and improvements placed on it. This court held that no error was committed in any matter relating to the title or possession of the land, but that error was committed, in acting on the report of the master, in allowing the plaintiffs for rents which accrued before the filing of the bill. On the presentation of the mandate to the Circuit Court, with a proposed decree thereon, the defendant filed exceptions, and the Circuit Court entered an order allowing the defendant to take further testimony in support of his exceptions, "by way of defence to the title to the land in controversy," and set the cause down upon the issues formed by the pleadings and exceptions as to the title to the land, and sustained the exceptions, and overruled a petition of the plaintiffs for a writ of possession. This court awarded a mandamus for the entry of the proposed decree, and for a writ of possession.

This court had not disturbed the findings and decree of the Circuit Court in regard to the title and possession, but only its disposition of the matter of accounting.

The mandate and the opinion, taken together, although they used the word "reversed," amounted to a reversal only in respect to the accounting,

and to a modification of the decree in respect of the accounting, and to an affirmance of it in all other respects.

The construction of the intent and meaning of the opinion of this court was not a matter for the exercise of judicial discretion by the Circuit Court, and the case is a proper one for a mandamus by this court.

PETITION for mandamus. The case is stated in the opinion.

Mr. U. M. Rose, (with whom was *Mr. G. B. Rose* on the brief,) for Gaines, petitioner.

Mr. A. H. Garland, (with whom was *Mr. John McClure* on the brief,) for Rugg and Latta, opposing.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

These cases grow out of what is known as "the Hot Springs litigation," phases of which are reported in *Hot Springs Cases*, 92 U. S. 698; *Rector* v. *Gibbon*, 111 U. S. 276; *Lawrence* v. *Rector*, 137 U. S. 139; and *Goode* v. *Gaines*, 145 U. S. 141. *Goode* v. *Gaines* covered also fourteen other cases, one of which, *Rugg* v. *Gaines*, is involved in No. 13 original; and another of which, *Latta* v. *Gaines*, is involved in No. 12 original.

The case involved in No. 13 original was a bill in equity filed by William H. Gaines and Maria, his wife, in the Circuit Court of the United States for the Eastern District of Arkansas, against D. C. Rugg and George W. Barnes, in which a decree was entered by that court, on November 11, 1887, on the report of a special master. The decree overruled the exceptions of the defendant Rugg to the report, and decreed that there was due to the plaintiffs for rent, according to the terms of a certain lease, from the date of the award to the date of the filing of the bill, $1016.38; that there was due to them since that date and until the filing of the master's report, for the rental value of the property, and interest, $811.68; and for the amount of rent to the date of the decree, $245; amounting in the aggregate to $2073.06; from which were to be deducted the amount due the defendant Rugg for taxes paid, and interest, $298; the amount of purchase money paid by him to the United States for the land, and interest,

$158.40; and the present value of the improvements, $500; those sums amounting in the aggregate to $956.40, which, taken from the $2073.06, left the sum of $1116.66, which the court found to be the balance due to the plaintiffs; and it decreed that the plaintiffs recover from Rugg $1116.66 and all costs of suit, and have execution therefor; that the plaintiffs recover from the defendants the possession of lot 14 in block 77 in the Hot Springs reservation, Garland County, Arkansas; that a writ of possession issue; that serving a copy of the decree should be the writ; and that the special master be allowed $100 for his services as such. The decree further declared that the defendant Rugg prayed an appeal to the Supreme Court of the United States, which was granted, and it ordered that, on his filing a bond in $3616.66, and a bond for costs for $250, the decree be superseded pending the appeal. Maria Gaines, one of the appellees, subsequently died, and it was ordered that Albert B. Gaines, her executor, and seven other persons, her sole devisees and legatees, be made appellees.

The case was argued in this court on April 18, 1892, and decided May 2, 1892; and the decree of this court was that the decree of the Circuit Court be reversed, each party to pay one-half of the costs in this court. The mandate of this court, dated May 24, 1892, recited its decree and ordered that the cause be remanded to the Circuit Court "for further proceedings to be had therein in conformity with the opinion of this court," and commanded the judges of the Circuit Court "that such further proceedings be had in said cause, in conformity with the opinion and decree of this court, as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding."

The bill of complaint of Gaines and his wife, which was filed May 23, 1884, against Barnes and Rugg and two other defendants, alleged in substance that, under the laws of the United States governing the entry and sale of lands in the reservation at Hot Springs, Arkansas, they were entitled to enter and purchase lot 14, in block 77, in Hot Springs; that the Hot Springs Commission, through a mistake of law, per-

mitted Barnes, assignee of Mary Waldron, who had entered upon and held said lot as tenant of the plaintiffs, to enter the lot in his own right, over the application to enter it lawfully made by the plaintiffs; that, by virtue of that error, Barnes, as assignee of the tenant, had procured a patent for the lot from the United States; and that Rugg had succeeded to the title of said tenant and Barnes. The bill prayed that the defendants might be held to be trustees for the benefit of the plaintiffs; that an account be had of the rents received by the defendants on the lot, and a decree be made for such rents, and for the possession of the lot; and for all other proper relief. On December 6, 1884, Rugg filed his answer to the bill, setting up various defences. On November 10, 1886, the bill was dismissed as to the defendants other than Barnes and Rugg.

On the hearing of the case, the Circuit Court found and decreed that the commissioners, by error and mistake of law, had awarded the right to purchase the lot to Barnes, who had sold it to Rugg, who had notice of the plaintiffs' claim to it; that, under such erroneous ruling, a patent had issued to Barnes; and the Circuit Court decreed that the title of Rugg to the lot be divested out of him and be vested in the plaintiffs and their heirs and assigns forever; that a reference be made to a master to take an account of the rents on said lot, the taxes paid and improvements placed on it, with directions to report an account of the same; and that the plaintiffs recover all costs of suit. On a hearing on the report of the master, the final decree of November 11, 1887, was made, in the terms before stated. This court, in each of the fifteen cases, including the two involved respectively in No. 13 original and No. 12 original, held that no error was committed by the Circuit Court in any matter relating to the title or possession of the lands, but that error had been committed in allowing to the plaintiffs, according to the account taken by the master, for rents which accrued before the bills were filed. It therefore reversed the decrees below, and remanded the several causes with a direction for further proceedings in conformity with the opinion of this court, the costs in this court to be equally

divided. The opinion is reported as *Goode* v. *Gaines*, 145 U. S. 141.

On the 1st of June, 1892, the mandates of this court in the two cases were presented to the Circuit Court, and were filed there and entered of record. On the same day, the plaintiffs in the Rugg suit presented to the Circuit Court a petition accompanying the mandate, and praying for the entry of a decree that all the right, title, claim and interest of the defendants in and to lot 14 in block 77, in the city of Hot Springs, be divested out of them and be vested in the plaintiffs; that an account between the defendants and the plaintiffs be stated in accordance with the directions contained in the mandate; that, in taking the account, the defendants be charged with the rental value of the lot from May 23, 1884, (the day the bill was filed,) or during such portions of that time as they had kept the plaintiffs out of the possession thereof, down to the date of the proposed decree, with interest on the same from the end of each year at 6 per cent per annum, no additional rent, however, to be charged to the defendants by reason of any improvements placed upon the lot by them; that the plaintiffs be charged with all taxes paid by the defendants on the lot from the day the bill was filed, with interest on the same from the time of such payments until the date of the decree, at 6 per cent per annum, and also with the present value of all improvements placed by the defendants upon the lot as the same might appear at the date of the decree, and with the sum of $120 paid by the defendants to the United States for the lot, with interest on the same at 6 per cent per annum from January 1, 1882; that the defendants pay all the costs of the plaintiffs in the cause in the Circuit Court; that the plaintiffs have execution therefor as at law; and that the special master proceed to state an account between the parties according to the terms of the decree, and to that end, take testimony in writing of all witnesses produced, and report the same, with his proceedings and findings, to the court. On the 21st of December, 1892, the plaintiffs filed in the Circuit Court a petition praying for a writ of possession commanding the marshal to put them in possession of the land mentioned in the decree.

Opinion of the Court.

On the 6th of January, 1893, Rugg filed in the Circuit Court his exceptions to the proposed decree filed by the plaintiffs on June 1, 1892. Those exceptions embraced the propositions which are set forth in the margin.[1] On a hearing on the petition and exceptions, before the court, held by Judge Caldwell, one of the Circuit Judges, an order was entered on January 7, 1893, which stated that "the court is of the opinion that said exceptions are well taken, and that the defendant herein should be allowed, if he so elects, to take farther testimony in support of his said exceptions, by way of defence to the title to

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[1] 1. That said proposed decree did not reverse the former decree.

2. That it appeared by the proofs in the cause that just after the award, and many times afterwards, appellees declared themselves satisfied with the awards made by said commission, and that by various acts and declarations they had estopped themselves from setting up any title or right to said lot as against said Rugg.

3. That said lot includes a piece of land not embraced in the lease made by Gaines to Waldron.

4. That there were four heirs of Ludovicus Belding, under whom appellees claim, of whom said Maria Gaines was one, and that there is no proof in the record that the appellees ever acquired the title of two of said heirs, by name Henry and Albert Belding.

5. That on the former hearing in the Circuit Court, the court was of the opinion that one holding under a quitclaim deed could not be held to be an innocent purchaser for value, but that since that time the Supreme Court of the United States has held otherwise; and that there is no proof in the record to show that Rugg had such notice as would bind him.

6. That in the absence of proof of the identity of lot 14, block 77, no final decree should be rendered.

7. That there is no proof in the record that the lot described in the lease is identical with lot 14.

8. Because there is no proof in the record that appellees ever acquired the interest of Albert and Henry Belding in said lot.

9. Because there is no proof in the record that Rugg bought with notice of plaintiff's claim; and because there is proof that he bought without such notice, and when plaintiffs were publicly proclaiming that they were content with the awards made.

10. Because there is no proof in the record on which a decree for plaintiffs can be based.

11. Defendant prays for a decree for one-half of the costs of transcript used on the appeal.

12. No judgment for costs should be rendered until the cause is finally disposed of.

the land in controversy, and that this cause should be set down upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands. It is, therefore, ordered, that said exceptions be sustained, and that said decree prepared as aforesaid be not entered; but, as the plaintiffs announce their purpose to apply to the Supreme Court of the United States for a writ of mandamus to compel the entry of said decree as prepared by the plaintiffs' solicitors, and the court being willing to expedite the said proposed proceeding, it is further ordered that said proposed decree and the petition of the plaintiffs for the entry thereof be made a part of the record herein. And it is further ordered, that the petition for writ of possession filed herein by said plaintiffs be, and the same is hereby, overruled; and said plaintiffs except to said several rulings, and ask that their exceptions be noted of record, which is accordingly done."

Thereupon, the plaintiffs made an application to this court, on January 23, 1893, for leave to file a petition for a writ of mandamus commanding Judge Caldwell, as judge of the Circuit Court, to grant the petition for a decree, filed by the plaintiffs in that court, on June 1, 1892, and to order the issue of a writ of possession as prayed by the plaintiffs, or to make such other orders and decrees as might be deemed proper in carrying out the decree heretofore made in this cause by this court, and for all other proper relief.

On the 30th of January, 1893, this court made an order, returnable March 6, 1893, requiring the Circuit Judge to show cause why the writ of mandamus should not be issued. A return to the order has been filed, made by Judge Caldwell, and the case has been argued before this court. In his return to the order to show cause, in case No. 13 original, Judge Caldwell makes the statement which is set forth in the margin.[1]

[1] Among other exceptions to the proposed decree is the fifth, which is as follows: "5. That one of the defences relied upon by the appellant in this cause, at the hearing in which the former decrees were rendered was, that he was a purchaser for full value from a person to whom the Hot Springs Commission had awarded the lot in controversy without notice of the claim

Opinion of the Court.

In *Goode* v. *Gaines*, 145 U. S. 141, this court adhered to its decision in *Rector* v. *Gibbon*, 111 U. S. 276, touching titles

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or contention of the appellees, and exhibited a quitclaim deed showing such conveyance and purchase in good faith and as evidence of his title; that this honorable court was of the opinion, at the former hearing of this cause, that one holding under a quitclaim deed could not be regarded as a *bona fide* purchaser for value without notice, and that such a deed was not sufficient to put appellees to proof of notice; that one holding under a quitclaim deed could not avail himself of such a defence; that the Supreme Court of the United States, at the October term, 1891, (since the decision and ruling of this honorable court as aforesaid,) has held in the case of *McDonald* v. *Belding*, 145 U. S. 492, that the question of whether one was a *bona fide* purchaser for value without notice was one that was not to be determined by a mere inspection of the muniments of title, and that one could as well be a *bona fide* purchaser for value, without notice, under a quitclaim deed as one of warranty; that such a question was one to be settled by proof. Appellant states that there is no proof in the record showing that appellant had notice of the claim of the appellees, and now denies, as is already denied by answer, that he had such notice, and submits that no decree ought to be rendered on the mandate herein in favor of the appellees, as to do so would not be according 'to right and justice and the laws of the United States' in the absence of proof that the appellees had such notice as is averred in the bill of complaint."

Case No. 379, *McDonald* v. *Belding*, 145 U. S. 492, and cases No. 227, *Goode* v. *Gaines;* No. 302, *Smith* v. *Gaines;* No. 303, *Dugan* v. *Gaines;* No. 304, *Cohn* v. *Gaines;* No. 305, *Allen* v. *Gaines;* No. 306, *Madison* v. *Gaines;* No. 307, *Rugg* v. *Gaines;* No. 308, *Garnett* v. *Gaines;* No. 309, *Garnett* v. *Gaines;* No. 310, *Rugg* v. *Gaines;* No. 311, *Granger* v. *Gaines;* No. 312, *Neubert* v. *Gaines;* No. 313, *Sumpter* v. *Gaines;* No. 314, *Latta* v. *Gaines;* and No. 315, *Latta* v. *Gaines*, were all cases growing out of what is known as the Hot Springs reservation litigation. There were some questions common to all the cases. The question as to whether the action of the Hot Springs commissioners was final (*Rector* v. *Gibbon*, 111 U. S. 276,) was common to all of them. The question as to the rights of those parties who had purchased and paid value without notice of any defect in the title, but who accepted quitclaim deeds from their grantors was not common to all the cases, but was raised in several of the cases upon pleadings and proofs identical in substance and legal effect. Among the cases in which that question was raised upon substantially the same pleadings and proofs was case No. 379, *McDonald* v. *Belding*, and case No. 314, *Latta* v. *Gaines*, and case No. 307, *Rugg* v. *Gaines*. In the Circuit Court, most, if not all, of these cases were tried at the same time and treated very much as one case. On appeal in this honorable court it appears that the cases were all submitted and heard together with the exception of case No. 379, *McDonald* v. *Belding*, which was argued, submitted and decided by itself. Why this case was

to land in the Hot Springs reservation, and held that there were no facts in the fifteen cases then before it (all being

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separated from the others in the argument and submission in this honorable court respondent is not advised. It appears from the report (145 U. S. 141) that cases numbered 227, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314 and 315 were argued April 18, 1892, and decided May 2, 1892, and that case No. 379, *McDonald* v. *Belding*, was submitted April 26, 1892, and decided May 16, 1892. In the case of *McDonald* v. *Belding*, this honorable court said: "Under all the circumstances it cannot be held that McDonald, although taking a quitclaim deed, was chargeable, when he purchased with notice of any existing claim to the property upon the part of the plaintiffs or of either of them," and reversed the decree of the Circuit Court and remanded the cause with directions to the Circuit Court to dismiss the bill. The same pleadings, the same proofs, and the same "circumstances" in substance and legal effect are present in the case of *Latta* v. *Gaines* and others and *Rugg* v. *Gaines* and others. On this point the pleadings and proofs in the last two cases may fairly be said to be identical with the pleadings and proofs in the case of *McDonald* v. *Belding*.

The contention of the petitioners is that while the mandate of this honorable court apparently reverses the decree of the Circuit Court that this honorable court did not intend so to do, but only intended to reverse so much of said decree as related to the mode of stating the account of rents and profits between the parties. Such an intention could have been made perfectly clear by affirming so much of the decree as vested title in the petitioners and directing how the account should be stated. Instead of doing that it reversed both the interlocutory and final decrees and remanded the cause to be proceeded in according to law and justice and the laws of the United States, in conformity to the opinion of this honorable court.

If the Supreme Court has not in fact reversed that portion of the decree of the Circuit Court which vested title in the petitioners, then there is no necessity for entering any portion of the proposed decree save that which directs the manner of stating the account. If it has reversed that portion of the decree vesting title in the petitioners and remanded the cause to be proceeded in, in accordance with the opinion of this honorable court, the determination of what the opinion directs calls for the exercise of judicial functions and discretion, and it is submitted that such discretion cannot be controlled by mandamus.

In the *McDonald-Belding case* it appears that one Flynn leased a lot in the Hot Springs reservation from Belding and made some improvements thereon; that after the appointment of the Hot Springs Commission, Flynn, on the ground that he had made the improvements on the lot, made claim to it, and Belding claimed that he was entitled to it by reason of previous occupation and possession, and that he held continuous possession through Flynn, his tenant. The commission awarded the lot to Flynn, who afterwards and before the commencement of suit by Belding, sold and conveyed

appeals from the Circuit Court of the United States for the Eastern District of Arkansas,) which took those cases out of the operation of that decision; but, in view of the delay in commencing the suits and the previous acquiescence of the plaintiffs in the possession by the defendants, this court limited the right of an account in equity of the rents of the premises to the date of the filing of the bills. It appears from the opinion of this court in *Goode* v. *Gaines*, that the only matter with which it was dissatisfied in the decrees of the Circuit Court was the direction to the master in the interlocutory decrees in respect of the accounting, and the result finally adjudged thereon. This court said that, in its opinion, the measure of relief awarded and allowed by the Circuit Court in respect of

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the same to McDonald by a quitclaim deed. After the sale to McDonald, Belding commenced suit against both of them, seeking to charge them as trustees and to compel them to convey to him, alleging that McDonald purchased with full knowledge of his (Belding's) equities. McDonald denied notice of the alleged equities of Belding and claimed to be an innocent purchaser for value. The Circuit Court held that one holding under a quitclaim deed could not be regarded as an innocent purchaser for value, and rendered a decree in favor of Belding. This honorable court, on appeal, held that McDonald, under the quitclaim deed, could be and was an innocent purchaser for value, and reversed the decree of the Circuit Court and directed that the bill should be dismissed.

In view of the uniform character of the Hot Springs litigation and the customary mode and manner of hearing and deciding what are known as the Hot Springs cases, respondent believes that the Circuit Court, in the disposition of said cases reversed by this honorable court and remanded to the Circuit Court with instructions to proceed therein "according to right and justice and the laws of the United States," should give effect to the several decisions of this honorable court in the Hot Springs cases, and that, where the pleadings and proofs are identical with the pleadings and proofs in *McDonald* v. *Belding*, the Circuit Court should apply the doctrine of that case, and that the opinion in that case should be read into and treated as if it were a part of the opinion in the consolidated case reported under the title of *Goode* v. *Gaines*, in such of the cases embraced therein as are on all fours with the case of *McDonald* v. *Belding*.

Respondent respectfully submits to the judgment of this honorable court, and will enter and enforce by proper decree any order or decree made by this honorable court in and about the matters complained of; and respondent respectfully refers to the brief of the counsel for George G. Latta and D. C. Rugg, which will be filed in this cause, and the authorities therein referred to, to show why a peremptory writ should not issue.

the accounting would operate harshly and oppressively upon the defendants; that the account between the parties should be stated, as to both debit and credit, from the day the bills were filed, with the exception of the credit for the amounts paid to the government for the lots, of which payments this court regarded the plaintiffs as getting the entire benefit; that no increased rent should be allowed on account of the improvements, as the plaintiffs were to be held to their value only as of the date of the decrees; and that, in other words, the defendants should be charged with rental value from the date of the filing of the bills to the rendition of the decrees, with interest, and should be credited with taxes, etc., paid after the date of the filing of the bills, with interest, and also with the amounts paid the government for the different parcels, with interest from the dates of payments, as well as with the value of the improvements in each instance at the time of the rendition of the decrees. Because this court was dissatisfied with the decrees in respect of the accounting, and only for that reason, it reversed the decrees; but it remanded the causes to the Circuit Court with a direction, as the opinion and the mandate explicitly state, for further proceedings to be had therein in conformity with the opinion of this court. It did not disturb the findings and decrees of the Circuit Court in regard to the title and possession, but only its disposition of the matter of accounting. The mandate and the opinion, taken together, although they used the word "reversed," amount to a reversal only in respect of the accounting, and to a modification of the decree in respect of the accounting, and to an affirmance of it in all other respects.

It is contended for the respondent that the construction of the intent and meaning of the opinion of this court in *Goode* v. *Gaines* was a matter for the exercise of judicial discretion by the Circuit Court. But we are of opinion that it is proper for this court, on this application for a writ of mandamus, to construe its own mandate in connection with its opinion; and if it finds that the Circuit Court has erred, or acted beyond its province, in construing the mandate and opinion, to correct the mistake now and here, and to do so by a writ of mandamus.

Opinion of the Court.

Obeying the mandate of this court, and proceeding in conformity with its opinion, in the present case, were not matters within the discretion of the Circuit Court; and, therefore, the cases which hold that this court will not direct in what manner the discretion of an inferior tribunal shall be exercised do not apply to the present case. The opinion of this court proceeded distinctly upon an approval by it of the action of the Circuit Court in respect to the title and the possession, and a disapproval only of the method of accounting. As to the account to be taken under the directions given by this court in its opinion in *Goode* v. *Gaines*, the Circuit Court had a certain discretion; and its further proceedings under such accounting could be reviewed only on appeal. But the Circuit Court had no right to empower the defendant, as it undertook to do by its order of January 7, 1893, to take further testimony in support of his exceptions, by way of defence to the title to the land in controversy, or to set down the cause for hearing upon the issues formed by the pleadings and such exceptions as to the title to the land, or to sustain the exceptions, or to refuse to enter the decree proposed by the plaintiffs, or to refuse to grant to the plaintiffs a writ of possession. What the proposed decree of the plaintiffs contained was a direction that the right, title, claim and interest of the defendants to the lot in question be divested out of them and vested in the plaintiffs; that an account between the parties be taken in accordance with the directions contained in the mandate; and that the account be taken on certain principles stated, which agree entirely, so far as we can see, with the directions contained in the opinion of this court in *Goode* v. *Gaines*, in respect to the accounting.

It is contended for the respondent that the decree of this court was one absolutely reversing the decree of the Circuit Court; that the Circuit Court had a right, therefore, to proceed in the case, in the language of the mandate, not merely "in conformity with the opinion and decree of this court," but also "according to right and justice;" and that, therefore, it had authority to permit the defendant Rugg to take further testimony in support of his exceptions, "by way of defence to

the title to the lands in controversy," and to set down the cause "upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands;" in other words, that the whole controversy was to be reopened as if it had never been passed upon by this court as to the title and possession of the land. This cannot be allowed, and is not in accordance with the opinion and mandate of this court.

As the decree of the Circuit Court, made November 11, 1887, directed that the plaintiffs recover the possession of the lot from the defendants and have a writ of possession, and that was a determination that the title of Rugg to the lot in question be divested out of him and be vested in the plaintiffs, it was perhaps unnecessary to insert that provision again in the new proposed decree. But, in view of the language of the opinion and mandate in regard to a reversal of the decree, it can do no harm, for in fact it was what was decided both by the Circuit Court and by this court.

The order made by the Circuit Court on January 7, 1893, states that the plaintiffs excepted to the several rulings of the court made in that order, and that such exceptions were entered of record.

It is, we think, very plain that so much of the decree of the Circuit Court of November 11, 1887, as was not disapproved by this court still stands in full force. Whatever there is to impair that decree must be sought for only in the opinion, decree and mandate of this court. This court held that no objection could be sustained to the provisions of the decree of the Circuit Court as to the title. It found error only in the rules prescribed by the Circuit Court for the taking of the account, and the decree of that court was reversed only for the purpose of taking an account according to the principles laid down by this court. As the decree of the Circuit Court in regard to the title was not invalidated by the action of this court on the appeal, the Circuit Court had no right to set aside that decree as respected the title nearly five years after it was rendered. The decree was beyond the control of the Circuit Court, unless on a bill of review duly filed, and the time for filing a bill of review had long ago elapsed. The Circuit Court

could do nothing to affect the decree, except in obedience to the mandate of this court. *Chaires* v. *United States*, 3 How. 611, 620.

What it remained for the Circuit Court to do was only the taking of the account in the manner indicated by this court. This court, in its opinion, overruled all the objections taken to the title, and to say that its decree virtually reversed the whole decree of the Circuit Court is to say that it has done that which it said in its opinion ought not to be done. Under its opinion, it intended to reverse only a part of the decree, and that is all that it did. It substantially affirmed that part of the decree below which related to the title, and virtually only modified the entire decree, and that only in respect to taking the account.

In *Skillern's Executors* v. *May's Executors*, 6 Cranch, 267, this court had reversed the decree of the Circuit Court and remanded the cause for further proceedings; and, after the mandate of this court had been received by the Circuit Court, that court discovered that the cause was not within its jurisdiction. The question being certified to this court as to whether the Circuit Court could then dismiss the case for want of jurisdiction, this court held that, as the merits of the case had been finally decided by it, and its mandate required only the execution of its decree, the Circuit Court was bound to carry that decree into execution, although the jurisdiction of the Circuit Court was not alleged in the pleadings. This court has even gone so far as to say, in *Washington Bridge Co.* v. *Stewart*, 3 How. 413, that after a case has been here decided upon its merits, and remanded to the court below, and is again brought up on a second appeal, it is too late then to allege that this court had not jurisdiction to try the first appeal.

To allow the exceptions filed in the Circuit Court on January 6, 1893, is substantially to allow the filing of a bill of review of the decree of the Circuit Court made November 11, 1887, as to the title to the land, and of the decree of this court which found that there was no error in that respect in the decree of the Circuit Court, and this without consent of the court. *Southard* v. *Russell*, 16 How. 547; *Purcell* v. *Miller*,

4 Wall. 519; *Kingsbury* v. *Buckner*, 134 U. S. 650, 671, 672. It has been distinctly held that a final judgment of this court is conclusive on the parties, and cannot be reëxamined. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 355.

In *Ex parte Dubuque & Pacific Railroad*, 1 Wall. 69, 73, a case where this court had reversed a judgment of a Circuit Court and remanded the cause with a mandate to that court to enter judgment for the other party, and the court below had thereafter received affidavits showing new facts and granted a new trial, this court, by mandamus, ordered it to vacate the rule for a new trial, saying that the court below had no power to set aside the judgment of this court, "its authority extending only to executing the mandate." This principle was applied also in *Ex parte Story*, 12 Pet. 339; *Sibbald* v. *United States*, 12 Pet. 488; *West* v. *Brashear*, 14 Pet. 51; *Bank of the United States* v. *Moss*, 6 How. 31, 40; *Corning* v. *Troy Iron & Nail Factory*, 15 How. 451; *Noonan* v. *Bradley*, 12 Wall. 121, 129; *Tyler* v. *Magwire*, 17 Wall. 253, 283; *Stewart* v. *Salamon*, 97 U. S. 361; *Durant* v. *Essex Co.*, 101 U. S. 555; *Mackall* v. *Richards*, 112 U. S. 369, and 116 U. S. 45; *Hickman* v. *Fort Scott*, 141 U. S. 415.

But we have had this matter before us very recently. In *Washington & Georgetown Railroad* v. *McDade*, 135 U. S. 554, this court affirmed a judgment of the Supreme Court of the District of Columbia, which had in general term affirmed a judgment awarding to the plaintiff $6195 as a recovery in an action of tort for damages for personal injuries sustained through the negligence of the defendant. Neither the special term nor the general term had said in its judgment anything about interest. This court, in its judgment, merely affirmed, with costs, the judgment of the general term, but said nothing about interest. The mandate of this court contained its judgment, and then commanded the court below that such execution and proceedings be had in the cause "as, according to right and justice and the laws of the United States, ought to be had," notwithstanding the writ of error. The court below, on the presentation to it of the mandate, entered up a judgment against the defendant for interest on the judg-

ment of the special term from the date of that judgment as originally entered. The defendant took exception to such action, and then applied to this court for a writ of mandamus to command the court below to vacate its judgment entered on the mandate of this court, so far as it related to interest. This court held that the mandamus must be granted, irrespectively of the question whether a judgment founded on tort bore, or ought to bear, interest in the Supreme Court of the District from the date of its rendition; and it issued the mandamus commanding the court below to vacate its judgment, so far as it related to interest, and to enter a judgment on the previous mandate of this court, simply affirming, without more, with costs, the original judgment of the general term. *In re Washington & Georgetown Railroad*, 140 U. S. 91. This court held that it was the duty of the court below to have entered a judgment strictly in accordance with the judgment of this court, and not to add to it the allowance of interest; and that the language of the mandate of this court, "that such execution and proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding," did not authorize the court below to depart in any respect from the judgment of this court. It further held that a mandamus would lie to correct the error, where there was no other adequate remedy, and where there was no discretion to be exercised by the inferior court, citing *Sibbald* v. *United States*, 12 Pet. 488; *Ex parte Bradley*, 7 Wall. 364, 376; *Virginia* v. *Rives*, 100 U. S. 313, 329; and, also, *Perkins* v. *Fourniquet*, 14 How. 328, 330; *Ex parte Dubuque & Pacific Railroad*, 1 Wall. 69; *Durant* v. *Essex Co.*, 101 U. S. 555, 556; *Boyce's Executors* v. *Grundy*, 9 Pet. 275.

In the present case, as we have before observed, there was no discretion to be exercised by the Circuit Court; and, although it might have been admissible to raise the question by a new appeal to the proper court, yet in view of the delay to be caused thereby, we do not consider that such remedy would have been, or would be, fully adequate, or that a writ of mandamus is now improper.

As to the suggestion that the views adopted by this court in its decision in *McDonald* v. *Belding*, 145 U. S. 492, decided by this court after the present cases were decided, would, if applied to the present cases, have caused a different result in them, we are of opinion that, without conceding that such would have been the result, this court cannot, on well-established rules and principles, permit the Circuit Court, of its own motion, to go back of, or subvert, what was settled by the opinion and mandate in the present cases.

As to the provision in the decree presented to the Circuit Court, June 1, 1892, that the defendants pay all the costs of the plaintiffs in the Circuit Court, it is sufficient to say that the decree of November 11, 1887, awarded to the plaintiffs a recovery from Rugg of all costs of the suit.

We therefore direct that a writ of mandamus be issued, in the terms prayed for in the petition. It is proper that the decree presented to the Circuit Court on June 1, 1892, should be entered. So far as it directs that the title to the land be divested out of the defendants and be vested in the plaintiffs, it corresponds with the terms of the decree of the Circuit Court of November 11, 1887. So far as the petition for a mandamus asks that the judge of the Circuit Court be commanded to order the issue of a writ of possession, it corresponds with the decree of the Circuit Court of November 11, 1887, which ordered a writ of possession to issue, and that a service of a copy of the decree should be the writ. So far as the decree presented to the Circuit Court on June 1, 1892, ordered that the account be stated in accordance with the directions contained in the mandate, and directed the terms in which the account should be taken, and as to the rental value of the lot, the interest, taxes, value of improvements and the amount paid by the defendant to the United States, with interest, the directions in such proposed decree correspond with the terms of the opinion of this court.

In all the particulars which we have above considered, case No. 12 original is also embraced. The same rulings are made as to that case as have been made in regard to No. 13 original, and a writ of mandamus in the same terms will be issued.

Writs of mandamus accordingly.

HUME *v.* BOWIE.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1107. Submitted February 6, 1893. — Decided March 20, 1893.

When the parties to a suit tried in the Supreme Court of the District of Columbia, at circuit, cannot agree as to the exceptions, the trial term may, under the rules, be extended into the succeeding term for the purpose of settling them; and in case the judge presiding at the trial dies without settling them, and in consequence thereof a motion be made to set aside the verdict and order a new trial, the then presiding judge in the Circuit Court may order the motion to be heard in General Term; and an order to set aside the verdict and direct a new trial made in General Term is not a final judgment from which an appeal may be taken to this court.

THIS was an action brought by William B. Bowie in the Supreme Court of the District of Columbia against Frank Hume as indorser upon a promissory note. The defendant pleaded to the declaration, issue was joined, and on the trial of the cause a verdict was rendered May 25, 1888, in favor of the defendant. During the trial various exceptions were reserved to the rulings and instructions of the court, which were duly noted at the time by the presiding justice upon his minutes. A motion for a new trial was made and overruled June 2, 1888, and an appeal to the general term was thereupon taken, and a bond on appeal duly executed and approved.

The record discloses that on January 3, 1888, the court in general term entered an order directing that, in addition to the Circuit Court to be held by Mr. Justice Hagner on the fourth Monday of January, 1888, a second Circuit Court should be held at the same time by Mr. Justice Merrick, the court to be held by Mr. Justice Hagner to be known as division number one, and the court to be held by Mr. Justice Merrick to be known as division number two. On April 27, 1888, the court in general term ordered that the Circuit Courts then being held in divisions numbers one and two should be continued further by the same justices through the May term

thereof. This case was tried in the Circuit Court, division number two, by Mr. Justice Merrick; verdict returned May 25; motion for new trial overruled June 2; appeal prayed June 5; bond approved June 12. On July 14, 1888, an order was entered by that justice providing that "the May term of the Circuit Court, division number two, is hereby entered as extended that the bills of exceptions not yet filed may be settled, to wit:" (Here follow names of cases, including this case.) On the same day, in division number one, the court ordered "the term of this court extended for the purpose of settling bills of exceptions and case in the following cases: (Cases named); and thereupon the May term adjourned without day except as above stated."

On January 24, 1889, an order was entered by the general term assigning the justices to serve for the year 1889, as follows: "First, for the General Term, Justices Hagner, James, and Merrick; second, for the Circuit Court, Chief Justice Bingham; third, for the Equity Court and Orphans' Court, Justice Cox; fourth, for the District Court, Justice James; fifth, for the Criminal Court, Justice Montgomery."

April 8, 1889, the death of William B. Bowie was suggested, and Anne H. Bowie, executrix, was substituted as party plaintiff, and, on April 23, she filed her motion to set aside the verdict and judgment and to grant a new trial, "because the bill of exceptions containing the exceptions reserved on the trial of the cause cannot be settled, signed and sealed as required by law, the justice of this court, who presided at the trial of this cause, (in division No. 2, May term, 1888, of this court,) having departed this life without having settled or signed and sealed the same."

Due notice of this motion was given and it was finally called up on June 8, 1889, before Chief Justice Bingham, holding a special term and Circuit Court, and "at the request of both parties by their respective attorneys was directed to be heard in the general term in the first instance." Subsequently the death of Anne H. Bowie was suggested and Richard Irving Bowie as administrator *de bonis non*, with the will annexed, substituted.

Statement of the Case.

The motion in question was heard upon certain certificates and affidavits, which are set forth in a bill of exceptions taken upon the disposition of the motion. It appeared that the bill of exceptions preserved on the trial was prepared by counsel for plaintiff and submitted to counsel for defendant, but that they could not settle it by agreement, and that before it was considered by the justice who presided at the trial, the latter became ill, and, afterwards, on February 6, 1889, died, leaving it unsettled.

On April 26, 1892, the motion was sustained by the general term, the judgment and verdict set aside, and a new trial granted. From this order a writ of error was sued out.

The following are sections of the Revised Statutes of the District of Columbia:

"SEC. 770. The supreme court, in general term, shall adopt such rules as it may think proper to regulate the time and manner of making appeals from the special term to the general term; and may prescribe the terms and conditions upon which such appeals may be made, and may also establish such other rules as it may deem necessary for regulating the practice of the court, and from time to time revise and alter such rules. It may also determine by rule what motions shall be heard at a special term, as non-enumerated motions, and what motions shall be heard at a general term in the first instance."

"SEC. 803. If upon the trial of a cause, an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice, and afterward settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised, but such case or bill of exceptions need not be sealed or signed.

"SEC. 804. The justice who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion shall be made at the same term at which the trial was had.

"SEC. 805. When such motion is made and heard upon the minutes, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner.

"SEC. 806. A motion for a new trial on a case or bill of exceptions, and an application for judgment on a special verdict or a verdict taken subject to the opinion of the court, shall be heard in the first instance at a general term."

Among the rules of the Supreme Court of the District of Columbia are these:

"2. The terms of the court shall be as follows: Of the General Term on the 4th Monday of January; 4th Monday of April; 1st Monday of October. Of the Circuit Court on the 4th Monday of January; 2nd Monday of May, which term shall not continue beyond the 2nd Saturday in July, except to finish a pending trial; 3d Monday of October. Of the District Court on the 1st Monday of June; 1st Monday of December. Of the Criminal Court on the 1st Monday of March; 3d Monday of June; 1st Monday of December. Of the special terms on the first Tuesday of every month, except August, in which month there shall be no term of court."

"54. Motions for new trial may be grounded on errors of law in the rulings of the justice presiding at the trial.

"1. The motion may be made upon the bills of exception, in which case it must be filed in the Circuit Court, but shall be heard in the General Term in the first instance.

"2. The justice who tried the cause may, in his discretion, before any bills of exceptions are prepared, entertain a motion to set aside the verdict for errors of law founded on the exceptions reserved during the trial and noted on his minutes. An appeal may be taken from the decision of the justice on such motion, in which case a bill of exceptions must be settled in the usual manner."

"61. If a party desires to present for review in the General Term the rulings or instructions of the presiding justice for alleged errors of law, he must at the trial and before verdict except to such rulings or instructions; and he may at the time

Argument against the Motion.

of taking exception reduce the same to writing in a formal bill of exceptions, or the justice may enter the exception upon his minutes and proceed with the trial and afterwards settle the bill of exceptions.

"62. The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it.

"63. Every bill of exceptions shall be drawn up by the counsel of the party tendering it and submitted to the counsel on the other side; and where the bill of exceptions is not settled before the jury retires, the counsel tendering the bill of exceptions shall give notice in writing to the counsel on the other side of the time at which it is proposed that the bill of exceptions shall be settled, and shall also, at least three days, Sundays exclusive, before the time designated on such notice, submit to the counsel on the other side the bill of exceptions so proposed to be settled; and if they cannot agree it shall be settled by the justice who presided at the trial, and in that case the justice shall be attended by the counsel on both sides, as he may direct.

"64. In case the judge is unable to settle the bill of exceptions and counsel cannot settle it by agreement a new trial shall be granted."

A motion was made to dismiss the writ of error on the ground that the judgment brought here by the writ of error was not a final judgment.

Mr. Enoch Totten for the motion.

Mr. Walter D. Davidge and *Mr. S. T. Thomas* opposing.

The motion to dismiss raises two questions: First, whether the court had jurisdiction, on motion after the term, to vacate the judgment: Second, if it had not, whether the judgment vacating the former judgment is a final judgment?

The case of *Phillips* v. *Negley*, 117 U. S. 665, decided in 1885, is absolutely decisive as to both these questions. There a judgment recovered in the court below was, after the term,

vacated, and a new trial granted at special term, on motion alleging fraud, deceit, surprise and irregularity.

The court in general term having ruled that the court in special term had jurisdiction to grant the motion in its discretion, the judgment of the court in general term was brought here by writ of error.

It was insisted in argument here that the court below had jurisdiction to vacate the judgment, and also that its judgment, as it vacated the former judgment for the purpose of a new trial, was not a final judgment. Thus both the questions involved in this case were directly presented and necessarily passed upon in *Phillips* v. *Negley*.

The judgment of this court reversed the judgment below and remanded the cause with directions to *dismiss the motion without prejudice to the right to file a bill in equity.*

It is argued in the brief in behalf of the defendant in error that the judgment or order vacating the former judgment is not final, because it does not dispose of the cause but directs a new trial, and many decisions of this court are cited. The form of the judgment is precisely the same as in *Phillips* v. *Negley*. The decisions referred to — and many others could be cited — relate to new trials or other further proceedings here in the progress of a cause, and, as said by Mr. Justice Matthews, "in the exercise of acknowledged jurisdiction."

The present case belongs to an entirely different class, where the judgment brought here for review is without jurisdiction.

The error of defendant's counsel consists in confounding two distinct and independent things, the proceeding in which the original judgment was rendered, and a new proceeding to vacate that judgment, instituted not by motion during the term, but after the term and when all jurisdiction over the judgment had ceased.

In such new proceedings without jurisdiction, whatever its form, the judgment is necessarily final. As said by Mr. Justice Miller in *Bronson* v. *Shulten*, 104 U. S. 410, 417: "The question relates to the *power* of the courts and not to the mode of procedure. It is whether there exists in the court

the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered."

The new proceeding, whatever the mode of procedure, whether by motion after the term when that is allowed by statute, or by bill in equity, is for an essentially different purpose from the proceeding in which the original judgment was rendered. It is, indeed, a new cause and the judgment or decree is an end of that cause. *Marine Ins. Co.* v. *Hodgson*, 7 Cranch, 332; *Crim* v. *Handley*, 94 U. S. 652; *Kibbe* v. *Benson*, 17 Wall. 624; *Embry* v. *Palmer*, 107 U. S. 3; *Cragin* v. *Lovell*, 109 U. S. 194; *Phillips* v. *Negley*, 117 U. S. 665.

In the argument below it was insisted that the May term, 1888, was still subsisting when, on the 23d of April, 1889, the motion was made. It is proper briefly to notice this point.

Rule 2, fixing the terms of the circuit, provides that the May term shall not continue beyond the second Saturday in July, except to finish a pending trial. Rule 62 declares that the bill of exceptions must be settled during the term, which may be *prolonged* in order to prepare it. Taking the two rules together it must be evident that, the former having fixed a limit, beyond which the May term should not continue, the latter created an exception for the sole purpose of settling bills of exception. Hence, when the second Saturday in July arrived, there being bills of exceptions in a number of causes unsettled, Mr. Justice Merrick passed an order extending the term beyond the limit fixed by Rule 2 for the special purpose of settling them.

This order shows on its face what was intended: that the term was to be "extended," or, in the words of Rule 62, "prolonged" for the special purpose of settling exceptions, instead of ending as provided by Rule 2. Such an order merely "extended" or "prolonged" the current term until it should be adjourned by judicial act or expire by efflux of time. It did not invest the term with the quality of immortality, and enable it to "run on forever." It was not until after the May term had ended by operation of law, and after the ensuing October term had intervened, and after the January term, 1889, had progressed to well-nigh its close, the

motion to vacate was filed. Neither during the May term after the above order, nor the October term, nor the January term until the motion was filed, was there any order of the court or motion or other act whatsoever in relation to the exceptions in this case.

The record shows on its face that the motion to vacate was made at the January term, 1889, held by Mr. Chief Justice Bingham, and was by him certified to the general term for hearing in the first instance. If the May term still had existence nobody held it or professed to hold it, and certainly the motion was made in fact at a subsequent term and to a judge whose authority was confined exclusively to such subsequent term and who assumed jurisdiction as holding such term.

The exceptions taken at the trial were by the terms of the statute to be heard in the first instance in general term. Of course they could also be considered under the motion for a new trial addressed to the discretion of the judge who tried the cause, and they, with the other ground assigned, were so considered and overruled and an appeal taken and perfected. Thus all matters of law and fact in impeachment of the judgment were pending in the general term, and the judge holding the circuit and special term had no jurisdiction to entertain the motion to vacate.

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

This case comes before us on a motion to dismiss the writ of error for want of jurisdiction, upon the ground that the judgment brought here by the writ is not a final judgment. *Baker* v. *White*, 92 U. S. 176; *Rice* v. *Sanger*, 144 U. S. 197; *Brown* v. *Baxter*, 146 U. S. 619. The question involved is one of power, for if the court had power to make the order, when it was made, then it was not a final judgment, as it merely vacated the former judgment for the purpose of a new trial upon the merits of the original action. If the court had no jurisdiction over that judgment, the order would be an order in a new proceeding, and in that view final and reviewable.

Opinion of the Court.

The rule is unquestionably correctly laid down in *Müller* v. *Ehlers*, 91 U. S. 249, that when judgment has been rendered, and the term expires, a bill of exceptions cannot be allowed, signed and filed as of the date of the trial, in the absence of any special circumstances in the case, and without the consent of parties or any previous order of court. But it is always allowable, if the exceptions be seasonably taken and reserved, that they may be drawn out and signed by the judge afterwards, and the time within which this may be done must depend upon the rules and practice of the court and the judicial discretion of the presiding judge. *Dredge* v. *Forsyth*, 2 Black, 563; *Chateaugay Iron Co., Petitioner*, 128 U. S. 544.

The Supreme Court of the District had power to prescribe rules upon the subject, and had done so. Under those rules, whenever the judge was unable to settle the bill of exceptions, and counsel could not settle it by agreement, a new trial followed as matter of course. If, therefore, in this case, the bill of exceptions was open to be settled at the time of the granting of the new trial, the power to grant the latter existed. If the bill were settled, the court in general term could hear the case, and if reversible error were found, could set aside the judgment; and if the bill could not be be settled, the judgment was necessarily so far *in fieri* as to be susceptible of being vacated under the rule. Ordinarily where a party, without laches on his part, loses the benefit of his exceptions through the death or illness of the judge, a new trial will be granted. *N. Y. Life & Fire Ins. Co.* v. *Wilson*, 8 Pet. 291, 303; *Borrowscale* v. *Bosworth*, 98 Mass. 34, 37; *Wright* v. *The Judge of the Detroit Superior Court*, 41 Michigan, 726; *State* v. *Weiskittle*, 61 Maryland, 48; *Benett* v. *P. & O. Steamship Co.*, 16 C. B. 29; *Newton* v. *Boodle*, 3 C. B. 795; *Nind* v. *Arthur*, 7 Dowl. & Lowndes, 252. And here the rule is so prescribed.

The rules also provided that the terms of court might be prolonged by adjournment for the purpose of settling bills of exceptions, and an order was accordingly entered prolonging the term at which this judgment was rendered, for the purpose of doing that in this case. This was equivalent to

the practice in many jurisdictions of entering an order granting additional time, after the expiration of the term, in which to settle such bills. The provision as to the prolongation of the term for the particular purpose is a mere difference in phraseology and not of the substance, and the question as to the close of the term in other respects is quite immaterial.

It is argued that, as Rule 2, fixing the terms of the Circuit Court, provides that the May term shall not continue beyond the second Saturday in July, except to finish a pending trial, the order extending the term under Rule 62, for the special purpose of settling bills of exceptions, beyond the limit fixed by Rule 2, could not extend such term beyond the commencement of the succeeding term, which was in this instance the third Monday of October, 1888. The May term, it is said, must necessarily have come to an end, either by the act of the justice who held it, or by operation of law through the efflux of time and the commencement of the succeeding term. But we are of opinion that under these rules the term may be continued indefinitely by order of court, so far as the settlement of bills of exceptions is concerned, and concur in the views of the Supreme Court of the District expressed in *Jones* v. *Pennsylvania Railroad*, 18 Dist. Col. 426, where it was held that Rule 62 was valid, and that while it would be more proper to specify the time to which the term might be extended under the provisions of that rule, yet an omission to do so did not invalidate the order.

It is to be remembered that the Supreme Court of the District sitting at special term and the Supreme Court sitting in general term is still the Supreme Court; that the judgment of the general term setting aside a verdict and judgment at law, and ordering a new trial, is equivalent to remanding the cause to the special term for a new trial; that an appeal from the special to the general term is simply a step in the progress of the cause during its pendency in the court; and that, though the judges may differ, the tribunal remains the same. *Metropolitan Railroad* v. *Moore*, 121 U. S. 558, 573; *Ormsby* v. *Webb*, 134 U. S. 47, 62. Some other judge must act on a motion for new trial by reason of inability created by death,

and while this order was entered at a term subsequent to that at which the judgment was rendered, it was entered in a matter kept within the control of the court by the order of prolongation. Mr. Justice Merrick, if living, might have settled the bill of exceptions in the case in April, 1889, at the time the motion under consideration was made, and inasmuch as, because of his decease, the bill of exceptions could not be settled by him, and counsel could not settle it by agreement, Rule 64 applied. At all events, the court had power to carry that conclusion into effect, and this being so, the order that it entered awarding a new trial was not a final judgment.

The distinction between *Phillips* v. *Negley*, 117 U. S. 665, and this case is, that there a verdict and judgment had been taken against the defendant and no motion was made or proceeding had at that term for the purpose and with the view of setting aside the judgment. The litigation was at an end upon the adjournment of the term and the successful party discharged from further attendance.

The result is that the writ of error must be

Dismissed.

PENNSYLVANIA COMPANY *v.* BENDER.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 1142. Submitted March 6, 1893. — Decided March 20, 1893.

Under the act of March 3, 1887, 24 Stat. c. 373, § 2, pp. 552, 553, a finding by the Circuit Court of the United States, on an application for the removal of a cause from a state court, that the application is sufficient, and such as entitles the defendant to remove the cause to a Federal court, does not, of itself, work such removal, but an order of the court to that effect, equivalent to a judgment, must be made.

When a manifestly defective petition for the removal of a cause from a state court to a Federal court is filed in the trial court of the State, and that court denies it, and proceeds to trial and judgment on the merits, and the cause is taken in error to an appellate court of the State, where the judgment below is affirmed, no Federal question arises.

Kanouse v. *Martin*, 15 How. 198, distinguished.

Statement of the Case.

On September 12, 1887, the defendant in error filed his petition in the court of common pleas of Holmes County, Ohio, to recover from the defendant, the Pennsylvania Company, the sum of $10,000. On October 3, the defendant answered. On March 2, 1888, it filed a petition for removal to the United States Circuit Court for the Northern District of Ohio. On March 24, a motion was made to strike this petition from the files, which, on March 27, was sustained. At the May term, 1888, a trial was had, both parties appearing. A verdict was returned by the jury for $6000, upon which judgment was duly entered. Thereafter a petition in error was filed in the Circuit Court of Holmes County to reverse such judgment. To this petition in error were attached two transcripts, one of the record in the court of common pleas, and the other of a certain journal entry of the Circuit Court of the United States for the Northern District of Ohio. This journal entry was as follows:

"George S. Bender, Administrator,
vs.
The Pennsylvania Company. } Law.

"Tuesday, *March* 6, 1888.

"This day came on to be heard the petition of the defendant for an order for the removal of this case from the court of common pleas of Holmes County, Ohio, and, it appearing to the court that the defendant has filed in this court its petition, bond and affidavit under the 2d section of the act of Congress of March 3, 1887, entitled 'An act to determine the jurisdiction of Circuit Courts of the United States and to regulate the removal of causes from State courts and for other purposes,' etc., from which it appears to the court that said affidavit is in compliance with said 2d section of said act of Congress, and that said bond is sufficient and satisfactory, and that said defendant by its petition, affidavit and bond has shown that it is entitled to remove cause to this court."

In that court a motion was made to strike the petition in error from the files; which motion was sustained. Thereupon the defendant filed its petition in error in the Supreme

Court of the State to reverse this ruling. On May 17, 1892, that court sustained the ruling of the Circuit Court and affirmed the judgment, to reverse which judgment of affirmance plaintiff in error sued out a writ of error from this court. The case is now submitted on a motion to dismiss.

Mr. Lyman R. Critchfield, for the motion.

Mr. L. L. Gilbert, (with whom were *Mr. J. R. Carey* and *Mr. F. J. Mullins* on the brief,) opposing.

Mr. Justice Brewer delivered the opinion of the court.

So far as the record of the case in the court of common pleas is concerned, there is obviously no error and no semblance of a Federal question. The petition there filed for removal was manifestly defective. It simply alleged that the plaintiff was a resident of the State of Ohio, and did not show his citizenship. In the petition in error filed in the Circuit Court no complaint was made of the order of the court of common pleas, striking out this petition for removal. Looking, therefore, only at the record of the court of common pleas, as it was presented to the Circuit Court, there was but one thing that it could do, and that was to affirm the judgment.

The contention, however, of the plaintiff in error is, that the order made in the United States court prior to the trial in the common pleas operated, by virtue of the act of Congress of March 3, 1887, to oust the common pleas court of jurisdiction, and remove the case to the Federal court, and that, therefore, the subsequent proceedings of trial and judgment were *coram non judice* and void.

But no order of removal was made by the Federal court. The journal entry, which is certified by the clerk to be the entire entry, is simply a finding that the application for removal is sufficient, and such as entitles the defendant to remove the cause to the Federal court. But such finding does not remove the case any more than an order overruling a demurrer to a petition makes a judgment. Such an order is simply an adjudication of the right of the plaintiff to a

judgment. Upon it alone execution cannot issue. There must be a judgment; or, in other words, an order based upon the determination of the right. A mere finding that the party is entitled to a removal is no order, and does not of itself work the removal.

There is a difference between the act of 1887 and earlier statutes in respect to the provisions for removals. Thus in the act immediately prior, that of 1875, the proceedings were these: The party desiring to remove filed in the state court his petition and bond; which, being done, the act provided that "it shall then be the duty of the state court to accept said petition and bond, and proceed no farther in such suit." And, also, that upon the filing of the copy of the record in the Circuit Court of the United States "the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court." Under that statute the proceedings were had in the state court — proceedings, therefore, of which it had knowledge, and the specific provision was that upon the filing of a sufficient petition and bond the state court should accept them, and proceed no further. No adjudication by the state court of the sufficiency of the petition and bond was essential; no failure of such adjudication prevented a removal; and yet the state court had a right to examine and see whether the petition and bond were sufficient. As said in *Removal Cases*, 100 U. S. 457, 474, "we fully recognize the principle heretofore asserted in many cases, that the state court is not required to let go its jurisdiction until a case is made which, upon its face, shows that the petitioner can remove the cause as a matter of right."

The act of March 3, 1887, 24 Stat. 552, 553, c. 373, § 2, establishes a different procedure, as follows: "Any defendant . . . may remove such suit into the Circuit Court of the United States for the proper district, . . . when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such state court." There is no specific declaration when proceedings in the state court shall stop. The right to a removal is determined by the Federal court, and determined upon

evidence satisfactory to it. When it is satisfied that the conditions exist, the defendant may remove: how? The proper way is for him to obtain an order from the Federal court for the removal, file that order in the state court, and take from it a transcript and file it in the Federal court. It may be said that these steps are not in terms prescribed by the statute. That is true; and also true that no specific procedure is named. The language simply is that the defendant may remove, when he has satisfied the Federal court of the existence of sufficient prejudice. The statute being silent, the general rules in respect to the transfer of cases from one court to another must obtain. If the order of one court is to stay the action of another, the latter is entitled to notice. If a case is to pass from one court to another, this is done by filing a transcript of the record of the one in the other. (*Virginia* v. *Paul*, *ante*, 107.) Such orders and transfers are generally in appellate proceedings; yet something of the same kind is appropriate and necessary in the orderly administration of affairs to transfer, by order of the Federal court, a case from the state court to itself. Certainly this statute does not abolish the law of comity, which controls the relations of the courts of two sovereignties exercising jurisdiction within the same territorial limits, nor does it abrogate the duty of counsel to seasonably advise the courts of which they are counsel of any matter which, if known, would prevent an erroneous exercise of jurisdiction. At any rate, if these exact steps are not requisite, something equivalent thereto is. If there had been more attention paid to these matters in removal proceedings, there would have been less irritation prevailing in state tribunals at removals.

But, again, the Revised Statutes of the State of Ohio of 1891 contain these sections:

"Section 6709. A judgment rendered, or final order made by the common pleas court, may be reversed, vacated, or modified by the circuit court, for errors appearing on the record. . . .

"Section 6710. A judgment rendered, or final order made, by the circuit court, any court of common pleas, probate court or the superior court of any city or county, may be reversed,

vacated or modified by the Supreme Court, on petition in error, for errors appearing on the record." . . .

And these provisions are in accord with the general rule in reference to the scope of inquiry in a reviewing court. Now, the record of the common pleas court disclosed no order of removal, no steps essential thereto. Obviously upon that record, as heretofore said, the Circuit Court could do nothing but affirm the judgment. The record of another court was presented and invoked to compel a decision that there was error in the proceedings of the common pleas court; and in support of this contention the case of *Kanouse* v. *Martin*, 15 How. 198, is cited. In that case it appeared that a suit was commenced in the court of common pleas for the city and county of New York. The defendant filed a petition and bond for removal. The court of common pleas denied his petition, and proceeded to try the case. Judgment having been rendered against him, he took the case to an appellate state court. The record which was sent up did not include the removal proceedings, they being matters which the statutes of New York State did not authorize to be incorporated into and made a part of the record. Diminution of the record was suggested, and thereupon a transcript of those proceedings was sent to the appellate court, but that court, holding that they were not, under the statutes of New York, technically a part of the record, refused to consider them, and affirmed the judgment. On a writ of error from this court the judgment was reversed, and it was held that, although those matters were not technically a part of the record according to the statutes of New York, yet that the act of Congress granting the right of removal was binding upon all the courts of the States, and that, if the proceedings were sufficient under that statute for removal, it was the duty of the appellate court to disregard the state limitation and inspect the removal proceedings. In its opinion, on page 208, this court said:

"But it is objected that this is a writ of error to the Superior Court, and that by the local law of New York, that court could not consider this error in the proceedings of the

Court of Common Pleas, because it did not appear upon the record, which, according to the law of the State, consisted only of the declaration, the evidence of its service, the entry of the appearance of the defendant, the rule to plead, and the judgment for want of a plea, and the assessment of damages; and that these proceedings, under the act of Congress, not being part of this technical record, no error could be assigned upon them in the Superior Court. This appears to have been the ground upon which the Superior Court rested its decision. That it was correct, according to the common and statute law of the State of New York, may be conceded. But the act of Congress, which conferred on the defendant the privilege of removal, and pointed out the mode in which it was to be claimed, is a law binding upon all the courts of that State; and if that act both rendered the judgment of the Court of Common Pleas erroneous, and in effect gave the defendant a right to assign that error, though the proceeding did not appear on the technical record, then, by force of that act of Congress, the Superior Court was bound to disregard the technical objection, and inspect these proceedings."

But all that that case decided was that when the statute of the State fails to make certain proceedings had in the trial court a part of the record for review in the appellate court, a law of Congress which gives a specific effect to those proceedings, if sufficient in form, compels an examination of them in the appellate court, in order that it may be there determined whether the trial court improperly refused to give the due effect to them. Or, to state it in other words, the act of Congress broadens the technical rule of the State statute so as to include in the record other proceedings actually had in the trial court. But that case does not decide that an appellate and reviewing court must examine other than the proceedings of the court whose judgment is sought to be reviewed. See upon this question the case of *Goodenough Horseshoe Manufacturing Co.* v. *Rhode Island Horseshoe Co.*, 131 U. S. App. ccxxviii, decided by this court in 1877, and reported in 24 L. C. P. R. Co. Rep. 368.

The motion to dismiss must be sustained.

HOHORST *v.* HAMBURG-AMERICAN PACKET COMPANY.

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

No. 134. Argued March 13, 1893. — Decided March 27, 1893.

A bill pending in a Circuit Court of the United States against a foreign corporation and other defendants citizens of the United States, for the infringement of letters patent, was dismissed as to the foreign corporation, and, so far as appeared from the record in the appeal from the judgment of dismissal, was still pending and undetermined as to the codefendants. *Held*, that the decree in favor of the corporation was not a final decree from which an appeal could be taken to this court, and that this appeal must be dismissed for want of jurisdiction.

THE case is stated in the opinion.

Mr. Salter S. Clark, for appellant, cited: *Ex parte Schollenberger*, 96 U. S. 369; *Jones* v. *Andrews*, 10 Wall. 327; *St. Louis & San Francisco Railway* v. *McBride*, 141 U. S. 127; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Gracie* v. *Palmer*, 8 Wheat. 699; *Atkins* v. *Disintegrating Co.*, 18 Wall. 272; *In re Louisville Underwriters*, 134 U. S. 488.

Mr. Walter D. Edmonds, for appellees, cited: *Smith* v. *Lyon*, 133 U. S. 315, 319; *In re Louisville Underwriters*, 134 U. S. 488; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Lake County* v. *Rollins*, 130 U. S. 662; *Cary* v. *Curtis*, 3 How. 236.

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

This was a bill filed by Friedrich Hohorst, a citizen of the State of New York, "against the Hamburg-American Packet Company, a corporation organized and existing under the laws of the Kingdom of Hanover, Empire of Germany, and doing business in the city of New York; Henry R. Kunhardt, Sr.,

Henry R. Kunhardt, Jr., George H. Diehl, citizens of the United States and residents of the State of New York, and Arend Behrens and William Koester, citizens of the United States and residents of the State of New Jersey," for infringement of patent, in the Circuit Court of the United States for the Southern District of New York, September 15, 1888. September 17, the subpœna was served on Henry R. Kunhardt, Sr., as a defendant, and as general agent of the Hamburg Company.

November 5, 1888, a general appearance for all the defendants was filed, and on December 18, 1888, a demurrer on behalf of the Packet Company, assigning as grounds that the causes of action against the several defendants were distinct and unconnected, and hence that the bill was multifarious, and for want of equity. A motion was made by complainant, December 24, to amend, and on January 7, 1889, a motion by defendant to dismiss. On January 28, 1889, leave to amend was granted and the motion to dismiss denied, and, on February 2, 1889, the amendments were made. These consisted in the insertion of the word "jointly" in the allegation of the defendants' infringement, and also of the following allegation: "Your orator further states that all of the defendants above named are inhabitants of the city and county of New York; that the defendant, the Hamburg-American Packet Company, has its principal business office in this country, located in the city and county of New York; that the defendants Henry R. Kunhardt, Sr., Henry R. Kunhardt, Jr., George H. Diehl, Arend Behrens and William Koester are, and during the time of the infringements above set forth were, copartners under the firm name of Kunhardt & Co., and as such copartners are and were the agents and managers of the business of the Hamburg-American Packet Company in this country, and have their principal business office, as such, located in the city and county of New York, and that the said infringements were committed in the prosecution of such business, and all the defendants have coöperated and participated in all the said acts and infringements."

On February 16, 1889, defendant Hamburg Company served

notice of final hearing upon the bill of complaint and demurrer, and on February 21, a notice was given of a motion that the appearance entered on behalf of the Hamburg Company be changed from a general appearance into a special appearance, and the service of subpœna made upon that defendant be set aside, and the bill of complaint dismissed as against the company because of lack of jurisdiction of the court over its person.

In April, 1889, an order was granted that unless complainant withdrew his amended complaint as to the defendant company, and stipulated to go to trial as to said defendant on the original bill of complaint, the notice of appearance should be, and was thereby, amended into a special appearance, and the service of the subpœna set aside and the bill of complaint dismissed as against said company. 38 Fed. Rep. 273.

On April 11, 1889, the notice of appearance was amended accordingly, subpœna set aside and the bill of complaint dismissed as against the company; whereupon complainant appealed to this court.

So far as appears from the record, the suit is still pending and undetermined as against the codefendants of the company. We are of opinion, therefore, that this appeal cannot be maintained because the decree rendered in favor of the company was not a final decree.

In *United States* v. *Girault*, 11 How. 22, 32, which was a writ of error to review a judgment rendered by the Circuit Court of the United States in Mississippi in favor of some of the defendants only, in an action on a bond, leaving the suit undisposed of as against one defendant, this court would not reverse the judgment according to the practice in Mississippi, but dismissed the writ of error; and Mr. Justice Nelson, delivering the opinion, said: "The practice in this court, in case the judgment or decree is not final, is to dismiss the writ of error or appeal for want of jurisdiction, and remand it to the court below to be further proceeded in." *Metcalfe's Case*, 11 Rep. 38, was cited, where it was held that a record of the common pleas could not be removed into the King's Bench before the whole matter was determined in the common pleas,

as it was entire and could not be in both courts at the same time; and, also, *Peet* v. *McGraw*, 21 Wend. 667, wherein Mr. Justice Nelson, then Chief Justice of New York, declared that a case could not be sent up in fragments by a succession of writs of error. Again, in *Holcombe* v. *McKusick*, 20 How. 552, 554, it was said: "It is the settled practice of this court, and the same in the King's Bench in England, that the writ will not lie until the whole of the matters in controversy in the suit below are disposed of. The writ itself is conditional, and does not authorize the court below to send up the case, unless all the matters between the parties to the record have been determined."

The same rule is applicable to an appeal in admiralty, *Dayton* v. *United States*, 131 U. S. App. lxxx, and in equity, *Frow* v. *De la Vega*, 15 Wall. 552, 554. In the latter case it was held that a final decree on the merits cannot be made separately against one of several defendants upon a joint charge against all, where the case is still pending as to the others. It is true that there a default had been entered with a decree *pro confesso* against one of several defendants, and a final decree had been made absolute against him, whereupon the court proceeded to try the issues made by the answers of the other defendants and dismissed complainant's bill; but this attitude of the case illustrated and required the application of the general rule.

In *Withenbury* v. *United States*, 5 Wall. 819, it was decided that where a decree in a prize cause disposed of the whole matter in dispute upon a claim filed by particular parties which was final as to them and their rights, and final also so far as the claimants and their rights were concerned as to the United States, it was final; while in *Montgomery* v. *Anderson*, 21 How. 386, where the District Court of the United States, sitting in admiralty, decreed that a sum of money was due, but the amount to be paid was dependent upon other claims that might be established, it was held that such a decree was not final.

There are cases in equity in which a decree, disposing of every ground of contention between the parties, except as to

the ascertainment of an amount in a matter separable from the other subjects of controversy, and relating only to some of the defendants, may be treated as final, though retained for the determination of such severable matter. *Hill* v. *Chicago & Evanston Railroad*, 140 U. S. 52. But this case presents no such aspect. Complainant insisted, by his amended bill, that the alleged liability was joint, and that "all the defendants have coöperated and participated in all the said acts and infringements."

In *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, a bill was filed against the mining company and others in the Circuit Court of the United States for the Southern District of New York, and service of subpœna was made upon the secretary of the company. The company appeared specially and moved for an order to set aside the service, which was granted, whereupon complainant applied to this court by petition for writ of mandamus to the judges of the Circuit Court to command them to take jurisdiction against the company upon the bill. The ground on which our jurisdiction was invoked was the inadequacy of any other remedy, and it was argued that as the cause could proceed as to the other defendants, no final judgment could be entered upon the order of the Circuit Court, and no appeal taken therefrom.

Under the circumstances

This appeal must be dismissed for want of jurisdiction, and it is so ordered.

COLUMBUS WATCH COMPANY *v.* ROBBINS.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 1242. Submitted March 7, 1893. — Decided March 27, 1893.

In order to give this court jurisdiction over questions or propositions of law sent up by a Circuit Court of Appeals for decision, it is necessary that the questions or propositions should be clearly and distinctly certi-

fied, and should show that the instruction of this court is desired in the particular case as to their proper decision.

A statement that one Circuit Court of Appeals has arrived at a different conclusion from another Circuit Court of Appeals on a question or proposition, is not equivalent to the expression of a desire for instruction as to the proper decision of a specific question, requiring determination in the proper disposition of the particular case.

The fact that a Circuit Court of Appeals for one Circuit has rendered a different judgment from that of the Circuit Court of Appeals for another Circuit, under the same conditions, may furnish ground for a *certiorari* on proper application.

THE case is stated in the opinion.

Mr. M. D. Leggett and *Mr. James Watson* for appellants.

Mr. Lysander Hill and *Mr. George S. Prindle* for appellees. *Mr. Frederick P. Fish* and *Mr. W. K. Richardson* also filed a brief for appellees.

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

The record in this case consists of the following certificate, signed on the 10th day of October, 1892, by the judges then holding the Circuit Court of Appeals for the Sixth Circuit:

"This cause comes before this court by an appeal from the decree of the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio sustaining the letters patent of the appellees and declaring that the appellants have infringed said letters patent and directing the issue of a perpetual injunction and ordering the statement of an account of profits and damages.

"The transcript presented to this court shows that the appeal was taken immediately from said decree before accounting was had. Both parties desire that this court should give a full hearing on the merits of said decree, so far as relate to the validity of the patent and infringement, and should enter a final decree in this court thereon, the parties agreeing between themselves to suspend accounting until the decision of this court can be had. This court, however, can-

not find that they have, under the 7th section of the act creating U. S. Circuit Appellate Courts, jurisdiction to grant such a hearing and enter such a final decree as is asked, because said decree of the Circuit Court is only an interlocutory decree and presents on appeal, under section 7, only the question whether the decree for an injunction, interlocutory in fact, however final in form, was improvidently granted in the legal discretion of the court and involves only incidentally the question of the validity of the patent and the infringement complained of. The Circuit Court of Appeals for the Fifth Circuit under similar circumstances, after listening to adverse argument, in *Jones* v. *Munger &c. Co.*, 50 Fed. Rep. 785, held that said section 7 gave jurisdiction to the court, on agreement of parties, to render a final decree on the merits of the validity and infringement of the patent involved. As the judgment of this court differs from that of a coördinate court, the instruction of the Supreme Court is respectfully requested upon the question.

"It is therefore ordered that a copy hereof, certified under the seal of the court, be transmitted to the clerk of the Supreme Court of the United States."

By section sixth of the Judiciary Act of March 3, 1891, establishing Circuit Courts of Appeals, (26 Stat. 826, c. 517,) it is provided that the judgments or decrees of those courts shall be final in certain enumerated classes of cases, and, among them, in all cases arising under the patent laws, but that, in such cases, the Circuit Court of Appeals may certify to "the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And, thereupon, the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Court of Appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."

And it is also provided, in respect of cases in which the judg-

ments and decrees of the Circuit Courts of Appeals are made final, that "it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its revision and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." Thus, in the interest of jurisprudence and uniformity of decision, the supervision of this court, by way of advice or direct revision, is secured. *In re Woods, Petitioner*, 143 U. S. 202; *Lau Ow Bew, Petitioner*, 141 U. S. 583; 144 U. S. 47, 58.

In order, however, to invoke the exercise of our jurisdiction in the instruction of the Circuit Courts of Appeals as to the proper decision of questions or propositions of law arising in the classes of cases mentioned, it is necessary that such questions or propositions should be clearly and distinctly certified, and that the certificate should show that the instruction of this court as to their proper decision is desired.

It was long ago settled, under the statutes authorizing questions upon which two judges of the Circuit Court were divided in opinion to be certified to this court, that each question so certified must be a distinct point or proposition of law, clearly stated, so that it could be definitely answered; *Perkins* v. *Hart*, 11 Wheat. 237; *Sadler* v. *Hoover*, 7 How. 646; *Jewell* v. *Knight*, 123 U. S. 426, 432; *Fire Ins. Assoc.* v. *Wickham*, 128 U. S. 426; and that if it appeared upon the record that no division of opinion actually existed among the judges of the Circuit Court, this court would not consider a question as certified even though it were certified in form. *Railroad Co.* v. *White*, 101 U. S. 98; *Webster* v. *Cooper*, 10 How. 54; *Nesmith* v. *Sheldon*, 6 How. 41.

We regard the certificate before us as essentially defective. It does not specifically set forth the question or questions to be answered, and, apart from that, it does not state that instruction is desired for the proper decision of such question or questions. On the contrary, it appears therefrom that the court had arrived at a conclusion, nothing doubting, (for reasons, we may remark, given in its opinion reported in 52 Fed. Rep. 337,) but that, because the Circuit Court of Appeals

for another circuit had reached the opposite conclusion, under similar circumstances, the request for instruction is preferred.

While the fact that the Circuit Court of Appeals for one circuit has rendered a different judgment from that of the Circuit Court of Appeals for another, under the same conditions, might furnish ground for a *certiorari* on proper application, the assertion of the existence of such difference and of the wish that it might be determined by this court is not equivalent to the expression of a desire for instruction as to the proper decision of a specific question or questions requiring determination in the proper disposition of the particular case. The difference can only exist when the courts have actually reached contradictory results, but each must proceed to its own judgment, unless such grave doubts arise as to induce the conviction that this court should be resorted to for their solution in the manner provided for.

As in our judgment this certificate is not in compliance with the statute, we must decline to certify any opinion upon the matters involved, and direct the cause to be

Dismissed.

HUBER *v.* NELSON MANUFACTURING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 143. Argued March 16, 17, 1893. — Decided March 27, 1893.

Letters patent No. 260,232, granted June 27, 1882, to Henry Huber, as assignee of Stewart Peters and William Donald, of Glasgow, Scotland, for an "improvement in water-closets," the patent expressing on its face that it was "subject to the limitation prescribed by § 4887, Rev. Stat., by reason of English patent dated April 7, 1874, No. 1207," are void because the English patent had expired April 7, 1881.

Reissued letters patent No. 10,826, granted to James E. Boyle, April 19, 1887, for an improvement in flushing apparatus for water-closets, on the reissue of original patent No. 291,139, granted to Boyle January 1, 1884, the application for the reissue having been filed January 2, 1885, are void, as to claims 1 and 2 of the reissue.

Every claim of the original patent contained, as an element, a flushing chamber, and no claim of the reissue which leaves out a flushing chamber can be construed as valid.

There is new matter in the reissue specification inserted to lay a foundation for the expanded claims in the reissue.

There is nothing in the original patent which suggests the possibility that Boyle's invention could be operated by a combination which omitted the flushing chamber as an element thereof.

In equity, to prevent the infringement of letters patent, and for damages for such infringement. Decree dismissing the bill, from which the plaintiffs appealed. The case is stated in the opinion.

Mr. Arthur S. Browne and *Mr. Phillip Mauro* for appellants. *Mr. Anthony Pollok* and *Mr. Paul Bakewell* were with them on the brief.

Mr. Seneca N. Taylor and *Mr. Benjamin F. Rex* for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a bill in equity, filed October 3, 1887, in the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, by Henry Huber and James E. Boyle, as plaintiffs, against the N. O. Nelson Manufacturing Company, a Missouri corporation, for the alleged infringement of two patents.

The first patent sued upon was granted June 27, 1882, No. 260,232, for an "improvement in water-closets," to Henry Huber, one of the plaintiffs, as assignee of Stewart Peters and William Donald, of Glasgow, Scotland. That patent sets forth that Peters and Donald had presented a petition for the grant of a patent for such improvement, and had assigned their right, title and interest in it to Huber, and that a description of the invention was contained in the specification annexed to the patent, and the patent granted to Huber, his heirs or assigns, for seventeen years from June 27, 1882, the exclusive right to make, use and vend the invention through-

out the United States and the Territories thereof, "subject to the limitation prescribed by sec. 4887, Rev. Stat., by reason of English patent, dated April 7, 1874, No. 1207."

The answer of the defendant avers that, although the British patent, No. 1207, was granted to Peters and Donald on April 7, 1874, for fourteen years from that date, it was subject to the provisions and conditions of § 2 of chapter 5 of the act of 16 Victoria, approved February 21, 1853, and to the condition thereunder that, if Peters and Donald, their executors, administrators or assigns, did not pay a stamp duty of £100 on the patent, before the expiration of seven years from its date, it should become void; that such duty was not paid, but the patentees voluntarily allowed the patent to expire at the end of seven years from its date; and that it became void thereby, and, since April 7, 1881, has been of no force or effect.

The English patent covered the same invention which is covered by United States patent No. 260,232. Peters and Donald assigned all their interest in the invention to James E. Boyle, October 27, 1881. The application for the United States patent was filed November 29, 1881; and, after the patent was granted, Boyle assigned his interest to Huber, November 26, 1881. Thus it appears that the application for No. 260,232 was filed more than seven months after the English patent to Peters and Donald had become void, and that the invention was assigned by Peters and Donald to Boyle more than six months after that patent had become void.

Sections 4886 and 4887 of the Revised Statutes (which were taken from §§ 24 and 25 of the act of July 8, 1870, c. 230, 16 Stat. 201) read as follows:

"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. 4887. No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

It was contended for the defendant in the Circuit Court, and was so held by that court, that patent No. 260,232 was void, under § 4887 of the Revised Statutes, because it was granted after the English patent to Peters and Donald had ceased to exist. The opinion of Judge Thayer, who held the Circuit Court, is reported in 38 Fed. Rep. 830. The facts above set forth are undisputed. Judge Thayer held that, under the decision of this court in *Bate Refrigerating Co.* v. *Hammond*, 129 U. S. 151, patent No. 260,232 was void.

In *Bate Refrigerating Co.* v. *Hammond*, a United States patent had been granted November 20, 1877, for seventeen years on an application filed December 1, 1876. A patent for the same invention had been granted in Canada, January 9, 1877, to the same patentee, for five years from that day, on an application made December 19, 1876. On a petition filed in Canada by the patentee, December 5, 1881, the Canada patent, on December 12, 1881, was extended for five years from January 9, 1882, and on December 13, 1881, for five years from January 9, 1887, under § 17 of the Canada act assented to June 14, 1872, (35 Vict., c. 26.) On those facts, this court held, under § 4887 of the Revised Statutes, that, as the Canada act was in force when the United States patent was applied for and issued, and the Canada extension was a

matter of right, at the option of the patentee, on his payment of a required fee, and the fifteen years term of the Canada patent had been continuous and without interruption, the United States patent did not expire before the end of the fifteen years duration of the Canada patent. Of course, the Canada patent was in force when the United States patent was granted, and the question presented in the present case did not distinctly arise. Judge Thayer held, that it was a logical conclusion from the decision in *Bate Refrigerating Co.* v. *Hammond* that a United States patent which was issued subject to the provisions of § 4887 remained in force no longer than the foreign patent having the shortest term; and that the omission to do an act required by the foreign law, which worked an absolute forfeiture of the foreign grant, extinguished the United States patent.

The Circuit Court also held that, as § 4887 enacted that the United States patent granted for an invention which had been previously patented in a foreign country should be so limited as to expire at the same time with the foreign patent, it presupposed that, at the date of the United States patent, there was in force a foreign patent for the invention; and that, if there was no such foreign patent in force when the United States patent issued, but only one which had lapsed and become void, although theretofore granted for the invention, there was no authority in law for the United States grant. In other words, the moment patent No. 260,232 was granted, § 4887 took effect upon it, and caused it to expire in the same instant in which it was created, or to be strangled in its birth.

The final decree of the Circuit Court in the present case was entered May 25, 1889. It decreed among other things that No. 260,232 was issued without authority of law, and was null and void. Since that time, and on March 24, 1890, this court decided the case of *Pohl* v. *Anchor Brewing Co.*, 134 U. S. 385, in which we held that a United States patent ran for the term for which the prior foreign patent was granted, without reference to whether the latter patent became lapsed and forfeited, after the grant of the United States patent, by reason

of the failure of the patentee to comply with the requirements of the foreign patent law. But that case did not distinctly cover the present one, because in that case the foreign patent was in force when the United States patent was granted, and it became lapsed or forfeited thereafter, in consequence of the failure of the patentee to comply with the requirements of the foreign patent law.

We are of opinion that, as in the case at bar the foreign patent was not in force when the United States patent was issued, the latter patent never had any force or validity. The delay in applying for the United States patent, until after the foreign patent expired, amounted to an abandonment of the right to a United States patent. This is in accordance with the view of the Commissioner of Patents in *Mushet's Case*, (Commissioner's Decisions of 1870, p. 106.)

The other patent sued on in the present case is reissued letters patent No. 10,826, granted to James E. Boyle, April 19, 1887, for an improvement in flushing apparatus for water-closets, claims 1 and 2 of which are alleged to have been infringed. The original patent, No. 291,139, was granted to Boyle, January 1, 1884, and the application for the reissue was filed January 2, 1885.

The answer sets up the invalidity of such reissue, and avers that the original patent was not inoperative or invalid by reason of an insufficient or defective specification, but was surrendered, after unreasonable delay, solely for the purpose of enlarging the specification and claims, and to cover improvements not within the contemplation of Boyle when he filed his original application and received his original patent; that the claims of the reissue unduly broadened the original patent; that the further design of Boyle in asking for the reissue was to cover apparatus placed upon the market before such reissue was applied for, by Frank B. Hanson, under letters patent No. 308,358, issued to Hanson, November 25, 1884, but applied for June 12, 1883; that said reissue No. 10,826, and especially claims 1, 2 and 4 thereof, were not for any invention described, indicated or suggested in the original patent No. 291,139; that the Commissioner of Patents exceeded his authority in grant-

ing such reissue; and that said claims and such reissue were void from the beginning.

The Circuit Court, in its decree entered May 25, 1889, adjudged that claims 1 and 2 of such reissue were granted without authority of law and were null and void; that the defendant had not infringed any of the remaining claims of such reissue (the whole number of claims being six); and that the bill be dismissed with costs. The plaintiffs appealed to this court from the entire decree. James E. Boyle having died during the pendency of the appeal, his administrator has been substituted as a party.

Judge Thayer, in his opinion, 38 Fed. Rep. 830, goes very fully into the question of the validity of the reissue. In order that the claims of the original and reissue patents may be more readily compared, they are here produced in parallel columns, the italicized words in each claim of one patent showing wherein it differs from the corresponding claim in the other patent:

Original Patent.	*Reissue Patent.*
	"1. *A water-closet consisting of a bowl, with the soil-passage leading therefrom and two successive traps in said passage, in combination with a flushing-pipe for conveying water to the bowl, a suction-injector arranged in connection with said pipe and to be traversed by the flushing water, and an air-pipe leading from the air-space between said traps and communicating with said injector, substantially as set forth, whereby the flow of water through said injector serves to draw air from said air-space.*

"1. A flushing apparatus for water-closets, consisting of a reservoir-tank, a flushing-*chamber adapted to be filled therefrom, a* valve controlling *the admission of water from said tank to said chamber*, a suction-injector arranged *beneath the outlet from said chamber*, a flushing-pipe *leading from said injector*, and a suction *or air* pipe *communicating* with said injector, *all combined and arranged substantially as set forth*, whereby the water in *escaping* from said *chamber into* the flushing-pipe traverses said injector, and sucks the air from said suction-pipe.

"2. The combination of a reservoir-tank, a flushing-chamber, a valve controlling the admission of water from said tank to said chamber, a suction-pipe *terminating at the upper part* of said chamber, an injector beneath the outlet from said chamber, a flushing-pipe leading downward from said injector, and a suction-passage affording communication from said injector to said suction-pipe, substantially as and for the purposes set forth.

"3. A flushing apparatus for water-closets, consisting of *the combination of* a reservoir-tank, a flushing-valve controlling *the outlet thereof*, a flushing-pipe *for conveying water therefrom to the bowl of the closet*, a suction-injector arranged *in connection with said pipe and to be traversed by the descending flushing water*, and a suction-pipe *in connection* with said injector, whereby the water in *flowing* from said *tank downward through* the flushing-pipe traverses said injector and sucks the air from said suction-pipe.

"3. The combination of a reservoir-tank, a flushing-chamber, a valve controlling the admission of water from said tank to said chamber, a suction-pipe, *communicating with the interior* of said chamber, an injector beneath the outlet from said chamber, a flushing-pipe leading downward from said injector, and a suction-passage affording communication from said injector to said suction-pipe, substantially as and for the purposes set forth.

"4. A flushing apparatus for water-closets, consisting

a reservoir-tank, a flushing-*chamber*, *a* valve controlling the *admission of water from said tank to said chamber*, a suction-injector *beneath the outlet from said chamber*, a flushing-pipe *leading downward from said injector*, a suction *or air* pipe *opening into the upper part of said chamber, and a suction-passage extending from said pipe to said injector*, whereby the passage of water through said injector *into the flushing-pipe* will *develop a suction in* said *suction-passage and* suction-pipe, *in combination with means, substantially as described, for admitting air to said suction-passage or pipe, and so breaking the vacuum therein before all the water has escaped from the chamber, whereby an after-wash is secured, all combined and arranged to operate* substantially as set forth.

"4. *In* combination, the tank E, the chamber F, provided with inlet-orifice *h'* and outlet-orifice *i*, the valve *h*, the suction-injector I, the flushing-pipe *l*, the air-pipe *e*, the suction-passage *t*, and the air-bell *n*, substantially as set forth.

"5. A flushing apparatus of a reservoir-tank, a flushing-valve controlling the *outlet thereof*, a flushing-pipe *for conveying water therefrom to the bowl of the closet*, a suction-injector *arranged in connection with said pipe and to be traversed by the descending flushing-water, and* a suction-pipe *in connection with said injector*, whereby the passage of water through said injector will *suck the air from* said suction-pipe, *all combined together, and with a trapped air-passage communicating with the said suction-pipe and arranged to be unsealed, and thereby to admit air to the suction-pipe and break the vacuum therein before the cessation of the flow of flushing-water*, substantially as set forth.

"5. *The* combination *of* the tank E, the chamber F, provided with inlet-orifice *h'*, and outlet-orifice *i*, the valve *h*, the suction-injector I, the flushing-pipe *l*, the air-pipe *e*, the suction-passage *t*, and the air-bell *n*, substantially as set forth.

"6. A flushing apparatus

for a water-closet, consisting of the combination of a reservoir-tank, a flushing-chamber provided with an inlet-orifice of large area communicating with said tank, and with an outlet-orifice of contracted area proportioned to the area of said inlet-orifice, substantially as specified, a valve adapted to close said inlet-orifice, an air-pipe opening into said flushing-chamber, and a flushing-pipe leading from said outlet-orifice, all arranged and adapted to operate substantially as set forth.

"6. *The combination, with tank E and chamber F, of the valve* h *thereof, its stem consisting of an overflow tube,* m, *and a sealing cup* m', *below the valve, in which cup the lower end of the overflow tube is immersed, substantially as set forth.*"

for a water-closet, consisting of the combination of a reservoir-tank, a flushing-chamber provided with an inlet-orifice of large area, communicating with said tank and with an outlet-orifice of contracted area proportioned to the area of said inlet-orifice, substantially as specified, a valve adapted to close said inlet-orifice, an air-pipe opening into said flushing-chamber, and a flushing-pipe leading from said outlet-orifice, all arranged and adapted to operate substantially as set forth."

In each of the six claims of the original patent, the flushing chamber F is made an element of the combination. Claim 6 of the reissue is substantially identical with claim 5 of the original, claim 5 of the reissue with claim 4 of the original, and claim 3 of the reissue with claim 2 of the original. Claim 4 of the reissue is in some respects similar to claim 3 of the original, but it omits the flushing chamber F, and mentions in its place a flushing valve, thus making a different combination. Neither the specification of the original nor any of its claims corresponds with or suggests the first two claims of the reissue.

Parts of the two specifications are here placed by us side by side, in order that the additions in the reissue to what was in the original may be distinctly seen, the additions in the reissue being printed in italics:

Old Specification.

The diagram, Fig. 6, is designed to illustrate the essential principle of my present invention even more clearly than the preceding figures. The air-pipe *e* does not enter the chamber F, but is connected by a branch with the flushing-pipe *l* below the chamber, the injector I being arranged at their junction. The valve *g'* is shown merely to prevent water setting back and flowing down the pipe *e*, since the top of this pipe is below the water level *x x*, instead of above it, as before.

New Specification.

The diagram, Fig. 6, is designed to illustrate the essential principle of my present invention even more clearly than the preceding figures. The air-pipe *e* does not enter the chamber F, but is connected by a branch with the flushing-pipe *l* below the chamber, the injector I being arranged at their junction. The *check* valve *g'* is shown merely to prevent water setting back and flowing down the pipe *e*, since the top of this pipe is below the water level *x x*, instead of above it, as before. *When the flushing-valve h is lifted the water from the tank F flows down the flushing-pipe l, and through the injector I, thus drawing air from the pipe e during the whole time that the water continues to flow through the injector. In this construction the chamber F has no function of its own, and constitutes essentially a mere enlargement of the upper portion of the flushing-pipe, to the same effect as*

No provision for securing an after-wash is here shown, but the bowl may be refilled after the flushing by any suitable means, as by water admitted by a valve through an independent flushing-pipe.

the ordinary "service-box" commonly used by plumbers. No provision for securing an after-wash is here shown, but the bowl may be refilled after the flushing by any suitable means — as, *for instance*, by water admitted by a valve through an independent flushing-pipe, *as shown in the patent of Peters and Donald, No. 260,232, dated June 27, 1882.*

In the opinion of Judge Thayer, it is correctly said: "In the construction of the 'flushing apparatus' or water-closet covered by the original letters, Boyle, the inventor, employed what is commonly called an 'injector' to exhaust the air confined between two traps located beneath the bowl or seat of the 'flushing apparatus.' The apparatus was so arranged that when in use water falling through a pipe from the water-tank or reservoir into the bowl passed by the mouth of the 'injector,' which was connected by a pipe with the confined air chamber between the traps, and by the operation of a well-known principle tended to exhaust the air and to create a vacuum in such chamber, the purpose of creating a vacuum being to induce a more powerful outflow of water from the bowl through the traps and into the soil pipe, by the aid of atmospheric pressure on the surface of the water in the bowl. The idea of constructing a water-closet or flushing apparatus with double traps underneath the seat, and a confined air chamber between the same, from which the air might be withdrawn when the closet was used, so as to induce a more powerful outflow, was not novel. The same method of construction was shown in the Peters and Donald patent before mentioned, but Peters and Donald employed a different device to exhaust the air between the traps. Although injectors and the principle upon which they were operated were well known, and

although they were in use for various purposes, it may be conceded that Boyle was the first to employ them in the construction of a flushing apparatus or water-closet. Being an old device, he could not claim the injector, independently, or otherwise than in combination with other devices forming a part of his improved sanitary water-closet. The first and most important claim in the original letters patent was for 'a flushing apparatus consisting of a reservoir tank, a flushing-chamber adapted to be filled therefrom, a valve controlling the admission of water from said tank to said chamber, a suction injector arranged beneath the outlet from said chamber, a flushing pipe leading from said injector, and a suction or air pipe communicating with said injector, all combined . . . substantially as set forth, whereby the water in escaping from said chamber into the flushing pipe, traverses said injector and sucks air from said suction pipe.' It will thus be seen that the 'injector' was one of six elements in the combination covered by the first claim of the original letters, No. 291,139."

In the affidavit made by Boyle, on December 27, 1884, to accompany his application for the reissue, he states that he believes his patent No. 291,139 "to be inoperative to fully protect the invention intended to be covered by it, for the following reason, namely, that the principal claims in said patent are defective or insufficient in that they are, or appear to be, limited to combinations embodying the 'flushing-chamber F' as an essential element, whereas that chamber is not essential to his invention in its generic features;" that, as stated in the specification of the original patent, his invention introduced "a new principle for operating double-trapped or siphon water-closets; namely, that of producing the requisite vacuum by causing the falling flushing water to act as an injector and draw air along with it," and that through inadvertence or mistake of judgment his claims were drawn with less breadth than his specification and do not, as they should, cover broadly the application of such principle; that such inadvertence or mistake arose by and in consequence of a misunderstanding between him and his attorney, Mr. Arthur C. Fraser, of the firm of Burke, Fraser & Connett, who prepared the applica-

tion for the patent, and also by reason of Boyle's want of familiarity with the technical meaning of the language used in patent claims, and that the same arose without any fraudulent or deceptive intention; that, in his early experiments with the invention, he devised and tested various forms and modifications of mechanism, and among others the three constructions shown by sketches which he annexed to the affidavit, and which sketches he describes as each showing a water-tank with an outlet valve, a flushing-pipe extending down to the closet bowl, an injector therein, a suction or air pipe extending to the air-space between the two traps below, and a lever for working the valve; that in one of such sketches the suction or air pipe joined the flushing-pipe by an elbow, their point of junction constituting the injector; that in another there was the same construction, except that the end of the suction or air pipe entered the flushing-pipe and turned down therein, forming a more perfect injector; that in the third, the suction or air pipe extended over the top of the tank and was connected by a rubber tube with the tubular valve-stem of the outlet valve, the bottom of the stem extending below the valve and into the flushing-pipe far enough to constitute an injector; that those constructions were all made and operated by him before January 1, 1882; that they all worked satisfactorily in siphoning the closet, but embodied no means for giving an "after-wash" for filling the bowl after the flushing; that in supplying such means he modified the construction and adopted those constructions which are shown in Figures 1, 4, and 5 of his original patent; that in describing his invention to his said attorney, he did not describe the first constructions devised by him and shown in the said three sketches, but only the preferred constructions; that on or about November 28, 1884, he observed in the Patent Office Gazette the report of a patent No. 308,358, granted November 25, 1884, to Frank B. Hanson, showing Boyle's said invention in a form almost identical with one of the said constructions originally invented by Boyle; that he thereupon consulted with his attorney to ascertain how such a patent came to be issued to Hanson; that his said attorney, in the course of a

few days, advised him of the defect or insufficiency in his said original patent; that, prior to being so advised, Boyle had no suspicion that his said patent was in anywise defective or insufficient; that he thereupon instructed his attorney to prepare an application for reissue of his said patent; that, believing that he, and not Hanson, was the original inventor of the subject-matter thereof, he demanded of the Commissioner of Patents the declaration of an interference with Hanson's patent; that, so far as he was aware, no interest had arisen adverse to the grant of the reissue which he applied for, either in favor of Hanson or of any other person; and that, so far as he was aware, his patent had not been infringed, nor had any attempt been made to imitate or evade the same, except by Hanson.

One of the claims of the patent issued to Hanson covers a flushing apparatus substantially the same as that described in claim 1 of the original patent to Boyle, omitting only the "flushing-chamber."

The view taken by Judge Thayer was that the sole purpose of Boyle, in asking for a reissue, was to eliminate the "flushing-chamber," as a constituent element of the combination covered by certain claims of the original patent to Boyle, particularly of claim 1, and to obtain a patent for a flushing apparatus like that described in said claim 1, less the flushing-chamber, and so claim 2 of the reissue was granted in the terms above set forth, omitting the flushing-chamber from the combination. It was omitted also from claim 1 of the reissue. The effect of this was to expand the claims of the original patent, because they had been limited by including the "flushing-chamber" as an element of the combination.

It is contended for the plaintiffs that the main feature of Boyle's flushing apparatus consisted in the use of an injector operated by falling flushing water, to pump air from between the two traps; that that fact was shown and spoken of in the original specification; that the flushing-chamber was not essential to the operation of that device, a single reservoir tank being sufficient for the purpose; that by inadvertence or mistake a non-essential limitation was put upon such claims

of the original patent as covered the injector device; that in consequence thereof the original patent was inoperative to secure the invention intended to be claimed; and that the patent, therefore, was properly reissued, the claims having simply been altered to cover more accurately the invention described in the original specification.

The opinion of the Circuit Court, in speaking of the contention that the original patent was inoperative to protect the invention intended to be covered by it, said that such patent certainly protected the flushing apparatus that was claimed as a whole in the first claim, and carefully described in the specification; that it protected also all the combinations which were claimed in its several claims; that it was not necessary to change the specification or the drawings to secure fully the apparatus claimed in the several claims of the original patent; that that was the identical apparatus which Boyle intended to manufacture; that, therefore, it could not be said that the original patent was "inoperative or invalid" in the sense that Boyle could not hold what he claimed, and intended to manufacture, because his original specification was either defective or insufficient; that what Boyle meant by asserting that the original patent was inoperative was only that a particular combination of parts might have been claimed originally that was not claimed, and that his original patent was inoperative to protect such particular combination, because no right to the protection of it had been asserted; that, even conceding that the original patent was "inoperative" in the sense in which that word is used in § 4916 of the Revised Statutes, the question remained whether the failure to claim what the original patent did not protect because it was not claimed therein, was due to "inadvertence, accident or mistake" in the sense of the statute; that all of the evidence which was before the Commissioner of Patents, tending to show inadvertence or mistake, (that is, the affidavit of Boyle, that of Fraser, and other documents,) was offered by the plaintiffs in the present suit, supplemented by some additional testimony; and that, under those circumstances, the Circuit Court could review the finding of the Commissioner on the point

that the original patent was inoperative by reason of inadvertence and mistake, at least to the extent of determining whether, as a matter of law, what was alleged to be a mistake was such a mistake as warranted a reissue.

Mr. Fraser, the attorney who obtained the original patent as well as the reissue, said in his affidavit presented to the Patent Office with the application for the reissue, that he clearly understood "that the invention in question introduced a new principle in water-closet flushing apparatus, that of exhausting the air by means of an injector, and so described the invention in the specification, but that in drawing the claims he inadvertently incorporated the flushing-chamber as an element therein, being at the time under the impression that the said flushing-chamber was essential to the operation of the invention, whereas in fact, the said chamber is essential only to the operativeness of the devices for producing the 'after-wash' for refilling the bowl, which devices are claimed specifically in claim 4 of said patent;" that he was not then aware that Boyle had used the flushing apparatus with a single tank, from which the flushing pipe led directly, thereby omitting the flushing-chamber beneath the tank, nor did it occur to Fraser at that time that the invention was susceptible of being so modified; that he drew the first three claims of the original patent, as granted, through a misapprehension of the essentials of the invention, arising from a misunderstanding between himself and Boyle, without any fraudulent or deceptive intention on the part of either; that Fraser was not aware of the defect or insufficiency in the patent until after he saw the patent of Hanson, No. 308,358; and that, after examining that patent and ascertaining the circumstances of its grant, he advised Boyle that Hanson had secured a patent covering Boyle's prior invention and counselled Boyle to apply for a reissue of his patent and to demand an interference with the patent of Hanson.

The Circuit Court further observed that Mr. Fraser's explanation showed that he understood that the falling flushing-water traversing the injector would perform its function of pumping air from between the traps equally well, whether the

water proceeded from a reservoir having one compartment or one having a dozen; that such fact was obvious to any observer who had any knowledge of the principle upon which an injector acts; that Fraser, therefore, must be understood as asserting merely that he incorporated the flushing-chamber as an element in the several combinations claimed in the original patent, because he intended to describe and claim an operative flushing apparatus or water-closet which would prove a marketable invention; that it was manifest from other statements made by Fraser in the course of his testimony, that in his opinion a flushing apparatus minus the flushing-chamber with its attendant devices for securing an after-wash would be practically useless; that some provision for refilling the bowl after the injector had ceased to act was essential to the successful operation of the flushing apparatus or water-closet, considered as a whole; and that, in drafting the several claims of the original patent, he intentionally and, as it would seem, with great care, included the flushing-chamber, for the reason that it was one of the essential parts of the flushing apparatus, without which the latter would not be serviceable.

The opinion also states that Boyle's affidavit, filed with the application for the reissue, describes no mistake, inadvertence or accident; that Boyle contents himself with the general statement that a misunderstanding existed between him and his attorney, but what it was does not appear; that, from his testimony in the present suit, it was manifest that Boyle, as well as Fraser, was of the opinion, when the original patent was granted, that a flushing apparatus constructed according to Boyle's design, but without the flushing-chamber to secure an after-wash, would be valueless, because it would command no sale; that Boyle admitted that he had made a flushing apparatus minus the flushing-chamber, which was not satisfactory, was not intended to be operative, and was not intended as a design for a water-closet that he expected to manufacture or sell; that if Boyle and Fraser made any mistake, or labored under any misapprehension when the original patent was taken out, it consisted in the assumption that the omission of a flushing-chamber on which the after-wash devices depended, and

without which there was no means (so far as Boyle had then discovered) of securing an after-wash automatically, would leave a valueless combination, and hence that there was no need of claiming such a combination; and that, when the statements of Boyle and Fraser were fairly analyzed, such appeared to be all that could reasonably be said in support of the contention that the claims of the original patent were due to inadvertence and mistake.

The opinion further states that the testimony showed, to the entire satisfaction of the court, that Fraser was right in supposing that Boyle's flushing apparatus, without the flushing-chamber, would be incomplete and therefore practically valueless; that Hanson, whose patent covered a water-closet having a single water reservoir and an injector, but no flushing-chamber or provision for an after-wash, and who caused Boyle to apply for the reissue in question to invalidate Hanson's patent, admitted that a water-closet constructed according to the specification of the Hanson patent was defective and unsalable, and for that reason had never been put upon the market; that Boyle, Fraser, and Hanson substantially agreed in their testimony that some mechanism to secure automatically an after-wash, that is, to flush the closet and refill the bowl at the end of the flushing by a single pull at the lever, was essential to the successful operation of a flushing apparatus; that, without such mechanism, an apparatus constructed with double traps and an injector to exhaust the air between the traps would be useless, in the sense that there would be no demand for such an apparatus; and that it would seem that Boyle displayed as much ingenuity (if not more) in devising the mechanism to produce an after-wash as in employing an injector, which was an old device, to pump air from between the traps.

The opinion then cites the cases of *Miller* v. *Brass Company*, 104 U. S. 350, 355; *Mahn* v. *Harwood*, 112 U. S. 354, 359; and *Coon* v. *Wilson*, 113 U. S. 268, 277, to the effect that a patent for an invention could not be lawfully reissued for the mere purpose of enlarging the claim, unless a clear mistake had been inadvertently committed in the wording of the claim.

Opinion of the Court.

The opinion of the Circuit Court further said that the testimony did not tend to establish that either Boyle or Fraser acted so inadvertently or under such misapprehension of either law or fact, when the claims of the original patent were formulated, as to justify a reissue of the patent; that it was obvious to them, as to any one, that the injector would perform its function as well with a single tank as with a tank and flushing-chamber combined; that both of them believed that a water-closet constructed according to Boyle's design, but without provision for an after-wash, would be valueless in the market; that in that belief they were right; that Boyle had discovered no method of producing an after-wash automatically by using a single water-tank, and hence both he and Fraser regarded the flushing-chamber as one of the essential features of the flushing apparatus intended to be manufactured, and accordingly claimed it industriously in all of the important claims; that even though they claimed the injector in combination with a part which was non-essential to its operation, and thereby limited the claim, yet they did so in pursuance of a well-defined purpose, not based upon a misconception of matters of fact or ignorance of law, so far as the records before the Commissioner of Patents or the proof in this case showed; that the injector was an old device when Boyle adopted it; that it could be claimed only in combination with other parts which would together produce a new result or effect, or constitute a new machine; that Boyle placed the injector, in combination with certain other old parts or devices which he deemed it necessary to employ, to make a new flushing apparatus that would be operative and useful; that by so doing he made each element of the combination material, and was entitled to be protected in the use of the combination so formed and claimed; that his sole purpose in asking for a reissue was to slough off one element of the combination, and so reduce the parts embraced in the claim that it would be impossible for any other person to use an injector in the construction of a double-trapped water-closet, without paying tribute to his patent; and that as the claims are enlarged in the reissue, it would be unlawful for a mechanic to use an

injector in the construction of a flushing apparatus, even if he should succeed in doing what Boyle failed to accomplish, that is to say, produce an after-wash automatically by the use of a single tank, because the parts with which the injector has been combined in the claims of the reissue are so few that they must necessarily all be used to work the injector.

The opinion further observed that if the injector were new with Boyle, and had not been claimed in the original patent, it might be proper to interpret the law liberally in favor of Boyle, to enable him to realize the full benefit of his invention; that an injector is an old device, and Boyle merely adopted it and applied it to a new use; and that he ought to be limited to that combination in which he deliberately placed and claimed it.

The conclusion of the opinion was that the reissue, being granted merely to enlarge the claims, could not be sustained, citing *Burr* v. *Duryee*, 1 Wall. 531, and *Gill* v. *Wells*, 22 Wall. 1; that the failure to claim the particular combination not claimed in the original patent but claimed in the reissue, was not due to any such inadvertence or mistake as would authorize the claiming of it in the reissue; and that the failure to claim such combination originally occurred under such circumstances, and was accompanied with such full knowledge of all material facts, as to amount to an abandonment of that particular combination to the public.

We are unanimously of opinion that these views of the Circuit Court are sound; and that it is unnecessary to consider the point made by the defendant that the reissue was invalid because it lacked novelty and invention. It is not contended that the defendant has infringed any other claims of the reissue than claims 1 and 2; and we think it entirely clear that the defendant has not infringed any of the claims of the original patent. The defendant had no flushing-chamber in any flushing apparatus made by it; and such flushing-chamber was an essential element in the specification and drawings of the original patent, and was one of the necessary elements in each of the six claims of the original patent, as made. It is impossible to examine the drawings of the original patent and

see that the flushing-chamber could be dispensed with in the structure. The original specification says that the invention of Boyle "has for its principal object to cheapen and simplify the overhead flushing apparatus." If the idea of constructing an apparatus without the flushing-chamber had occurred to Boyle, he would have set forth such a construction in one of the figures of his drawings, because the omission of the flushing-chamber would have promoted both cheapness and simplicity. The drawings, however, contradict the possibility of making the structure without a flushing-chamber. The entire text of the original specification shows nothing but the invention of a structure containing both a tank and a flushing-chamber. That chamber is referred to in the text of the original specification thirty-one times.

We think that, on all the facts of this case, no one of the claims of the reissue can be construed as valid in leaving out the flushing-chamber as an element of the combination, inasmuch as every claim of the original patent contained it. *Prouty* v. *Ruggles*, 16 Pet. 336, 341; *Brookes* v. *Fiske*, 15 How. 212, 219; *Burr* v. *Duryee*, 1 Wall. 531; *Reckendorfer* v. *Faber*, 92 U. S. 347; *Fuller* v. *Yentzer*, 94 U. S. 288; *Railway Co.* v. *Sayles*, 97 U. S. 554; *Water-Meter Co.* v. *Desper*, 101 U. S. 332.

Moreover, the matter above printed in italics, in the right-hand column, taken from the new specification, is new matter, inserted evidently for the purpose of laying a foundation for the two expanded claims in the reissue, which it is alleged the defendant infringes. In the reissue, the flushing-chamber forms an element in the combination claimed in each claim except claims 1, 2 and 4; and to lay the foundation for leaving out the flushing-chamber as an element in claims 1, 2 and 4 of the reissue, the statement is made in the specification of the reissue of the new matter that the flushing-chamber "has no function of its own, and constitutes essentially a mere enlargement of the upper portion of the flushing-pipe, to the same effect as the ordinary 'service-box' commonly used by plumbers."

In the specification of the original patent, the flushing-

chamber had been made an essential element in each of the six claims. The application for the Hanson patent was filed in the Patent Office, June 12, 1883, although the patent was not granted until November 25, 1884, and it was pending in the Patent Office during more than six months before Boyle's original patent, No. 291,139, was granted, January 1, 1884. The Hanson patent shows a flushing apparatus wherein the injector principle is used for exhausting the air in the confined space between the two traps, by the use of one tank containing water for flushing the basin. It was not until Boyle obtained knowledge of the Hanson patent that he conceived the idea of claiming such a construction as had been patented to Hanson. Then, and not until then, he announced the idea that it was of value to do away with the flushing-chamber, although the specification of his original patent, in its text and drawings and claims, emphasized the importance of the flushing-chamber as an element in every one of his combinations. The specification, drawings and claims of the original patent do not suggest the idea that the flushing-chamber "has no function of its own." There is nothing in the original patent which suggests any such combination as is claimed in claims 1, 2 and 4 of the reissue, or which suggests the possibility that Boyle's invention could be operated by a combination which omitted the flushing-chamber as an element thereof. Every one of the elements which is made a part of the several combinations claimed in the original patent is thereby made material to such combinations. *Eames* v. *Godfrey*, 1 Wall. 78; *Burr* v. *Duryee*, 1 Wall. 531; *Case* v. *Brown*, 2 Wall. 320; *Gould* v. *Rees*, 15 Wall. 187; *Gill* v. *Wells*, 22 Wall. 1; *Fuller* v. *Yentzer*, 94 U. S. 288; *Powder Co.* v. *Powder Works*, 98 U. S. 126; *Leggett* v. *Avery*, 101 U. S. 256; *James* v. *Campbell*, 104 U. S. 356; *Coon* v. *Wilson*, 113 U. S. 268; *Parker & Whipple Co.* v. *Yale Clock Co.*, 123 U. S. 87; *Electric Gas Lighting Co.* v. *Boston Electric Co.*, 139 U. S. 481; *Topliff* v. *Topliff*, 145 U. S. 156.

Decree affirmed.

WASATCH MINING COMPANY *v.* CRESCENT MINING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 135. Argued March 13, 1893. — Decided March 27, 1893.

The plaintiff below contracted to buy of defendant and the defendant agreed to sell to plaintiff, for a valuable consideration, several pieces or parcels of land. In pursuance of said contract, a deed was made by the defendant to the plaintiff, wherein and whereby, by mistake and inadvertence in describing the property conveyed, there was omitted therefrom an important part of the property contracted to be sold. The purchase price was a round sum for all the tracts, and was paid. *Held*, that a case for a reformation of the deed was clearly made out, unless, indeed, the defendant should be able to show some good reason why such admitted or established facts are not entitled to their apparent weight.

In equitable remedies given for fraud, accident or mistake, it is the facts as found that give the right to relief; and, as it is often difficult to say, upon admitted facts, whether the error which is complained of was occasioned by intentional fraud or by mere inadvertence or mistake, the appellant in this case has no reason to complain of the language of the court below, in attributing his misconduct to mistake or inadvertence rather than to intentional fraud; and he cannot raise such an objection for the first time in this court.

When, in the trial of a case, no objection is made to the admission of evidence and its relevancy to the pleadings, it is too late to raise those questions in this court.

The record discloses that the Crescent Mining Company filed its complaint against the Wasatch Mining Company in the District Court of the Third Judicial District of Utah Territory; that an answer denying the allegations of the complaint was duly filed; that evidence was taken on behalf of the respective parties; that the action was tried by the court sitting without a jury; and that the court made the following findings of fact:

"In July, 1886, said plaintiff contracted to buy of defendant and defendant agreed to sell to plaintiff for a valuable consideration the following described mining property and prem-

Statement of the Case.

ises, situated in Uintah mining district, Summit County, Utah Territory, bounded, with magnetic variation, at 17 deg. and 20 min. east, as follows, to wit:

"Beginning at corner No. 1 of the Walker and Walker Extension mine, and running thence N. 44 deg. 35 min. west 220 feet to corner No. 2 of said mine, from which U. S. mineral monument No. 4 bears south 46 deg. 10 min. west, at a distance of 158 feet; thence south 21 deg. 15 min. west 196 feet to corner No. 3; thence south 68 deg. 5 min. west 2804 feet to corner No. 4; thence south 44 deg. 35 min. east 216 feet to corner No. 5; thence north 68 deg. 5 min. east 1410 feet to corner No. 3 of the Buckeye mine; thence south 44 deg. 35 min. east along the southerly end line of said Buckeye mine 130 feet to corner No. 4 thereof; thence north 68 deg. 5 min. east 1400 feet to corner No. 1 of said last-mentioned mine; thence north 44 deg. 35 min. west 130 feet to corner No. 2 of said Buckeye mine, the same being also corner No. 6 of said Walker and Walker Extension mine; thence north 21 deg. 15 min. east 190 feet to the place of beginning, together with all dips, spurs and angles, and also all metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant or appurtenant, or therewith usually had and enjoyed, and all the estate, rights, title, interest and property, possession, claim and demand of said party defendant in or to the same.

"2. In pursuance of said contract a deed was made by defendant to plaintiff, bearing date September 1, 1886, wherein and whereby, by mistake and inadvertence in describing the property so contracted for and to be deeded, there was omitted therefrom so much of said property and premises as had been patented by the United States to James Lowe and others as part of lot 42, called the Pinyon and Pinyon Extension mining claim.

"3. That in making said contract and said deed it was the intention of parties plaintiff and defendant to include the premises and property omitted as last aforesaid, and the purchase price thereof was paid and secured with that of the property deeded."

Argument for Appellant.

From the facts so found the court drew the conclusion that the plaintiff was entitled to have its deed from defendant so reformed as to embrace and include in its description of the property to be conveyed all that which was described in the first finding of fact.

From this judgment of the District Court an appeal was taken to the Supreme Court of the Territory, and from the judgment of that court, affirming the decree of the District Court, an appeal was taken to this court.

Mr. A. B. Browne, for appellant. *Mr. Charles W. Bennett* filed a brief for the same.

I. The complaint, assuming all its allegations to be true, does not state a case entitling respondent to the relief obtained. Under the clear intent of that contract in the event of the representatives and successors in interest of William Jennings failing to join in the deed (and they did so fail) the Wasatch Mining Company was not required to make any deed until the final determination in its favor of the action against the Jenningses, nor until the Crescent Mining Company paid appellant $42,500. Here, according to the contract, the money was to be paid — not secured merely — before respondent would be entitled to demand any sort of a deed.

Now the complaint shows that the action mentioned in the contract is still pending. If at the time of the commencement of this action respondent was entitled to a deed, it must be by reason of some other transaction, some contract between the parties other than that of July the 9th. If there was any other negotiation between the parties, any other contract under which respondent was entitled to call for a deed, it was bound to allege it in its complaint. Failing to do so, the court had no authority to render the decree that it did, no matter how convincing the evidence might be that respondent was entitled to a deed. *Crocket* v. *Lee*, 7 Wheat. 522; *Carneal* v. *Banks*, 10 Wheat. 181; *Harding* v. *Handy*, 11 Wheat. 103; *Harrison* v. *Nixon*, 9 Pet. 483; *Foster* v. *Goddard*, 1 Black, 506; *Ferguson* v. *Ferguson*, 2 Comstock, (2 N. Y.,) 360; *Bailey*

v. *Ryder*, 10 N. Y. 363; *Mondran* v. *Goux*, 51 California, 151; *Dudley* v. *Scranton*, 57 N. Y. 424; *Schofield* v. *Whitelegge*, 49 N. Y. 259; *Tooker* v. *Arnoux*, 76 N. Y. 397.

II. If it were conceded that the complaint stated a case entitling the respondent to the relief granted, still there would have to be a reversal, because the court's findings are not within the issues presented by the pleadings.

A court of equity may reform a writing *inter partes* whenever, either through fraud or accident or mistake, it has been so written as not to express the true agreement. But one may no more be permitted to allege actual, positive fraud as the ground for reformation, and obtain the relief on proof of mistake, than he may be permitted to allege a mistake as the ground for relief and recover on proof of actual fraud. This we understand to be elementary doctrine. It is abundantly settled by authority. *Murcier* v. *Lewis*, 39 California, 533; *Devoe* v. *Devoe*, 51 California, 543; *Mondran* v. *Goux*, 51 California, 151; *Morenhout* v. *Barron*, 42 California, 591.

III. In discussing the second assignment of error, we have said all we desire to say in support of the third assignment of error.

Mr. R. N. Baskin, (with whom was *Mr. Thomas Marshall* on the brief,) for appellee.

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

This was a suit brought in the District Court of the Territory of Utah by the Crescent Mining Company against the Wasatch Mining Company for the reformation of a deed, made by the latter to the former, so as to make it embrace and include a certain piece or parcel of land claimed to have been wrongfully omitted from the deed.

Under the act entitled "An act concerning the practice in territorial courts and appeals therefrom," approved April 7, 1874, (18 Stat. p. 27,) if the findings of the District Court are sustained by the Supreme Court, such findings furnish a

sufficient statement of the facts for the purposes of an appeal to this court, and our inquiry is whether, upon such facts, the judgment appealed from was right. *Stringfellow* v. *Cain*, 99 U. S. 610.

If the plaintiff below contracted to buy of defendant and the defendant agreed to sell to plaintiff, for a valuable consideration, several pieces or parcels of land, and if, in pursuance of said contract, a deed was made by the defendant to the plaintiff, "wherein and whereby, by mistake and inadvertence in describing" the property conveyed, there was omitted therefrom an important part of the property contracted to be sold, and if the purchase price, being a round sum for all the tracts, has been paid, a case for a reformation of the deed was clearly made out, unless, indeed, the defendant should be able to show some good reason why such admitted or established facts are not entitled to their apparent weight.

In the effort to do so, the appellant points to what he contends is a fatal variance between the allegations of the bill of complaint and the findings of fact on which the court below based its judgment. The bill, as he reads it, is restricted to the case of an alleged fraud and conspiracy between the defendant company and one E. P. Ferry, a director and representative of the Crescent Mining Company, whereby the defendant company delivered and Ferry accepted, with a view to cheat and defraud the plaintiff company, a deed not conforming with the contract but omitting an important part of the land sold. And as the court finds, in terms, that the omission was by "mistake and inadvertence in describing the property so contracted for and to be deeded," the contention is that the case is within the scope of well-settled cases, which hold that no decree can be made in favor of a complainant on grounds not stated in his bill.

If this objection is well taken, the complainant was in fault in another very important particular. He omitted to make Ferry a party.

But we think this omission to make Ferry a party really shows that the complainant was not proceeding on a case of fraud and conspiracy between the defendant company and

Ferry, as the principal ground for relief. The allegations respecting Ferry were to show reasons why the deed was accepted by the plaintiff company, and how the delay to institute proceedings was accounted for. The word "fraud," as a term in legal proceedings, generally, is rather a legal conclusion than an independent fact.

In equitable remedies given for fraud, accident or mistake, it is the facts as found that give the right to relief, and it is often difficult to say, upon admitted facts, whether the error which is complained of was occasioned by intentional fraud or by mere inadvertence or mistake. Indeed, upon the very same state of facts, an intelligent man, acting deliberately, might well be regarded as guilty of fraud, and an ignorant and inexperienced person might be entitled to a more charitable view. Yet the injury to the complainant would be the same in either case.

The substantial meaning of the cases cited by the appellant is, that the matters alleged in the bill as injurious to the complainant must be those proved on the trial and relied on by the court in awarding relief, and we think that the appellant has no reason to complain of the language of the court below in attributing the appellant's misconduct to mistake and inadvertence, rather than to intentional fraud.

The appellant was too late in making this objection, even if it had been well founded. No such objection was taken in the District Court, when there would have been an opportunity for the plaintiff to amend his complaint, and such an objection was out of place and time when urged as a ground of appeal in this court.

Another assignment of error asks us to reverse the court below, because the complaint does not state a case entitling the plaintiff to any relief. The claim is, that by the terms of the contract between the parties, as set forth in the complaint and shown in evidence, the plaintiff was not entitled to a deed at the time of bringing the action; that the conditions upon which the deed was to be delivered had not yet been performed.

Such a contention seems quite inconsistent with the allega

tions of the answer of the defendant in the court below, averring the delivery of a proper deed by the defendant to the plaintiff, and with the finding of the court that a deed had passed, and the payment of a portion of the purchase money, and the security of the rest by a mortgage upon the property so conveyed.

The argument, however, discloses that the plaintiff seeks to overturn the decree below, because the agreement which was set up in the complaint, and which recited the execution of the deed, does show that the deed was not to be delivered until a certain controversy pending between the defendant, the Wasatch Mining Company and third parties, and affecting the title to the lands in dispute, should have been determined in favor of the Wasatch Mining Company when the entire purchase money should be paid, and because it appears from the complaint that said suit was not yet determined, nor said purchase money paid, at the time this action was commenced.

The proceedings in the District Court and the findings show that, without awaiting the determination of the outstanding controversy, the deed in question was delivered and accepted, and the unpaid portion of the purchase money, instead of being paid in cash, was secured to be paid by a mortgage given by the Crescent Mining Company to the Wasatch Company.

This was plainly a fulfilment of the contract in a modified form, agreed to by both the parties, and the assignment of error resolves itself into a contention that the bill of complaint did not, in terms, allege the modification of the agreement in the particulars mentioned, and did not aver a waiver of the condition that the deed was not to be delivered until the pending suit with third parties should be determined, and that therefore the case made and found was different from the one alleged.

The same answer is applicable to this objection that was made to the one first considered, — it came too late. In the District Court the defendant did not demur to the complaint as asking a form of relief inconsistent with the terms of the contract alleged, but by an answer and cross-bill brought all

the facts before the court; nor did the defendant object to plaintiff's evidence as exhibiting a different case from that asserted in the bill.

The Supreme Court of the Territory rightfully held that the defendant should have raised the question in the trial court, where ample power exists to correct and amend the pleadings; and, not having done so, but having gone to trial on the merits, the defendant was precluded from assigning error for matters so waived.

The doctrine on this subject is well expressed in the case of *Tyng* v. *Commercial Warehouse Co.*, 58 N. Y. 308, 313: "No question appears to have been made during the trial in respect to the production of evidence founded on any notion of variance or insufficiency of allegation on the part of plaintiff. Had any such objection been made it might have been obviated by amendment in some form or upon some terms under the ample powers of amendment conferred by the Code of Procedure. It would therefore be highly unjust, as well as unsupported by authority, to shut out from consideration the case as proved, by reason of defects in the statements of the complainant. Indeed, it is difficult to conceive of a case in which, after a trial and decision of the controversy, as appearing on the proofs, when no question has been made during the trial in respect to their relevancy under the pleadings, it would be the duty of a court, or within its rightful authority, to deprive the party of his recovery on the ground of incompleteness or imperfection of the pleadings."

No injustice is done the appellant by thus disposing of this objection, because the facts conclusively show that the written contract between the parties was not annulled or a new one substituted, but that it was substantially executed — the defendant simply accepting other conditions than those stipulated in its favor and delivering a deed as averred in the complaint.

Upon the facts as found, we are satisfied that the court below committed no error in its decree, and it is accordingly

Affirmed.

CAMERON *v.* UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 42. Argued November 14, 15, 1892. Dismissed December 19, 1892. Reinstated February 6, 1893. Submitted March 6, 1893. Decided March 27, 1893.

A suit under the act of February 25, 1885, 23 Stat. 321, c. 149, to prevent the unlawful occupancy of public lands, is a summary proceeding in the nature of a suit in equity, which may be tried by the court without the intervention of a jury, and is not governed by Rev. Stat. § 649.

The provisions of the said act of 1885 do not operate upon persons who have taken possession of land under a *bona fide* claim or color of title.

Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims title.

On the facts in this case, as detailed in the opinion of the court, *infra*, pp. 305–307, *Held*,

(1) That the lands in question were not public lands of the United States, within the meaning of that term as used in the acts of Congress respecting the disposition of public lands;

(2) That the defendant held them under claim or color of title, under an *expediente* of the Mexican government;

(3) That in thus holding the court intimates no opinion as to the validity of the defendant's title.

This case was originally instituted by the filing of a complaint by the United States in the District Court of the First Judicial District of the Territory of Arizona, to compel the removal by the defendant Cameron of a wire fence, by which it was alleged he had enclosed about 800 acres of public lands "without any title or claim or color of title, acquired in good faith thereto, and without having first made application to acquire title thereto, or any part thereof, according to law." The proceeding was taken under an act of Congress of February 25, 1885, 23 Stat. 321, c. 149, to prevent the unlawful occupancy of public lands. The first section of the act reads as follows: "All inclosures of any public lands in any State or Territory of the United States, heretofore or to be here-

after made, erected or constructed by any person . to any of which land included within the enclosure the person . . . making or controlling the enclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States at the time any such enclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction or control of any such enclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use or occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States without claim, color of title or asserted right as above specified as to enclosure, is likewise declared unlawful, and hereby prohibited."

In his answer the defendant denied in general terms the allegations of the complaint and, in an amendment thereto, set up a Mexican grant of May 15, 1825, to one Romero and other citizens of Santa Cruz; the death of Romero in 1873; the purchase by Alfred A. Green of the interest of his heirs in the grant; the sale by Green to one Rollin R. Richardson of an undivided nine-tenths of Green's interest upon certain terms and conditions expressed in the contract; the entry by Richardson upon the land, claiming the right to the possession thereof; the sale by Richardson to the defendant Cameron of all his interest in the land, and the assignment of his contract with Green, whereby the defendant became the equitable owner of the said undivided nine-tenths interest, and "is in the possession thereof and entitled to be in possession thereof." The answer further averred that an application was then pending before Congress for the confirmation of this grant; that the same had been examined by the surveyor general of Arizona, who had reported it to be a valid grant, and recommended that it be confirmed to the representatives of Romero and his associates to the extent of four square leagues, but defendant claimed that it should be confirmed to the exterior boundaries thereof, as set forth and described in the original

expediente. Upon the trial, the court found the issues in favor of the United States; decreed the enclosure to be of public lands, and therefore unlawful, and rendered a special judgment, in the terms of the act, that the fence be removed by the defendant within five days, and, in default of his so doing, that the same be destroyed by the United States marshal.

Defendant thereupon appealed to the Supreme Court of the Territory, by which the judgment was affirmed. Defendant was then allowed an appeal to this court.

Mr. Rochester Ford and *Mr. James C. Carter* for appellant.

Mr. Solicitor General for appellee.

Mr. W. H. Barnes filed a brief for appellee.

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

This case was originally dismissed upon the ground that the question at issue between the parties being the fact whether defendant had claim or color of title to the lands in question, acquired in good faith, there was no evidence of the value of such claim or color of title, even if the same were capable of pecuniary estimation, of which the court expressed a doubt. 146 U. S. 533.

The case was subsequently reinstated upon its being made to appear that the enclosed tract contained 1200 acres; that defendant had been engaged since 1883 in the business of grazing cattle upon this grant and the lands adjacent thereto; that his fence enclosed and controlled the only unappropriated water in a section of grazing country embracing not less than 100 square miles; that without such fence the use and control of the enclosed land and water would be of no use to him; that if he had not the ability to maintain the fence, the land and water would be at once seized and appropriated by other persons, and defendant's cattle driven and kept away; that he would be unable to conduct his cattle business in this sec-

tion; and that the possession, use and occupation of such enclosure exceeds the value of $10,000. These facts make a wholly different showing, and the case is therefore properly before us on its merits.

1. A preliminary objection is made by the appellee to the consideration of the case upon the ground that the proceeding is in the nature of a common law action; that it was tried without the intervention of a jury, and without a stipulation waiving a trial by jury; that the Supreme Court of Arizona could not properly consider any of the matters raised by the bill of exceptions, nor can this court do so; that all the Supreme Court could do was to affirm the judgment of the District Court; and that all this court can do is to affirm the judgment of the Supreme Court of Arizona. By section 2 of the act of February 25, 1885, under which this prosecution was commenced, the district attorney was given authority "to institute a civil suit in the proper . . . Territorial District Court in the name of the United States, and against the parties named or described who shall be in charge of or controlling the enclosure complained of as defendants; and jurisdiction is also hereby conferred on any . . . Territorial District Court having jurisdiction over the locality where the land enclosed, or any part thereof, shall be situated to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act. . . . In any case, if the enclosure shall be found to be unlawful, the court shall make the proper order, judgment or decree for the destruction of the enclosure in a summary way, unless the enclosure shall be removed by the defendant within five days after the order of the court."

It is a sufficient answer to this objection of the Government to say that this is not a common law action, but a summary proceeding more in the nature of a suit in equity, and that the decree provided by the act for the abatement of the enclosure is unknown to an action at common law as administered in this country. Proceedings by *assize of nuisance* and by writ *quod permittat prosternere* have been abolished by statute in England, and are now obsolete, if ever used, in this country.

3 Bl. Com. 221. In cases like the present the only common law remedy available to the United States would be an action of ejectment or trespass to oust the intruders. The proceeding contemplated by this act is more nearly analogous to the summary remedies provided for the enforcement of mechanics' liens considered by this court in *Idaho and Oregon Land Co.* v. *Bradbury*, 132 U. S. 509, or the special proceedings under the territorial statutes of Utah discussed in *Stringfellow* v. *Cain*, 99 U. S. 610; *Cannon* v. *Pratt*, 99 U. S. 619; *Neslin* v. *Wells*, 104 U. S. 428; *Gray* v. *Howe*, 108 U. S. 12; and in *Ely* v. *New Mexico &c. Railroad Co.*, 129 U. S. 291, appealed from the Supreme Court of Arizona. In these cases the validity of special statutory proceedings of this description was sustained, and in *Hecht* v. *Boughton*, 105 U. S. 235, it was held that under the act of April 7, 1874, 18 Stat. 27, c. 80, an appeal was the only proceeding by which this court could review the judgment or decree of a territorial court in a case where there was not a trial by jury.

The practice pursued in this case conformed to the territorial statutes of Arizona, which provide for a waiver by oral consent in open court of a trial by jury, in actions arising upon contract, and with the assent of the court, in other cases. The case is not governed by section 649 of the Revised Statutes.

2. The act of Congress which forms the basis of this proceeding was passed in view of a practice which had become common in the Western Territories of enclosing large areas of lands of the United States by associations of cattle raisers, who were mere trespassers, without shadow of title to such lands, and surrounding them by barbed wire fences, by which persons desiring to become settlers upon such lands were driven or frightened away, in some cases by threats or violence. The law was, however, never intended to operate upon persons who had taken possession under a *bona fide* claim or color of title; nor was it intended that, in a proceeding to abate a fence erected in good faith, the legal validity of the defendant's title to the land should be put in issue. It is a sufficient defence to such a proceeding to show that the lands enclosed were not public lands of the United States, or that defendant had claim

or color of title, made or acquired in good faith, or an asserted right thereto, by or under claim made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States. As the question whether the lands enclosed by the defendant in this case were public lands of the United States depends upon the question whether he had claim or color of title to them, the two questions may be properly considered together.

Defendant justified under an *expediente* of the Mexican Government which appears to have been obtained in the following manner: On July 19, 1821, Don Manuel Bustillo applied to the governor intendente of Sonora and Sinaloa, to purchase at auction four square leagues of land for the raising of stock at the place named de la Zanja, "three square leagues of land (*tres sitios de tierra*) in the same *presidio* in which I reside and outside of the boundaries thereof and on the side of the north, and one square more (*un sitio mas*) for an '*estancia*' in the place of the '*cajoncito*' on the side of the east"; and prayed for a measurement of the lands by the proper officers, and for a valuation of the same. Upon this petition the intendente ordered a measurement of the lands, summoning the adjacent land owners, and appointing appraisers for the valuation of the land, publication to be made for thirty days for the purpose of soliciting bidders. The measurements were made (the details of which are fully set forth) from a central point named San Rafael, two leagues in each direction, *i.e.* to the four points of the compass, and monuments were put up on the four corners of the square as well as in the centre of the four exterior lines. All these monuments were placed at the time the lands were measured under the authority of the Government. The monuments included four leagues square, or sixteen square leagues.

Upon the completion of this survey, the lands were valued at $60 each for the three square leagues, for the reason that they contained permanent water, and the remaining square league at $30, for the reason that it contained no water except such as was furnished by wells. The land was thereupon put up at auction, and after some spirited bidding between Bus-

tillo and Romero was struck off to the latter at $1200, and the grant made to him by the proper officer in the name of the Mexican Republic, in which the land is described as four square leagues for the raising of cattle, (*cuatro sitios de tierra para cria de ganado mayor*,) included in the place called "San Rafael de la Zanja," situated in the jurisdiction of the *Presidio* of Santa Cruz, to Don Ramon Romero and other citizens (*vecinos*) interested. The grantees were also required to confine themselves within their respective limits, "which are to be designated by landmarks of stone and mortar," (*mojoneras de cal y canto*,) and were guaranteed the free enjoyment and quiet and peaceful possession of said lands.

A petition to the surveyor general of the Territory of Arizona was filed February 28, 1880, by the heirs of Romero for the confirmation of this grant, under an act of Congress of July 22, 1854, 10 Stat. 308, c. 103, as marked by the survey and monuments. See also act of July 15, 1870, 16 Stat. 291, 304, c. 292. The surveyor general reported that the grant should be confirmed to the extent of four square leagues and no more.

The court found that the fence maintained by the defendant was within the exterior boundaries of the grant, as said boundaries were recited as measured in the *expediente*, and outside the four square leagues measured by the surveyor general; that the defendant had succeeded to all the rights of Romero in the grant, and was and had been in possession of all the buildings on the four square leagues surveyed by the surveyor general and claimed, and had always claimed title to the possession of all the land within the exterior boundaries as measured in the *expediente*, claiming title thereto; "that the report of the said surveyor general upon said grant has never been finally acted upon by Congress; and that said claim and said report are still pending before Congress."

Upon proof of the foregoing facts, we think it clear that defendant established a color of title to the lands in question. In *Wright* v. *Mattison*, 18 How. 50, 56, it was said by Mr. Justice Daniel: "The courts have concurred, it is believed, without an exception, in defining 'color of title' to be that

which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith. . . . A claim to property, under a conveyance, however inadequate to carry the true title to such property, and however incompetent might have been the power of the grantor in such conveyance to pass a title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title." In that case a tax deed was held to convey a colorable title. And in *Gregg* v. *Sayre*, 8 Pet. 244, a deed purporting to convey a title in fee, which was fraudulent as to the grantor, but which the grantee had accepted in good faith, was held to have the same effect. In *Bryan* v. *Forsyth*, 19 How. 334, it was held that under an act of Congress making a general grant of land to the inhabitants of a village, when the survey was made and approved, by which the limits of the lot were designated, the title was such as to sustain an action of ejectment even before a patent was issued. To the same effect are *Pillow* v. *Roberts*, 13 How. 472; *Meehan* v. *Forsyth*, 24 How. 175; *Gregg* v. *Forsyth*, 24 How. 179; *Hall* v. *Law*, 102 U. S. 461; *Deffeback* v. *Hawke*, 115 U. S. 392, 407.

It is true there are cases to the effect that color of title by deed cannot exist as to lands beyond what the deed purports to convey; but where the deed is fairly open to construction as to what it does purport to convey, and at the time it was executed the land was officially surveyed according to the theory of the party claiming under such deed, it is manifest these authorities have no application. Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed or the construction of the instrument under which the party in possession claims his title.

While a grant of four square leagues of land in the place

called San Rafael de la Zanja, standing alone, would appear to have been a grant of a certain quantity of land, when it appears by the same instrument that the limits of the grant were to be designated by landmarks of stone and mortar; that such designation was actually made; and that juridical possession of the land was delivered in pursuance thereof; it is at least open to doubt whether it does not fall within the class of concessions by specific boundaries, as these grants are distinguished in *United States* v. *McLaughlin*, 127 U. S. 428. Under the view taken by the court below, that the grant was of only four square leagues of land, it was evidently a mere float, and defendant would have no color of title to any specific land until the same was designated, and would have no authority to maintain a fence around any part of the tract. In the case of *Fremont* v. *United States*, 17 How. 542, a grant of a tract of land known as Mariposas, to the extent of ten square leagues within the limits of the Sierra Nevada and certain rivers, was held to convey a present and immediate interest to so much land to be afterwards laid off by official authority. As no survey in that case was made, it was held to be a grant of quantity only. The same ruling was made with regard to the Moquelamos grant, which was described as "bounded on the east by the adjacent sierra." *United States* v. *McLaughlin*, 127 U. S. 428. See also *United States* v. *Armijo*, 5 Wall. 444; *Higueras* v. *United States*, 5 Wall. 827; *Alviso* v. *United States*, 8 Wall. 337; *Hornsby* v. *United States*, 10 Wall. 224.

It is evident that the lands in question were not public lands of the United States within the meaning of that term as used in the acts of Congress respecting the disposition of public lands. As early as 1839 it was held by this court, in *Wilcox* v. *Jackson*, 13 Pet. 498, that whenever a tract of land had once been legally appropriated to any purpose, it became from that moment severed from the mass of public lands. In that case there was a reservation of lands for a military post, for an Indian agency, and for the erection of a light-house, and it was held that the lands so reserved were not subject to entry at the land office. So in *Leavenworth, Lawrence &c.*

Railway v. *United States*, 92 U. S. 733, the doctrine of the former case was reaffirmed and held to apply to Indian reservations. And in *Newhall* v. *Sanger*, 92 U. S. 761, lands within the boundaries of an alleged Mexican or Spanish grant, which were *sub judice* at the time the Secretary of the Interior ordered a withdrawal of the lands along the road of a certain railroad, were held not to be embraced in a grant to the company. Speaking of such claims, it was said by Mr. Justice Davis, "that claims, whether grounded upon an inchoate or a perfected title, were to be ascertained and adequately protected. This duty, enjoined by a sense of natural justice and by treaty obligations, could only be discharged by prohibiting intrusion upon the claimed lands until the opportunity was afforded the parties in interest for a judicial hearing and determination. It was to be expected that unfounded and fraudulent claims would be presented for confirmation. There was, in the opinion of Congress, no mode of separating them from those which were valid without investigation by a competent tribunal; and our legislation was so shaped that no title could be initiated under the laws of the United States to lands covered by a Mexican or Spanish claim, until it was barred by lapse of time or rejected." It was urged in that case that the reservation could only be of lands "lawfully" claimed, but it was said expressly that there was no authority to import the word "lawful" into the statute in order to change its meaning, and that the act in question expressly excluded from preëmption and sale all lands covered by any foreign grant or title. In *Doolan* v. *Carr*, 125 U. S. 618, it was held that, if the grant was of a specific quantity within designated outboundaries containing a greater area, only so much land within the outboundaries as was necessary to cover the specific quantity granted was excluded from the grant to the railroad companies. Indeed, the cases in which these rules have been applied to lands reserved for any purpose whatever are too numerous even to require citation. In this case there is an express finding that the report of the surveyor general limiting the grant to four square leagues has never been finally acted upon by Congress, and that the claim

and report are still pending before Congress; in other words, that the claim is *sub judice.*

It is true that in the act of July 22, 1854, 10 Stat. 308, c. 103, establishing the office of surveyor general for New Mexico, (then including Arizona,) there is a provision which is omitted in the act of July 11, 1870, 16 Stat. 230, c. 246, establishing the same office for Arizona, that "until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the Government, and shall not be subject to the donations granted by the previous provisions of this act"; but as the sundry civil appropriation act of that year (16 Stat. 291) provides that the surveyor general of Arizona shall have all the powers and perform all the duties enjoined upon the surveyor general of New Mexico, there could have been no intention to change the settled policy of the Government in this particular.

We do not wish to be understood as intimating an opinion as to the validity of defendant's title. There is an apparent discrepancy between the terms of the grant and the survey that was made in pursuance of it which may perhaps be susceptible of elucidation.

But we think that defendant has shown color of title to the land enclosed, and

The judgment of the Supreme Court of Arizona must, therefore, be reversed, and the case be remanded with directions to dismiss the petition.

Mr. Chief Justice Fuller dissented from the opinion and judgment.

MONONGAHELA NAVIGATION COMPANY *v.* UNITED STATES.

APPEAL FROM AND ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 722. Argued October 25, 26, 1892. — Decided March 27, 1893.

In the proceedings taken under the act of August 11, 1888, 25 Stat. pp. 400, 411, c. 860, to condemn lock and dam No. 7 of the Monongahela Navigation Company, that company is entitled under the provisions of the Fifth Amendment to the Constitution, to recover compensation from the United States for the taking of the franchise to exact tolls, as well as for the value of the tangible property taken.

The assertion by Congress of its purpose to take the property which that company had constructed in the Monongahela River by authority of the State of Pennsylvania did not destroy the franchise granted to the company by the State.

Bridge Company v. *United States,* 105 U. S. 470, distinguished from this case.

By the act of August 11, 1888, 25 Stat. 400, 411, c. 860, Congress, among other things, enacted:

"The Secretary of War be, and is hereby, authorized and directed to negotiate for and purchase, at a cost not to exceed one hundred and sixty-one thousand, seven hundred and thirty-three dollars, and thirteen cents, lock and dam number seven, otherwise known as 'the Upper Lock and Dam,' and its appurtenances, of the Monongahela Navigation Company, a corporation organized under the laws of Pennsylvania, which lock and dam number seven and its appurtenances constitute a part of the improvements in water communication in the Monongahela River, between Pittsburgh, in the State of Pennsylvania, and a point at or near Morgantown, in the State of West Virginia. And the sum of one hundred and sixty-one thousand, seven hundred and thirty-three dollars and thirteen cents, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, for consummating said purchase, the same

to be paid on the warrant of the Secretary of War, upon full and absolute conveyance to the United States of the said lock and dam number seven, and its appurtenances, of the said Monongahela Navigation Company.

"In the event of the inability of the Secretary of War to make voluntary purchase of said lock and dam number seven and its appurtenances for said sum of one hundred and sixty-one thousand, seven hundred and thirty-three dollars and thirteen cents, or a less sum, then the Secretary of War is hereby authorized and directed to institute and carry to completion proceedings for the condemnation of said lock and dam number seven and its appurtenances, said condemnation proceedings to be as prescribed and regulated by the provisions of the general railroad law of Pennsylvania, approved February nineteenth, eighteen hundred and forty-nine, and its supplements, except that the United States shall not be required to give any bond, and except that jurisdiction of said proceedings is hereby given to the Circuit Court of the United States for the Western District of Pennsylvania, with right of appeal by either party to the Supreme Court of the United States: *Provided*, That in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated; and the sum of five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to pay the necessary costs of said condemnation proceedings; and upon final judgment being entered therein the Secretary of War is hereby authorized and directed to draw his warrant on the Treasury for the amount of said judgment and costs, and said amount for the payment thereof is hereby appropriated out of any moneys in the Treasury not otherwise appropriated. And when said lock and dam number seven and its appurtenances shall have been acquired by the United States, whether by purchase or condemnation, the Secretary of War shall take charge thereof, and the same shall thereafter be subject to the provisions of section four of an act, entitled 'An act making appropriations for the construction, repair and preservation for certain public work on rivers

and harbors, and for other purposes,' approved July fifth, eighteen hundred and eighty-four."

The effort at a voluntary purchase failing, on December 1, 1888, proceedings of condemnation were commenced in the Circuit Court of the United States for the Western District of Pennsylvania. Viewers were appointed, who reported the value of the lock and dam number seven to be $209,393.52. Such valuation did not take into account the franchise of the company to collect tolls. An appeal was taken, as provided by the statutes of Pennsylvania, which appeal gave the right to a trial *de novo*, according to the course of the common law. A jury having been waived, the matter was tried before the court, the Navigation Company being the plaintiff as to the question of amount of compensation. These facts appeared on the trial:

"In 1836, the State of Pennsylvania incorporated and by acts in that and subsequent years granted to the Monongahela Navigation Company the right 'to enter upon the said river Monongahela and upon the lands on either side, and to use the rocks, stone, gravel or earth which may be found thereon in the construction of their works, . . . and to form and make, erect and set up any dams, locks or any other device whatsoever which they shall think most fit and convenient, to make a complete slack-water navigation between the points herein mentioned, to wit: the city of Pittsburgh and the Virginia State line.'

"The Monongahela River rises in the mountains of West Virginia, flows northwardly through Pennsylvania to Pittsburgh, where it forms a junction with the Allegheny and Ohio Rivers.

"In pursuance of its charter the Navigation Company, between 1841 and the present time, has constructed in said river seven locks and dams, which together now carry the slack-water navigation as far as the West Virginia State line.

"Prior to the construction of said company's works, that is to say, prior to the year 1841, the navigation of the Monongahela River was conducted altogether in small vessels, including small steamboats of not exceeding a tonnage of fifty

tons, which could not ascend the river at all seasons, but only during limited periods, depending on the rise in the river. The trade or commerce on said river, prior to its improvement by said company's works, was small, particularly in the article of coal, for which the river in its natural condition did not furnish sufficient harbors or places of shipment at all seasons of the year; but by the construction and maintenance of said company's works there has been created an existing navigation for large steamboats at all seasons of the year, and facilities for a large commerce, particularly in the article of coal, of which there is now transported in a single day as much as was, before the construction of the company's works, transported in an entire year.

"The construction of the lock and dam No. 7, the property attempted to be appropriated in this proceeding, by the Monongahela Navigation Company, was begun in the year 1882 and completed in 1884, being the last one built, and completing the company's improvements in the State of Pennsylvania.

"The work was commenced under the following circumstances:

"It was provided by an act of the legislature of Pennsylvania, constituting a supplement to the company's charter, approved April 8, 1857, that whenever the construction of sufficient locks and dams to extend the slack water on the Monongahela River from the Pennsylvania State line to Morgantown, in Virginia, shall have been commenced, it shall be the duty of the Monongahela Navigation Company to commence the construction of lock and dam No. 7 in such manner and on such plan as will extend the navigation from its present terminus to the Virginia State line, and complete the same simultaneously with the completion of the work extending to Morgantown."

On March 3, 1881, Congress passed an act, 21 Stat. 468, 471, c. 136, among other things appropriating $25,000 for improving the Monongahela River in West Virginia and Pennsylvania with this proviso:

"But this sum shall not be expended until the Monongahela Navigation Company shall have undertaken in good faith the

building of lock and dam number seven at Jacob's Creek, and until said company shall, in manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same."

After the passage of this act, and on March 24, 1881, Colonel Wm. E. Merrill, the engineer and officer in charge of the public works of the United States on the river Monongahela, addressed this letter to the Navigation Company:

"U. S. Engineer's Office, Custom-House,
"Cincinnati, O., *March* 24, 1881.

"Hon. J. K. Moorhead, *President Mon. Nav. Co., Pittsburgh, Pa.*

"Sir: The last river and harbor bill contains the following appropriation:

"'Improving Monongahela River, West Virginia and Pennsylvania, $25,000, but this sum shall not be expended until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam number seven, at Jacob's Creek, and until said company shall, in manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same.'

"You will, therefore, see that my work on number eight is wholly dependent on your work on number seven.

"I have, therefore, to urge on your company that you will, at the earliest date possible, 'undertake in good faith the building of lock and dam number seven,' and that you will give the Secretary of War satisfactory assurance of your ability and purpose to complete it.

"I would, therefore, suggest that it might be useful for your secretary to communicate at once to the Secretary of War such facts as to the financial resources of the company and its intentions about number seven as will satisfy him on the points specially left to his discretion, and unlock the appropriation so that it may be used this summer.

"Respectfully, your obedient servant,

"Wm. E. Merrill,
"*Maj. Eng'rs & B'v't Col.*"

Statement of the Case.

Whereupon, and on April 6, 1881, the following resolutions were passed by the Navigation Company, notice of which was given to the Secretary of War:

"Whereas Congress has made an appropriation for the commencement of the building of lock and dam number eight in the Monongahela River, the payment of which appropriation is made to depend upon the Secretary of War being satisfied of the *bona fide* intention of this company to construct lock and dam number seven, and of their financial ability to complete the same; and

"Whereas Col. Merrill, of the United States engineers, in charge of the government improvement of the Monongahela River, has requested this company to furnish the Secretary of War with satisfactory assurances in relation thereto: Therefore

"*Resolved*, That it is the *bona fide* purpose and intention of this company to construct lock and dam number seven in the Monongahela River in the manner and at the time required of them by the acts of assembly of the State of Pennsylvania — that is to say, so to complete said lock and dam number seven that the same shall be ready for use as soon as the requisite locks and dams above lock and dam number seven, constructed or about to be constructed by the Federal Government, shall also be finished and ready for use, so as to complete the slack water of said river from Pittsburgh, Pennsylvania, to Morgantown, Virginia.

"*Resolved*, That the secretary of this company be directed to forward a copy of the foregoing resolution, together with copies of the company's annual report showing the intention of the company and their ability to complete this work, to Col. Merrill and also to the Secretary of War."

And on May 4, 1881, Col. Merrill addressed the following letter to the President of the Navigation Company:

"Sir: I have just received official notice from the Secretary of War, through the Chief of Engineers, that the resolution and documents relative to the construction of lock and dam No. 7, on the Monongahela River, forwarded to this

office by your company in April last, (duplicate sent to the honorable Secretary of War,) have been considered as fully meeting the requirements of the proviso in the last appropriation for the improvement of the above-named river, prohibiting the expenditure of the money appropriated, 'until the Monongahela Navigation Company shall have undertaken in good faith the building of lock and dam No. 7 at Jacob's Creek, and until said company shall, in a manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same.'"

Thereafter, and in 1882, lock and dam number seven were commenced and completed in 1884. In the course of the trial the company called a witness, and offered to prove by him and other witnesses:

"That the paid-up capital stock of the Monongahela Navigation Company consists of thirty-two thousand, six hundred and thirty-nine shares of fifty dollars; that dividends have been declared on the stock for a number of years at the rate of twelve per cent per annum.

"That the tolls received by the said company for the use of its works, including lock and dam No. 7, have averaged for several years past not less than $240,000; that the market value of the stock was at the time of the inception of these proceedings about $100 per share; that the money value of their entire works and franchise is not less than $4,000,000; that the actual toll receipts of lock and dam No. 7 for several years past have exceeded $2800 per annum, and that a very large increase of such toll receipts at lock and dam No. 7 will certainly take place in a short time by the development of coal mines naturally tributary to said lock and dam.

"That by the construction and maintenance of the company's works a permanent and reliable public highway has been created on which a large and increasing carriage of coal and general merchandise takes place, and that permanent navigation for the largest vessel and steamboat now exists from the city of Pittsburgh, Pennsylvania, to or near the line between the States of Pennsylvania and West Virginia.

"That in view of the present and prospective tolls receivable

Counsel for Appellant.

at lock and dam No. 7, the present value of said lock and dam No. 7 is not less than $450,000, said value being predicated upon said present and prospective tolls; that said lock and dam No. 7 are a portion of said company's works, which consist of seven dams, each furnished with a lock or locks.

"That the navigation which is sought by these proceedings to be made free was mainly created and made possible at all seasons by the construction and maintenance of the company's works.

"That a large portion of the tolls received by the company is charged upon merchandise and articles carried between points of shipment and delivery entirely within the State of Pennsylvania, and constituting internal commerce of said State, and that a portion of the tolls collectible at lock and dam No. 7, for the use of said lock and dam, is chargeable for merchandise, goods and passengers carried between points of shipment and delivery in the State of Pennsylvania, the transportation being wholly within the State as to said portion.

"To which offer of testimony counsel for the United States objected, for the reason that the same was incompetent and irrelevant; whereupon the court sustained the objection and rejected the evidence."

The result of the trial was a finding by the court that the value of the lock and dam number seven was $209,000, "not considering or estimating in this decree the franchise of this company to collect tolls." Such amount was the sum adjudged and decreed to be paid by the United States to the Navigation Company for the property condemned. The company brought the case to this court by both writ of error and appeal.

Mr. Wayne McVeagh and *Mr. Johns McCleave*, (with whom was *Mr. Thomas D. Carnahan* on the brief,) for appellant and plaintiff in error, cited *Cardwell* v. *American Bridge Co.*, 113 U. S. 205; *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Pound* v. *Turck*, 95 U. S. 459; *Huse* v. *Glover*, 119 U. S. 543; *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Pennsylvania Railroad* v. *Balt. & Ohio Railroad*, 60

Maryland, 263; *Commonwealth* v. *Pittsburgh & Connellsville Railroad*, 58 Penn. St. 26; *Isom* v. *Miss. Central Railroad*, 36 Mississippi, 300; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *Bridge Company* v. *United States*, 105 U. S. 470; *County of Mobile* v. *Kimball*, 102 U. S. 691; *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Montgomery County* v. *Schuylkill Bridge Co.*, 110 Penn. St. 54.

Mr. Attorney General and *Mr. Solicitor General* for appellees and defendants in error.

The principal question at bar is whether the proviso in the River and Harbor Act of August 11, 1888, is valid. This question was raised in various forms upon the trial, the contention of the appellant being that the franchise is no less property than the material structure of the lock and dam, and that therefore the same cannot be taken or destroyed by the government, directly or indirectly, without compensation. On behalf of the government, on the contrary, it was claimed by the district attorney, and held by the court, that the right of the United States to regulate and absolutely control the navigation of the Monongahela River was supreme and paramount; that it was not within the power of the State to grant to any corporation or persons a franchise in, or connected with, the navigation of said river which was not wholly subordinate to the rights of the United States; that any franchise granted by the State had, as matter of law, necessarily within it, as a condition, that it might be terminated at any time by an act of the United States, and that therefore no injury entitled to compensation could accrue to any party claiming such franchise, by reason of the exercise of such paramount right by the United States.

I. Has the appellant, as against the United States, a vested property in the franchise to maintain and take toll for the use of this lock and dam? By clause 3, section 8, article 1, of the Constitution, there is vested in Congress power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Under this grant

the authority of Congress to control the navigation of all streams which are highways of commerce between the States has been uniformly asserted by Congress and never successfully denied in the courts. It is true there are numerous decisions upholding the exercise of a regulating power over such channels of commerce by the States, but in every case it has been admitted that such exercise could be upheld only because and so long as Congress failed to assert its jurisdiction.

It is presumed that it will not be questioned by appellants that the Monongahela River, at the point under discussion, was a navigable channel of interstate commerce. Certainly such a contention could not be successfully maintained. *Escanaba Company* v. *Chicago*, 107 U. S. 678; *Barney* v. *Keokuk*, 94 U. S. 324; *The Montello*, 20 Wall. 430; *The Genesee Chief*, 12 How. 443; *Bridge Co.* v. *United States*, 105 U. S. 470; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Willamette Bridge Co.* v. *Hatch*, 125 U. S. 1.

In *Bridge Co.* v. *United States*, Chief Justice Waite, delivering the opinion of the court, said (at page 479): "the power of Congress in respect to legislation for the preservation of interstate commerce is just as free from State interference as any other subject within the sphere of its legislative authority. The action of Congress is supreme, and overrides all that the States can do. Where, therefore, Congress in a proper way declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a State can make it lawful. Those who act on state authority alone necessarily assume all the risks of legitimate Congressional interference." This case is instructive, not only in the clearness of the opinion of the Chief Justice, speaking for the majority of the court, but because the dissenting opinions bring out with more distinctness the points decided.

In *The Willamette Bridge Case*, the late Mr. Justice Bradley, in the opinion of the court, said (p. 12): "We do not doubt that Congress, if it saw fit, could thus assume the care of said streams, in the interest of foreign and interstate commerce; we only say that, in our opinion, it has not done so by the clause in question. And although, until Congress acts, the

States have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the States, or individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, viz., the ultimate (though yet unexerted) power of Congress over the whole subject matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams. It might itself give original authority for the erection of such bridges when called for by the demands of interstate commerce by land; but in many, perhaps the majority, of cases, its assent only is asked, and the primary authority is sought at the hands of the State." *The Willamette Bridge* and *The Escanaba Bridge* cases above cited. See also *Gilman* v. *Philadelphia*, 3 Wall. 713; *Martin* v. *Mott*, 12 Wheat. 19; *Luther* v. *Borden*, 7 How. 1, 43.

III. The foregoing propositions being established, the maintenance of appellant's contention that it has in this franchise a vested property as against the United States is impossible. The truth is that in condemning and paying the appellant for its material improvements Congress makes a concession which could not have been enforced by law. It was entirely competent for Congress to have enacted and enforced a law forbidding the collection of any further tolls by this corporation, as being an unlawful obstruction or interference with interstate commerce, making in said law no provision whatever for any payment to the owners of the property. It has not, however, seen fit to enforce the extreme legal rights of the Government, but recognizing the large expenditures of money made by this company, and the equity growing out of such expenditures, provision has been made for the reimbursement of all such expenditures. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 547.

IV. But not only is the demand for compensation on account of the destruction of this franchise unfounded as against the United States, but such a demand could not be maintained even against the State of Pennsylvania. In the legis-

lation constituting the charter of appellant, through which alone it obtains any rights in the premises, the State distinctly reserved the option to take possession of this property upon the payment of the cost of material improvements, and expenses, with six per cent interest, less dividends.

In view of these enactments, it is clear that this corporation has no contract with the State of Pennsylvania for an unlimited franchise. Its property is always subject to be taken by the State as provided in the sections quoted. Much less can appellant demand compensation for the franchise from the government of the United States, with which it has no contract in the premises, and which is simply exercising a paramount authority derived directly from the Constitution of the United States, the supreme law of the land.

V. It is said that by the act of March 3, 1881, (21 Stat. 471,) Congress has impliedly recognized and confirmed a vested right in the premises.

To this proposition there are two very ready answers. *First:* the legislation of 1881 does not by its terms amount to a contract between the government and appellant in the premises. *The Bridge Company* v. *The United States*, 105 U. S. 570. *Second:* it is incompetent for a legislature to barter away or conclude itself in the exercise of any constitutional grant of legislative power. The legislature of Pennsylvania, itself, has held that the right of the Navigation Company in the case at bar is a revocable license. *Monongahela Navigation Co.* v. *Coons*, 6 W. & S. 101; *Susquehanna Canal Co.* v. *Wright*, 9 W. & S. 9; *S. C.* 42 Am. Dec. 312; *New York & Erie Railroad* v. *Young*, 33 Penn. St. 175; *McKeen* v. *Delaware Canal Co.*, 49 Penn. St. 424; *Freeland* v. *Pennsylvania Railroad*, 66 Penn. St. 91. See also *Bailey* v. *Phil. Wilm. & Balt. Railroad*, 4 Harr. (Del.) 389; *S. C.* 44 Am. Dec. 593; *Rundle* v. *Del. & Raritan Canal Co.*, 14 How. 80.

In conclusion, we submit that the power of Congress over this subject matter is plenary. *In re Rapier*, 143 U. S. 110, 134.

Mr. C. Newell and *Mr. D. T. Watson* also filed a brief for appellee.

Opinion of the Court.

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

It appears from the foregoing statement that the Monongahela Company had, under express authority from the State of Pennsylvania, expended large sums of money in improving the Monongahela River, by means of locks and dams; and that the particular lock and dam in controversy were built not only by virtue of this authority from the State of Pennsylvania, but also at the instance and suggestion of the United States. By means of these improvements, the Monongahela River, which theretofore was only navigable for boats of small tonnage, and at certain seasons of the year, now carries large steamboats at all seasons, and an extensive commerce by means thereof. The question presented is not whether the United States has the power to condemn and appropriate this property of the Monongahela Company, for that is conceded, but how much it must pay as compensation therefor. Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for in any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government. The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.

In the case of *Sinnickson* v. *Johnson*, 17 N. J. L. (2 Harr.) 129, 145, cited in the case of *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, 178, it was said that "this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of uni-

versal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle." And in *Gardner* v. *Newburgh*, 2 Johns. Ch. 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to the affirmations lying behind it in the Declaration of Independence, for, in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses. And with respect to constitutional provisions of this nature, it was well said by Mr. Justice Bradley, speaking for the court, in *Boyd* v. *The United States*, 116 U. S. 616, 635: "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government, the last, the one in point here, being, "Nor shall private

property be taken for public use without just compensation." The noun "compensation," standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken. This excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it, to stand as a declaration, that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.

We do not in this refer to the case where only a portion of a tract is taken, or express any opinion on the vexed question as to the extent to which the benefits or injuries to the portion not taken may be brought into consideration. This is a question which may arise possibly in this case, if the seven locks and dams belonging to the Navigation Company are so situated as to be fairly considered one property, a matter in respect to which the record before us furnishes no positive evidence. It seems to be assumed that each lock and dam by itself constitutes a separate structure and separate property,

and the thoughts we have suggested are pertinent to such a case.

By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes — that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 571, Mr. Justice McLean in his opinion, referring to a provision for compensation found in the charter of the Warren bridge, uses this language: "They [the legislature] provide that the new company shall pay annually to the college, in behalf of the old one, one hundred pounds. By this provision, it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do: assess the amount of compensation to which the complainants are entitled." See also the following authorities: *Commonwealth* v. *Pittsburgh & Connellsville Railroad*, 58 Penn. St. 26, 50; *Penn. Railroad* v. *Balt. & Ohio Railroad*, 60 Maryland, 263; *Isom* v. *Mississippi Central Railroad*, 36 Mississippi, 300.

In the last of these cases, and on page 315, will be found these observations of the court: "The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted

or tolerated under our Constitution. If anything *can be* clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so."

We are not, therefore, concluded by the declaration in the act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property.

How shall just compensation for this lock and dam be determined? What does the full equivalent therefor demand? The value of property, generally speaking, is determined by its productiveness — the profits which its use brings to the owner. Various elements enter into this matter of value. Among them we may notice these: Natural richness of the soil as between two neighboring tracts — one may be fertile, the other barren; the one so situated as to be susceptible of easy use, the other requiring much labor and large expense to make its fertility available. Neighborhood to the centres of business and population largely affects values. For that property which is near the centre of a large city may command high rent, while property of the same character, remote therefrom, is wanted by but few, and commands but a small rental. Demand for the use is another factor. The commerce on the Monongahela River, as appears from the testimony offered, is great; the demand for the use of this lock and dam constant. A precisely similar property, in a stream where commerce is light, would naturally be of less value, for the demand for the use would be less. The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner. For each separate use of one's property by others, the owner is entitled to a reasonable compensation; and the number and amount of such uses determine the productiveness and the earnings of the property, and, therefore, largely its value. So that if this property, belonging to the Monongahela Company, is rightfully where it is, the company may justly demand from every one making use of it a compensation; and to take that property from it deprives it of the aggregate amount of such compensation which otherwise it would continue to receive. What amount of compensation for

each separate use of any particular property may be charged is sometimes fixed by the statute which gives authority for the creation of the property; sometimes determined by what it is reasonably worth; and sometimes, if it is purely private property, devoted only to private uses, the matter rests arbitrarily with the will of the owner. In this case, it being property devoted to a public use, the amount of compensation was subject to the determination of the State of Pennsylvania, the State which authorized the creation of the property. The prices which may be exacted under this legislative grant of authority are the tolls, and these tolls, in the nature of the case, must enter into and largely determine the matter of value. In the case of *Montgomery County* v. *Bridge Company*, 110 Penn. St. 54, 58, in which the condemnation of a bridge belonging to the bridge company was sought, the court said: "The bridge structure, the stone, iron and wood, was but a portion of the property owned by the bridge company, and taken by the county. There were the franchises of the company, including the right to take toll, and these were as effectually taken as was the bridge itself. Hence, to measure the damages by the mere cost of building the bridge would be to deprive the company of any compensation for the destruction of its franchises. The latter can no more be taken without compensation than can its tangible corporeal property. Their value necessarily depends upon their productiveness. If they yield no money in return over expenditures, they would possess little, if any, present value. If, however, they yield a revenue over and above expenses, they possess a present value, the amount of which depends, in a measure, upon the excess of revenue. Hence it is manifest that the income from the bridge was a necessary and proper subject of inquiry before the jury."

So, before this property can be taken away from its owners, the whole value must be paid; and that value depends largely upon the productiveness of the property, the franchise to take tolls. That, in the absence of Congressional action, the State of Pennsylvania had the power, either acting itself or through a corporation which it chartered, to improve the navigation of the river by means of locks and dams, and also to authorize

the exaction of tolls for the use of such improvements, are matters upon which there can be no dispute, in view of the many decisions of this court. Those very closely in point are *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Pound* v. *Turck*, 95 U. S. 459; *Huse* v. *Glover*, 119 U. S. 543; *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288.

In the first of these cases it appeared that the Marsh Company was incorporated by an act of the general assembly of Delaware, and authorized to construct a dam across Blackbird Creek, a navigable stream within the territorial limits of the State; that, in pursuance of such authority, it did construct such dam, by which the navigation of the stream was obstructed; Willson, with others, were the owners of a sloop, regularly licensed according to the laws of the United States, which sloop broke and injured the dam. On being sued for this injury, the owners pleaded that the dam was wrongfully erected, obstructing the navigation of the stream, and that the sloop could not, without breaking through the dam, pass over and along the stream, and that in order to remove the said obstructions it did the injury complained of. A demurrer to this plea was sustained, and in due course the case came to this court. The opinion was delivered by Chief Justice Marshall, sustaining the ruling, and holding that the dam, in the absence of legislation by Congress, was rightfully there, having been authorized by the legislature of the State in which the stream was situated. In it the Chief Justice said (p. 252): "If Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States, we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question. We do

not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

In the case of *Pound* v. *Turck*, it appeared that a dam and boom had been placed in the Chippewa River, under authority of the legislature of Wisconsin. The fact that the plaintiff suffered injury therefrom was established, and the defence was that they were rightfully there. Mr. Justice Miller, speaking for the court, on page 464, uses this language : " There are within the State of Wisconsin, and perhaps other States, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to saw-logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the State may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislature."

Huse v. *Glover* comes even nearer to this case. The State of Illinois, at an expense of several hundred thousand dollars, constructed locks and dams on the Illinois River for the purpose of improving its navigation, and prescribed rates of toll to be paid by those using the improvements. A bill was filed to enjoin the exaction of toll on vessels of complainant passing through the improved waters of the river. After referring to the clause in the ordinance for the government of the Northwest Territory, which provided that the navigable waters

should be common highways, forever free, without any tax or duty, Mr. Justice Field, for the court, on page 548, 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. . . . How the highways of a State, whether on land or by water, shall be best improved for the public good is a matter for state determination, subject always to the right of Congress to interpose in the cases mentioned."

And in the last of these cases, where the Manistee River was improved under authority of the legislature of the State of Michigan, and tolls exacted for the use of the improved water way, we find this in the opinion, on page 295: "The internal commerce of the State — that is, the commerce which is wholly confined within its limits — is as much under its con-

trol as foreign or interstate commerce is under the control of the general government; and, to encourage the growth of this commerce and render it safe, the States may provide for the removal of obstructions from their rivers and harbors, and deepen their channels, and improve them in other ways, if, as is said in *County of Mobile* v. *Kimball*, the free navigation of those waters, as permitted under the laws of the United States, is not impaired, or any system for the improvement of their navigation provided by the general government is not defeated. 102 U. S. 691, 699. And to meet the cost of such improvements, the States may levy a general tax or lay a toll upon all who use the rivers and harbors as improved. The improvements are, in that respect, like wharves and docks constructed to facilitate commerce in loading and unloading vessels. *Huse* v. *Glover*, 119 U. S. 543, 548. Regulations of tolls or charges in such cases are mere matters of administration, under the entire control of the State."

Kindred to these are the cases of *Gilman* v. *Philadelphia*, 3 Wall. 713; *Transportation Company* v. *Chicago*, 99 U. S. 635; *Escanaba Company* v. *Chicago*, 107 U. S. 678; *Cardwell* v. *American Bridge Co.*, 113 U. S. 205; and *Willamette Bridge Company* v. *Hatch*, 125 U. S. 1, 12, in which the power of a State, in the absence of Congressional action, to obstruct navigation by the construction of bridges across navigable streams, was sustained. And, also, the cases of *Packet Co.* v. *Keokuk*, 95 U. S. 80, and *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, in which the power of a State, under like circumstances to improve the border of streams by wharves and exact wharfage therefor, was affirmed.

While in a matter of this kind it is needless to look for authorities beyond the decisions of this court, yet the cases of *Kellogg* v. *Union Company*, 12 Connecticut, 6, and *Thames Bank* v. *Lovell*, 18 Connecticut, 500, may be referred to as containing very satisfactory discussions of this question. We quote from the opinion in the latter case, page 511:

"These acts, improving rivers, constructing roads, etc., will never be complained of, as interfering with the rights and powers of Congress. The tolls alone are the subject of com-

plaint. But these are only the fair equivalent for privileges which the State had a right to create, and without which these privileges could never have existed. Commerce, therefore, has not been crippled by the tolls, as the defendant claims, but has been extended by them. The legislature of the State creating this corporation, with its duties and its privileges, has come in aid of the powers of Congress.

"It seems to be admitted, that States may construct canals, turnpikes, bridges, etc., and impose tolls upon passengers and freight, as a remuneration for the improvements; and that this may be done, without interfering with the power of Congress to regulate commerce among the States, or its power to establish post-offices and post-roads. We have not been able to discover a sound distinction between these cases and the one we are considering. Congress has the same power to regulate commerce upon the land as upon the water. A river, to be sure, is a natural channel; but if it is not a navigable one, it can no more be used for the purposes of commerce than the land; and, therefore, to convert it from the mere natural channel into a public highway, for commercial purposes, and to levy a toll to reimburse the expense, no more conflicts with the powers of Congress over the commerce of the country than the construction of a canal or a turnpike for the same purposes, with the same tolls. And this, we think, is equally true of rivers, which are only navigable to a partial and limited extent, and by artificial and expensive means are rendered navigable to a greater extent, with a reasonable toll levied upon those only who receive the benefit of the extended navigation. The principle is the same in both the cases stated."

But in this case there was not only the full authority of the State of Pennsylvania, but also, so far as respects this particular lock and dam, they were constructed at the instance and implied invitation of Congress. The act of March 3, 1881, making an appropriation for the improvement of the river, in terms provided that no such improvement should be made until the Navigation Company had in good faith started upon the building of this lock and dam. This lock and dam connected the lower improvements already made by the Naviga-

tion Company with the upper improvements proposed to be made by Congress, and the appropriation by the latter was conditioned on the company's undertaking their construction. This is something more than the mere recognition of an existing fact; it is an invitation to the company to do the work; and when in pursuance of that invitation, and under authority given by the State of Pennsylvania, the company has constructed the lock and dam, it does not lie in the power of the State or the United States to say that such lock and dam are an obstruction and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the Navigation Company.

Upon what does the right of Congress to interfere in the matter rest? Simply upon the power to regulate commerce. This is one of the great powers of the national government, one whose existence and far-reaching extent have been affirmed again and again by this court in its leading opinions, and the power of Congress over such natural highways as navigable streams is confessedly supreme. See among the various cases in which this supremacy has been affirmed: *Gilman* v. *Philadelphia*, 3 Wall. 713, 725; *County of Mobile* v. *Kimball*, 102 U. S. 691, 696; *Bridge Company* v. *United States*, 105 U. S. 470, 482; *Miller* v. *New York*, 109 U. S. 385, 392; *Wisconsin* v. *Duluth*, 96 U. S. 379; *Willamette Iron Bridge Company* v. *Hatch*, 125 U. S. 1. In *Wisconsin* v. *Duluth* (p. 383) it was said: "It is to be observed, as preliminary to an examination of the acts of the general government in the special matter before us, that the whole system of river and lake and harbor improvements, whether on the seacoast or on the lakes or the great navigable rivers of the interior, has for years been mainly under the control of that government, and that, whenever it has taken charge of the matter, its right to an exclusive control has not been denied. . . . And while this court has maintained, in many cases, the right of the States to authorize structures in and over the navigable waters of the States, which may either impede or improve their navigation, in the absence of any action of the general government in the same matter, the doctrine has been laid down with unvarying

uniformity, that when Congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under state authority. The adjudged cases in this court on this point are numerous."

And in *Willamette Iron Bridge Company* v. *Hatch* (p. 12) the proposition was thus stated: "And although, until Congress acts, the States have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose." It cannot be doubted, in view of the long list of authorities, — for many more might be cited, — that Congress has the power in its discretion to compel the removal of this lock and dam as obstructions to the navigation of the river, or to condemn and take them for the purpose of promoting its navigability. In other words, it is within the competency of Congress to make such provision respecting the improvement of the Monongahela River as in its judgment the public interests demand. Its dominion is supreme.

But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post-offices and post-roads; but, if Congress wishes to take private property upon which to build a post-office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. And if that property be improved under authority of a charter granted by the State, with a franchise to take tolls for the use of the

improvement, in order to determine the just compensation, such franchise must be taken into account. Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a post-office is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property taken there can be as little doubt. If a man's house must be taken, that must be paid for; and, if the property is held and improved under a franchise from the State, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken. So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation. It should be noticed that here there is unquestionably a taking of the property, and not a mere destruction. It is not a case in which the government requires the removal of an obstruction. What differences would exist between the two cases, if any, it is unnecessary here to inquire. All that we need consider is the measure of compensation when the government, in the exercise of its sovereign power, takes the property.

And here it may be noticed that, after taking this property, the government will have the right to exact the same tolls the Navigation Company has been receiving. It would seem strange that if by asserting its right to take the property, the government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and, having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls.

In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice.

Much reliance is placed upon the case of *Bridge Company* v. *United States*, 105 U. S. 470. But that was a case not of the taking, but of the destruction, of property. It is true, Mr. Chief Justice Waite, in delivering the opinion of the court, uses this language in reference to the power of Congress: "But the power of Congress in respect to legislation for the preservation of interstate commerce is just as free from state interference as any other subject within the sphere of its legislative authority. The action of Congress is supreme and overrides all that States may do. When, therefore, Congress, in a proper way, declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a State can make it lawful. Those who act on state authority alone, necessarily assume all the risks of legitimate congressional interference." But such affirmation of power was not made with reference to a question like this. The facts in that case were these: The Bridge Company was a creature of the legislation of the States of Ohio and Kentucky, and incorporated to build a bridge across the Ohio River, between Newport and Cincinnati. The state charters authorized the construction of a bridge in accordance with the provisions of an act of Congress of July 14, 1862, or any act that Congress might pass on the subject. On March 3, 1869, Congress passed a resolution giving its assent to the construction of this bridge. This resolution contained this reservation: "But Congress reserves the right to withdraw the assent hereby given, in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge." 15 Stat. 347. After the passage of this resolution the company commenced the erection of a drawbridge, and expended a large amount of money in the undertaking.

Before, however, the bridge was finished, Congress passed an act (the act of March 3, 1871, 16 Stat. 572, 573, c. 121) requiring a high bridge. The act provided that upon the Bridge Company making the changes required by the act, it might file its bill in the Circuit Court of the United States for the Southern District of Ohio, to have determined whether the bridge had been constructed theretofore, so far as the work had progressed, in accordance with the provisions of law then in existence; and, second, the liability of the United States, if any there was, by reason of the changes. The suit was brought, and on appeal to this court, by four to three, Mr. Justice Matthews taking no part in the decision, the court held that the government was not liable for any damages. The case turned in the judgment of the majority mainly upon the resolution of March 3, 1869, heretofore quoted. In the early part of the opinion, (p. 475,) the Chief Justice says: "No question can arise in this case upon what the States have done, for both Ohio and Kentucky required the company to comply with the regulations of Congress. Neither are we called on to determine what would have been the rights of the company, if, in the original license, no power of future control by Congress had been reserved." He then proceeds to consider at some length the peculiar language of that reservation. Under it, as he says, Congress had the right to withdraw assent, which was equivalent to a positive enactment that a further maintenance of the bridge, as at first planned and partially constructed, was unlawful, and the mere exercise of its power under this reservation, to declare the proposed structure unlawful, did not expose the government to any liability for damages. We quote fully the expression of views on this subject:

"It is next insisted that if, in the judgment of Congress, the public good required the bridge to be removed, or alterations to be made in its structure, just compensation must be made the company for the loss incurred by what was directed. It is true that one cannot be deprived of his property without due process of law, and that private property cannot be taken for public use without just compensation.

"In the present case, the Bridge Company asked of Con-

gress permission to erect its bridge. In response to this request permission was given, but only on condition that it might be revoked at any time if the bridge was found to be detrimental to navigation. This condition was an essential element of the grant, and the company in accepting the privileges conferred by the grant assumed all risks of loss arising from any exercise of the power which Congress saw fit to reserve. What the company got from Congress was the grant of a franchise expressly made defeasible at will, to maintain a bridge across one of the great highways of commerce. This franchise was a species of property, but from the moment of its origin its continued existence was dependent on the will of Congress, and this was declared in express terms on the face of the grant by which it was created. In the use of the franchise thus granted, the company might, and it was expected would, acquire property. The property thus acquired Congress could not appropriate to itself by a withdrawal of its assent to the maintenance of the bridge that was to be built, but the franchise, by express agreement, was revocable whenever in the judgment of Congress it could not be used without substantial and material detriment to the interest of navigation. A withdrawal of the franchise might render property acquired on the faith of it, and to be used in connection with it, less valuable; but that was a risk which the company voluntarily assumed when it expended its money under the limited license which alone Congress was willing to give. It was optional with the company to accept or not what was granted, but having accepted, it must submit to the control which Congress, in the legitimate exercise of the power that was reserved, may deem it necessary for the common good to insist upon."

It is evident, therefore, that the point decided was that Congress had reserved the right to withdraw its assent to the construction of a bridge on the plan proposed, whenever, in its judgment, such bridge should become an obstruction to the navigation; that the Bridge Company entered upon the construction of the bridge in the light of this express reservation, and with the knowledge that Congress might at any time declare that the bridge constructed as proposed was an

obstruction to navigation; and that Congress, exercising this reserved power, did not thereby subject the government to any liability for damages. There was no taking of private property for public uses; and while the company may have been deprived of property, it was deprived by due process of law, because deprived under authority of an express reservation of power. Even this conclusion was reached with strong dissent, Mr. Justice Miller, Mr. Justice Field and Mr. Justice Bradley dissenting, and each writing a separate opinion. And those opinions only make more clear the fact that the case was rested in the judgment of the majority on the effect of the reservation.

In the case at bar there is no such reservation; there is no attempt to destroy property; there is simply a case of the taking by the government, for public uses, of the private property of the Navigation Company. Such an appropriation cannot be had without just compensation; and that, as we have seen, demands payment of the value of the property as it stands at the time of taking.

The theory of the government seems to be, that the right of the Navigation Company to have its property in the river, and the franchises given by the State to take tolls for the use thereof, are conditional only, and that whenever the government, in the exercise of its supreme power, assumes control of the river, it destroys both the right of the company to have its property there, and the franchise to take tolls. But this is a misconception. The franchise is a vested right. The State has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior, power exists in the national government. It may take it for public purposes, and take it even against the will of the State; but it can no more take the franchise which the State has given than it can any private property belonging to an individual.

Notice to what the opposite view would lead: A railroad between Columbus, Ohio, and Harrisburg, Pennsylvania, is an interstate highway, created under franchises granted by the two States of Ohio and Pennsylvania, franchises not

merely to construct, but to take tolls for the carrying of passengers and freight. In its exercise of supreme power to regulate commerce, Congress may condemn and take that interstate highway; but in the exercise of that power, and in the taking of such property, may it ignore the franchises to take tolls, granted by the States, or must it not rather pay for them, as it pays for the rails, the bridges, and the tracks? The question seems to carry its own answer. It may be suggested that the cases are not parallel, in that in the present there is a natural highway; while in that suggested it is wholly artificial. But the power of Congress is not determined by the character of the highway. Nowhere in the Constitution is there given power in terms over highways, unless it be in that clause to establish post-offices and post-roads. The power which Congress possesses in respect to this taking of property springs from the grant of power to regulate commerce; and the regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway. They are simply the means and instrumentalities of commerce, and the power of Congress to regulate commerce carries with it power over all the means and instrumentalities by which commerce is carried on. There may be differences in the modes and manner of using these different highways, but such differences do not affect or limit that supreme power of Congress to regulate commerce, and in such regulation to control its means and instrumentalities. We are so much accustomed to see artificial highways, such as common roads, turnpike roads and railroads, constructed under the authority of the States, and the improvement of natural highways carried on by the general government, that at the first it might seem that there was some inherent difference in the power of the national government over them. But the grant of power is the same. There are not two clauses of the Constitution, each severally applicable to a different kind of highway. The fee of the soil in neither case is in the general government, but in the State or private individuals. The differences between the two are in their origin — nature provides the one, man establishes the other.

Opinion of the Court.

Mr. Justice Bradley, delivering the opinion of the court in *Railroad Company* v. *Maryland*, 21 Wall. 456, 470, referred to this matter in these words: "Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well."

It is also suggested that the government does not take this franchise; that it does not need any authority from the State for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, and then either makes the use of it free to all, or exacts such tolls as it sees fit, or transfers the property to a new corporation of its own creation, with such a franchise to take tolls as it chooses to give. But this franchise goes with the property; and the Navigation Company, which owned it, is deprived of it. The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived.

Another contention is this: First, that the grant of right to the Navigation Company was a mere revocable license; secondly, that, if it was not, there was a right in the State to alter, amend or annul the charter; and, thirdly, that there was, by the 18th section thereof, reserved the right at any time after twenty-five years from the completion of the improvement to purchase the entire improvement and franchise by paying the original cost, together with six per cent interest thereon, deducting dividends theretofore declared and paid —

a provision changed by section 8 of the act of June 4, 1839, so as to require a payment of the expenses incurred in constructing and making repairs, with eight per cent per annum interest. But little need be said in reference to this line of argument. We do not understand that the Supreme Court of Pennsylvania has ever ruled that a grant like this is a mere revocable license. The cases referred to by counsel are those in which there was simply a permit; but here there was a chartered right created, — the right not merely to improve the river, but to exact tolls for the use of the improvement, — and such right created by an act of incorporation, as long ago settled in this court in *Dartmouth College Trustees* v. *Woodward*, 4 Wheat. 518, is a contract which cannot be set aside by either party to it.

Again, the State has never assumed to exercise any rights reserved in the charter, or by any supplements thereto. So far as the State is concerned, all its grants and franchises remain unchallenged and undisturbed in the possession of the Navigation Company. The State has never transferred, even if it were possible for it to do so, its reserved rights to the United States government, and the latter is proceeding not as the assignee, successor in interest, or otherwise of the State, but by virtue of its own inherent supreme power. What the State might or might not do, is not here a matter of question, though doubtless the existence of this reserved right to take the property upon certain specified terms may often, and perhaps in the present case, materially affect the question of value. And, finally, there is no suggestion on the part of Congress, and no proffer in these proceedings, of payment under the terms of the charter and supplementary act of 1839, and no attempt to ascertain the amount which would be due to the company in accordance therewith.

These are all the questions presented in this case. Our conclusions are, that the Navigation Company rightfully placed this lock and dam in the Monongahela River; that, with the ownership of the tangible property, legally held in that place, it has a franchise to receive tolls for its use; that such franchise was as much a vested right of property as the owner-

ship of the tangible property; that the right of the national government, under its grant of power to regulate commerce, to condemn and appropriate this lock and dam belonging to the Navigation Company, is subject to the limitations imposed by the Fifth Amendment, that private property shall not be taken for public uses without just compensation; that just compensation requires payment for the franchise to take tolls, as well as for the value of the tangible property; and that the assertion by Congress of its purpose to take the property does not destroy the state franchise.

The judgment, therefore, will be

Reversed, and the case remanded with instructions to grant a new trial.

MR. JUSTICE SHIRAS, having been of counsel, and MR. JUSTICE JACKSON, not having been a member of this court at the time of the argument, took no part in the consideration and decision of this case.

ANKENY *v.* CLARK.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

No. 64. Argued December 21, 22, 1892. — Decided March 27, 1893.

When one party to a special contract not under seal refuses to perform his side of the contract, or disables himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a *quantum meruit* for anything he had done under it previously to the rescission.

This doctrine was supported by the Supreme Court of the Territory of Washington in this case, and is now sustained by this court, notwithstanding the decision of the Supreme Court of the State of Washington in *Distler* v. *Dabney*, 23 N. W. Rep. 335, construing the code of that State adversely to it.

Stutsman County v. *Wallace*, 142 U. S. 293, explained and distinguished from this case.

Judgments of Territorial Courts in mere matters of procedure are not sub-

ject to reversal because of decisions made in subsequent cases by the courts of the State, after its admission, while the former cases were pending on appeal in this court.

Defects in the pleadings in this case, if any, not having been questions below, cannot operate here to invalidate the trial there.

A title derived from a land grant railroad company which has not received a patent, by reason of failure to pay the costs of surveying, is not a title which a party who has contracted for a deed of the land and has paid the purchase price therefor, is obliged to accept.

When a contract is entered into to convey and to purchase a tract of land, and title fails as to part of it, the purchaser may rescind the contract as to all.

When part of a contract of purchase of land is that the purchaser shall assume and pay a mortgage thereon, if the title to a part of it fails he may rescind the contract without paying the mortgage.

When a contract to convey land permits the purchaser to enter and occupy, and he does so and makes the payments prescribed by the contract, and the seller fails to convey by the agreed title, the seller cannot, in an action by the purchaser to recover back the purchase money, set up as an offset a claim for the rent of the land during the buyer's occupancy.

It appears from the record in this case that on October 20, 1882, at Walla Walla, in Washington Territory, Levi Ankeny, the plaintiff in error, entered into a contract with Van Buren Clark, the defendant in error, by which Ankeny agreed to sell and convey to Clark two quarter sections of land in Walla Walla County in consideration of 12,000 bushels of wheat, to be delivered in three annual instalments of 4000 bushels each, and of the assumption by Clark of a mortgage of $3000 on the land. This contract was evidenced by three written instruments as follows:

1. A bond from Ankeny to Clark in the penal sum of $10,000 conditioned to convey the land to Clark upon his paying the consideration according to agreement.

2. A "wheat note" from Clark to Ankeny, which reads as follows:

"Walla Walla, W. T., *Oct.* 20, 1882.

"For value received I promise to pay to Levi Ankeny or order twelve thousand (12,000) bushels of good, merchantable wheat, said wheat to be delivered to the owner of this note at any railroad station in Walla Walla County, Washington Ty.,

and payments to be made as follows: On or before Oct. 15th, 1883, four thousand (4,000) bushels; on or before Oct. 15th, 1884, four thousand (4,000) bushels; and on or before Oct. 15th, 1885, four thousand (4,000) bushels; the owner of this note to furnish sacks for said wheat."

3. A chattel mortgage from Clark to Ankeny to secure the payment of the wheat note.

Under this agreement, Clark entered into possession of the land and continued in possession of it until the fall of 1886.

In performance of this contract, Clark, in December, 1883, delivered to Ankeny 4167 bushels of wheat, and in September, 1885, he delivered 8600 bushels, making 767 bushels more than the contract called for. Ankeny accepted this wheat in fulfilment of the contract.

After the delivery of the wheat to Ankeny, Clark demanded a deed for the land. This Ankeny neglected to give, putting Clark off from time to time upon one pretext or another, until Clark, becoming impatient, finally insisted either upon a deed to the land or payment for his wheat. Clark was then referred by Ankeny to the latter's attorneys, who informed him that he could have a warranty deed to the quarter on the even section and a quitclaim deed to the quarter on the odd section, or the railroad land, as it was called, and they further informed him that if the Northern Pacific Railroad Company should not get title to the odd section and he should be obliged to procure title from the government, Ankeny would pay the necessary expenses of obtaining title in that way. This does not seem to have satisfied Clark, and on November 16, 1886, he served upon Ankeny the following notice:

"WALLA WALLA, W. T., *Nov.* 16, 1886.

"Levi Ankeny Esq., Walla Walla, W. T.

"DEAR SIR: I have performed my part of the contract in the purchase of the land described in your bond to me. I have learned that you have no title to one hundred and sixty acres of it. You have refused to give me anything more than a quit-claim deed to this part of the land. I cannot accept

such a deed. It was not what the contract called for. Unless within five days from this date you convey a perfect title to me to the whole of the land described in the bond by a good and sufficient conveyance I will, at the end of that time, abandon this land and surrender the possession to you and look to you for such compensation as the law allows me on account of violation of the contract.

"Resp'y, V. B. Clark."

Ankeny seems to have paid no attention to this notice, and Clark, several days thereafter, taking a witness with him, went to Ankeny's bank and formally surrendered possession of the land to Ankeny. Clark then abandoned possession of the land and has not occupied it since.

Subsequently to all this, and on the 19th day of March, 1887, Clark brought this action in the District Court of the First District to recover from Ankeny the value of 12,767 bushels of wheat delivered under the contract. The case was tried before a jury, who, upon the direction of the court, brought in a verdict for the plaintiff, and judgment was given upon the verdict.

The defendant took the case in error to the Supreme Court of the Territory of Washington, which affirmed the judgment of the District Court. The case is now before this court on error to the Supreme Court of the Territory of Washington.

Mr. John H. Mitchell for plaintiff in error.

I. The plaintiff must recover, if he recover at all, upon the cause of action stated in the complaint. He cannot in his reply be permitted to introduce a new cause of action and recover upon that. *Brown* v. *McCune*, 5 Sandford Sup. Ct. (N. Y.) 224; *Campbell* v. *Mellen*, 61 Wisconsin, 612; *Durbin* v. *Fisk*, 16 Ohio St. 533; *Duponti* v. *Mussy*, 4 Wash. C. C. 128; *Burnheimer* v. *Marshall*, 2 Minnesota, 78; *Hatch* v. *Coddington*, 32 Minnesota, 92; *Hite* v. *Wells*, 17 Illinois, 88; *McConnel* v. *Kibbe*, 29 Illinois, 483; *Burdell* v. *Denig*, 15 Fed. Rep. 397. The cause of action stated in the complaint is

assumpsit for the recovery of the reasonable value of certain wheat alleged to have been sold and delivered to defendant by plaintiff, while the cause of action stated in the reply is the alleged breach of a specific contract. The evidence to support the theory of the reply would have been inadmissible to sustain the averments in the complaint, and *vice versa*. *Distler* v. *Dabney*, 23 N. W. Rep. 335.

II. The plaintiff must plead and prove a rescission of the contract, or such facts as entitle him to treat it as rescinded. *Riddell* v. *Blake*, 4 California, 264; *Thayer* v. *White*, 3 California, 228; *O'Rielly* v. *King*, 28 How. Pr. 408; *Shultz* v. *Christman*, 6 Mo. App. 338; *Clay* v. *Hart*, 49 Texas, 433. In this action he has done neither.

III. In order to rescind a contract for the sale of land on the ground that the vendor cannot perform it because he has no title to the land, it is necessary for the vendee to aver and show an outstanding paramount title in another; *Thayer* v. *White*, 3 California, 228; *Riddell* v. *Blake*, 4 California, 264. There is no averment in the pleadings of a paramount title in the United States, or in any other person; nor is there any evidence to support such an averment, had it been made.

IV. The Supreme Court of the territory, it will be observed, based its ruling on the doctrine laid down by this court, first, in the case of *Railway Co.* v. *Prescott*, 16 Wall. 603, approved in *Railway Co.* v. *McShane*, 22 Wall. 444, 462, and adhered to in *Northern Pacific Railroad* v. *Traill County*, 115 U. S. 600.

All that can possibly be claimed for the principle enunciated in these cases, and all ever intended by this court, it is respectfully submitted, is simply this: that until the company has complied with the provisions of the above proviso and paid into the Treasury of the United States the cost of surveying, selecting and conveying the lands claimed, the United States may withhold the evidence of a legal title already vested in virtue of a present grant, in order to protect its lien for the cost of surveying, selecting and conveying the lands, and that in such case, until patent does issue, the lands shall not be subject to state or territorial taxation.

Argument for Plaintiff in Error.

But the rule does not affect a case like this, where it appears affirmatively that the lands have been earned by the construction of the road and its acceptance, and that the party derives title through a deed from the railroad company, and it is not shown that the costs of survey have not been paid.

V. The legal title of the United States to the public lands may pass as well by an act of Congress in the words of a present grant as by a patent; and the act granting lands to the Northern Pacific Railroad Company is a grant *in præsenti; Wilcox* v. *Jackson*, 13 Pet. 498; *Rutherford* v. *Greene*, 2 Wheat. 196; *Stoddard* v. *Chambers*, 2 How. 284; *Meegan* v. *Boyle*, 19 How. 130; *Railroad Co.* v. *Smith*, 9 Wall. 95; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Langdeau* v. *Hanes*, 21 Wall. 521; *Leavenworth, Lawrence & Galveston Railroad* v. *United States*, 92 U. S. 733; *Barney* v. *Dolph*, 97 U. S. 652; *Simmons* v. *Wagner*, 101 U. S. 260; *Van Wyck* v. *Knevals*, 106 U. S. 360; *Kansas Pac. Railway* v. *Dunmeyer*, 113 U. S. 629; *Walden* v. *Knevals*, 114 U. S. 373; *St. Paul & Pac. Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1; *Wisconsin Central Railroad* v. *Price County*, 133 U. S. 496; *United States* v. *Missouri, Kansas &c. Railway*, 141 U. S. 358; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241; *Sioux City &c. Land Co.* v. *Griffey*, 143 U. S. 32; *New Orleans Pacific Railway* v. *Parker*, 143 U. S. 42.

VI. The pleadings are destitute of any allegation as to the rescission of the contract, and no rescission by agreement is proven. The evidence is conflicting, but plaintiff's evidence, if uncontradicted, would not establish an agreement to rescind. *Dial* v. *Crain*, 10 Texas, 444; *Pratt* v. *Morrow*, 45 Missouri, 404; *S. C.* 100 Am. Dec. 301; *Thurston* v. *Ludwig*, 6 Ohio St. 1; *S. C.* 67 Am. Dec. 328. In any event, the question as to whether plaintiff had complied with his part of the contract, as also whether there was a rescission of the same, were questions of fact for the jury under the instructions of the court, and it was grave error in the court in directing a verdict for plaintiff.

VII. Plaintiff paid the wheat on the contract for the purchase of the land. He received possession of the land from the defendant under the same contract. It is also admitted

that the use of the land while held by the plaintiff under the contract was of the value of $2127. If the plaintiff is entitled in this action to rescind the contract, or treat it as rescinded, and recover the value of the wheat paid on the contract, he should deduct the value of that which he received under it. *Moyer* v. *Shoemaker*, 5 Barb. 319; *McIndoe* v. *Morman*, 26 Wisconsin, 588; *Baston* v. *Clifford*, 68 Illinois, 67; *Cobb* v. *Hatfield*, 46 N. Y. 533; *Burg* v. *Cedar Rapids and Missouri Railroad*, 32 Iowa, 101; *Masson* v. *Bovet*, 1 Denio, 69; *S. C.* 43 Am. Dec. 651; *Fratt* v. *Fiske*, 17 California, 380.

Mr. John B. Allen for defendant in error.

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

Numerous errors have been assigned to the rulings of the court below. The first has to do with a question of pleading. The plaintiff declares in assumpsit for the value of a certain amount of wheat by the plaintiff sold and delivered to the defendant. To this the defendant answered, setting up the execution of a so-called wheat note and a chattel mortgage to secure it, and alleging that "all the wheat delivered to defendant by plaintiff was delivered and received as payment on said note and not otherwise." In this answer no mention was made of any contract for the sale of land. The plaintiff, by way of replication, made a full statement of the contract for the sale of the land, alleging performance on his part, and default on the part of the defendant. He averred that after he, the plaintiff, had so performed said contract by the delivery of the wheat to the defendant, he duly demanded that defendant should convey the land to the plaintiff, as by his bond he had undertaken to do; that the defendant neglected and refused so to do, and still neglected and refused to grant and convey said land to the plaintiff by any good and sufficient deed, and that said defendant had no title to one parcel of the land described in the bond, and that since the making of the contract defendant was not the owner or seized in fee or

at all of said land. He further alleged that the wheat mentioned in his complaint or declaration, except an excess thereof over the requirements of said bond, was the purchase price of the land; and that, by reason of defendant's neglect and refusal and inability to perform the said contract, the defendant became and was indebted to plaintiff for the reasonable value of said wheat, and that such demand constituted the cause of action in the complaint pleaded.

In disposing of the contention of the plaintiff in error that the pleadings disclose a departure by the plaintiff below from the cause of action set forth in his complaint, and a resort to a new and different cause of action in his replication, we are, of course, entitled to regard the allegations of fact contained in the complaint and replication as true.

It would, therefore, appear that there was a contract whereby the defendant below was to grant and convey unto the plaintiff certain tracts of land by a good and sufficient deed of conveyance, in consideration whereof the plaintiff was to deliver to the defendant twelve thousand bushels of wheat; that the plaintiff performed his part of the contract by delivering the said wheat, which was received by the defendant; that the plaintiff thereupon demanded of the defendant a conveyance of the land; that defendant neglected and refused to grant and convey said tracts of land by any good or sufficient deed; and that, as to one of the tracts, the defendant had no title to convey.

Upon such a state of facts it seems plain that the plaintiff had a right to treat the contract as at an end, and to bring an action to recover the value of the wheat he had delivered to the defendant, and such other damages as he might have suffered by reason of that failure of the latter to perform his part of the contract; and, *a fortiori*, that he might waive any demand for consequential damages, and confine his claim to a demand for the value of the wheat. In the latter event he might well assert his claim by a count alleging the delivery and receipt of the wheat, a consequent duty on the defendant to pay its value, and a demand for the same.

Under the ordinary system of pleadings, an action of

assumpsit would lie to recover back purchase money paid upon a contract of sale which has been rescinded.

Smith expresses the doctrine, in his note to *Cutter* v. *Powell*, (2 Leading Cases, 30, 7th American edition,) thus:

"It is an invariably true proposition that whenever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a *quantum meruit* for anything he had done under it previously to the rescission."

The learned author sustains his proposition by citing *Withers* v. *Reynolds*, 2 B. & Ad. 882; *Planché* v. *Colburn*, 8 Bing. 14; *Palmer* v. *Temple*, 9 Ad. & El. 508.

Well-considered American cases are to the same effect. *Eames* v. *Savage*, 14 Mass. 425; *McCrelish* v. *Churchman*, 4 Rawle, 26; *Baston* v. *Clifford*, 68 Illinois, 64; *Stahelin* v. *Sowle*, 87 Michigan, 124.

It is, however, contended that, under the code of Washington, a different rule prevails, and the case of *Distler* v. *Dabney*, 23 N. W. Rep. 335, decided by the Supreme Court of that State, is cited. That decision was made after the trial of the present case, and while the appeal from the Supreme Court of the Territory of Washington was pending in this court; but it is claimed that, under the doctrine of *Stutsman County* v. *Wallace*, 142 U. S. 293, when, pending an appeal from a territorial court to the Supreme Court of the United States upon a question of local law, the Territory is admitted as a State, and the Supreme Court of the new State reaches an opposite conclusion upon the same question, the later decision will be followed by the Supreme Court of the United States.

It does, indeed, appear that, in the case of *Distler* v. *Dabney*, the Supreme Court of the State of Washington has construed the code of that State as meaning that the plaintiff's complaint must contain his real cause of action, and that he cannot be permitted to meet matter set up in the answer by resorting, in his replication, to a new cause of action inconsist-

ent with the statement made in the complaint. The facts of that case were not dissimilar to those of the case in hand, and it must be conceded that, if we are bound to adopt the construction put by the Supreme Court of the State on the code of the State as applicable to the code of the Territory, notwithstanding an opposite view of the Supreme Court of the Territory, it would lead to a reversal of the judgment in this case, unless, indeed, the objection was waived by the subsequent conduct of the defendant.

It would seem to be altogether unreasonable that the judgments of territorial courts, in mere matters of procedure, should be subject to reversal, because of decisions made by the courts of the State in subsequent cases, while the former cases were pending on appeal in this court. Nor do we understand the case of *Stutsman County* v. *Wallace* to so hold. In that case there were involved a substantive right to an estate and a construction of the tax laws of the State and Territory, and it was pointed out, in the reasoning of this court, that our mandate must be issued to the Supreme Court of the State, which, in its turn, directs the state court succeeding to the District Court of the Territory to proceed in conformity to our judgment; and it would seem to irresistibly follow that, in the enforcement of a law common to the Territory and to the State, this court must, in pursuance of the well-settled rule, adopt the construction put upon the local statute by the highest court of the State.

The distinction between that and the present case is obvious. The question before the territorial courts in the particular we are now considering, involved no substantive right, but a mere matter of orderly procedure in the trial court, and we are satisfied with the ruling of the Supreme Court of the Territory that the District Court did not err in regarding the facts set up in the replication as properly pleaded to the matters alleged in the answer, and as not, in substance, a departure from the complaint.

The course of the District Court at the trial was approved by the Supreme Court of the Territory, and surely cannot now be impugned, because, in a later and different case, arising in

the courts of the new State, the Supreme Court of the State declares the methods to be followed by the courts of the State. Even if, as a matter of technics, the replication was a departure from the complaint, it is not easy to see how the defendant could have availed himself of such a defect in a court of error. His proper course, if he wished to invoke the rigor of the law, was to raise the question either by a demurrer or by a motion; but his conduct in agreeing to a change of venue, after the pleadings had been perfected, in entering into a stipulation as to the principal facts of the case, and in going to trial upon the issue as made up, ought to preclude him from opening the pleadings at the trial.

These views also dispose of the further objection that the plaintiff did not, in his replication, plead a rescission of the contract. But the reply did allege facts that gave a right to rescind, and the plaintiff's evidence, if true, sustained those allegations. Such a defect, if it were one, would, if demurred to, have been curable by amendment, and cannot operate in a court of error to invalidate the trial below.

Assuming the sufficiency of the pleadings, we are brought to consider the second question in the case, and that is whether, upon the evidence, the plaintiff was entitled to a verdict and judgment. The trial court having thought fit to peremptorily direct the jury to find a verdict for the plaintiff in a stated amount, the defendant is obviously entitled to the benefit of every fact and presumption which might have justly controlled the jury in his favor, or, in other terms, the plaintiff must be able to sustain his judgment as the proper conclusion of the law upon the uncontradicted or admitted facts of the case.

There were three principal matters of contention in the trial court:

1st. Did Ankeny have a good title to the northeast quarter of section 19, being part and parcel of the lands which he agreed to sell to Clark?

2d. Did Ankeny make an efficient tender of a good and sufficient deed of conveyance?

3d. Supposing that Ankeny failed in one or both of these particulars, was Clark disabled from availing himself of such

failure by having himself failed to pay the mortgage for $3000 upon the land contracted for, and which he had agreed to pay as part of the purchase money; and did he waive tender of a deed?

We shall briefly consider these subjects in their order. And first, as to Ankeny's title to the northeast quarter of section 19. It was conceded, in the stipulation filed, that the main line of the Northern Pacific Railroad Company was completed in the year 1880, on the route and line shown by certain maps of definite location attached to the stipulation, and that after examination and report by commissioners, as provided in the act of Congress, the road was accepted by the President of the United States; that, on May 30, 1881, the Northern Pacific Railroad Company executed and delivered to one Peter Huff a warranty deed for said northeast quarter of section 19; and that, on December 13, 1881, the said Peter Huff, together with his wife, executed and delivered to Ankeny a warranty deed for the said northeast quarter of section 19. Upon this state of facts it was contended by the plaintiff Clark that there was nothing to show that the Northern Pacific Railroad Company had paid into the Treasury of the United States the cost of surveying, selecting and conveying the same, as prescribed by the act of July 15, 1870, nor to show that any patent had been granted to the railroad company, and that hence, within the cases of *Railway Company* v. *Prescott*, 16 Wall. 603, *Railway Company* v. *McShane*, 22 Wall. 444, and *Northern Pacific Railroad* v. *Traill County*, 115 U. S. 600, the Northern Pacific did not have and hold the legal title to the tract in question; and, therefore, that the conveyance by the railroad company to Huff and that by Huff to Ankeny did not operate to vest a good legal title in the latter.

On the part of the defendant Ankeny it was claimed that by force of the original grant to the Northern Pacific Railroad Company, and the filing of its map of definite location, and by reason of the construction and completion of its road, and the acceptance thereof by the President of the United States, there was vested in the railroad company a good legal

title; and that it was not necessary to show affirmatively the payment of the cost of the survey, nor to show that a patent had been granted to the railroad company; and to sustain this position he cited the case of *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241.

Whether the reasoning and language of the cases so cited by the respective parties can be satisfactorily reconciled, we do not feel called upon to determine, because we think that, at any rate, there is doctrine common to the cases that warranted the plaintiff in refusing to accept the defendant's deed.

The opinions in the earlier cases, in treating of the effect attributable to the non-payment by the railroad companies of the cost of surveying, selecting and conveying the lands, as prescribed by the act of July 15, 1870, 16 Stat. 305, c. 292, speak of the title remaining in the United States until such payment shall be made. And the court below seized on this language as establishing, in the present case, a want of legal title in the Northern Pacific Railroad Company, and consequently in its grantee; and hence held that the plaintiff was justified in rejecting the defendant's title.

In the case of *Deseret Salt Co.* v. *Tarpey*, the court, per Mr. Justice Field, regarded the failure or omission to pay the survey charges as operative to "preserve to the government such control over the property granted as to enable it to enforce the payment of these costs, and for that purpose to withhold its patents from the parties entitled to them until such payment," and thus to give the government a lien for said costs.

We therefore conclude that Ankeny, the defendant below, if he held only a title derived from the Northern Pacific Railroad Company, and if that company had not paid the costs of surveying, and had not received a patent, did not hold such a title as it was obligatory on the plaintiff to accept, and that the plaintiff below had a right to refuse the tender of defendant's deed, declare the contract off, and maintain his action for the recovery of the purchase money.

But it is contended that the record does not disclose that the costs of survey and conveyance had not been paid, and that it may be presumed that they had been paid, and even

that the lands had been actually patented to the railroad company, in which event the question whether the costs of survey had been paid would be immaterial.

Turning to the pleadings and to the stipulation as to the facts, we find that the defendant did not aver in his answer, nor was it admitted in the stipulation that the railroad company had complied with the necessary conditions as to payment of costs of survey, nor was it alleged or admitted that a patent had been issued to the railroad company for the lands in question. The plaintiff having alleged want of title in the defendant, and the latter having met that allegation only by the admission in the stipulation that the railroad company had filed its map of definite location and had constructed its road to the satisfaction of the President, we think that the court below was warranted in holding that the defendant's title was imperfect, and that there was no question of fact to submit to the jury.

If we are right in the conclusion that the defendant's title to the land in dispute was imperfect, and subject to be defeated by the United States in asserting their right to be paid the costs of survey, it is not necessary to consider whether the defendant made a proper tender of a deed of conveyance, or whether the deed was in the form called for by the contract, or whether the plaintiff waived a tender of the deed.

If the questions of tender and of waiver actually confronted us, it might be difficult to show that they ought not to have been submitted to the jury. But if the defendant had no title which he could insist on the plaintiff's accepting, then those questions have no legal significance.

An argument is made that, as the failure of title was only as to part of the land, the plaintiff could not elect to rescind as to all. But the contract was an entire one. The purchase money was not apportioned among the several tracts. The plaintiff's right to refuse to accept was, therefore, clear. *Duke of St. Albans* v. *Shore*, 1 H. Bl. 270.

Again, it is contended that the plaintiff was in no position to rescind, because he had not himself fully complied with his part of the contract, in that he had not paid the mortgage of

$3000 that was on the land, and the payment of which he had assumed. If, however, the defendant had no sufficient title to the land, that would relieve the plaintiff from the duty of paying the incumbrance. It cannot be plausibly maintained that, before a vendee can decline to accept an imperfect title he must pay off a mortgage whose payment was to constitute part of the purchase money.

Another assignment of error is to the refusal of the court to charge the plaintiff and credit the defendant with the rent of the land during the period while the plaintiff was in possession. But the plaintiff was not in possession as a tenant, or under any agreement that he should pay rent. Nor does the law, under the circumstances of the case, raise any obligation to pay rent. *Bardsley's Appeal*, 10 Atlantic Rep. 39, 40, is directly in point: "It may be conceded, if one occupy the land of another by the consent of the latter, without any agreement, that assumpsit for use and occupation will lie. Such, however, is not this case. Here the possession was taken and maintained under an express contract, by which the appellant, in consideration of $8000 to be paid therefor, agreed to convey to the vendee a certain house free and clear of all incumbrances, and title to be perfect. At the date of the agreement the vendee paid $500, and was at all times ready to pay the residue of the purchase money on a deed being delivered to him according to the agreement. The vendor was not able to execute a deed according to his contract. These facts show the vendee was not in possession under such circumstances as to create the relation of landlord and tenant. There was neither an express nor an implied contract to pay rent, and no action could be maintained to recover for the use and occupation of the premises."

The authorities are uniform on this subject, and we content ourselves with a reference to a few cases. *Patterson* v. *Stewart*, 6 W. & S. 527; *Williams* v. *Rogers*, 2 Dana (Ky.), 374; *Gillet* v. *Maynard*, 5 Johns. 86; *Guthrie* v. *Pugsley*, 12 Johns. 126; *Cook* v. *Doggett*, 2 Allen, 439.

None of the errors assigned having been sustained, the judgment of the court below is *Affirmed.*

JOHNSTON *v.* STANDARD MINING COMPANY.

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

No. 133. Argued March 10, 1893. — Decided March 27, 1893.

The mere institution of a suit does not of itself relieve a person from the charge of laches; and if he fail in its diligent prosecution, the consequences are the same as though no action had been begun.

Where a question of laches is in issue the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put the duty of inquiry upon a man of ordinary intelligence.

The duty of inquiry is all the more peremptory when the thing in dispute is mining property, which is of an uncertain character, and is liable to suddenly develop an enormous increase in value.

In this case it is clear that the plaintiff did not make use of that diligence which the circumstances of the case called for.

This was a bill in equity to establish the ownership of the plaintiff in one-fourth of a mining claim, known as the "J. C. Johnston lode," and for a decree that the defendant be required to execute a deed of the same, and to account to plaintiff for one-fourth of the net proceeds of the mine. The bill, which was originally filed in the state court against the Standard Mining Company, Isaac W. Chatfield, and other defendants, was subsequently removed to the Circuit Court of the United States, upon the petition of the Standard Mining Company, as a suit involving a separate controversy between itself and the plaintiff Johnston.

The bill averred in substance that on September 14, 1880, plaintiff, being then the owner and in possession of an undivided half of the J. C. Johnston lode mining claim, situated in the Roaring Fork Mining District, Pitkin County, Colorado, executed a certain title bond, whereby he agreed to sell and convey to the defendant Chatfield an undivided one-fourth interest in such mining claim, with other property, for a consideration of $1200; that on October 12, 1880, plaintiff executed to Chatfield a deed of his entire interest in such mining claim for a nominal consideration of $1200; that his interest at the time

Statement of the Case.

was an undivided half, and that such conveyance was in pursuance of said bond as to a one-fourth interest covered by said bond; and as to the remaining one-fourth interest, such conveyance was in trust that Chatfield, with Charles I. Thomson and Daniel Sayre, who were his legal advisers and were also made defendants, would defend Johnston's title to this claim against another, known as the Smuggler claim No. 2, with which these parties represented to him that it was in conflict, and would perfect plaintiff's title to the J. C. Johnston claim by obtaining a patent therefor, and would thereupon convey to plaintiff an undivided one-eighth interest in the property free and clear of all costs and expenses of the patent proceedings and of the threatened litigation with the Smuggler No. 2 claim, and of all charges, incumbrances, and assessments, and would hold the remaining one-eighth of said title for Thomson and Sayre as compensation for their legal services and for the costs of litigation; "but it was expressly agreed and understood that, if said services should not be necessary and should not be performed, said Thomson and Sayre should receive nothing, and that the said remaining one-eighth should be reconveyed to plaintiff."

The bill further averred that, upon the solicitation of these parties, plaintiff was induced to employ Thomson and Sayre upon these terms, and thereupon executed the deed to Chatfield of all his interest in the claim, and in pursuance of such agreement, a contract in writing was drawn up, and signed by Chatfield and plaintiff, whereby the former agreed, upon perfecting the title to the claim, to convey to plaintiff an undivided one-eighth free and clear of all expenses and of the proposed litigation; that plaintiff did not retain a copy of this contract, but that the same was left in the possession of Thomson and Sayre, who promised to have the same recorded, but failed to do so.

The bill further averred that on December 14, 1880, Chatfield conveyed to the Fulton Mining Company, also made a defendant, all his interest in such claim; that such conveyance was made before the incorporation of the Fulton Mining Company, and, therefore, that it acquired no title by said conveyance; that the incorporators of said Fulton Mining Com-

pany were the defendants in this suit, including Chatfield, Thomson and Sayre, and the same defendants were all directors of such company for the first year of its existence, and that all of them had, before such conveyance by Chatfield to the company, full knowledge and actual notice of the uses and trusts upon which Chatfield held plaintiff's title as aforesaid; that in February, 1881, the Fulton Mining Company made application for letters patent for the J. C. Johnston mining claim, and that letters patent were issued to said mining company, bearing date February 21, 1884, but that plaintiff did not learn of the issuance of said patent until February, 1885; that, upon learning of the same, plaintiff immediately made demand upon Chatfield individually and as manager of the Fulton Mining Company for a conveyance of his interest in the property according to plaintiff's contract with Chatfield, which demand was refused.

The bill further charged that, from time to time, after the execution of his contract with Chatfield, and until he learned of the issuance of the letters patent to the Fulton Mining Company, he frequently inquired of Chatfield as to the progress that was being made to perfect the title to the J. C. Johnston claim, and that Chatfield always answered such inquiries that the patent had not been received, but that application had been made therefor, and that everything would be all right; that he had implicit confidence in said Chatfield, and knowing also that the issuance of United States patents for mining claims was usually attended with long delays, plaintiff never suspected that anything was wrong until he learned of the issuance of the patent and until his demand was refused as aforesaid. It was further charged that no *bona fide* suit or proceeding was ever brought or threatened by the claimants of Smuggler No. 2 claim, as was represented by Chatfield, Thomson and Sayre; that the only such suit ever brought by any claimants of Smuggler No. 2 was begun in the Circuit Court of the United States in May, 1881; that a demurrer to the complaint was filed on July 20, and no further proceedings were taken until December 18, 1882, when the cause was dismissed by stipulation of

the parties, but that such proceedings were taken without the knowledge or consent of the plaintiff; that such suit was without foundation or merit, and that said Thomson and Sayre caused the same to be brought only that they might appear to defend the same, and thereby apparently perform the services for which they were to receive one-eighth share of said Johnston claim. Plaintiff further averred that he did not discover the fraud practised upon him by the said Thomson and Sayre until April, 1885, when he was informed of the same by his attorney, who, at his request, investigated and reported the facts in relation thereto.

The bill further averred that the Fulton Mining Company conveyed the claim to one William J. Anderson, who was made a defendant, by deed dated July 5, 1886, for a consideration of $125,000; and that Anderson attempted to convey the same to the Standard Mining Company, now the sole defendant, by deed dated June 17, 1887, for a consideration of $2,500,000, but that all of said parties had full knowledge and actual notice of the plaintiff's interest in the property, and the trusts upon which Chatfield took title thereto, and that such conveyances were fraudulent and void as to plaintiff, and made with special intent to defraud and hinder him.

He further averred that the several defendants had mined large quantities of ore from the claim; and prayed that he be adjudged to be the owner of one-fourth of such claim; that the defendant be decreed to execute a deed of the same to him, and be required to account to him for the proceeds of the ore, and that, in case such relief could not be granted, for a personal judgment against Chatfield for the value of an undivided one-eighth of such mine, and against Thomson and Sayre for the value of another one-eighth, and for an accounting from them personally for the ores mined.

The Standard Mining Company filed its answer to this bill in the Federal court, and upon the issue formed between the parties testimony was taken, the case heard by the District Judge, and on March 1, 1889, an interlocutory decree entered substantially in accordance with the prayer of the bill, and an accounting ordered. The defendant immediately applied for

a rehearing, and the case was reheard without reference to the grounds relied upon in the petition for rehearing, which did not raise the question of laches, and the case was again taken under advisement, when the court delivered a second opinion, dismissing the bill upon the ground of laches. Thereupon plaintiff filed a petition for a rehearing upon this question, which was denied by the court without argument. Plaintiff thereupon appealed to this court.

Mr. Hugh Butler, (with whom was *Mr. Leon D. Geneste* on the brief,) for appellant.

Mr. C. S. Thomas for appellee.

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

The bill was dismissed in the court below upon the ground of laches, and the correctness of its ruling in that particular is the first question presented for our consideration.

The gist of the plaintiff's bill is the alleged fraud of Chatfield in failing to carry out his contract of October 12, 1880, wherein he agreed, that in the event of succeeding in certain legal proceedings to be instituted by him for vesting the legal title to the Johnston claim in the plaintiff, he would convey to plaintiff an undivided one-eighth interest in the lode free and clear of all expenses incidental to the litigation; plaintiff upon his part agreeing to pay an undivided one-eighth of the expenses which should accrue in the developing and opening of the lode. The lode in question had been located on the preceding 4th of August by Johnston as owner of one-half, Joseph W. Adair as owner of one-fourth, and George A. Crittenden as owner of the remaining fourth. It seems there was a conflict between this and another mining claim known as Smuggler No. 2, and the agreement with Chatfield was made for the purpose of contesting this claim.

It also appeared that plaintiff was one of the parties who had located the Smuggler No. 2 claim; that early in the year

1880 plaintiff had entered into what is known as a grub-stake contract with one Acheson individually and as agent and attorney-in-fact of Edward Dunscomb and James E. Seaver, whereby plaintiff agreed to locate mining claims on behalf of himself and these parties, in consideration of which they agreed to furnish all the supplies and pay all the expenses which should be required in prospecting, locating and developing such mining claims; that, in pursuance of such agreement, plaintiff found indications of a silver-bearing lode on Smuggler Mountain, in the Roaring Fork Mining District, and on April 15, 1880, located Smuggler No. 2 mining claim upon this vein; that such location was made in the joint names of plaintiff, owner of one-fourth, and the wives of Dunscomb and Seaver, each claiming three-eighths; that, after such location and before the discovery of any vein within the limits of the Smuggler claim, the other parties abandoned such claim, failed to furnish the necessary supplies and money to the plaintiff, who continued to develop and work the ground on his own account and at his own expense; that, on August 4, 1880, plaintiff discovered within the limits of said Smuggler claim a vein or lode, and thereupon duly located the same as the "J. C. Johnston lode" mining claim for the use of himself, Crittenden and Adair, as above stated; that, upon learning of such discovery and location, Acheson, Dunscomb and Seaver negotiated with Crittenden and Adair for the purchase of their interests in the Johnston claim, and on August 10, 1880, purchased the same for $1000; that at the same time they negotiated with plaintiff and agreed to purchase his one-fourth interest, but failed to do so.

Plaintiff further contended that these facts respecting the location of the two claims, and the negotiations with Acheson, Dunscomb and Seaver, were known to Chatfield, Thomson and Sayre, who still insisted that there were certain parties who, as grantees of Dunscomb and Seaver, claimed title under the Smuggler location adversely to plaintiff's interest in the Johnston claim, and that legal proceedings had already been, or were about to be, commenced to enforce said claims; that Chatfield, Thomson and Sayre represented that it was desirable

to perfect the title of the Johnston claim by obtaining a patent therefor, and to this end they had secured or would secure a conveyance from the owners of the other half of the Johnston claim. They further represented to him that, for the better management of the property, they proposed to organize a stock company, and to that end they had secured the other half interest in the Johnston claim; and that the defendants were then associated together, and had agreed to organize a stock company for that purpose, and that the Fulton Mining Company was shortly thereafter incorporated by them. These conflicting claims with regard to the ownership of the property within the limits of these two claims were evidently the foundation of the agreement of October 12, 1880, whereby Chatfield agreed to clear up the title to the property, and to convey one-eighth to the plaintiff.

Most of the testimony was directed to the relative merits of the Smuggler No. 2 and the J. C. Johnston locations, apparently upon the assumption by the defendant that the plaintiff was bound to prove that the owners of the Johnston lode had the better title. Plaintiff, however, contends that the contract of October 12, 1880, and the other conveyances made about the same time, when read in the light of the surrounding circumstances, are conclusive evidence of the following: First, that the interest actually purchased by Chatfield in the Johnston mine was a quarter interest, and that the remaining fourth of Johnston's interest in the property, which he deeded to Chatfield, was in trust; second, that this fourth interest was the interest referred to in the contract as being claimed adversely to Chatfield by certain persons; third, that the defendants Thomson and Sayre were employed to institute the "legal proceedings" mentioned in the contract, and were to receive as a contingent fee for their services in that behalf an eighth of the Johnston mine, in case those proceedings were successful; fourth, that in such case Johnston was to receive the remaining eighth of this contested quarter; fifth, that the "legal proceedings" mentioned contemplated and included an application for letters patent and the acquisition of the government title, as well as a suit of some kind.

Opinion of the Court.

Upon the basis of the fifth and last proposition above stated the plaintiff contends that it would follow that a cause of action did not accrue to him until a patent had been issued by the government, which did not take place until July, 1884, and that as the plaintiff was not informed of this fact until some time in 1885, and as he filed his first bill against Chatfield in the United States court on August 1, 1885, he insists that he fulfilled all the requirements of the law with respect to diligence, and that the defence of laches is not sustained. We think this position, however, is founded upon a somewhat strained interpretation of the contract in question. It provides that "in the event of the party of the first part," (Chatfield,) "prevailing and succeeding in certain legal proceedings about to be instituted and commenced by the party of the first part for the vesting of the legal title in the party of the first part, against persons who claim adversely to him an interest in the following-described property, . . . that the party of the first part, upon so acquiring the title legal and equitable to the said mine, by means of the legal proceedings so about to be commenced, doth hereby covenant and agree to and with the said party of the second part," (Johnston,) "to convey to the said party of the second part an undivided one-eighth interest in and to the said above-described lode, which shall be free and clear from all expense incidental to the litigation incident to said contemplated suit." A compliance with this contract on Chatfield's part evidently required the commencement within a reasonable time, and the diligent prosecution of, a suit for the establishment of his title to the property, since the question of adverse claims could not be determined by the mere application for a patent without the institution of a suit, or the compromise of these conflicting claims. That this was the construction put upon it by Chatfield himself is evident from the fact that, three days after this contract was made, he executed a quit-claim deed to Thomson and Sayre of an undivided one-eighth interest in the Johnston lode for a nominal consideration of $500. It is admitted, however, that no money consideration was paid for this conveyance, and Chatfield testifies that the actual consideration for this deed to Thomson

and Sayre was the legal services which they were to perform in and about the "legal proceedings" mentioned in the contract, and he further testifies that those services were never performed. This is all that Chatfield appears to have done at this time in the performance of his contract. Whether, if suit had been begun and prosecuted to a successful termination, a bill would have lain before the patent was issued it is not necessary to decide, since it is clear that the failure of Chatfield to institute legal proceedings within a reasonable time was a breach of his contract, and entitled plaintiff to treat it as at an end.

There were also significant facts occurring thereafter which should have put plaintiff upon inquiry, and stimulated him to activity in asserting his rights. As he was one of the original locators, both of the Smuggler No. 2 and the Johnston claims, he must have known that in any controversy between them, he would have been an important witness, and the very fact that he was not called upon indicated that the suit was not being prosecuted, and strengthened the inference, derivable from all the testimony, that the claim was not then considered of sufficient value to warrant the institution of a suit. That he was accessible as a witness is evident from his own testimony that he was in Thomson and Sayre's office in 1881, and was working at that time for Chatfield on a sub-contract. The incorporation of the Fulton Mining Company in 1880, and the conveyance by Chatfield, Crittenden and Adair of the entire property to the mining company by deeds put upon record, were wholly inconsistent with the spirit, if not with the letter, of the contract, and were circumstances calculated to arouse suspicion, since they divested Chatfield of his interest in the mine, disabled him from instituting legal proceedings in his own name, and put the ownership of the mine in the shape of capital stock, which was liable at any time to pass into the hands of purchasers who might be entirely ignorant of the plaintiff's interest. It is but just, however, to say in this connection that plaintiff seems to have been apprised of the fact that these parties were about to associate themselves together in forming a stock company, and that the advantages of such a

corporation were urged upon him, and in his first bill he averred that it was understood that the company would convey and transfer to him stock in such company to the amount of his interest in the lode, and that Chatfield would hold his interest in trust for the plaintiff until his title to the location had been established. If he assented to the formation of the corporation and to the transfer of the mine to it, he clearly waived his right to reclaim an interest in the mine itself. It is also a circumstance proper to be considered, as bearing upon the equities of this defence, that, at the time of the institution of this suit, a large proportion, if not a majority, of the stock in this company had passed into the hands of purchasers who had not been connected with the formation of the company, and were entirely ignorant of the Johnston-Chatfield contract.

In May, 1881, plaintiff went to the office of Thomson and Sayre, in Leadville, asked how the case was, and was informed that it was compromised. He then told them he would like to take the papers and copy them. They gave them to him. He took them and looked them over; went down to have them copied, but found it would cost too much, and did not have it done. These papers were the contracts between Chatfield and himself, Crittenden, Adair and himself, and the original grub-stake contract between Dunscomb, Seaver and himself. He must then have been informed of the fact that the contract of October 12, 1880, had not been recorded, although Thomson and Sayre promised him it should be. In 1882 it seems that he spoke to Chatfield, and said that he thought he ought to be entitled to his interest in the property; that they should have gone on and contested the case; to which Chatfield replied that they had found that there was "no shadow of a ghost to maintain his case." Even then he did not act.

It was not until April, 1885, more than a year after the Fulton Mining Company had obtained a patent to the property, that he made a formal demand upon Chatfield, and on August 1, 1885, filed his first bill in the Circuit Court of the United States to establish his title to a quarter interest in the lode. This suit does not seem to have been prosecuted with

much diligence, since it was allowed to linger for nearly a year, and was then dismissed, apparently, for a want of jurisdiction appearing upon the face of the bill. It has been frequently held that the mere institution of a suit does not of itself relieve a person from the charge of laches, and that if he fail in the diligent prosecution of the action, the consequences are the same as though no action had been begun. *Hawes* v. *Orr*, 10 Bush, 431; *Erhman* v. *Kendrick*, 1 Met. (Ky.) 146, 149; *Watson* v. *Wilson*, 2 Dana, 406; *Ferrier* v. *Buzick*, 6 Iowa, 258; *Bybee* v. *Summers*, 4 Oregon, 351, 361.

On the 19th of August, 1886, a second suit was brought in the state court, which, after some delay, caused in part by the death of the plaintiff's counsel, was dismissed because of a defective summons under the state practice.

While there is no direct or positive testimony that plaintiff had knowledge of what was taking place with respect to the title or development of the property, the circumstances were such as to put him upon inquiry; and the law is well settled that, where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry. This principle was applied at the present term of this court in *Foster* v. *Mansfield &c. Railway*, 146 U. S. 88, to a case where a stockholder in a railway company sought to set aside a sale of the road which had taken place ten years before, when the facts upon which he relied to vacate the sale were of record and within easy reach. See also *Wood* v. *Carpenter*, 101 U. S. 135, 141; *Kennedy* v. *Green*, 3 Myl. & K. 699, 722; *Buckner* v. *Calcote*, 28 Mississippi, 432; *Cole* v. *McGlathry*, 9 Maine, 131; *McKown* v. *Whitmore*, 31 Maine, 448.

The duty of inquiry was all the more peremptory in this case from the fact that the property of itself was of uncertain character, and was liable, as is most mining property, to suddenly develop an enormous increase in value. This is actually what took place in this case. A property which, in October, 1880, plaintiff sold to Chatfield upon the basis of $4800 for

the whole mine is charged, in a bill filed October 21, 1887, to be worth $1,000,000, exclusive of its accumulated profits. Under such circumstances, where property has been developed by the courage and energy and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of plaintiff's rights. *Felix* v. *Patrick*, 145 U. S. 317, 334; *Hoyt* v. *Latham*, 143 U. S. 553, 567; *Hammond* v. *Hopkins*, 143 U. S. 224; *Great West Mining Co.* v. *Woodmas Mining Co.*, 14 Colorado, 90.

The language of Mr. Justice Miller in *Twin Lick Oil Company* v. *Marbury*, 91 U. S. 587, 592, with regard to the fluctuating value of oil wells, is equally applicable to mining lodes: "Property worth thousands to-day is worth nothing to-morrow; and that which to-day would sell for a thousand dollars at its fair value, may, by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit."

We think it is clear that the plaintiff did not make use of that diligence which the circumstances of the case called for, and the decree of the court below dismissing his bill is, therefore,

Affirmed.

Syllabus.

AMERICAN CONSTRUCTION COMPANY *v.* JACKSONVILLE, TAMPA AND KEY WEST RAILWAY COMPANY.

SAME *v.* PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES.

ORIGINAL.

Nos. 14, 15, original. Argued March 6, 7, 1893. — Decided March 27, 1893.

A writ of mandamus does not lie to the United States Circuit Court of Appeals to review, or to the Circuit Court of the United States to disregard, a decree of the Circuit Court of Appeals, made on appeal from an interlocutory order of the Circuit Court, and alleged to be in excess of its powers on such an appeal, but which might be made on appeal from the final decree, when rendered.

Under the act of March 3, 1891, c. 517, § 6, this court has power, in a case made final in the Circuit Court of Appeals, although no question of law has been certified by that court to this, to issue a writ of *certiorari* to review a decree of that court on appeal from an interlocutory order of the Circuit Court; but will not exercise this power, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

This court will not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals, by which, on appeal from an interlocutory order of the Circuit Court, granting an injunction, appointing a receiver of a railway company, and authorizing him to issue receiver's notes, the injunction has not only been modified, but the order has been reversed in other respects.

A decree of the Circuit Court of Appeals, by which, on appeal from an interlocutory order of the Circuit Court, vacating an order appointing a receiver, the order appealed from has been reversed, the receivership restored and the case remanded to the Circuit Court to determine who should be receiver, will not be reviewed by this court by writ of *certiorari*, either because no appeal lies from such an interlocutory order, or because the order appointing the receiver was made by a Circuit Judge when outside of his circuit.

A Circuit Judge having taken part in a decree of the Circuit Court of Appeals on an appeal from an interlocutory order setting aside a previous order of his in the case, this court granted a rule to show cause why a writ of *certiorari* should not issue to the Circuit Court of Appeals to bring up and quash its decree because he was prohibited by the act of March 3, 1891, c. 517, § 3, from sitting at the hearing.

Statement of the Case.

THESE were two petitions to this court, each praying, in the alternative, for a writ of mandamus, or a writ of *certiorari*, to the United States Circuit Court of Appeals for the Fifth Circuit.

In the first case, No. 14, it appeared that the following proceedings were had in the Circuit Court of the United States for the Northern District of Florida.

On July 6, 1892, the American Construction Company, a corporation of Illinois, and a stockholder in the Jacksonville, Tampa and Key West Railway Company, a corporation of Florida, engaged in operating a railroad in that State, filed a bill in equity, in behalf of itself and of such other stockholders as might come in, against the railway company, and against its president and directors, citizens of other States; alleging that they had made a contract in its behalf, which was illegal and void, and unjust to its stockholders, and had declined to have an account taken; and praying for an account, a receiver and an injunction.

On the filing of the bill, Judge Swayne, the District Judge, made a restraining order, by which, until the plaintiff's motion for an injunction and for the appointment of a receiver could be heard and determined, the railway company and its officers and agents were enjoined and restrained from remitting, sending or removing any of its income, tolls and revenues from the jurisdiction of the court, and from selling, disposing of, hypothecating or pledging any of its bonds of a certain issue at less than their par value.

On August 4, 1892, Judge Swayne, after a hearing of the parties, made an order, appointing Mason Young receiver of all the property of the railway company; enjoining the railway company, its officers and agents, and all persons in possession of its property, from interfering with the possession, control, management and operation of the property, and from obstructing the exercise of the receiver's rights and powers, or the performance of his duties; and continuing the restraining order of July 6, until the further order of the court.

On August 5, Judge Swayne, on a petition of the receiver, and after hearing him and the parties, made an order, author-

izing him to pay certain interest and obligations of the railway company out of the income and money coming into his hands as receiver, or, if those should be insufficient for that purpose, to issue receiver's notes in payment of such interest and obligations, or, at his discretion, to borrow money on such receiver's notes for that purpose, the amount of such notes, outstanding at one time, not to exceed $125,000.

On August 27, the railway company prayed and was allowed an appeal from the orders of August 4 and August 5 to the United States Circuit Court of Appeals for the Fifth Circuit, and gave bond to prosecute the appeal.

On November 18, the construction company moved the Circuit Court of Appeals to dismiss the appeal, because that court had no jurisdiction to review the action of the Circuit Court in making those orders or either of them.

On January 16, 1893, the Circuit Court of Appeals, held by Circuit Judges Pardee and McCormick and District Judge Locke, denied the motion to dismiss the appeal; and entered a decree, reversing and setting aside the orders appealed from, except as to the injunction; modifying the injunction so as to permit the railway company to send away money for the payment of its bonds which had been regularly sold, and for the purchase of necessary equipment and supplies, and to restrain it from disposing of, at less than their par value, such only of the bonds of the issue mentioned, as remained the property of the company; and instructing the Circuit Court to modify accordingly the restraining order of July 6, continued by the order of August 4, and to vacate the order of August 4, appointing a receiver, to discharge the receiver, and to restore the property of the company to its officers.

On January 23, the construction company filed a petition for a rehearing, upon the grounds, among others, that the Circuit Court of Appeals had no jurisdiction to review an order appointing a receiver; and that its decree did not allow the receiver time to settle his accounts, nor provide for the payment of his notes in the hands of *bona fide* holders for value.

On January 30, the Circuit Court of Appeals denied a rehearing, and sent down a mandate in accordance with its

Statement of the Case.

decree; and on February 1, the mandate was filed in the Circuit Court.

On February 2, the construction company moved this court for leave to file a petition for a writ of mandamus to the Circuit Court of Appeals to dismiss so much of the appeal of the railway company as undertook to bring before that court the action of the Circuit Court in appointing a receiver, and in authorizing him to borrow money upon receiver's notes; or, in the alternative, for a writ of *certiorari* to the Circuit Court of Appeals to bring up its decree for review by this court.

In the second case, No. 15, beside the facts above stated, the following facts appeared:

On July 23, 1892, the Pennsylvania Company for Insurances on Lives and Granting Annuities, a corporation of Pennsylvania, as trustee under a mortgage of the property of the railway company to secure the payment of its bonds of the issue aforesaid, presented to Judge Pardee a bill in equity, addressed to the same Circuit Court, against the railway company, praying for a foreclosure of the mortgage, for the appointment of a receiver, and for an injunction.

On the same day, upon this bill, and with the consent of the railway company, Judge Pardee signed an order, appointing Robert B. Cable receiver of all its property; and declaring that the appointment was provisional, to the extent that any one having an interest in the property of the railway company might show cause within thirty days why the appointment should not be confirmed; and that the appointment should not "affect or forestall any action the court or any of its judges may hereafter see proper to take on any bill heretofore filed in this court against said railroad company, wherein a receivership has also been prayed for." This bill and order were directed by Judge Pardee to be filed of July 23, 1892, and were filed by the clerk as of that day.

On July 29, the construction company filed in the Circuit Court a petition of intervention, setting forth the previous proceedings in the first case, and praying that the order appointing Cable receiver might be set aside and vacated.

Statement of the Case.

On August 4, on this petition, Judge Swayne, holding the Circuit Court, made an order, setting aside and vacating the order appointing Cable receiver, and staying all further proceedings in the cause until the further order of the court.

On August 23, the Pennsylvania Company prayed and was allowed an appeal from that order of Judge Swayne to the United States Circuit Court of Appeals for the Fifth Circuit, and gave bond to prosecute its appeal.

On November 18, the construction company moved to dismiss this appeal, because the Circuit Court of Appeals had no jurisdiction of an appeal from that order, and because it appeared by the pleadings and papers on file that the suit was a collusive one between the appellant and the railway company.

On January 16, 1893, the Circuit Court of Appeals, held by Circuit Judges Pardee and McCormick and District Judge Locke, denied the motion to dismiss the appeal; and entered a decree, by which that order was reversed, "the stay of proceedings dissolved, the receivership restored," and the cause remanded to the Circuit Court, with instructions to proceed therein in accordance with the opinion rendered by the Circuit Court of Appeals, by which it was "left with the Circuit Court to determine what person is the proper one to execute the office of receiver in this case, and to continue receiver Cable, or to appoint a more suitable person in his place, as the relations of the parties and the character and condition of the property may, in the judgment of that court, require."

On January 23, the construction company filed a petition for a rehearing, upon the following grounds:

1st. That the order appealed from was purely in the discretion of the Circuit Court, and not subject to appeal.

2d. That the order of July 23, 1892, appointing Cable receiver, was a nullity, because made by Judge Pardee in the State of Ohio, outside of his circuit, and while the Circuit Court was in session in the district where the suit was pending.

3d. That, this order being a nullity, there was no receivership to be restored; and that the Circuit Court of Appeals had no power or jurisdiction to vacate the order of the Circuit Court appointing or refusing to appoint a receiver.

4th. That, if the order of July 23, 1892, was valid, the Circuit Judge who made it could not sit in the Circuit Court of Appeals at the hearing of the cause, and was expressly prohibited from so doing by the following provision in the act creating that court: "Provided that no justice or judge, before whom a cause or question may have been tried or heard in the District Court or existing Circuit Court, shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals." Act of March 3, 1891, c. 517, § 3, 26 Stat. 827.

5th. That it should be left open to the Circuit Court to inquire whether the suit was collusive, and thereupon either to appoint a receiver or to dismiss the bill.

On January 30, the Circuit Court of Appeals denied a rehearing, and sent down a mandate in accordance with its decree; and on February 1, this mandate was filed in the Circuit Court.

On February 2, the construction company moved this court for leave to file a petition for a writ of mandamus to the Circuit Court of Appeals to dismiss so much of the appeal of the Pennsylvania Company as undertook to bring before that court the action of the Circuit Court in vacating and setting aside the order for the appointment of a receiver; or, in the alternative, for a writ of *certiorari* to the Circuit Court of Appeals to bring up its decree for review by this court.

This court gave leave to file both petitions of the American Construction Company, stayed proceedings under the mandates of the Circuit Court of Appeals, and ordered notice to the railway company and to the Pennsylvania Company of a renewal of the motions for writs of mandamus or writs of *certiorari*, returnable March 6.

The petitioner gave notice to those companies that on that day it would move accordingly for writs of mandamus or *certiorari* to the Circuit Court of Appeals, as prayed for in the petitions; and would also, in the alternative, move for a writ of mandamus to the Circuit Court to disregard the mandates of the Circuit Court of Appeals, except so far as they affirmed, modified or reversed the injunction orders of the Circuit Court,

and especially to disregard the parts of those mandates which undertook to modify or reverse any order appointing or refusing to appoint a receiver.

At the time so appointed, the parties appeared, and the motions were argued.

Mr. William B. Hornblower and *Mr. Eugene Stevenson*, (with whom was *Mr. William Pennington* on the brief,) for the petitioner in both cases.

Mr. John G. Johnson and *Mr. Thomas Thacher* opposing in No. 14.

Mr. C. M. Cooper, (with whom was *Mr. J. C. Cooper* on the brief,) opposing in No. 15.

Mr. Justice Gray, after stating the facts, delivered the opinion of the court.

By the Constitution of the United States, in cases to which the judicial power of the United States extends, and of which original jurisdiction is not conferred on this court, "the Supreme Court shall have appellate jurisdiction, with such exceptions and under such regulations as the Congress shall make." Constitution, art. 3, sec. 2. This court, therefore, as it has always held, can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by Congress. *Wiscart* v. *Dauchy*, 3 Dall. 321, 227; *Durousseau* v. *United States*, 6 Cranch, 307, 314; *Barry* v. *Mercein*, 5 How. 103, 119; *United States* v. *Young*, 94 U. S. 258; *The Francis Wright*, 105 U. S. 381; *National Exchange Bank* v. *Peters*, 144 U. S. 570, 572.

Under the Judiciary Act of 1789 and other acts embodied in the Revised Statutes, the appellate jurisdiction of this court from the Circuit Court of the United States was limited to final judgments at law, and final decrees in equity or admiralty. Acts of September 24, 1789, c. 20, §§ 13, 22, 1 Stat. 81, 84; March 3, 1803, c. 40, 2 Stat. 244; Rev. Stat. §§ 691, 692. No appeal, therefore, lay to this court from an order of the Circuit Court, granting or refusing an injunction, or appoint-

ing or declining to appoint a receiver *pendente lite*, or other interlocutory order, until after final decree. *Hentig* v. *Page*, 102 U. S. 219; *Keystone Co.* v. *Martin*, 132 U. S. 91; *Lodge* v. *Twell*, 135 U. S. 232.

By the same statutes, this court is empowered to issue writs of mandamus, "in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States." Act of September 24, 1789, c. 20, § 13, 1 Stat. 81; Rev. Stat. § 688.

But a writ of mandamus cannot be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court. *Ex parte Whitney*, 13 Pet. 404; *Ex parte Schwab*, 98 U. S. 240; *Ex parte Perry*, 102 U. S. 183; *Ex parte Morgan*, 114 U. S. 174. It does not, therefore, lie to review a final judgment or decree of the Circuit Court, sustaining a plea to the jurisdiction, even if no appeal or writ of error is given by law. *Ex parte Newman*, 14 Wall. 152; *Ex parte Baltimore & Ohio Railroad*, 108 U. S. 566; *In re Burdett*, 127 U. S. 771; *In re Pennsylvania Co.*, 137 U. S. 451, 453.

Least of all, can a writ of mandamus be granted to review a ruling or interlocutory order made in the progress of a cause: for, as observed by Chief Justice Marshall, to do this "would be a plain evasion of the provision of the act of Congress that final judgments only should be brought before this court for reëxamination;" would "introduce the supervising power of this court into a cause while depending in an inferior court, and prematurely to decide it;" would allow an appeal or writ of error upon the same question to be "repeated, to the great oppression of the parties;" and "would subvert our whole system of jurisprudence." *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569; *Life & Fire Ins. Co.* v. *Adams*, 9 Pet. 573, 602.

This court, and the Circuit and District Courts of the United States, have also been empowered by Congress "to issue all writs, not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Act of September 24, 1789, c. 20, § 14, 1 Stat. 81; Rev. Stat. § 716.

Under this provision, the court might doubtless issue writs of *certiorari*, in proper cases. But the writ of *certiorari* has not been issued as freely by this court as by the Court of Queen's Bench in England. *Ex parte Vallandigham*, 1 Wall. 243, 249. It was never issued to bring up from an inferior court of the United States for trial a case within the exclusive jurisdiction of a higher court. *Fowler* v. *Lindsey*, 3 Dall. 411, 413; *Patterson* v. *United States*, 2 Wheat. 221, 225, 226; *Ex parte Hitz*, 111 U. S. 766. It was used by this court as an auxiliary process only, to supply imperfections in the record of a case already before it; and not, like a writ of error, to review the judgment of an inferior court. *Barton* v. *Petit*, 7 Cranch, 288; *Ex parte Gordon*, 1 Black, 503; *United States* v. *Adams*, 9 Wall. 661; *United States* v. *Young*, 94 U. S. 258; *Luxton* v. *North River Bridge*, 147 U. S. 337, 341.

There is, therefore, no ground for issuing either a writ of mandamus, or a writ of *certiorari*, as prayed for in these petitions, unless it be found in the act of March 3, 1891, c. 517, entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes." 26 Stat. 826.

By section 4 of this act, "the review, by appeal, by writ of error or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States, or in the Circuit Courts of Appeals hereby established, according to the provisions of this act, regulating the same;" and by section 14, "all acts and parts of acts, relating to appeals or writs of error, inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act, are hereby repealed."

By section 5, appeals or writs of error may be taken from the Circuit Court directly to this court in cases where the jurisdiction of the court below is in issue, (the question of jurisdiction alone being brought up,) in prize causes, in cases of convictions of capital or otherwise infamous crimes, and in cases involving the construction or application of the Constitution of the United States, or the constitutionality of a law

of the United States, or the validity or construction of a treaty, or where the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

By section 6, the appellate jurisdiction from final decisions of the Circuit Court, in all cases other than those provided for in section 6, is conferred upon the Circuit Court of Appeals, "unless otherwise provided by law;" and its judgments or decrees "shall be final" in all cases in which the jurisdiction depends entirely on the citizenship of the parties, as well as in cases arising under the patent laws, the revenue laws, or the criminal laws, and in admiralty cases.

By the same section, however, the Circuit Court of Appeals "in any such subject within its appellate jurisdiction" may, at any time, certify to this court questions or propositions of law, and this court may thereupon either instruct it on such questions, or may require the whole case to be sent up for decision; and any case "made final in the Circuit Court of Appeals" may be required by this court, by *certiorari* or otherwise, to be certified "for its review and determination, with the same power and authority in the case" as if it had been brought up by appeal or writ of error.

By a further provision in the same section, (which has no special bearing on these cases,) an appeal or writ of error or review by this court is given as of right in all cases not made final in the Circuit Court of Appeals, wherein the matter in controversy exceeds $1000.

The only provision in the act, authorizing appeals from interlocutory orders or decrees of the Circuit Courts, is in section 7, which provides that where, upon a hearing in equity, "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;" "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."

By section 12, the Circuit Court of Appeals has the powers specified in section 716 of the Revised Statutes, that is to say, to issue all writs, not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law.

The effect of these provisions is that, in any case in which the jurisdiction of the Circuit Court depends entirely on the citizenship of the parties, (as in the cases now before us,) and in which the jurisdiction of that court is not in issue, the appeal given from its judgments and decrees, whether final or interlocutory, lies to the Circuit Court of Appeals only; and the judgments of the latter court are final, unless either that court certifies questions or propositions of law to this court, or else this court, by *certiorari* or otherwise, orders the whole case to be sent up for its review and determination.

The primary object of this act, well known as a matter of public history, manifest on the face of the act, and judicially declared in the leading cases under it, was to relieve this court of the overburden of cases and controversies, arising from the rapid growth of the country, and the steady increase of litigation; and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the Circuit Courts of Appeals thereby established in each judicial circuit, and to distribute between this court and those, according to the scheme of the act, the entire appellate jurisdiction from the Circuit and District Courts of the United States. *McLish* v. *Roff*, 141 U. S. 661, 666; *Lau Ow Bew's Case*, 141 U. S. 583, and 144 U. S. 47.

The act has uniformly been so construed and applied by this court as to promote its general purpose of lessening the burden of litigation in this court, transferring the appellate jurisdiction in large classes of cases to the Circuit Court of Appeals, and making the judgments of that court final, except in extraordinary cases.

It has accordingly been adjudged that a writ of error or appeal directly to this court under section 5, in a case concerning the jurisdiction of the Circuit Court, does not lie until after final judgment, and cannot, therefore, be taken from an order

of the Circuit Court remanding a case to a state court, there being, as said by Mr. Justice Lamar, speaking for this court, "no provision in the act, which can be construed into so radical a change in all the existing statutes and settled rules of practice and procedure of Federal courts, as to extend the jurisdiction of the Supreme Court to the review of jurisdictional cases in advance of the final judgments upon them." *McLish* v. *Roff*, above cited; *Chicago &c. Railway* v. *Roberts*, 141 U. S. 690.

It has also been determined that, in the grant of the appellate jurisdiction to the Circuit Court of Appeals, by section 6, in all cases other than those in which this court has direct appellate jurisdiction under section 5, the exception "unless otherwise provided by law" looks only to provisions of the same act, or to contemporaneous or subsequent acts expressly providing otherwise, and does not include provisions of earlier statutes. *Lau Ow Bew* v. *United States*, 144 U. S. 47, 57; *Hubbard* v. *Soby*, 146 U. S. 56.

In the same spirit, the authority conferred on this court by the very provision on which the petitioners mainly rely, by which it is enacted that "in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court," has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *Lau Ow Bew's Case*, 141 U. S. 583, and 144 U. S. 47; *In re Woods*, 143 U. S. 202. Accordingly, while there have been many applications to this court for writs of *certiorari* to the Circuit Court of Appeals under this provision, two only have been granted: the one in *Lau Ow Bew's Case*, above cited, which involved a grave question of public international law, affecting the relations between the United States and a foreign country; the other in *Fabre, Petitioner*, No. 1237 of the present term,

an admiralty case, which presented an important question as to the rules of navigation, and in which the decree of the Circuit Court of Appeals for the Second Circuit reversed a decree of the District Judge, and was dissented from by one of the three Circuit Judges; and in each of those cases the Circuit Court of Appeals had declined to certify the question to this court.

There are much stronger reasons against the interposition of this court to review a decree made by the Circuit Court of Appeals on appeal from an interlocutory order, than in the case of a final decree. Before the act of 1891, as has been seen, no interlocutory order was subject to appeal, except as involved in an appeal from a final decree. The only appeal from an interlocutory order under the act of 1891 is that allowed by section 7 to the Circuit Court of Appeals, the same court to which an appeal lies from the final decree. The question whether a decree is an interlocutory or a final one is often nice and difficult, as appears by the cases collected in *Keystone Co.* v. *Martin*, 132 U. S. 91, and in *McGourkey* v. *Toledo & Ohio Central Railway*, 146 U. S. 536. Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

In such an exceptional case, the power and the duty of this court to require, by *certiorari* or otherwise, the case to be sent up for review and determination, cannot well be denied, as will appear if the provision now in question is considered in connection with the preceding provisions for the interposition of this court in cases brought before the Circuit Court of Appeals. In the first place, the Circuit Court of Appeals is authorized, "in every such subject within its appellate juris-

diction," and "at any time," to certify to this court "any questions or propositions of law," concerning which it desires the instruction of this court for its proper decision. In the next place, this court, at whatever stage of the case such questions or propositions are certified to it, may either give its instruction thereon, or may require the whole record and cause to be sent up for its consideration and decision. Then follows the provision in question, conferring upon this court authority "in any such case as is hereinbefore made final in the Circuit Court of Appeals," to require, by *certiorari* or otherwise, the case to be certified to this court for its review and determination. There is nothing in the act to preclude this court from ordering the whole case to be sent up, when no distinct questions of law have been certified to it by the Circuit Court of Appeals, at as early a stage as when such questions have been so certified. The only restriction upon the exercise of the power of this court, independently of any action of the Circuit Court of Appeals, in this regard, is to cases "made final in the Circuit Court of Appeals," that is to say, to cases in which the statute makes the judgment of that court final, not to cases in which that court has rendered a final judgment. Doubtless, this power would seldom be exercised before final judgment in the Circuit Court of Appeals, and very rarely indeed before the case was ready for decision upon the merits in that court. But the question at what stage of the proceedings, and under what circumstances, the case should be required, by *certiorari* or otherwise, to be sent up for review, is left to the discretion of this court, as the exigencies of each case may require.

In the first of the cases now before us, the appeal was clearly well taken from the order of the Circuit Court, so far, at least, as the injunction was concerned. If the Circuit Court of Appeals, on the hearing of that appeal, erred in going beyond a modification of the injunction, and in setting aside so much of the orders appealed from as appointed a receiver and permitted him to issue receiver's notes, the error was one in the judicial determination of a case within the jurisdiction of that court, and neither so important in its immediate effect,

nor so far-reaching in its consequences, as to warrant this court in undertaking to control the cause at this stage of the proceedings.

In the first case, therefore, the writ of *certiorari* prayed for is denied, because no reason is shown for issuing it, under the circumstances of the case.

Nor do those circumstances make a case for issuing a writ of mandamus, either to the Circuit Court of Appeals or to the Circuit Court. The decisions of this court upon applications for writs of mandamus since the act of 1891 affirm the principles established in the earlier decisions, before cited. *In re Morrison*, 147 U. S. 14, 26; *In re Hawkins*, 147 U. S. 486; *In re Haberman Manuf. Co.*, 147 U. S. 525; *Virginia* v. *Paul*, *ante*, 107, 124.

In the first case, therefore, the writs of mandamus, as well as the writ of *certiorari*, must be denied.

The second case is governed by the same considerations as the first, except in the following respects:

1st. It is contended that the order of Judge Swayne, setting aside and vacating the order of Judge Pardee appointing Cable receiver, was not such an interlocutory order as an appeal lies from to the Circuit Court of Appeals under section 7 of the act of 1891. 26 Stat. 828. But if that order could not be the subject of a separate appeal, it might clearly, so far as material, be brought before the Circuit Court of Appeals on appeal from the final decree, when rendered. If that court decided erroneously in determining the matter on an interlocutory appeal, that affords no ground for the extraordinary interposition of this court by *certiorari* or mandamus.

2d. It is contended that the original order of Judge Pardee was a nullity, because made by him outside of his circuit, and while the Circuit Court was in session in the district where the suit was pending. But that fact does not appear of record; and if it were proved, the question whether Judge Pardee's order was invalid for that reason (though in itself a question of interest and importance) does not appear to have a material bearing, in any aspect of the case; for whether that order, or the subsequent decree of the Circuit

Court of Appeals, was valid or invalid, the question who should be appointed receiver remained within the jurisdiction of the Circuit Court.

3d. The more important suggestion is that the decree of the Circuit Court of Appeals is void, because Judge Pardee took part in the hearing and decision in that court, though disqualified from so doing by section 3 of the Judiciary Act of 1891, which provides that "no justice or judge, before whom a cause or question may have been tried or heard" in the Circuit Court "shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals." 26 Stat. 827. The question whether this provision prohibited Judge Pardee from sitting in an appeal which was not from his own order, but from an order setting aside his order, is a novel and important one, deeply affecting the administration of justice in the Circuit Court of Appeals. If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or *certiorari*. *United States* v. *Lancaster*, 5 Wheat. 434; *United States* v. *Emholt*, 105 U. S. 414; *The Queen* v. *Justices of Hertfordshire*, 6 Q. B. 753; *Oakley* v. *Aspinwall*, 3 N. Y. 547; *Tolland* v. *County Commissioners*, 13 Gray, 12.

The writ of *certiorari*, authorized by the act of 1891, and prayed for in this case, being in the nature of a writ of error to bring up for review the decree of the Circuit Court of Appeals, the question whether the writ should be granted rests in the discretion of this court; but when the writ has been granted, and the record certified in obedience to it, the questions arising upon that record must be determined according to fixed rules of law. *Harris* v. *Barber*, 129 U. S. 366, 369.

For the reasons above stated, this court is of opinion that the writ of *certiorari* prayed for in the second case should not be granted, unless Judge Pardee was disqualified by the act of 1891 to sit at the hearing in the Circuit Court of Appeals; but that, if he was so disqualified, the writ should be granted,

for the purpose of bringing up and quashing the decree of that court; that there should, therefore, be a rule to show cause why a writ of *certiorari* should not issue on this ground and for this purpose only; and that the question whether the decree of the Circuit Court of Appeals was void, by reason of Judge Pardee's having taken part in it, can more fitly be determined on further argument upon the return of that court to the rule to show cause. *Ex parte Dugan*, 2 Wall. 134.

If the decree of the Circuit Court of Appeals is void, because one of the judges who took part in the decision was forbidden by law to sit at the hearing, a writ of *certiorari* to that court to bring up and quash its decree is manifestly a more decorous, as well as a more appropriate, form of proceeding than a writ of mandamus to the Circuit Court to disregard the mandate of the appellate court.

The following orders, therefore, will be entered in these two cases:

In No. 14, writs of mandamus and certiorari denied; and petition dismissed.

In No. 15, writs of mandamus denied; and rule granted to show cause why a writ of certiorari should not issue to bring up and quash the decree of the Circuit Court of Appeals.

THE CHIEF JUSTICE was not present at the argument of these cases, and took no part in their decision.

On April 3, the petitioner moved this court to continue in force the stay of proceedings in No. 14 until the final disposition of No. 15. The court denied the motion. Thereupon the petitioner moved, and was permitted by the court, to dismiss the petition in No. 15.

WOLFE *v.* HARTFORD LIFE AND ANNUITY INSURANCE COMPANY.

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

No. 162. Submitted March 23, 1893. — Decided March 27, 1893.

A complaint which avers that the plaintiff was, at the several times named therein, "and ever since has been and still is a resident of the city, county and State of New York," is not sufficient to give the Circuit Court of that circuit jurisdiction on the ground of citizenship of the parties, when the record nowhere discloses the plaintiff's citizenship.

THE case is stated in the opinion.

Mr. Robert S. Green and *Mr. Henry Thompson* for the plaintiff in error.

Mr. Herman Kobbe for defendant in error.

THE CHIEF JUSTICE: The complaint in this case avers that the plaintiff was at the several times mentioned therein, "and ever since has been and still is, a resident of the city, county and State of New York," but his citizenship is nowhere disclosed by the record.

It is essential in cases where the jurisdiction depends upon the citizenship of the parties that such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or should appear with equal distinctness in other parts of the record. It is not sufficient that jurisdiction may be inferred argumentatively from the averments. *Brown* v. *Keene*, 8 Pet. 112, 115; *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237; *Menard* v. *Goggan*, 121 U. S. 253.

Judgment reversed at the cost of plaintiff in error and the cause remanded for further proceedings.

Counsel for Appellee.

OGDEN *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 1184. Submitted March 20, 1893. — Decided March 27, 1893.

The appeal in this case from a decree of the Circuit Court in a suit against the United States brought under the act of March 3, 1887, 24 Stat. 505, c. 359, not having been taken until August 9, 1892, is dismissed.

THE appellant brought this suit against the United States under the act of March 3, 1887, 24 Stat. 505, c. 359. The amount claimed exceeded the sum necessary to give this court jurisdiction on appeal. The bill was dismissed June 27, 1892. The application for appeal was made August 9, 1892. On behalf of the appellee the following motion was made: "And now, March 20, 1893, comes the Solicitor General, on behalf of the appellee, and moves the court to dismiss the appeal herein — for that such appeal is not authorized, by the act of March 3, 1891, 26 Stat. 826, entitled 'an act to establish Circuit Courts of appeals,' and so forth; and because such appeal is without the authority of law, and this court, therefore, is without jurisdiction of said appeal:" and with this motion was also submitted a statement of the appellants' counsel in which, acknowledging notice of the motion, he said: "I am anxious that the question shall be determined; the time you give me, however, is too short to prepare or file a brief. I accept your communication of the 13th as notice and waive any other, asking you in making the motion to state to the court that, so far as appellant is concerned, the case is submitted for construction of the statute conferring jurisdiction on the Circuit Courts in actions against the government, and whether that act conferring special jurisdiction with special procedure is affected by the general act creating the Circuit Courts of appeal."

Mr. Solicitor General for appellee in support of the motion.

Mr. J. R. Beckwith for appellants, opposing.

THE CHIEF JUSTICE: This appeal is dismissed upon the authority of *Bank* v. *Peters*, 144 U. S. 570; *Hubbard* v. *Soby*, 146 U. S. 56, and cases cited.

NORTHERN PACIFIC RAILROAD COMPANY *v.* WALKER.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 1124. Argued January 31, February 1, 1893. — Decided April 3, 1893.

Following *Walter* v. *Northeastern Railroad Company*, 147 U. S. 370, it is again held that 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.

As, perhaps, by amendment this bill might be retained as to some one of the defendants, this court declines to dismiss the bill, and reverses the judgment, and remands the cause to the court below for further proceedings in conformity with this opinion.

THE case is stated in the opinion.

Mr. Frederick M. Dudley and *Mr. James McNaught* for appellant.

Mr. S. L. Glaspell, (with whom was *Mr. Edgar W. Camp* on the brief,) for appellees.

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

This was a bill filed in the Circuit Court of the United States for the District of North Dakota, November 21, 1890, by the

Northern Pacific Railroad Company against the county auditors of twelve counties of that State, praying for a decree adjudging certain assessments and taxes levied upon lands in each of said counties to be illegal and void and a cloud upon complainant's title, and that defendants and each of them be restrained from selling or attempting to sell said lands or any portion thereof, or issuing any tax certificates therefor. The case proceeded to a decree, dismissing the bill for want of equity, whereupon it was carried by appeal to the Circuit Court of Appeals for the Eighth Circuit.

Certain questions or propositions of law, concerning which that court desired the instruction of the Supreme Court for a proper decision of the case, were certified to this court, and argument having been had upon the certificate, we directed a *certiorari* to issue requiring the whole record and cause to be sent up for consideration. This has been done, and we find upon examination that the case comes directly within *Walter* v. *Northeastern Railroad*, 147 U. S. 370.

The record does not show that the amount of the assessments and taxes, forming the subject of the litigation, levied in either or all of the counties, exceeded the sum of $2000; and even if this had been so as to the aggregate, the defendants could not have been joined in a single suit, and the jurisdiction thus been sustained. Upon the face of the record, therefore, the Circuit Court was without jurisdiction, (act of March 3, 1887, 24 Stat. 552, c. 373; act of August 13, 1888, 25 Stat. 433, c. 866,) but as perhaps by amendment the bill might be retained as to some one of the defendants, we will not direct its dismissal.

In pursuance of section 10 of the Judiciary Act of March 3, 1891, 26 Stat. 829, c. 517, the decree of the Circuit Court is reversed at the costs of the appellant, and the cause remanded to that court with a direction for further proceedings in conformity with this opinion.

BARNUM *v.* OKOLONA.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

No. 154. Argued and submitted March 22, 1893. — Decided April 3, 1893.

Town bonds having more than ten years to run, issued by a town in Mississippi under the act of March 25, 1871, of the legislature of Mississippi, to aid in the construction of the Grenada, Houston and Eastern Railroad are void.

Woodruff v. *Okolona*, 57 Mississippi, 806, approved and followed.

That municipal corporations have no power to issue bonds in aid of a railroad except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds except subject to the restrictions and conditions of the enabling act, are propositions well settled by frequent decisions of this court.

Argument in this case was commenced by the counsel for the plaintiff in error. At the close of his opening the court declined to hear further argument.

Mr. E. H. Bristow, (with whom was *Mr. W. B. Walker* on the brief,) for plaintiff in error.

Mr. William T. Houston, *Mr. D. W. Houston* and *Mr. R. O. Reynolds* for defendant in error.

Mr. Justice Shiras delivered the opinion of the court.

The act of March 25, 1871, of the State of Mississippi authorized certain counties, cities, and towns to aid in the construction of the Grenada, Houston and Eastern Railroad, by subscribing for capital stock of the company organized to build and maintain that railroad.

The 4th and 5th sections of said act were as follows:

"Sec. 4. *Be it further enacted*, That it shall and may be lawful for the boards of supervisors of any county which

shall have voted a tax as provided by this act, or of the act to which this act is amendatory, to issue bonds due and payable at such time or times as said boards of supervisors may deem best for the taxpayers of their respective counties, not to extend beyond ten years from the date of issuance, for such sums as said boards of supervisors may deem necessary to meet, pay off, and discharge the subscriptions of said counties respectively for capital stock in the Grenada, Houston and Eastern Railroad Company, which have been or which may hereafter be subscribed for by said boards of supervisors, or by the boards of police (as the case may be) respectively, not to exceed the total sum of such stock subscriptions, which said bonds shall be signed by the president of the board of supervisors issuing the same, and be made payable to the president and directors of the Grenada, Houston and Eastern Railroad Company and their successors and assigns, and may be assigned, sold and conveyed, with or without guarantee of payment, by the said president and directors, or may be mortgaged in like manner at their discretion as they may deem best for the company.

"SEC. 5. *Be it further enacted*, That it shall be lawful for the mayor and selectmen of any incorporated city or town who may have subscribed, or shall hereafter subscribe, for capital stock in the Grenada, Houston and Eastern Railroad Company, as authorized by this act, or the act of which this act is amendatory, to issue bonds of their respective corporations in the same manner and with the like effect sufficient in amount to meet the total sum of their respective subscriptions for stock, as the boards of supervisors of the different counties are by this act authorized to do, and all bonds and coupons of interest issued by said mayor and selectmen shall be alike binding upon said towns respectively, in their corporate capacity, as the said bonds so issued by the said boards of supervisors shall be binding upon said counties respectively."

In pursuance of the powers so conferred the town of Okolona subscribed for stock in the said company, and paid for the same by executing and delivering to the railroad company its bonds, bearing date September 1, 1871, with coupons attached,

payable in New York city to bearer, and maturing at from eleven to seventeen years after their date. The bonds recite that they are "issued and delivered to the Grenada, Houston and Eastern Railroad Company by the town of Okolona to meet and pay off the amount subscribed by said town to the capital stock of the railroad company aforesaid."

Frank D. Barnum, a citizen of Tennessee, brought an action of debt against the town of Okolona at the April term, 1889, of the District Court of the United States for the Northern District of Mississippi, and averred in his declaration that he was the holder and owner for value, and before the maturity thereof, of sixteen bonds of said town with their coupons attached, which were due and unpaid, and the amount whereof he was entitled to recover. The declaration likewise averred that said bonds recited that they had been issued in pursuance of the said act of March 25, 1871.

To this declaration the defendant demurred, and assigned for cause, among other things, that it appeared, in and by said declaration, that the bonds sued on were payable more than ten years after their execution, and were, therefore, void.

Upon argument, the court below sustained the defendant's demurrer, whereupon the plaintiff sued out this writ of error to this court.

That municipal corporations have no power to issue bonds in aid of a railroad except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds except subject to the restrictions and conditions of the enabling act, are propositions so well settled by frequent decisions of this court that we need not pause to consider them. *Sheboygan County* v. *Parker*, 3 Wall. 93, 96; *Wells* v. *Supervisors*, 102 U. S. 625; *Claiborne County* v. *Brooks*, 111 U. S. 400; *Young* v. *Clarendon Township*, 132 U. S. 340, 346.

Accordingly if, in the present instance, the legislature of Mississippi, in authorizing the town of Okolona to subscribe for stock in a railroad company and to pay for the same by

an issue of bonds, prescribed that such bonds should not extend beyond ten years from the date of issuance, such limitation must be regarded as in the nature of a restriction on the power to issue bonds. *Norton* v. *Dyersburg*, 127 U. S. 160; *Brenham* v. *German American Bank*, 144 U. S. 173, 188.

It is, however, contended on behalf of the plaintiff in error that no such limitation was put, by the enabling act, on bonds issued by towns; that the restriction to a limit of ten years, contained in the 4th section of the act of March 25, 1871, was applicable only to the case of bonds issued by counties. It is true that, in the 5th section of the act, which conferred the power on towns and cities to subscribe for railroad stock and pay therefor in bonds, no express provision is found as to the length of time during which the bonds should run. As, however, the 5th section does provide that the bonds to be given by towns shall be issued "in the same manner and with the like effect sufficient in amount to meet the total sum of their respective subscriptions for stock, as the boards of supervisors of the different counties are by this act authorized to do," and that all "bonds and coupons of interest issued by said mayor and selectmen shall be alike binding upon said towns respectively, in their corporate capacity, as the said bonds so issued by the said boards of supervisors shall be binding upon said counties respectively," it seems plain that the legislative intent was that the bonds of the towns should be subject to the ten-year limitation contained in the 4th section. This is the fair and obvious import of the language used.

The question involves the construction of the statute of Mississippi, and has been decided by the Supreme Court of that State in the case of *Woodruff* v. *Okolona*, 57 Mississippi, 806, where it was held that bonds issued under that act, having more than ten years to run, were void, and where, in order to reach that conclusion, it was necessary to hold that the limitation of ten years for the running of the bonds contained in the 4th section was applicable to bonds issued by towns under the 5th section.

As against a party who became the owner of such bonds before the decision of the Supreme Court of the State was

rendered, which was the case here, we do not consider ourselves bound by such decision unless we regard it as intrinsically sound. *Enfield* v. *Jordan*, 119 U. S. 680; *Bolles* v. *Brimfield*, 120 U. S. 759. Still, even in such a case, the construction put upon a state statute by the Supreme Court of such State is entitled to our respectful consideration; and we do not hesitate to adopt it as a true construction in the present case, where we have reached the same conclusion upon an independent reading of the statute.

Our conclusion, upon the whole case, is that the town of Okolona had no power to issue the bonds in suit, and that the judgment of the court below must be

Affirmed.

PEOPLE *ex rel.* SCHURZ *v.* COOK.

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

No. 139. Argued March 15, 1893. — Decided April 3, 1893.

The authority conferred by the act of the legislature of New York of May 11, 1874, c. 430, p. 547, as amended by the act of June 2, 1876, c. 446, p. 480, upon purchasers at a foreclosure sale of a railroad, to organize a corporation to receive and hold the purchased property, creates no contract with the State.

The imposition, under the provisions of the act of the legislature of New York of April 16, 1886, c. 143, of a tax upon a corporation so organized after the passage of that act by purchasers who purchased at a foreclosure sale made before its passage, for the privilege of becoming a corporation, violates no contract of the State, and is no violation of the Constitution of the United States.

This writ of error was brought to review a judgment of the Supreme Court of the State of New York, adopting and entering a decision of the Court of Appeals of said State in pursuance of a remittitur therefrom, on the ground that it gave effect to and enforced a law of the State, which, in violation of the Constitution of the United States, impairs the obligation of a contract. Whether there was a contract and whether

its obligation had been impaired, as claimed by plaintiffs in error, were questions which arose and were to be determined upon the following state of facts: Several railroad corporations properly organized under the laws of New York and Pennsylvania, after duly executing mortgages upon their respective properties and franchises to secure the payment of bonds lawfully issued by them, were consolidated, under legislative authority from those States, into one company, which was incorporated February 14, 1883, under the name of the Buffalo, New York and Philadelphia Railroad Company. This new company, in pursuance of proper authority, also executed a mortgage upon its properties and franchises to secure the payment of bonds issued by it. Default was made in the payment of the bonds issued under and secured by each of these various mortgages, and foreclosure proceedings were instituted thereon, and the mortgages duly foreclosed, and the entire properties and franchises of all the companies, constituent and consolidated, were regularly sold under such foreclosure proceedings and bid in by the plaintiffs in error as the representatives of the security holders, in pursuance of a scheme of reorganization previously agreed upon. The properties and franchises so sold and purchased were duly conveyed to the purchasers September 28, 1887, who thereupon adopted and executed articles of association under and in conformity with the provisions of the reorganization acts of the State, (c. 430 of the Laws of 1874, as amended by c. 446 of the Laws of 1876,) and having prepared a certificate of incorporation, as provided by said acts, setting forth, among other things not material to be noticed, that they had associated themselves together as a corporation to be known as the Western New York and Pennsylvania Railway Company, with a maximum capital stock of $15,000,000, divided into 150,000 shares, they presented said certificate to Frederick Cook, secretary of State, with the request to file the same in his office, such filing being required before the parties forming the organization could become a body corporate. They tendered the secretary of State, at the time of applying to have the certificate filed, the sum of $45 as the proper amount

Statement of the Case.

of fees for recording the same. The secretary refused to permit it to be filed, basing his refusal upon the provision of an act of the legislature known as chapter 143 of the Laws of 1886, which provided that any corporation incorporated under any general or special law of the State, having capital stock divided into shares, should pay to the state treasurer for the use of the State a tax of one-eighth of one per centum upon the amount of capital stock which the corporation was authorized to have. The act further provided that "the said tax shall be due and payable upon the incorporation of said corporation or upon the increase of the capital stock thereof; and no such corporation shall have or exercise any corporate power until the said tax shall have been paid. And the secretary of State and any county clerk shall not file any certificate of incorporation or association until he is satisfied that the said tax has been paid to the state treasurer. And no such company incorporated by any special act of the legislature shall go into operation or exercise any corporate powers or privileges until said tax has been paid as aforesaid." This act took effect immediately upon its passage. When the plaintiffs in error presented their certificate of incorporation to the secretary of State for filing, the tax imposed by this act, amounting to $18,000, had not been paid or tendered to the state treasurer, and for this reason the secretary refused to file the certificate. Thereupon the plaintiffs in error applied to the Supreme Court of the State of New York, at special term, for a peremptory writ of mandamus, to compel the secretary of State to file said certificate. The petition set out in detail the foregoing proceedings. In response to the order to show cause why the writ should not be granted, the secretary of State made return, stating, among other objections not material to this case, that the said Western New York and Pennsylvania Railway Company of New York sought to be incorporated as a corporation, had neglected and refused to pay the incorporation tax imposed by the law of 1886, and that he could not be required to file the certificate until said tax had been paid. The special term denied the motion for a mandamus. From this order the relators appealed to the general term of

the Supreme Court, which affirmed the action of the special term. 47 Hun, 467. The relators then appealed from the decision of the general term to the Court of Appeals, which affirmed the order of the former, 110 N. Y. 443, and remitted the cause to the Supreme Court of the State, where judgment was entered in conformity with the decision of the Court of Appeals.

Mr. George Zabriskie for plaintiffs in error.

The provisions of the Railroad Law of New York, enabling the incorporated purchasers of railroads and franchises sold under foreclosure to possess, exercise and enjoy the property purchased, formed part of the mortgagor company's charter and constituted a contract between the State and the mortgagor company for the benefit of the bondholders and ultimately for the benefit of the purchasers. *Fletcher* v. *Peck*, 6 Cranch, 87; *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 547; *Greenwood* v. *Freight Company*, 105 U. S. 13, 20; *New Orleans Gas Company* v. *Louisiana Light Company*, 115 U. S. 650, 660; *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y. 234.

The franchises which the corporation mortgages, and which the State stipulates to confer upon the incorporated purchasers, are rights or privileges which are essential to the operations of the corporation, and without which its road or works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines and the like. They are positive rights and privileges without the possession of which the road of the company could not be successfully worked. *Morgan* v. *Louisiana*, 93 U. S. 217, 223.

When there is a judicial sale under a mortgage authorized by the State, covering franchises, those franchises which are necessary for the use and enjoyment of the road pass, under the legislation of New York, to the purchasers in the sense indicated in *Memphis Railroad Co.* v. *Commissioners*, 112 U. S. 609; and purchasers under a foreclosure sale of mort-

gaged property derive their title (through the State, in the case of franchises) from the mortgagee. The foreclosure cuts off the equity remaining in the mortgagor, and leaves the title conveyed by the mortgage absolute. *Packer* v. *Rochester & Syracuse Railroad*, 17 N. Y. 283, 287.

But the franchises being derived originally from the State, are transferable from the mortgagee only to the extent, and in the manner, and to the persons prescribed by the State. The State has given express authority, and its own contract, to transfer them to the mortgagee; and it is needless to consider whether or not this grant would in the absence of further express language imply a further agreement, *quasi ex contractu*, that if the mortgagee were obliged to resort to his security for the collection of his debt, and realize his security in the usual way, by foreclosure of the mortgagor's equity, and a sale, passing title to the purchasers, the State would also grant to the purchasers the same franchises which had been transferred to the mortgagee, and sold by judicial process; because there is no room for an implied covenant, since the State has entered into an express covenant on this point by those provisions of the charter which relate to mortgaging and the rights acquired by purchasers under foreclosure; by which the State agrees to grant to the purchasers, when incorporated, the same franchises and other rights that belonged to the corporation which last owned the railroad.

These franchises and other rights, however, do not comprise the power to act in a corporate capacity, which does not belong to the corporation, but to the corporators. *Southern Pacific Railroad* v. *Orton*, 32 Fed. Rep. 457; *Memphis &c. Railroad* v. *Commissioners*, 112 U. S. 609; *People* v. *Coney Island Railway*, 89 N. Y. 75. But the State does exact that the purchasers shall become a corporation; and it is only to such corporation, and not to the purchasers themselves, that the State agrees to grant the franchises.

When the mortgages, under which the plaintiffs in error claim title, were made and the bonds were issued under them, all the existing legislation of the State as to the title which passed, under the mortgages, to the mortgagees, and their

right to transfer it to the purchasers by foreclosure, and the right of the incorporated purchasers to take, exercise and enjoy the mortgaged franchises, as well as the other mortgaged property, constituted part of the contract.

The contract of the State of New York was not to grant to natural persons the railroad franchises covered by the mortgages and sold under judicial process of foreclosure, but only to grant those franchises to a corporation organized by, and composed of, the purchasers and their associates or assigns.

The distinction between acquiring title to railroad franchises and obtaining the power to exercise and enjoy them in operating the railroad is established by judicial decisions of the courts of New York. *People* v. *Railroad Co.*, 89 N. Y. 75; *Fanning* v. *Osborne*, 102 N. Y. 441.

The policy of the State of New York, as gathered from its legislation, is to confer railroad franchises only upon railroad corporations and not upon individuals. It results from all this that grants of corporate powers by the State of New York for the operation of railroads are conferred by the State only upon corporations; that there is no law authorizing natural persons to exercise the corporate franchises which they may purchase under foreclosure; that the State has always deemed it necessary to make provision either by special act (prior to 1854) or by general law (since 1854) whereby the purchasers might, by turning themselves into a corporation, enable themselves to use and exercise the franchises of which they had become the owners; and that these provisions for incorporation of the purchasers are inseparable from the terms of the contract of the State with the corporation conferring power to make mortgages upon railroad companies.

The contract of the State being plainly to confer the franchises on the corporation formed by the purchasers, there is no implication of a grant to confer them upon the purchasers individually. The obligation is construed strictly. *Auburn & Cato Plank-road Co.* v. *Douglass*, 9 N. Y. 444; *United States* v. *Arredondo*, 6 Pet. 691, 738; *Rice* v. *Railroad Co.*, 1 Black, 358, 380.

The State having agreed unconditionally to give to the

incorporated purchasers the right to use for the operation of the railroad the corporate franchises acquired under the mortgages, and to confer on them the corporate capacity necessary for that purpose, violates its contract when either it refuses absolutely to give the franchises or the corporate capacity or imposes any conditions upon giving them; and its refusal or its imposition of conditions is not justified by any power reserved to the State either by the Constitution of the State or by the charter or acts of incorporation of the railroad companies.

The general railroad law of New York, c. 140, Laws of 1850, § 48, provided that "the legislature may at any time annul or dissolve any incorporation formed under this act, but such dissolution shall not take away or impair any remedy given against such corporation, its stockholders or officers for any liability which shall have been previously incurred." The effect of these reservations is to empower the legislature to take the life of the corporation; but it does not authorize the legislature to interfere with the property of the corporation or to impair the obligation of any contract; and there is a contract, within the meaning of the rule, whenever a mortgage covering corporate franchises or other property is made and bonds are issued under it. *People* v. *O'Brien*, 111 N. Y. 1.

The power of the State to tax does not authorize the imposition of the tax provided in the act of 1886 upon the plaintiffs in error. States cannot impair the obligation of contracts by means of taxation. The tax in question is, in reality, the price exacted by the State for the grant of the power to be a corporation, which it had previously contracted to grant without price. It is not assessed upon the value of the property, but upon the nominal amount of capital stock without reference to its actual value. *Bank of Commerce* v. *New York*, 2 Black, 620, 629. The payment in question is quite different in principle from the annual tax. It is made once for all, and not from year to year. It is payable only for the initial grant of corporate capacity to a group of individuals, and of corporate franchises to such corporation, and not for the privilege of exercising franchises after they have been acquired by the

corporation. *State* v. *Parker*, 32 N. J. Law, (3 Vroom,) 426; *Chilvers* v. *People*, 11 Michigan, 43; *People* v. *Thurber*, 13 Illinois, 554.

The Court of Appeals felt themselves controlled by the authority of *Memphis &c. Railroad Co.* v. *Commissioners*, 112 U. S. 609; but that case does not decide the question in this suit.

However true the observations in that opinion are, with reference to railroads in Arkansas or elsewhere, they are not applicable to railroads in New York. In that State "the right [to become incorporated] conferred under the general law, is in the nature of a contract." *Abbott* v. *Johnstown &c. Railroad*, 80 N. Y. 27, 30.

Mr. S. W. Rosendale, Attorney General of the State of New York, for defendant in error.

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

The present writ of error is prosecuted to review and reverse this judgment, on the ground that the decision of the Court of Appeals, in enforcing the provisions of the law of 1886 against the relators, plaintiffs in error, and requiring of them the payment of one-eighth of one per centum upon the amount of the capital stock of the company sought to be incorporated, as a condition precedent to the filing of the certificate and becoming a body politic and corporate under the name of the Western New York and Pennsylvania Railway Company of New York, impaired the obligation of a contract made and entered into between the State and the several corporations and mortgagees thereof, to whose rights, properties and franchises the plaintiffs in error, under the foreclosure proceedings aforesaid, had succeeded. Their claim is that, under and by virtue of the provisions of the laws of 1874, as amended in 1876, embodying the alleged contract with the State, they are entitled to be incorporated, and cannot lawfully be required to pay any tax to the State before becoming a corporation,

and acquiring the right to exercise corporate functions and franchises. The act of 1874, as amended in 1876, is by its caption entitled "An act to facilitate the reorganization of railroads sold under mortgage, and to *provide for the formation of new companies in such cases.*" The provisions of the statute, so far as material to this case, are the following:

"In case the railroad and property connected therewith, and the rights, privileges and franchises of any corporation, except a street railroad company, created under the general railroad law of this State, or existing under any special or general act or acts of the legislature thereof, shall be sold under or pursuant to the judgment or decree of any court of competent jurisdiction made or given to execute the provisions [or] enforce the lien of any deed or deeds of trust or mortgage heretofore executed by any such company, the purchasers of such railroad property and franchises, and such persons as they may associate with themselves, their grantees or assignees, or a majority of them, may become a body politic and corporate, and as such may take, hold and possess the title and property included in said sale, and shall have all the franchises, rights, powers, privileges and immunities which were possessed before such sale by the corporation whose property shall have been sold as aforesaid, by and upon filing in the office of the secretary of State, a certificate, duly executed under their hands and seals, and acknowledged before an officer authorized to take the acknowledgment of deeds, in which certificate the said persons shall describe by name and reference to the act or acts of the legislature of this State under which it was organized, the corporation whose property and franchises they shall have acquired as aforesaid, and also the court by authority of which such sale shall have been made, giving the date of the judgment or decree thereof, authorizing or directing the same, together with a brief description of the property sold, and shall also set forth the following particulars:

"1. The name of the new corporation intended to be formed by the filing of such certificate.

"2. The maximum amount of its capital stock and the number of shares into which the same is to be divided, speci-

fying how much of the same shall be common and how much preferred stock, and the classes thereof, and the rights pertaining to each class.

"3. The number of directors by whom the affairs of the said new corporation are to be managed, and the names and residences of the persons selected to act as directors for the first year after its organization.

"4. Any plan or agreement which may have been entered into pursuant to the second section hereof.

"And upon the due execution of such certificate and the filing of the same in the office of the secretary of State, the persons executing such certificate and who shall have acquired the title to the property and franchises sold as aforesaid, their associates, successors and assigns, shall become and be a body politic and corporate, by the name specified in such certificate, and shall become and be vested with and entitled to exercise and enjoy all the rights, privileges and franchises which, at the time of said sale, belonged to or were vested in the corporation which last owned the property so sold or its receiver."

Now it is contended by plaintiffs in error that the State having, by and under these provisions of law, agreed to give to the purchasers of railroad properties and franchises acquired under foreclosure proceedings, not merely the right to hold, use and operate the same, but also to confer on them the *corporate capacity* necessary for that purpose, this latter branch of the contract is violated when the State thereafter either refuses to confer such corporate capacity, or imposes any condition upon the purchasers' right to be and to become a body politic and corporate. Upon this theory the claim is made that the tax imposed by the law of 1886, which was held by the state courts to apply to their case and to the corporation they proposed to form, impaired the obligation of the contract, and was, therefore, unconstitutional. This claim was disposed of by the New York Court of Appeals, speaking by Peckham, J., as follows:

"We think it also plain that, under the reorganization acts above mentioned, when the purchasers at the foreclosure sale

undertake to reorganize under those acts, and for that purpose to file in the secretary's office a certificate, upon the filing of which they become a body politic and corporate, the corporation thus formed is a new and entirely different one from that whose property and franchises the purchasers may have bought under the foreclosure proceedings. It is true that the corporation about to be formed by the filing of the certificate has, by force of the statute, when formed, all the rights, franchises, powers, privileges and immunities which were possessed before such sale by the corporation whose property was sold; but that does not make the corporation the same by any means. The right to be a corporation, which the old corporation had, was not mortgaged and was not sold, and did not pass to the purchasers; and they only obtain such a right upon filing the certificate mentioned, and they then obtain it by direct grant from the State, and not in any degree by the sale and purchase of the franchises, etc., of the old corporation.

"The last ground argued by counsel is, we think, equally untenable. There has been no violation of any contract. These mortgages, it is true, were all executed and the bonds issued long prior to the passage of the tax act of 1886, already mentioned. The franchises of the corporations were duly mortgaged under the provisions of state laws, by which it was provided that purchasers at foreclosure sales under such mortgages could, upon compliance with the law, file certificates and become incorporated bodies. But such acts were in no sense contracts on the part of the State with persons purchasing bonds secured by such mortgages, or with future possible purchasers at foreclosure sales, that the provisions existing at the time of the mortgaging of the franchises for the incorporation of such purchasers should remain the same. I think this question has been decided in this way by the Supreme Court of the United States and further discussion of it is unnecessary. *Memphis & Little Rock Railroad* v. *Commissioners*, 112 U. S. 609."

The principles and reasoning in the decision of this court in *Memphis &c. Railroad Co.* v. *Commissioners*, 112 U. S. 609,

are directly applicable to the present case. The attempt to distinguish the two cases necessitates the drawing of distinctions too refined and theoretical to form the basis of sound judicial determination. It was said by this court in that case, (p. 621): "In many, if not in most, acts of incorporation, however special in their nature, there are various provisions which are matters of general law and not of contract, and are, therefore, subject to modification or repeal. Such, in our opinion, would be the character of the right in the mortgage bondholders, or the purchasers at the sale under the mortgage, to organize as a corporation, after acquiring title to the mortgaged property, by sale under the mortgage, if, in the charter under consideration, it had been conferred in express terms, and particular provision had been made as to the mode of procedure to effect the purpose. It would be matter of law and not of contract. At least, it would be construed as conferring only a right to organize as a corporation according to such laws as might be in force at the time when the actual organization should take place, and subject to such limitations as they might impose. It cannot, we think, be admitted that a statutory provision for becoming a corporation *in futuro* can become a contract, in that sense of the clause of the Constitution of the United States which prohibits state legislation impairing its obligation, until it has become vested as a right by an actual organization under it; and then it takes effect, as of that date and subject to such laws as may then be in force. . . . The State does not part with the franchise until it passes to the organized corporation; and when it is thus imparted it must be what the government is then authorized to grant and does actually confer." It is further said therein that "the franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or impor

tant to the beneficial use of the railroad could as well be exercised by natural persons." p. 619.

But it is urged by plaintiffs in error that, under the decisions of the highest court of New York, they cannot, as private persons or as an association, so use, maintain and operate the railroad which they have purchased. Without reviewing the New York cases cited in support of this position, we doubt whether they go to that extent. But if they so held under any law of the State passed since the execution of the mortgages under which plaintiffs in error have succeeded to the properties and franchises of the railroad sold under foreclosure, as already mentioned, *then* the question would be whether the impairment of the obligation of the contract would not consist in *denying* the purchasers the right to use the property and franchises so acquired. The fact, if it exists, that plaintiffs in error are not allowed to operate the railroad and exercise the franchises purchased without first obtaining corporate existence, in no way shows or tends to establish their contention, that said act of 1874, as amended in 1876, constituted a contract on the part of the State to confer corporate capacity upon them without imposing any tax as a prerequisite to the grant of corporate existence. Again, there is nothing in the acts of 1874 and 1876 which would or could have exempted the railroad corporation, to whose rights, privileges and franchises the plaintiffs in error have succeeded, from the payment of taxes such as the State by its legislation might thereafter impose. If they were not in fact, they could constitutionally have been made subject to the provisions of said act of 1886, and been required to pay the tax of one-eighth of one per centum upon the amount of their capital stock. The settled rule of this court and of the courts of New York, requires that exemption from taxation, so essential to the existence of government, must be expressed in the clearest and most unambiguous language, and not be left to implication or inference. *Vicksburg, Shreveport &c. Railroad* v. *Dennis*, 116 U. S. 665; *Chicago, Burlington &c. Railroad* v. *Guffey*, 120 U. S. 569; *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 294; and *People ex rel. Ins. Co.* v. *Davenport*, 91 N. Y. 574, 586.

The plaintiffs in error acquired the properties and franchises of these corporations, which were subject to the taxing power of the State, after the act of 1886 was passed and went into effect. There is no provision of the law under which they made their purchase requiring them to become incorporated; but, desiring corporate capacity, they demanded the grant of a new charter under which to exercise the franchises so acquired, without compliance with the law of the State existing at the time their application for incorporation was made. We are clearly of the opinion that the act of 1874, as amended in 1876, set up and relied upon by them, does not sustain such a claim. The provisions of that act do not constitute a contract on the part of the State with either the corporations, or the mortgagees, bondholders or purchasers at foreclosure sale. They are merely matters of law instead of contract, and the right therein conferred upon purchasers of the corporate properties and franchises sold under foreclosure of mortgages thereon, to reorganize and become a *new corporation*, is subject to the laws of the State existing or in force at the time of such reorganization and the grant of a new charter of incorporation. *Memphis &c. Railroad Co.* v. *Commissioners*, *supra*.

There is another difficulty in the way of sustaining the claim of the plaintiffs in error in this case. The Constitution of New York, providing for the formation of corporations under general laws, reserves to the State the power to alter, change or repeal all such general laws. The Revised Statutes of the State, c. 18, title 3, sec. 8, vol. 3, 8th ed., p. 1724, provides that "the charter of every corporation that shall be granted by the legislature shall be subject to alteration, suspension or repeal in the discretion of the legislature"; and by the general railroad law of New York, c. 140, Laws of 1850, § 48, it is provided that "the legislature may, at any time, annul or dissolve any corporation formed under this act, but such dissolution shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liability which shall have been previously incurred."

In the case of *The People* v. *O'Brien*, 111 N. Y. 1, cited by counsel for the plaintiffs in error, while the court held that it

was not within the power of the legislature to destroy the property rights of a corporation, it was not questioned that the legislature could destroy the existence of the corporation.

In the still later case of *The Mayor &c. of the City of New York* v. *The Twenty-third Street Railroad Company*, 113 N. Y. 311, it was directly held that the right reserved to the legislature to alter or repeal the charter of a corporation included the right to tax a corporation upon its franchises as such instead of exacting license fees, as before prescribed. Earl, J., speaking for the court there, said: "As it (the legislature) has the power utterly to deprive the corporation of its franchise to be a corporation, it may prescribe the conditions and terms upon which it may live and exercise such franchises. It may enlarge or limit its powers, and it may increase or limit its burdens." This construction of the statutes of the State by its highest court is of controlling authority. *Bucher* v. *Cheshire Railroad*, 125 U. S. 555; *Gormley* v. *Clark*, 134 U. S. 338; and *Stutsman County* v. *Wallace*, 142 U. S. 293. The right being thus reserved to the legislature, under the power to alter or repeal the charter of corporations, not only to terminate their existence, but to impose upon them increased burdens, it cannot be properly asserted that the act of 1886, imposing the tax complained of, was unconstitutional, even though the act of 1874 created a contract with corporations and their mortgagees to whose right, properties and franchises plaintiffs in error have succeeded. The corporations, mortgagees and bondholders under such circumstances acquire their rights subject to the reserved power of the legislature to enlarge or diminish the franchises conferred, and to increase or reduce the burdens thereon. Purchasers succeeding to properties and franchises of corporations thus situated cannot occupy any better position in respect to their application for a new charter of incorporation.

In *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, 270, it was said by this court, that "a legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a

law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract. . . . The corporation, by accepting the grant subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation," citing, in support of those views, *Greenwood* v. *Freight Co.*, 105 U. S. 13, 17. This principle should be especially maintained and applied in cases like the present, where the taxing power of the State is involved.

We do not deem it necessary to consider other points made in the briefs of counsel. They are of minor importance, and do not affect or control the principal question presented. Our conclusion is that there is no error in the judgment complained of, and that the same should be

Affirmed.

MANHATTAN COMPANY *v.* BLAKE.

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

No. 163. Submitted March 23, 1893. — Decided April 3, 1893.

Under § 110 of the act of June 30, 1864, c. 173, 13 Stat. 277, afterwards embodied in § 3408 of the Revised Statutes, imposing a tax of $\frac{1}{24}$ of 1 per cent each month "upon the average amount of the deposits of money, subject to payment by check or draft, or represented by certificates of deposit or otherwise, whether payable on demand or at some future day, with any person, bank, association, company or corporation, engaged in the business of banking," moneys deposited by the treasurer of the State of New York, in the bank of the Manhattan Company, in the city of New York, intended to satisfy the interest or principal of stocks of that State, and credited to said treasurer, and then drawn for by him by drafts payable to the order of the cashier of the bank, and then paid out by the bank for such interest or principal, are subject to such tax.

The bank received a salary from the State for rendering such services, and did not charge any of the tax to the State.

Statement of the Case.

Such tax was not a tax on the revenues of the State in the hands of a disbursing agent.

Nor was a trust created in favor of each creditor of the State as to the deposit in the hands of the bank.

This was an action at law, brought January 31, 1883, by the president and directors of the Manhattan Company, a New York corporation, possessing banking powers and carrying on the business of banking in the city of New York, against Marshall B. Blake, in the Supreme Court of the State of New York, and removed by the defendant, by *certiorari*, into the Circuit Court of the United States for the Southern District of New York, on the ground that the suit was brought against him on account of acts done by him under the revenue laws of the United States, and as collector of internal revenue for the second collection district of the State of New York.

The complaint in the suit, which was put in in the state court, contained six paragraphs, setting forth (1) the status of the plaintiff; (2) the status of the defendant, and an allegation that the banking house of the plaintiff was situated, and its business was carried on, in said second collection district; (3) that, on December 24, 1881, the plaintiff received from the defendant a notice stating that the tax assessed against it, from July 1, 1864, to May 31, 1881, amounting to $121,215.34, was due and payable on or before the last day of December, 1881, and that, unless it was paid by that time, it would become his duty to collect it, with a penalty of five per cent additional, and interest at one per cent per month, the tax being one upon deposits; (4) that the plaintiff, apprehending that if it did not pay the tax on or before December 31, 1881, the defendant would levy upon its property to satisfy the tax, paid to him on that day the sum of $113,085.62, being the amount of the tax without including any penalty, but that, before paying such amount, the plaintiff delivered to the defendant a written protest against the payment of the tax on deposits during the period from July 1, 1864, to November 30, 1879, because a portion of that tax was assessed upon moneys transmitted to the plaintiff by the treasurer of the

State of New York, for the payment of debts of the State, and which were not "deposits," within the meaning of the statute of the United States, and because the remainder of such tax was assessed upon moneys deposited with the plaintiff by the United States Trust Company of New York, on which the latter company had already paid to the United States a tax as upon deposits, but that the defendant, notwithstanding such protest, insisted upon the payment of the tax and required the plaintiff to pay it; (5) that said tax was in part unlawfully assessed against the plaintiff, and it was not legally liable to pay the same, for the reason that $31,021.25 of said tax was assessed against it on account of moneys transmitted to it by the treasurer of the State of New York, and received by the plaintiff as the agent of the State, to be applied by the plaintiff to the payment of the debts of the State, and the moneys were not "deposits," within the meaning of the revenue laws of the United States, and for the further reason that $64,518.73 of said tax was assessed against the plaintiff on account of moneys received by it from the United States Trust Company of New York, upon which the latter company paid to the United States a tax as deposits; and (6) that, before the commencement of the suit, the plaintiff appealed to the Commissioner of Internal Revenue of the United States, and claimed that $95,539.98 of said tax was erroneously assessed and paid, for the reasons before mentioned, and that the plaintiff was entitled to have that sum refunded, and that said commissioner rejected said appeal and claim, for the reason, as stated by him, that the amount was legally assessed and collected. The complaint prayed judgment for $95,539.98, with interest from December 31, 1881.

The answer of the defendant, which was put in in the Circuit Court of the United States, admitted the allegations contained in paragraphs 1, 2, 3, 4 and 6 of the complaint, and put in issue the allegations of paragraph 5, and averred that the $113,085.62 had been paid to the defendant, as collector of internal revenue, as a tax on the deposits of money with the plaintiff, subject to payment by check or draft or represented by certificate of deposit or otherwise; that that sum

was justly due as such tax; and that he had long since covered the same into the Treasury of the United States.

The case was tried before Judge Lacombe and a jury, on the 22d of October, 1888. There was a bill of exceptions, which stated that the evidence of the respective parties was set forth in the following agreed statement of facts:

"First. The first, second, third, fourth and sixth articles of the complaint, the same being admitted by the answer.

"Second. That plaintiff has for more than forty years maintained a transfer office within its banking house in 40 Wall street, in New York, as provided by a contract made by the commissioners of the canal fund and the canal board with the Manhattan Company and pursuant to an act passed by the legislature of the State of New York authorizing such contract, passed May 13, 1840. (See Session Laws of 1840, p. 229.) Said agreement or contract is contained in document 5 of Assembly Reports of the State of New York for the year 1841, and said act and said contract as contained in said volumes may be referred to by either party herein and are admitted to be in evidence for the purpose of this action. It has also, during the period above mentioned and long prior thereto, acted as a depositary of moneys of the State of New York committed to its keeping by the treasurer of the State of New York under the authority vested in that officer by the statute of this State. Title 4, c. 8, part 1, of the Revised Statutes, (1 Edmonds, 177,) Exhibit B, *post*, and any and all acts in reference to the relations of the plaintiff to the State as a depositary of moneys of the State may be referred to by either party herein and are admitted to be evidence for all the purposes of this action.

"Third. That in pursuance of the provisions of the said contract contained in assembly document No. 5, and between the years 1864 and 1882, the plaintiff maintained such transfer office and paid out to various creditors of the State large sums of money received from the treasurer of the State of New York to be applied to the payment of the interest accruing from time to time on various stocks of the State of New York, and more particularly stock of the canal loan and volunteer

bounty loan, and also for the payment of the principal of the same as the same from time to time became due and payable, and gave receipts and vouchers for the same, as were required by the State, in accordance with the provisions of the act and agreement hereinbefore referred to; that such money so sent to the bank, so far as the same was to be applied to the extinguishment of the canal loan or volunteer bounty loan debts, was to be applied to the extinguishment of debts incurred by the State in the exercise of its sovereign and reserved powers.

"Fourth. That the tax assessed against the plaintiff, as stated in the third article of the complaint herein, was assessed upon deposits in plaintiff's bank, which included the amounts so received by the plaintiff from the treasurer of the State of New York to satisfy the interest or principal of said stocks; that the tax upon the amounts so received from the treasurer of the State of New York by the plaintiff was the sum of $31,021.25; that the course of business between the plaintiff and the treasurer of the State of New York in reference to the money so transmitted by him, for the purpose aforesaid, to the plaintiff was as follows: The interest upon said canal loan and volunteer bounty loan and the principal thereof falls due upon the first day of certain specified months. At some time during the week preceding the first day of the month when such principal or interest would fall due, the treasurer of the State would remit by mail to plaintiff drafts drawn by various country banks upon their respective correspondents in the city of New York to an amount equal to the payments to be made on the first of the ensuing month, the receipt of which drafts would be acknowledged by mail in a letter addressed by the plaintiff to the treasurer. Upon the receipt of these drafts, the amount thereof was at once credited to an account upon plaintiff's books entitled 'Treasurer of the State of New York, account of canal fund,' so far as the proceeds of said drafts were to be applied for payments on account of the canal indebtedness, and to an account entitled 'Treasurer of the State of New York,' so far as the proceeds of said drafts were to be applied to the bounty indebtedness. These drafts were collected by the plaintiff through the New York clearing house

and their proceeds mixed with the general deposits of the plaintiff. Plaintiff had on hand at the close of each day's business sufficient deposits to meet all claims of the State. Upon the receipt by the treasurer of the State of a notification from plaintiff that such drafts had been received by it the treasurer has drawn drafts upon the plaintiff to the order of the cashier of the plaintiff, enclosed and mailed in a letter addressed to the plaintiff, in which was indicated the purpose to which the funds were to be applied. The draft relating to canal loan, upon its receipt by plaintiff, was charged against the account entitled 'Treasurer of the State of New York, account of canal fund,' and credited to a new account called 'Interest New York State stocks, canal loan, July 2, 1881.' The draft relating to bounty loans was in like manner charged against the account entitled 'Treasurer of the State of New York,' and credited to a new account entitled 'Interest loan for payment of bounties to volunteers due January 1, 1877.'

"The mode in which the money was actually paid out by plaintiff was as follows: The book containing the names of the parties entitled to be paid with receipts for them to sign was placed in the hands of the transfer clerk of the plaintiff at its banking house, and to him the parties were directed in the first instance to apply. The transfer clerk, upon being satisfied of their identity and obtaining their signatures to the receipts, gave them each a paper in the following form signed by him:

"'*Registered Stock.*

"'N. Y. State stock.

"'No. —. NEW YORK, ——— —, 18—.

"'Manhattan Company.

"'Charge interest New York State stock, ——— —, 18—, —— dollars.

"'$—.

———— ————,

"'*Transfer Officer.*'

"The money was sent down in the same way; but when the principal became due the parties came with their certifi-

cates of stock and surrendered them and gave an assignment, and then they received from the transfer clerk a sort of a paper in this form:

"'State of New York, Transfer Office of the Manhattan Company.

"'Pay to the order of ——— ——— —— dollars.

"'Reimbursement of loan to provide for deficiences in the sinking fund of July 1, 1881.

"'Registered stock.

"'Transfer office. ——— ———,

"'*Transfer Clerk.*'

"The papers, of which the above is a copy, were presented to the plaintiff's paying teller by the person entitled to receive the interest or principal, and the money was paid him by such teller. The amount paid upon each was charged either to the account 'Interest New York State stock, canal loan, July 2, 1881,' or to the account 'Interest loan for payment of bounties to volunteers due January 1, 1877,' according to the fact in each case, until said accounts were balanced.

"Fifth. The claim of plaintiff in this action, so far as it relates to the sum of $64,518.73, being the sum assessed and collected on amounts upon which taxes have theretofore been paid by the United States Trust Company, is hereby waived and withdrawn."

The contract mentioned in paragraph 2 of the agreed statement of facts was made July 13, 1840, between "The People of the State of New York, by their agents, the commissioners of the canal fund of the said State, of the first part," and "the President and Directors of the Manhattan Company, in the city of New York, of the second part." The material parts of the contract were as follows:

"In consideration of the agreements and undertakings hereinafter contained on the part of the said party of the second part, the said party of the first part hereby agrees to establish an office in the bank of the said party of the second part in the city of New York for the issue and transfer of certificates

Statement of the Case.

of any stock authorized by the laws of the State of New York for any loans made in its behalf by the comptroller or the commissioners of the canal fund, which office shall be continued and maintained in the said bank during the pleasure of the commissioners of the canal fund of the said State. . . .

"For rendering the services contemplated by this agreement the party of the first part will pay to the said party of the second part, so long as the said transfer office shall be continued in the said bank, a compensation at the rate of twelve hundred and fifty dollars annually, and to be paid quarterly, in lieu of all expenses and charges of every description, except the expense of ledgers and transfer books.

"In consideration of the aforesaid agreements the said party of the second part hereby agree and engage to maintain an office in their said bank for the issue and transfer of certificates of stock for any loan made in behalf of the people of the said State by the comptroller or by the commissioners of the canal fund, which certificates shall be issued and which transfers shall be made as hereinbefore declared; and for all transfers made and certificates issued contrary to the provisions of this agreement hereinbefore contained, the said party of the second part shall be immediately liable to the said party of the first part for the nominal amount of all certificates so transferred or issued. . . .

"And the said party of the second part further agree that they will pay and redeem such certificates of stock issued under the direction of the commissioners of the canal fund in behalf of the State of New York, as shall from time to time be directed by the said commissioners, from the funds to be provided by them, at such rates as they shall prescribe; and will also pay and redeem such certificates of stock issued under the directions of the comptroller, as he shall direct, out of funds to be provided by him, at such rates as he shall prescribe, and in such payments will conform to such regulations as may be prescribed by the said commissioners or the comptroller in regard to such certificates respectively, and will render accounts of such payments and vouchers for the same as shall be prescribed in such regulations.

"And the said party of the second part further agree that they will from time to time pay the interest on all loans made by the commissioners of the canal fund in behalf of the State of New York, out of funds to be provided for that purpose, on such vouchers and proofs as the said commissioners shall prescribe, and will render accounts of such payments, with such vouchers, within such time, and in such form as they shall direct, and in like manner will pay the interest on loans made by the comptroller from funds to be provided by him, at such times and on such vouchers as he shall prescribe, and will render an account to him of such payments, with the vouchers therefor, within such time and in such form as he shall direct."

The provisions of the statute of New York, referred to in paragraph 2 of the agreed statement of facts as Exhibit B, Title 4, chapter 8, part 1, of the Revised Statutes of the State, were as follows:

"§ 7. The treasurer shall deposit all moneys that shall come to his hands on account of this State, except such as belong to the canal fund, within three days after receiving the same, in such bank or banks in the city of Albany, as in the opinion of the comptroller and treasurer, shall be secure, and pay the highest rate of interest to the State for such deposit.

"§ 8. All moneys directed by law to be deposited in the Manhattan bank, in the city of New York, to the credit of the treasurer, shall remain in said bank, subject to be drawn for as the same may be required.

"§ 9. The comptroller may transfer the deposits in the Manhattan bank from time to time to the bank or banks in the city of Albany, in which the moneys belonging to this State shall be deposited pursuant to the foregoing seventh section of this Title, so often as it will be for the interest of the State to transfer such deposits; but the comptroller may continue such deposits in the Manhattan bank, if the said bank shall pay a rate of interest to the State for such deposits, equal to that paid by the bank or banks in Albany, in which the state deposits shall be made.

"§ 10. The moneys so deposited shall be placed to the

account of the treasurer; and he shall keep a bank book, in which shall be entered his account of deposits in, and moneys drawn from, the banks in which such deposits shall be made."

At the trial, the foregoing being all the evidence on both sides, the court directed a verdict for the defendant, to which direction the plaintiff excepted. The verdict having been rendered, a judgment was entered thereon against the plaintiff, and for costs. The plaintiff sued out a writ of error from this court.

Mr. Augustus S. Hutchins and *Mr. John W. Butterfield* for plaintiff in error.

I. The contract, under the provisions of which the money in question was sent by the state treasurer to the bank, and the manner in which the money was credited and disbursed by the bank, show plainly that the ordinary relation of banker and depositor never arose, and that Congress could never have contemplated the inclusion of such moneys for purposes of taxation under the general title of "deposits" as used in the act. On the contrary, it seems that the bank, as to the funds in dispute, was merely the salaried disbursing agent of the State and a trustee for the State's creditors. *Mechanics' Bank* v. *Merchants' Bank*, 6 Met. (Mass.) 13; *Libby* v. *Hopkins*, 104 U. S. 303; *Sharpless* v. *Welsh*, 4 Dall. 279; *Locomotive Works* v. *Kelley*, 88 N. Y. 234; *People* v. *City Bank*, 96 N. Y. 32; *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Van Alen* v. *American Bank*, 52 N. Y. 1; *Pennell* v. *Deffell*, 4 De G., M. & G. 372; *Frith* v. *Cartlandt*, 2 Hem. & Mill. 417; *Martin* v. *Funk*, 75 N. Y. 134.

II. In construing a statute, it is always permissible to consider the motives which actuated the law makers and the object for which the act was passed.

It seems quite inconceivable that Congress intended to charge with taxation such deposits as those in question, which were sent to the bank, not to remain indefinitely and to be loaned out at usury by the bank, for its own profit, but to be immediately paid out to certain specified creditors of the

Counsel for Defendant in Error.

State. The authorities in this, as, indeed, in all courts, have held, from time immemorial, that the intent of the law makers must be looked for and followed in the construction of the statute, though it limit or even contradict the literal wording of the statute, and that if the language will admit of it, a construction must be given conformable to reason, justice and the public convenience and welfare. *Brewer* v. *Blougher*, 14 Pet. 178; *Minnesota* v. *Barber*, 136 U. S. 313; *Maillard* v. *Lawrence*, 16 How. 251; *Chase* v. *N. Y. Central Railroad*, 26 N. Y. 523; *Beebe* v. *Griffing*, 14 N. Y. (4 Kernan) 235; *Donaldson* v. *Wood*, 22 Wend. 395; *United States* v. *Fisher*, 2 Cranch, 358; *McKay* v. *Detroit Plank Road Co.*, 2 Michigan, 138; *King* v. *Hodnett*, 1 T. R. 96; *Edwards* v. *Dick*, 4 B. & Ald. 212; *Murray* v. *Baker*, 3 Wheat. 541; *Pearse* v. *Morris*, 2 Ad. & El. 84; *Green* v. *Kemp*, 13 Mass. 515; *S. C.* 7 Am. Dec. 169; *Commonwealth* v. *Weiher*, 3 Met. 445; *Jackson* v. *Collins*, 3 Cowen, 89; *Margate Pier Co.* v. *Hannan*, 3 B. & Ald. 266; *Atkinson* v. *Fell*, 5 M. & S. 240.

III. The money so paid by plaintiff in error, and the recovery of which is now sought, was the proceeds of a tax collected by the agent of the government of the United States, and levied upon all the moneys then in the bank, including money of the State of New York then in the possession of an agent of the State of New York, and held for immediate disbursement to the State's creditors by such agent, who was receiving a salary to effect such disbursement, and such tax was, to that extent, in effect a tax upon the revenues of the State in the hands of its disbursing agent. Such moneys could not be constitutionally included in the term "deposits" as used in the act of 1863. *Collector* v. *Day*, 11 Wall. 113; *McCulloch* v. *Maryland*, 4 Wheat. 316; *People* v. *Commissioners of Taxes*, 90 N. Y. 63; *Bank* v. *New York*, 2 Black, 620; *United States* v. *Railroad Co.*, 17 Wall. 322; *National Bank* v. *United States*, 101 U. S. 1; *Weston* v. *Charleston*, 2 Pet. 249; *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435; *Veazie Bank* v. *Fenno*, 8 Wall. 533.

Mr. Assistant Attorney General Maury for defendant in error.

Opinion of the Court.

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

The statute of the United States under which the tax was assessed was § 110 of the act of June 30, 1864, c. 173, 13 Stat. 277, afterwards embodied in § 3408 of the Revised Statutes, which latter section reads as follows: "There shall be levied, collected and paid, as hereinafter provided: First. A tax of one twenty-fourth of one per centum each month upon the average amount of the deposits of money, subject to payment by check or draft, or represented by certificates of deposit or otherwise, whether payable on demand or at some future day, with any person, bank, association, company or corporation, engaged in the business of banking." Although this tax on deposits in banks was repealed by the act of Congress of March 3, 1883, c. 121, 22 Stat. 488, yet the latter act expressly excepted "such taxes as are now due and payable."

It was contended for the plaintiff (1) that the contract before set forth, made July 13, 1840, under the provisions of which the money in question was sent by the treasurer of the State to the plaintiff, and the manner in which that money was credited and disbursed by the plaintiff, show that the ordinary relation of banker and depositor never arose; that Congress did not contemplate the including of such money for purposes of taxation, under the general title of "deposits" as used in § 3408; and that the bank, as to the funds in question, was merely the salaried disbursing agent of the State and a trustee for the creditors of the State; (2) that the money paid by the plaintiff, which it now seeks to recover, was the proceeds of a tax collected by the agent of the United States and levied upon all the money in the hands of the plaintiff, including money of the State of New York, then in the possession of an agent of that State and held for immediate disbursement by that agent to the creditors of the State, such agent receiving a salary to effect such disbursement; that such tax was, to that extent, a tax upon the revenues of the State in the hands of its disbursing agent; and that such money could not

be included constitutionally in the term "deposits," as used in the statute of the United States.

The money in question was deposited with the plaintiff by the treasurer of the State of New York, to be afterward disbursed by the plaintiff, as agent of the State, for certain purposes designated in the statute of the State and in the contract of July 13, 1840. The money, when so deposited, became the property of the plaintiff, and was credited by it to the treasurer of the State in account, and was thereafter drawn for by drafts made by the treasurer of the State and sent to the plaintiff. If such money had been lost or stolen while in the hands of the plaintiff, the plaintiff, and not the State, would have borne the loss. The identical money received by the plaintiff from the treasurer of the State was not to be returned to the treasurer, or paid to his drawee, or kept distinct from the other funds of the plaintiff. It was not only a deposit of money, but was subject to payment by check or draft, and was payable either on demand or at some future day, all within the terms of the taxing statute of the United States. That statute covered general deposits, and not special deposits.

There is no foundation for the contention on the part of the plaintiff that a trust was created in its hands in favor of each creditor of the State intended to be paid through the plaintiff, as a consequence resulting from each deposit of money made by the treasurer of the State with the plaintiff. The money so deposited was not placed, by the mere fact of the deposit, irrevocably beyond the control of the State. Neither the money credited to the account called "Interest New York State stocks, canal loan," nor that credited to the account entitled "Interest loan for payment of bounties to volunteers," became, by such respective credits, the property of the holders of the securities for the respective loans, so as to create a title in them to the money as interest money. If the money had been withdrawn by the State from the plaintiff, the latter could not have been liable therefor to the creditors holding such securities.

By the contract of July 13, 1840, the plaintiff agreed to act as agent of the State in paying out from the deposits made

with it by the State sums of money in favor of the holders of the obligations of the State, to pay such holders the interest on such obligations. The plaintiff occupied two relations to the State, one that of debtor as a bank for the money deposited with it by the State, and the other that of agent of the State to pay out from the money deposited, if it remained on deposit, money for certain specified purposes. The tax was assessed on deposits of money "subject to payment by check or draft, or represented by certificates of deposit or otherwise, whether payable on demand or at some future day"; and the clear purpose of the statute was to tax deposits of money in the situation of those in question. There is nothing in the contract of July 13, 1840, to relieve the plaintiff from its liability as a bank for the money deposited with it by the State. The plaintiff did not hold the money as an agent of the State, but was such agent only to disburse the money. The theory that the plaintiff was a trustee of the money deposited, for certain *cestuis que trust*, on the ground that the right to the money had become vested, by the mere fact of the deposit, in the creditors of the State, would make it necessary that it should be impossible for the State to withdraw the deposit, which was not the fact.

We see nothing to affect these views in the cases cited by the plaintiff, of *Mechanics' Bank* v. *Merchants' Bank*, 6 Met. (Mass.) 13; *Sharpless* v. *Welsh*, 4 Dall. 279; *Van Alen* v. *American Bank*, 52 N. Y. 1; *Martin* v. *Funk*, 75 N. Y. 134; *Locomotive Works* v. *Kelley*, 88 N. Y. 234; *People* v. *City Bank*, 96 N. Y. 32; *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Libby* v. *Hopkins*, 104 U. S. 303; *Pennell* v. *Deffell*, 4 De G., M. & G. 372; *Frith* v. *Cartland*, 2 Hem. & Mill. 417.

It is distinctly provided by § 8 of Title 4, chapter 8, part 1, of the Revised Statutes of New York, that "all moneys directed by law to be deposited in the Manhattan bank, in the city of New York, to the credit of the treasurer, shall remain in said bank, subject to be drawn for as the same may be required." This shows clearly that the money put into the plaintiff's bank by the State is "deposited" there, and is to lie

there, to the credit of the treasurer of the State, and may be drawn at any time when required by the State. Section 9 also shows that the money so deposited is considered by the State as "deposits." It thus becomes "deposits of money, subject to payment by check or draft," within the meaning of the statute of the United States imposing the tax.

Nor do we perceive any soundness in the view that the money on which the tax in question was assessed was a part of the revenue of the State in the hands of its agent for immediate disbursement, and so not liable for the tax. We cannot regard the money in question as the money of the State in the hands of its agent. After it was deposited with the plaintiff it was the money of the plaintiff, and no tax was put upon the plaintiff as respected its function as agent of the State. It might as well be said that a tax upon the business of the plaintiff would have been invalid because such business embraced transactions with the State. Even regarding the tax as a tax upon the plaintiff as a bank, it was not a tax upon it as agent of the State, but as a bank receiving deposits. The account of the State was not charged by the plaintiff with the amount of the tax, nor was that amount deducted from the deposits made by the treasurer of the State with the plaintiff. So the tax did not fall upon the State in any way.

The contention is, however, that if the tax was not on the function of the plaintiff as agent of the State, it was on the revenue of the State. It might as well be contended that a federal tax assessed on, and collected from, the money of a citizen of New York, who was in arrears to the State in respect of his taxes, was laid on the revenues of the State, and, therefore, illegal. The cases cited by the plaintiff in this connection, of *McCulloch* v. *Maryland*, 4 Wheat. 316; *Weston* v. *City of Charleston*, 2 Pet. 449; *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435; *Veazie Bank* v. *Fenno*, 8 Wall. 533; *Collector* v. *Day*, 11 Wall. 113; *United States* v. *Railroad Company*, 17 Wall. 322; *Bank of Commerce* v. *New York City*, 2 Black, 620; *National Bank* v. *United States*, 101 U. S. 1; and *People* v. *Commissioners of Taxes*, 90 N. Y. 63, have no application to the case in hand. The plaintiff in

Statement of the Case.

the present case was not required to withhold, and did not withhold from the State anything that would otherwise be due to the State.

Judgment affirmed.

UNITED STATES *v.* OLD SETTLERS.

OLD SETTLERS *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 1031, 1032. Argued December 13, 14, 1892. — Decided April 3, 1893.

Finding of facts by the Court of Claims, in a suit which Congress has authorized it to take jurisdiction of in equity, may be reviewed by this court.

Congress has not authorized the courts in this litigation to go behind the treaty of August 6, 1846, 9 Stat. 871, with the Cherokee Nation.

So far as there is a conflict between the treaties with the Cherokees and subsequent acts of Congress, the latter must prevail.

The contention made by the Western Cherokees as to the ownership of land to the west of the Mississippi was put to rest by the treaty of 1846, and cannot now be revived.

The rule that, when a party without force or intimidation and with a full knowledge of all the facts in the case, accepts on account of an unliquidated and controverted demand a sum less than what he claims and believes to be due him, and agrees to accept that sum in full satisfaction, he will not be permitted to avoid his act on the ground of duress, does not apply in this case, as it is evident that Congress was convinced that a mistake had been made, and intended to afford an opportunity to have it corrected.

On examining the account between the United States and the Western Cherokees, this court finds some small errors in the statement of it as made by the Court of Claims, and, after correcting those errors, it agrees with the Court of Claims that interest should be allowed on all but a small part of it, and orders the judgment, as thus corrected, to be affirmed.

THE original petition was filed March 8, 1889, and the substituted petition, January 23, 1890, and thereby the petitioners, Bryan, Wilson and Hendricks, purporting to act for themselves, and as the commissioners of the "Old Settlers," or

"Western Cherokee" Indians, represented that the latter are that part of the Cherokee race of Indians which formerly composed the Western Cherokee Nation, and which subsequently became known as the "Old Settlers," and that for the purpose of prosecuting their claims against the United States government they had appointed Bryan, Wilson and Hendricks as their commissioners to represent and in their names and for their benefit to do and perform any and all acts and things necessary and proper to be done by them in the premises; that the suit was brought under the provisions of the act of Congress approved February 25, 1889, entitled "An act to authorize the Court of Claims to hear, determine and render final judgment upon the claim of the Old Settlers or Western Cherokee Indians," 25 Stat. 694, c. 238, and which is as follows:

"That the claim of that part of the Cherokee Indians, known as the Old Settlers or Western Cherokees, against the United States, which claim was set forth in the report of the Secretary of the Interior to Congress of February third, eighteen hundred and eighty-three, (said report being made under act of Congress of August seventh, eighteen hundred and eighty-two,) and contained in Executive Document Number Sixty of the second session of the Forty-seventh Congress, be, and the same hereby is, referred to the Court of Claims for adjudication; and jurisdiction is hereby conferred on said court to try said cause, and to determine what sum or sums of money, if any, are justly due from the United States to said Indians, arising from or growing out of treaty stipulations and acts of Congress relating thereto, after deducting all payments heretofore actually made to said Indians by the United States, either in money or property; and after deducting all off-sets, counter-claims and deductions of any and every kind and character which should be allowed to the United States under any valid provision or provisions in said treaties and laws contained, or to which the United States may be otherwise entitled, and after fully considering and determining whether or not the said Indians have heretofore adjusted and settled their said claim with the United States, it being the intention of

this act to allow the said Court of Claims unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of said Indians, may be fully considered and determined; and to try and determine all questions that may arise in such cause on behalf of either party thereto and render final judgment thereon; and the Attorney General is hereby directed to appear in behalf of the government; and if said court shall decide against the United States, the Attorney General shall, within sixty days from the rendition of judgment, appeal the cause to the Supreme Court of the United States; and from any judgment that may be rendered, the said Indians may also appeal to said Supreme Court: *Provided*, That the appeal of said Indians shall be taken within sixty days after the rendition of said judgment, and said courts shall give such cause precedence: *Provided further*, That nothing in this act shall be accepted or construed as a confession that the government of the United States is indebted to said Indians.

"SEC. 2. That said action shall be commenced by a petition stating the facts on which said Indians claim to recover, and the amount of their claim; and said petition may be verified by the authorized agent or attorney of said Indians as to the existence of such facts, and no other statement need be contained in said petition or verification."

And it was thereupon averred that under the provisions of certain treaties, made and entered into in 1817 and 1819, the Western Cherokees, or Old Settlers, sold, ceded and relinquished, and there was conveyed to the United States, all their right, title and interest in and to all the lands belonging to them situated in the States east of the Mississippi, and in consideration thereof the United States sold them certain lands, situated in what is now the State of Arkansas; that in consideration of the subsequent sale and cession of the lands in Arkansas to the United States, and in further consideration of the removal of the Western Nation of Cherokees from the State of Arkansas, under the provisions of the treaties of May 6, 1828, and February 14, 1833, between the Western Cherokee Nation and the United States, the latter bargained, sold, ceded, relinquished

and conveyed, solely and exclusively to the Western Cherokee Nation, subsequently known as the Old Settlers, all the lands situated in the now Indian Territory, and described in the treaties of 1828 and 1833, and solemnly guaranteed the lands to them forever. That while in the peaceable and undisputed possession and enjoyment of the tract of land, in the now Indian Territory, the United States under the color of a pretended treaty with the Eastern Cherokee Nation in 1835, made and entered into without the knowledge or consent of the Western Cherokee Nation, and to which it was not a party, and from the provisions of which it was prevented from protecting itself by force and fraud on the part of the United States, granted to the Eastern Cherokees the same lands that were sold and conveyed to the Western Cherokee Nation, without the consent and against the wishes and in fraud and violation of the rights of the latter, and removed the Eastern Cherokees against their will and by force of arms from their homes east of the Mississippi, and located them upon the lands belonging to the Western Cherokees, thus depriving them of the sole use, right to and interest in the lands as guaranteed by treaty, and reserving to them only an interest in proportion to their numbers, they being but one-third of the whole Cherokee people; that from that time and continually thereafter the Western Cherokees protested against and resisted this invasion of their rights, until in 1846, when acting under duress of life, liberty and property, advantage being also taken by the United States of the fiduciary relations existing towards the Western Cherokees, and also of the condition of extreme impoverishment, destitution and want to which the Western Cherokees had been reduced by the United States, they were forced to make and enter into an agreement with the United States fraudulent in character, by the terms of which the consideration they were to receive was grossly inadequate to compensate them for their right to and interest in the lands, of which they had been unjustly deprived by the United States, and for the property destroyed and lost to them through the wrongful acts of the United States, and its default to comply with its treaty obligations. It was further alleged that the land so

bargained, sold, relinquished and conveyed to the Western Cherokees by the treaties of 1828 and 1833 contained in all 13,610,795.34 acres, and that the Western Nation of Cherokees formed but one-third of the whole Cherokee race, the Eastern Nation forming the other two-thirds; and that the amount of land owned by the Western Nation, which was appropriated by the United States and granted to the Eastern Nation of Cherokees under the provisions of the treaty of 1835, was the same part of the whole body of land as was the Eastern Nation of the whole body of the Cherokee people; and that, therefore, the United States took from the Western Cherokees and deprived them of the sole use, right, title and interest in and to two-thirds of 13,610,795.34 acres, amounting to the sum of 9,073,863.56 acres, and converted the same to the public use and benefit, the land being worth at the time it was so taken and converted the sum of $5,671,164.72½.

Petitioners further alleged that after the Eastern Cherokees had been forcibly removed into the country of the Western Cherokees through the wrongful acts of the United States, and because of its failure to protect the Western Cherokees according to treaty stipulations, property of great value was lost to them, to wit, of the value of $30,000; and further, that the only payments made to the Western Cherokees since the appropriation of their lands and the destruction of their property, were the sum of $532,896.90, appropriated by act of Congress of September 30, 1850, 9 Stat. 556, c. 91, a one-third interest in the sum of $500,000 given by the United States to the whole Cherokee people in common, by the treaty of 1835; and a one-third interest in 800,000 acres of land sold in common to the Cherokee people by the United States in the treaty of 1835, which was made exclusively with the Eastern Cherokee Nation for the sum of $500,000, at which valuation the Western Cherokees have been and still are held charged by the government for their one-third share.

It was further alleged that, under the provisions of the treaty of 1846, the sum of $5,600,000, which had been provided by the treaty of 1835, and a supplementary treaty thereto of 1836, was adopted and taken by the United States

as a basis of settlement of the claims of the Western Cherokees against the United States, from which amount certain sums were to be first deducted and of the residuum thus obtained the Western Cherokees were to be paid one-third according to their numerical proportion to the whole people, and that the charges to be made against the said "treaty fund" were to be limited to "proper" and legitimate charges, "excluding all extravagant and improper expenditures"; that the only legitimate charges against the treaty fund are among those enumerated in the 15th article of the treaty of 1835, as provided in the treaty of 1846, which proper charges were as follows, to wit: the amount invested as a general national fund, $500,000; the amount expended for 800,000 acres of land, $500,000; the amount expended for improvements, $1,540,572.27; the amount expended for ferries, $159,572.12; the amount expended for spoliations, $264,894.09; and that the $600,000 forming a part of the treaty fund was provided by article three of the supplemental treaty of 1836, for, among other things, the removal of the Eastern Cherokees; that out of this fund there were removed in number 2495; that of this number, 295 were chattels, to wit, slaves; that for the removal of personal property there was no provision made by the treaty; and that, therefore, the only proper expenditure for removal was for 2200 Eastern Cherokees at $20 each, according to the terms of article four of the treaty of 1846, amounting to $44,000.

It was also charged that by the fourth article of the treaty of May 6, 1828, 7 Stat. 311, there were 3343.41 acres reserved by the United States, which the latter agreed to dispose of and to apply the proceed thereof to the sole interest and benefit of the Western Cherokees, together with the value of certain agency improvements on the lands, and that the United States have failed and neglected to do so, and are, therefore liable for the full value of the lands and agency improvements, in all, the sum of $9179.16\frac{1}{4}$.

It was further averred that, according to the foregoing itemized statement under article four of the treaty of 1846, their account with the United States should be stated as follows:

Statement of the Case.

	Dr.	Cr.
"By 'treaty fund,' under 4th article, treaty 1846		$5,600,000 00
To improvements	$1,540,572 27	
" ferries	159,572 12	
" spoliations	264,894 09	
" additional lands	500,000 00	
" invested funds	500,000 00	
" removal 2200 Indians	44,000 00	
	$3,009,038 48	$5,600,000 00
		3,009,038 48
"Balance of 'treaty fund,' after proper reductions		$2,590,961 52
By ⅓ of the above balance, under terms of said 4th article of treaty of 1846		863,653 84
To appropriation, act September 30, 1850		532,896 90
"Principal sum due under 4th article of treaty of 1846		$330,756 94"

Petitioners further alleged that under the provisions of the eleventh article of the treaty of 1846, and a resolution of the Senate of the United States of September 5, 1850, in pursuance thereof, they are entitled to interest at the rate of five per cent per annum upon whatever principal sum might be found due them from the 12th of June, 1838, until paid; wherefore it was prayed:

"First. That they be not held to be bound by the terms of the contract made and entered into by and between them and the defendants on the 6th day of August, 1846, and known as the treaty of 1846, as fully set forth above, and that they may be relieved of the onerous, unjust and inequitable provisions thereof, and that the defendants to this suit be decreed and adjudged to pay unto them the value of the lands belonging to them under the treaties of 1828 and 1833, as aforesaid, the sole right and title in and to, and use and benefit of which were taken from them by the said treaty of 1835 with the Eastern Cherokees, at the valuation of similar lands by the said treaty, to wit, the sum of 62½ cents per acre; in all, the sum of $5,671,164.72½, together with the additional sums of $30,000 and $9179.16¼, as set forth in paragraphs 8 and 11 of this petition, less one-third of the amounts paid for additional lands and the permanent investment fund, and the payment, $532,896.90, as set forth in the 9th paragraph of this petition;

amounting in all to $866,230.23⅓, showing a balance as follows:

	Dr.	Cr.
" By value of lands		$5,671,164 72½
" property destroyed, etc		30,000 00
" value of lands and improvements in Arkansas		9,179 16¼
To ⅓ price additional lands	$166,666 66⅔	
" ⅓ permanent investment fund	166,666 66⅔	
" payment, act of September 30, 1850	532,896 90	
	$866,230 23⅓	$5,710,343 88¾
		866,230 23⅓
" Balance		$4,844,113 65

" For this amount, together with interest, at the rate of 5 per centum per annum, from June 12, 1838, until paid, your petitioners ask for a decree.

" Second. That if this honorable court should hold that they are not entitled to the relief above prayed for, that the defendants be adjudged and decreed to pay unto your petitioners the sums of $330,756.94, under the provisions of the 4th article of the treaty of 1846, and $9179.16¼, under the provisions of the treaty of 1828, and the further sum of $30,000 for property destroyed, etc.; in all the sum of $369,936.10¼, with interest at the rate of five per centum per annum, from June 12, 1838, until paid.

" Third. That this honorable court will examine this case, with 'unrestricted latitude, . . . so that the rights, legal and equitable, both of the United States and your petitioners, may be fully considered and determined,' and enter such a decree as equity and good conscience may dictate in the premises."

Upon the hearing the facts disclosed by the evidence, chiefly documentary, and set forth in substance in the findings and opinion of the Court of Claims, (27 Ct. Cl. 1,) may be sufficiently stated as follows:

The Cherokee Indians held, under the treaty of November 28, 1785, 7 Stat. 18, a considerable body of lands situated in the States of North Carolina, Tennessee, Georgia and Alabama.

Statement of the Case.

On the 27th of December, 1817, a treaty between the United States and "the chiefs, headmen and warriors of the Cherokee Nation east of the Mississippi River and the chiefs, headmen and warriors of the Cherokees on the Arkansas River, and their deputies," was proclaimed, in the preamble to which it is recited that in 1808, there being dissatisfaction on the part of a portion of the nation who wished to continue the hunter life and to remove across the Mississippi River on vacant lands of the United States, a representation to that effect was made to the authorities at Washington, to which the President replied, January 9, 1809, that "those who wish to remove are permitted to send an exploring party to reconnoitre the country on the waters of the Arkansas and White Rivers, and the higher up the better, as they will be the longer unapproached by our settlements, which will begin at the mouths of those rivers," and that "when this party shall have found a tract of country suiting the emigrants, and not claimed by other Indians, we will arrange with them and you the exchange of that for a just portion of the country they leave, and to a part of which, proportioned to their numbers, they have a right."

It was further recited that the Cherokees had explored the country on the west side of the Mississippi and had settled down upon United States lands on the Arkansas and the White Rivers, and that these emigrants and those about to remove were ready to relinquish their proportionate rights in the lands East which they had left and were about to leave. Thereupon the cession of certain lands was made; a census of those Indians remaining East, and of those on the Arkansas, and removing there, or declaring their intention of doing so, was provided for; the annuity for 1818 was agreed to be divided in proportion to the numbers of the two parts of the nation; and the United States bound themselves to give as much land on the Arkansas and White Rivers as they had or might receive of the lands East, as the just proportion of that part of the nation on the Arkansas agreeably to their numbers; also, to give to all the poor warriors who might remove, one rifle and ammunition, one blanket, and one brass kettle or

beaver trap; to furnish flat-bottomed boats and provisions to aid in removal, and to pay for improvements adding to the real value of the lands ceded. Treaty of July 8, 1817, 7 Stat. 156.

About one-third of the whole nation emigrated, and by the treaty of March 10, 1819, provision was made for the payment of one-third of the annuity to the Cherokees West and two-thirds to those East. 7 Stat. 195. The Indians who thus emigrated, with accessions down to 1835, were known as the "Old Settlers" or "Western Cherokees."

On May 28, 1828, a treaty was made with the "Chiefs and Headmen of the Cherokee Nation of Indians west of the Mississippi," by which it was agreed that the lands in Arkansas should be relinquished to the United States, and a new grant was made of seven million acres, with an outlet west, the whole amounting to 13,610,795.34 acres. The preamble recites: "Whereas, it being the anxious desire of the government of the United States to secure to the Cherokee Nation of Indians, as well those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States east of the Mississippi, and who may wish to join their brothers of the West, *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain theirs forever — a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State."

By Article 2, the United States agreed to possess the Cherokees with the land described west of the Arkansas, and by Article 3, the expenses of removal are provided for.

By the 4th article, the property and improvements connected with the Indian agency were to be sold under the direction of the agent, and the proceeds of the same to be applied in the erection, in the country to which the Cherokees were going, of a grist and saw mill for their use.

Article 8 stated that "The Cherokee Nation west of the

Statement of the Case.

Mississippi, having, by this agreement, freed themselves from the harassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and their posterity, under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extent of unembarrassed country; and that their brothers yet remaining in the States may be induced to join them and enjoy the repose and blessings of such a state in the future, it is further agreed, on the part of the United States, that to each head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States, east of the Mississippi, who may desire to remove West, shall be given, on enrolling himself for emigration, a good rifle, a blanket, and kettle and five pounds of tobacco; (and to each member of his family one blanket;) also, a just compensation for the property he may abandon, to be assessed by persons to be appointed by the President of the United States. The cost of the emigration of all such shall also be borne by the United States, and good and suitable ways opened, and provisions procured for their comfort, accommodation and support by the way, and provisions for twelve months after their arrival at the agency," etc. 7 Stat. 311, 313.

A supplemental treaty with the Western Cherokees was proclaimed February 13, 1833, the purpose of which was to more clearly define the boundaries of the cession of 1828. By the 4th article, certain corn mills were to be erected in lieu of the requisition of article 4th of the prior treaty. 7 Stat. 465.

Efforts followed the treaty of 1828 to induce the Eastern Cherokees to remove West, but the consent of all could not be obtained. The Eastern Cherokees became divided into two parties, the Ridge, or treaty party, and the Ross party, of which the latter was largely in the majority. December 29, 1835, a treaty was made with "the chiefs, headmen and people of the Cherokee tribe of Indians," at New Echota, and proclaimed May 23, 1836, which referred in its second article to the treaties with the Western Cherokees of 1828 and 1833, as securing the conveyance of the seven million acres and the

outlet to the "Cherokee Nation of Indians," and recited that: "Whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of five hundred thousand dollars therefor," thereby covenanted and agreed to convey eight hundred thousand acres more.

Articles 1, 8, 10 and 15 are as follows:

"ARTICLE 1. The Cherokee Nation hereby cede, relinquish and convey to the United States all the lands owned, claimed or possessed by them east of the Mississippi River, and hereby release all their claims upon the United States for spoliations of every kind, for and in consideration of the sum of five millions of dollars, to be expended, paid and invested in the manner stipulated and agreed upon in the following articles. But as a question has arisen between the commissioners and the Cherokees, whether the Senate in their resolution, by which they advised 'that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi River,' have included and made any allowance or consideration for claims for spoliations, it is therefore agreed on the part of the United States that this question shall be again submitted to the Senate for their consideration and decision, and if no allowance was made for spoliations, that then an additional sum of three hundred thousand dollars be allowed for the same."

"ARTICLE 8. The United States also agree and stipulate to remove the Cherokees to their new homes, and to subsist them one year after their arrival there, and that a sufficient number of steamboats and baggage-wagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician, well supplied with medicines, shall accompany each detachment of emigrants removed by the government. Such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for

each member of their family; and in lieu of their one year's rations, they shall be paid the sum of thirty-three dollars and thirty-three cents if they prefer it.

"Such Cherokees also as reside at present out of the nation, and shall remove with them in two years west of the Mississippi, shall be entitled to allowance for removal and subsistence as above provided."

"ARTICLE 10. The President of the United States shall invest in some safe and most productive public stocks of the country for the benefit of the whole Cherokee Nation who have removed or shall remove to the lands assigned by this treaty to the Cherokee Nation west of the Mississippi, the following sums as a permanent fund for the purposes hereinafter specified, and pay over the net income of the same annually to such person or persons as shall be authorized or appointed by the Cherokee Nation to receive the same, and their receipt shall be a full discharge for the amount paid to them, viz., the sum of two hundred thousand dollars, in addition to the present annuities of the nation, to constitute a general fund, the interest of which shall be applied annually by the council of the nation to such purposes as they may deem best for the general interest of their people. The sum of fifty thousand dollars to constitute an orphans' fund, the annual income of which shall be expended towards the support and education of such orphan children as are destitute of the means of subsistence. The sum of one hundred and fifty thousand dollars, in addition to the present school fund of the nation, shall constitute a permanent school fund, the interest of which shall be applied annually by the council of the nation for the support of common schools and such a literary institution of a higher order as may be established in the Indian country. . . . The United States also agree and stipulate to pay the just debts and claims against the Cherokee Nation held by the citizens of the same, and also the just claims of citizens of the United States for services rendered to the nation, and the sum of sixty thousand dollars is appropriated for this purpose, but no claims against individual persons of the nation shall be allowed and paid by the nation. The sum of three hundred

thousand dollars is hereby set apart to pay and liquidate the just claims of the Cherokees upon the United States for spoliations of every kind, that have not been already satisfied under former treaties."

"ARTICLE 15. It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims for spoliations, removal, subsistence, and debts, and claims upon the Cherokee Nation, and for the additional quantity of lands and goods for the poorer class of Cherokees and the several sums to be invested for the general national funds; provided for in the several articles of this treaty, the balance, whatever the same may be, shall be equally divided between all the people belonging to the Cherokee Nation East according to the census just completed; and such Cherokees as have removed West since June, 1833, who are entitled by the terms of their enrolment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees East, they shall also be paid for their improvements according to their approved value before their removal, where fraud has not already been shown in their valuation."

Article 11 provided for a commutation of the permanent annuity of ten thousand dollars for the sum of $214,000.

By Article 12, a committee was designated, "fully empowered and authorized to transact all business on the part of the Indians which may arise in carrying into effect the provisions of this treaty and settling the same with the United States," and it was provided "that the sum of one hundred thousand dollars shall be expended by the commissioners in such manner as the committee deem best for the benefit of the poorer class of Cherokees as shall remove West, or have removed West, and are entitled to the benefits of this treaty."

By Article 16, it was stipulated that the Cherokees should "remove to their new homes within two years from the ratification of this treaty," and by Article 17, that "all the claims arising under or provided for in the several articles of this treaty shall be examined and adjudicated by . . . such

commissioners as shall be appointed by the President of the United States for that purpose, and their decision shall be final, and on their certificate of the amount due the several claimants they shall be paid by the United States." 7 Stat. 478–486.

A controversy arising as to the deduction of the cost of removal from the five million dollars purchase money, a supplemental treaty was concluded and proclaimed with the other treaty, on the same day, namely, May 23, 1836, of which Articles 2 and 3 are as follows:

"ARTICLE 2. Whereas the Cherokee people have supposed that the sum of five millions of dollars fixed by the Senate in their resolution of — day of March, 1835, as the value of the Cherokee lands and possessions east of the Mississippi River was not intended to include the amount which may be required to remove them, nor the value of certain claims which many of their people had against citizens of the United States, which suggestion has been confirmed by the opinion expressed to the War Department by some of the Senators who voted upon the question; and whereas the President is willing that this subject should be referred to the Senate for their consideration, and if it was not intended by the Senate that the above-mentioned sum of five millions of dollars should include the objects herein specified, that in that case such further provision should be made therefor as might appear to the Senate to be just.

"ARTICLE 3. It is therefore agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people, to include the expense of their removal, and all claims of every nature and description against the government of the United States not herein otherwise expressly provided for, and to be in lieu of the said reservations and preëmptions, and of the sum of three hundred thousand dollars for spoliations described in the first article of the above-mentioned treaty. This sum of six hundred thousand dollars shall be applied and distributed agreeably to the provisions of the said treaty, and any surplus which may remain after removal and payment of the claims so ascertained shall be turned over and belong to the education fund. But it is ex-

pressly understood that the subject of this article is merely referred hereby to the consideration of the Senate, and if they shall approve the same, then this supplement shall remain part of the treaty."

Article 4 provided: "It is also understood and agreed that the one hundred thousand dollars appropriated in Article 12 for the poorer class of Cherokees, and intended as a set-off to the preëmption rights, shall now be transferred from the funds of the nation and added to the general national fund of four hundred thousand dollars, so as to make said fund equal to five hundred thousand dollars." 7 Stat. 488.

There was accordingly invested $714,000, $500,000 national fund, covering the various items before mentioned, and $214,000 commutation.

The five million six hundred thousand dollars was thenceforth commonly styled the treaty fund, though the six hundred thousand dollars was allowed with particular reference to the expense of removal.

The court having ruled the Secretary of the Interior to furnish from the official records of his department information, first, as to the number of acres of land ceded to the Cherokee Indians under the treaty of December 29, 1835, exclusive of the eight hundred thousand acres; and, second, the number of acres of land ceded and relinquished by the Cherokee Indians to the United States east of the Mississippi River under said treaty, the Secretary furnished a letter from the acting Commissioner of Indian Affairs to him, from which it appeared that the land by actual survey (except the Cherokee reservation, which was estimated) amounted to 13,610,795.34 acres, and that the number of acres stated in the patent issued December 31, 1838, to the Cherokee Nation for said land, the outlying boundaries of which had been surveyed, was 13,574,135.14, which included the seven million acres and the outlet as such; and, further, that there were no data in the office of Indian Affairs from which an approximate estimate could be made of the number of acres of land ceded to the United States east of the Mississippi, but that a letter to the Secretary of War, dated February 27, 1833, gave an estimate of 6,730,000

acres, which was believed too large by nearly a million of acres.

The record contains a communication from commissioners appointed to settle claims under the treaty of 1835, addressed to the Secretary of War, under date of February 21, 1837, asking his opinion "of the true and fair construction of those provisions of the treaty which provide for claims of citizens of the United States for services rendered the Cherokee Nation," and saying, "we are not able to perceive any provision whatever for the payment of claims of the above description, except what is contained in the 10th article of the treaty, and which limits the amount which may be thus allowed to the sum of sixty thousand dollars."

The treaty of New Echota was signed by persons purporting to represent the Eastern Cherokees, and assent to its provisions was given by two delegates from the Western Cherokees. John Ross and his followers were absent from the council that adopted the treaty, and disputed its validity. The authority of the Western delegates was also denied. The Ridge or treaty party numbered some 2200, and they emigrated to the West, carrying with them 295 slaves, the cost of removal falling on the United States. The Eastern Cherokees, numbering 14,757, disavowed the treaty, and memorialized the President and Congress. The United States authorities then in effect offered that if they would remove to the Indian Territory the expense of their subsistence should not be charged against the $5,600,000. Early in 1838, the removal of these Indians by military force commenced, and by act of Congress of June 12, 1838, 5 Stat. 241, c. 97, $1,047,067 was appropriated to defray the expenses of their removal and subsistence. The whole of this appropriation was expended, and in addition the sum of $189,422.76. In August, 1838, on their way to the Indian Territory, the Eastern Cherokees last mentioned resolved in council "that the inherent sovereignty of the Cherokee Nation, together with the constitution, laws and usages of the same, are, and by the authority aforesaid, are hereby declared to be in full force and virtue, and shall continue so to be in perpetuity, subject to such modifications as

the general welfare may render expedient." Upon their arrival they refused to submit to the government of the Western Cherokees, but offered to unite in a general council which should frame a constitution and establish a government for all. The Western Cherokees declined to make this arrangement, and insisted that the Eastern Cherokees had entered their territory without their permission, and that their character was that of aliens or immigrants, subject to the constitution and laws theretofore existing in the Territory. A number of efforts followed to form a union, and at a popular convention in January, 1840, an act of union was ratified, which had been adopted in July, 1839. The validity of this act of union and of the ratification was denied, but the Cherokee Nation thereby created seems to have been recognized as lawful by the United States. However, between the years 1838 and 1846, the Cherokee country was the scene of intestinal disorders of the gravest character, destroying the rights and liberties of certain of the Cherokees and endangering the peace of the frontier.

June 18, 1846, the Western Cherokees agreed to submit their claims to a board of commissioners to be appointed by the President and Senate of the United States. The board was appointed, and arrived at and announced its conclusions after an elaborate presentation of the claims of the Western Cherokees.

On August 3, 1846, the delegates of the Western Cherokees informed the commissioners that they were willing to agree to the suggested basis of settlement, which they state as they understand it; and closed their letter by saying, "that they will always consider whatever money may be paid their people, under the provisions of the present treaty, will be received as a payment for their country west of the Mississippi, which they now relinquish to the whole nation. They do not acquiesce in the decision of the commissioners that their country became the property of the whole Cherokee people by virtue of the treaty of 1828, or any subsequent treaty, and, should the treaty now proposed fail, from any cause, it is their fixed determination to reassert their rights to the country secured to them by the treaty of 1833, and to prosecute their claim to

the same by all proper and lawful means in the power of a feeble and oppressed people"; and they ask that the letter be communicated to the President and Senate of the United States, with the other proceedings.

August 6, 1846, a treaty was concluded between the United States, by Edmund Burke, William Armstrong and Albion K. Parris, commissioners; the principal chief and delegates duly appointed by the Eastern Cherokees; the representatives of the treaty party; and the representatives of the Western Cherokees. 9 Stat. 871.

The preamble stated the reasons for the treaty as follows:

"Whereas serious difficulties have, for a considerable time past, existed between the different portions of the people constituting and recognized as the Cherokee Nation of Indians, which it is desirable should be speedily settled, so that peace and harmony may be restored among them; and whereas certain claims exist on the part of the Cherokee Nation, and portions of the Cherokee people, against the United States; therefore, with a view to the final and amicable settlement of the difficulties and claims before mentioned, it is mutually agreed by the several parties to this convention as follows, viz.:"

By Article 1, lands now occupied by the Cherokee Nation were secured to the whole Cherokee people; by Article 2, it was provided that all differences theretofore existing between the several parties of the Cherokee Nation should be settled and adjusted; that all party distinctions should cease except so far as they should be necessary to carry out the treaty, and a general amnesty was thereby declared; Article 3 related to certain reimbursements to be made by the United States to the five-million-dollar fund, with which it was not properly chargeable.

Articles 4 and 5 read as follows:

"Article 4. And whereas it has been decided by the board of commissioners recently appointed by the President of the United States to examine and adjust the claims and difficulties existing against and between the Cherokee people and the United States, as well as between the Cherokees themselves,

that under the provisions of the treaty of 1828, as well as in conformity with the general policy of the United States in relation to the Indian tribes, and the Cherokee Nation in particular, that that portion of the Cherokee people known as the 'Old Settlers,' or 'Western Cherokees,' had no exclusive title to the territory ceded in that treaty, but that the same was intended for the use of, and to be the home for, the whole nation, including as well that portion then east as that portion then west of the Mississippi; and whereas the said board of commissioners further decided that, inasmuch as the territory before mentioned became the common property of the whole Cherokee Nation by the operation of the treaty of 1828, the Cherokees then west of the Mississippi, by the equitable operation of the same treaty, acquired a common interest in the lands occupied by the Cherokees east of the Mississippi River, as well as in those occupied by themselves west of that river, which interest should have been provided for in the treaty of 1835, but which was not, except, in so far as they, as a constituent portion of the nation, retained, in proportion to their numbers, a common interest in the country west of the Mississippi, and in the general funds of the nation; and, therefore, they have an equitable claim upon the United States for the value of that interest, whatever it may be. Now, in order to ascertain the value of that interest, it is agreed that the following principles shall be adopted, viz.: All the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to five million six hundred thousand dollars, (which investments and expenditures are particularly enumerated in the 15th article of the treaty of 1835,) to be first deducted from said aggregate sum, thus ascertaining the residuum or amount which would, under such marshalling of accounts, be left for *per capita* distribution among the Cherokees, emigrating under the treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the Old Settlers (or Western Cherokees) a sum equal to one-third part of said residuum, to be distributed *per capita* to each individual of said party of 'Old Settlers,' or 'Western Cherokees.' It is further agreed

that, so far as the Western Cherokees are concerned, in estimating the expense of removal and subsistence of an Eastern Cherokee, to be charged to the aggregate fund of five million six hundred thousand dollars above mentioned, the sums for removal and subsistence stipulated in the 8th article of the treaty of 1835, as commutation money in those cases in which the parties entitled to it removed themselves, shall be adopted. And as it affects the settlement with the Western Cherokees, there shall be no deduction from the fund before mentioned in consideration of any payments which may hereafter be made out of said fund; and it is hereby further understood and agreed that the principle above defined shall embrace all those Cherokees west of the Mississippi who emigrated prior to the treaty of 1835.

"In the consideration of the foregoing stipulation on the part of the United States, the 'Western Cherokees,' or 'Old Settlers,' hereby release and quit-claim to the United States all right, title, interest or claim they may have to a common property in the Cherokee lands east of the Mississippi River, and to exclusive ownership to the lands ceded to them by the treaty of 1833 west of the Mississippi, including the outlet west, consenting and agreeing that the said lands, together with the eight hundred thousand acres ceded to the Cherokees by the treaty of 1835, shall be and remain the common property of the whole Cherokee people, themselves included.

"Article 5. It is mutually agreed that the *per capita* allowance to be given to the 'Western Cherokees,' or 'Old Settlers,' upon the principle above stated, shall be held in trust by the government of the United States, and paid out to each individual belonging to that party or head of family, or his legal representatives. And it is further agreed that the *per capita* allowance to be paid as aforesaid shall not be assignable, but shall be paid directly to the persons entitled to it, or to his heirs or legal representatives, by the agent of the United States authorized to make such payments.

"And it is further agreed that a committee of five persons shall be appointed by the President of the United States from the party of 'Old Settlers,' whose duty it shall be, in conjunc-

tion with an agent of the United States, to ascertain what persons are entitled to the *per capita* allowance provided for in this and the preceding article."

Article 6 appropriated one hundred and fifteen thousand dollars for the indemnification of the treaty party; Article 7 related to the value of salines, which were the private property of individual Western Cherokees, and of which they were dispossessed; Article 8 provided for the payment to the Cherokee Nation of two thousand dollars for a printing press, etc., destroyed; five thousand dollars to be equally divided "among all those whose arms were taken from them previous to their removal West by order of an officer of the United States; and the further sum of twenty thousand dollars in lieu of all claims of the Cherokee Nation as a nation, prior to the treaty of 1835, except all lands reserved by treaties heretofore made for school funds."

Article 9 read thus:

"ARTICLE 9. The United States agree to make a fair and just settlement of all moneys due to the Cherokees, and subject to the *per capita* division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, and commutation therefor, debts and claims upon the Cherokee Nation of Indians, for the additional quantity of land ceded to said nation; and the several sums provided [for] in the several articles of the treaty, to be invested as the general funds of the nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835. The aggregate of which said several sums shall be deducted from the sum of six millions six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over, *per capita*, in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835, and the supplement of 1836, being all those Cherokees residing East at the date of said treaty and the supplement thereto."

Article 10 related to Cherokees still residing east of the Mississippi River. Articles 11 and 12 were as follows:

"ARTICLE 11. Whereas the Cherokee delegations contend that the amount expended for the one year's subsistence, after their arrival in the West, of the Eastern Cherokees, is not properly chargeable to the treaty fund; it is hereby agreed that that question shall be submitted to the Senate of the United States for its decision, which shall decide whether the subsistence shall be borne by the United States or the Cherokee funds, and if by the Cherokees, then to say whether the subsistence shall be charged at a greater rate than thirty-three $\frac{33}{100}$ dollars per head; and also the question whether the Cherokee Nation shall be allowed interest on whatever sum may be found to be due the nation, and from what date and at what rate per annum.

"ARTICLE 12. The Western Cherokees, called 'Old Settlers,' in assenting to the general provisions of this treaty in behalf of their people have expressed their fixed opinion that, in making a settlement with them upon the basis herein established, the expenses incurred for the removal and subsistence of Cherokees, after the twenty-third day of May, 1838, should not be charged upon the five millions of dollars allowed to the Cherokees for their lands under the treaty of 1835, or on the fund provided by the third article of the supplement thereto; and that no part of the spoliations, subsistence or removal provided for by the several articles of said treaty and the supplement thereto, should be charged against them in their settlement for their interest in the Cherokee country east and west of the Mississippi River. And the delegation of 'Old Settlers,' or 'Western Cherokees,' propose that the question shall be submitted with this treaty to the decision of the Senate of the United States, of what portion, if any, of the expenditures made for removal, subsistence and spoliations under the treaty of 1835 is properly and legally chargeable to the five-million fund. And they will abide by the decision of the Senate."

The treaty was ratified by the Senate, August 8, 1846, after amendments to the fifth article, (which is given above as amended,) and striking out the twelfth article. The amend-

ments to the treaty by the Senate were agreed to by the representatives of the several parties of Indians, August 13, 1846.

A joint resolution of Congress was approved August 7, 1848, 9 Stat. 339, as follows:

"That the proper accounting officers of the Treasury be, and they are hereby, authorized and required to make a just and fair statement of the claims of the Cherokee Nation of Indians, according to the principles established by the treaty of August, eighteen hundred and forty-six, between the United States and said Indians, and that they report the same to the next session of Congress."

On the 8th of August, 1850, the Senate Committee on Indian Affairs made a report, (Sen. Rep. 1st Sess. 31st Cong. No. 176,) setting forth, among other things, that "the statement of accounts according to the principles of the treaty of 1846 between the United States and the Western and Eastern Cherokees, respectively, was a labor of time and research, involving an examination of every item of expenditure under the treaty of 1835, through a period extending from the year 1835 to 1846. This duty was, therefore, committed by joint resolution of Congress of the 7th of August, 1848, to the Second Auditor and Second Comptroller of the Treasury; not only because they were 'the proper accounting officers,' but because one of those officers had acted as one of the commissioners of the United States in making the treaty of 1846, and was justly supposed to be well informed as to its true object and intent."

The officer thus referred to was Judge Parris, of Maine, and the record contains the report of the Second Comptroller and Second Auditor of the Treasury, giving a statement of the account of the Cherokee Nation of Indians, according to the principles established by the treaty. The items of charges against the Cherokee Nation are given in detail and deducted from $6,647,067, the amount specified in Article 9 of the treaty, being made up of the $5,000,000, the $600,000, and the $1,047,067.

The account as stated in the Senate report was as follows:

Statement of the Case.

"This fund, provided by the treaty of 1835, consisted of....			$5,600,000 00
From which are to be deducted, under the treaty of 1846, (4th article,) the sums chargeable under the 15th article of the treaty of 1835, which, according to the report of the accounting officers, will stand thus:			
For improvements		$1,540,572 27	
For ferries		159,572 12	
For spoliations		264,894 09	
For removal and subsistence of 18,026 Indians, at $53.33\frac{1}{3}$ per head		961,386 66	
Debts and claims upon the Cherokee Nation, viz.:			
National debts (10th article)....	$18,062 06		
Claims of United States citizens (10th article)	61,073 49		
Cherokee committee (12th article)	22,212 76		
		101,348 31	
Amount allowed United States for additional quantity of land ceded		500,000 00	
Amount invested as a general fund of the nation		500,880 00	
Making in the aggregate the sum of			4,028,653 45
Which, being deducted from the treaty fund of $5,600,000, leaves the residuum, contemplated by the 4th article of the treaty of 1846, of			$1,571,346 55"

of which amount one-third was to be allowed to the Western Cherokees for their interest in the Cherokee country east, being the sum of $523,782.18, and an appropriation of that amount was recommended. The committee also considered the two questions referred to the Senate in respect of whether the amount expended for subsistence should be borne by the United States or by the Cherokee funds; and whether the Cherokees should receive interest on the sums found due them from a misapplication of their funds; and recommended the adoption of the following resolutions, which were accordingly adopted, September 5, 1850, by the Senate as umpire under Article 11 of the treaty of 1846, (Sen. Journ. 1st Sess. 31st Cong. 601):

"*Resolved by the Senate of the United States*, That the Cherokee Nation of Indians are entitled to the sum of $189,422.76 for subsistence, being the difference between the amount

allowed by the act of June 12, 1838, and the amount actually paid and expended by the United States, and which excess was improperly charged to the 'treaty fund' in the report of the accounting officer of the Treasury.

"*Resolved*, That it is the sense of the Senate that interest at the rate of five per cent per annum should be allowed upon the sums found due the 'Eastern' and 'Western' Cherokees, respectively, from the 12th day of June, 1838, until paid."

The committee gave their reasons for the first resolution at length. They stated that they entertained no doubt but that by a strict construction of the treaty of 1835 the expense of a year's subsistence of the Indians after their removal west was a proper charge upon the treaty fund, but they set forth a variety of considerations which justified the conclusion that the expense for subsistence was to be borne by the United States, including certain action by the Secretary of War in 1838, and the language of the act of June 12, 1838, making the appropriation of $1,047,067. By the latter Congress provided that no part of the $600,000 or of the $1,047,067 should be taken from the treaty fund. The $1,047,067 was, said the committee, "made auxiliary to the $600,000 provided for in the third supplemental article — a fund provided for removal and other expenditures independent of the treaty, and in full for these objects. But as respects *subsistence*, it was *in aid* of the *expense* for that purpose, a discharge *pro tanto* of the obligation of the government to subsist them, and not final satisfaction, as in the case of removal. The fund proved wholly inadequate for these purposes. The entire expense of removal and subsistence amounted to $2,952,196.26, of which the sum of $972,844.78 was expended for subsistence, and of this last amount, $172,316.47 was furnished to the Indians when in great destitution, upon their own urgent application, after the expiration of the one year, upon the understanding that it was to be deducted from the moneys due them under the treaty. This leaves the net sum of $800,528.31 paid for subsistence, and charged to the aggregate fund. Of this sum the United States provided, by the act of 12th of June, 1838,

for $611,105.55." This left $189,422.76 to be made up in order to cover the entire subsistence.

The second section of the act of June 12, 1838, read as follows:

"That the further sum of one million forty-seven thousand and sixty-seven dollars be appropriated, out of any money in the Treasury not otherwise appropriated, in full for all objects specified in the third article of the supplementary articles of the treaty of eighteen hundred and thirty-five between the United States and the Cherokee Indians, and for the further object of aiding in the subsistence of said Indians for one year after their removal west: *Provided*, That no part of the said sum of money shall be deducted from the five millions stipulated to be paid to the said tribe of Indians by said treaty."

And of this amount the committee found that only $611,105.55 had been expended for the one year's subsistence.

The act of Congress of September 30, 1850, making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1851, 9 Stat. 544, 556, c. 91, contained the following:

"For the additional amount for expenses paid for subsistence and improperly charged to the treaty fund, according to the award of the Senate of fifth day of September, eighteen hundred and fifty, under the provisions of the eleventh article of the treaty of sixth day of August, eighteen hundred and forty-six, one hundred and eighty-nine thousand four hundred and twenty-two dollars and seventy-six cents, and that interest be paid on the same at the rate of five per cent per annum, according to a resolution of the Senate of fifth September, eighteen hundred and fifty: *Provided*, That said money shall be paid by the United States and received by the Indians on condition that the same shall be in full discharge of the amount thus improperly charged to said treaty fund: *Provided, further*, That in no case shall any money hereby appropriated be paid to any agent of said Indians, or to any other person or persons than the Indian or Indians to whom it is due *per capita*.

"To the 'Old Settlers,' or 'Western Cherokees,' in full of all demands, under the provisions of the treaty of sixth August, eighteen hundred and forty-six, according to the principles established in the fourth article thereof, five hundred and thirty-two thousand eight hundred and ninety-six dollars and ninety cents; and that interest be allowed and paid upon the above sums due, respectively, to the Cherokees and 'Old Settlers,' in pursuance of the above-mentioned award of the Senate, under the reference contained in the said eleventh article of the treaty of sixth August, eighteen hundred and forty-six: *Provided*, That in no case shall any money hereby appropriated be paid to any agent of said Indians, or to any other person or persons than the Indian or Indians to whom it is due: *Provided, also*, That the Indians who shall receive the said money shall first, respectively, sign a receipt or release, acknowledging the same to be in full of all demands under the fourth article of said treaty."

The Western Cherokees were accordingly paid *per capita* the amount so appropriated, principal and interest, the interest amounting to $345,583.25. They receipted as required by the statute, but upon the occasion of their being so paid they gave to the Superintendent of Indian Affairs, at Fort Gibson, a protest setting forth their reasons why the payment should not be received in full of all demands. The form of the receipt thus executed was as follows:

"We the undersigned 'Old Settlers,' or Western Cherokees, do hereby acknowledge to have received from John Drennen, supt. of Indian affairs, the sums opposite our names respectively, being in full of all demands under the provisions of the treaty of the sixth of August, eighteen hundred and forty-six, according to the principles established in the fourth article thereof, as per act entitled 'An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30th, one thousand eight hundred and fifty-one.' Approved September 30th, 1850."

The protest, after setting forth that the condition of the

Statement of the Case.

Old Settlers had been a deplorable one, and that they ought not to be deprived summarily of the right to present a claim for a larger amount than had been awarded to them, and referring to the report of the Senate Committee on Indian Affairs, and the appropriation of the $189,422.76, and that the treaty fund should be relieved of the whole amount expended on account of subsistence as an improper charge, continued thus:

"4th. It has thus been conclusively shown that after the statement was made, under the report of the accounting officers of December 3d, 1849, and the 'Old Settlers' were charged with the removal and subsistence of 18,026 Indians, the Senate of the United States decided that the subsistence was improperly charged, and in a subsequent appropriation for the Eastern Cherokees, or 'emigrant party,' it has been refunded, and the sum of $189,422.76, which had been charged to the treaty fund, has been declared to be an 'improper' charge, and payment thereof is assumed by the United States. The 'Old Settlers,' or Western Cherokees, are, therefore, entitled to one-third part of the money improperly charged for the subsistence of 18,026 Indians, at $33.33\frac{1}{3}$ cents per head, which has been deducted from the amount due them in the act of appropriation made for their benefit September 30th, 1850. There were some slight alterations made in the statement of accounts after the report of the committee was submitted, but they changed the amount very little, and are not worth noting.

"5th. The amount, then, due the 'Old Settlers,' or Western Cherokees, in accordance with the decision of the Senate, is the one-third part of the charge made against them for the subsistence one year after removal of 18,026 Indians, which, at $33.33\frac{1}{3}$ cents per head, amounts to the sum of $600,856.66, the one-third part of which is $200,285.33 (two hundred thousand two hundred and eighty-five dollars and thirty-three cents). This sum, with the interest from June 12, 1838, is now due to the 'Old Settlers' Cherokees, (in addition to the amount appropriated by the act of September 30, 1850,) in accordance with the principle established by the

Senate of the United States in the resolution adopted by that honorable body. Here, in one item alone, the 'Old-Settler' Cherokees are declared by an act of the United States government to be entitled, in addition to the amount they are now receiving, to upwards of three hundred and thirty thousand dollars ($330,000). It is known to the 'Old Settlers' that many honorable members of Congress were aware that this item could have been added to the appropriation of September 30, 1850, and that a favorable report thereon would have been made from the Office of Indian Affairs, but that those who represented the 'Old Settlers,' with other friends, deemed it advisable not to make the effort then to change the statement already made — it being at the close of the session, when the least delay or interference might have defeated the appropriation, even under the first statement."

The protest then concluded with objections to the number of Indians for whose removal charges had been made, and generally to the charges for improvements, ferries, depredations, and for debts and claims upon the Cherokee Nation East and other expenditures of similar character, as improperly made.

The United States acquired the reservation, improvements and property in Arkansas referred to in article four of the treaty of 1828, but neither the agreement therein set forth on the part of the United States to account for and invest the proceeds thereof to the use of the Western Cherokees, nor the subsequent agreement set forth in the treaty of 1833, was ever performed. The tract of land so ceded to the United States contained 3343.41 acres, of the value of $4179.26.

Certain papers on file in the Interior Department were put in evidence, purporting to be copies of the proceedings of councils of the Western Cherokees held in the years 1875, 1876, 1877, 1879, 1880, 1881, 1882 and 1883, at Tahlequah, Cherokee Nation. At these councils, Bryan, Wilson and Hendricks were appointed commissioners to prosecute the claims of the Western Cherokees against the United States, and Bryan was appointed treasurer of a fund of thirty-five

per cent of the moneys that might be recovered against the United States, which sum was placed at the disposal of the commissioners for the prosecution of the claim. It does not appear that these councils were composed of persons who were ascertained to be Western Cherokees in the manner prescribed in the fifth article of the treaty of 1846, nor did it appear that subsequent to the treaty the Western Cherokees had any organization or corporate existence under the laws of the United States or of the Cherokee Nation. The proceedings of the council held on October 25, 1883, embodied a number of resolutions, which, in the view taken of the case, it is unnecessary should be repeated.

The record does not show that the Western Cherokees formally denied the validity of the treaty of 1835 until the immigration of the Eastern Cherokees was completed, and until after there was a disagreement as to the government that should be adopted and control the Cherokee country. The earlier immigrants, known as the Ridge party, and the great body of the Eastern Cherokees, known as the Ross party, were welcome to the country as immigrants under the existing laws. Prior to 1842 it does not appear that the Western Cherokees notified the United States that they had repudiated the action of Rogers and Smith, who signed the treaty of 1835 as delegates from the Western Cherokees. After the entry of the Eastern Cherokees, the question first at issue between them and the Western Cherokees related to the government of the country, until, in 1842, they addressed a memorial to the President, setting forth their title to fourteen million acres of land and their right to the full and exclusive enjoyment of the same, of which they alleged they had been deprived by the intrusion of the Eastern Cherokees under the authority of the United States.

No action on behalf of the Old Settlers appears to have been taken from the filing of the protest September 22, 1851, until the year 1875; and in the meetings of the Old Settlers, heretofore referred to, the validity of the several treaties with the Cherokees was recognized.

On August 7, 1882, an act of Congress was approved, mak-

ing appropriations for sundry civil expenses, which contained the following clause:

"The Secretary of the Interior shall investigate and report to Congress what in his opinion would be an equitable settlement of all matters of dispute between the Eastern Band of Cherokee Indians (including all the Cherokees residing east of the Mississippi River) and the Cherokee tribe or nation west; also all matters of dispute between other bands or parts of the Cherokee Nation; also all matters between any of said bands, or parts thereof, and the United States arising from or growing out of treaty stipulations or the laws of Congress relating thereto; and what sum or sums of money, if any, should, in his opinion, be paid under such settlement." 22 Stat. c. 433, pp. 302, 328.

In pursuance of the authority thus given, an investigation was directed and a report made by the Secretary of the Interior, February 23, 1883, contained in Senate Documents, Second Session, Forty-seventh Congress, Executive Document, No. 60. This is the claim referred to in the jurisdictional act, and shows a balance of $421,653.68, in accordance with the following account:

"*Account with the whole Cherokee people.*

	Dr.	Cr.
"By amount appropriated by act of July 2, 1836, for lands under first article treaty of 1835		$5,000,000 00
By amount appropriated under third article treaty 1836, by act of July 2, 1836		600,000 00
By amount erroneously charged for removal of 2495 [should be 18,026] Indians, at $53.33⅓ per head		961,386 66
To amount paid for improvements	$1,540,572 27	
To amount paid for ferries	159,572 12	
To amount paid for spoliations	264,894 09	
To removal and subsistence of 18,026 Indians at $53.33⅓ per head	961,386 66	
To debts, &c.	101,348 31	
To additional land purchased	500,000 00	
To amount invested as a permanent fund	500,880 00	
	$4,028,653 45	$6,561,386 66
Deduct		4,028,653 45
Balance due as of date June 12, 1838		$2,532,733 21

Statement of the Case.

	Dr.	Cr.
Balance due as of date June 12, 1838		$2,532,733 21
Of which amount the 'Old Settlers' are entitled to one-third		844,244 40
'Old Settlers' account		$844,244 40
To one-third of unexpended balance of $600,000 appropriated under article 3, treaty 1836, viz., $39,300	$13,100 00	
To one-third of the cost of removing 2495 Indians, at $53.33 per head, $133,058.35	44,352 78	
	$57,452 78	$844,244 40
Deduct		57,452 78
Balance due		$786,791 62
By interest on balance ($786,791.62), at 5 per cent, from June 12, 1838, to September 22, 1851		$522,342 21
To appropriation by act September 22, 1851	532,896 90	
To interest allowed under same act	354,583 25	
	$887,480 15	$1,309,133 83
Deduct		887,480 15
Balance due 'Old Settlers'		$421,653 68"

The principal difference between this and the prior account was in the deduction of the item of $961,386.66.

The Secretary's report was accompanied by that of the Commissioner of Indian Affairs, going over the whole subject of the claims of the Eastern and of the Western Cherokees, with accompanying reports, and among others, two of the Senate Committee on Indian Affairs, one made February 9, 1881, and another March 29, 1882, the latter being a repetition of the former. These reports considered the claim of the Western Cherokees and announced the conclusion that the receipt by those Indians, under the act of September 30, 1850, "does not preclude them from making their claim for any other sum that may be justly due them under a fair and proper interpretation of the treaties with them," and that the facts necessary to determine the justness of the claim preferred by them "consist almost, if not wholly, of public treaties, proceedings of the Senate, acts of Congress, and the records of the several departments of the government, all of which are preserved." The committee were of opinion that the

case should receive a full investigation by the courts, because such an investigation involved a judicial interpretation of the several treaties, the construction of the several acts of Congress and the examination of the settlements made and accounts stated with them, under these treaties and acts of Congress.

On February 13, 1884, the case of the Old Settlers was transmitted to the Court of Claims by the Senate Committee on Indian Affairs, under the provisions of the act of March 3, 1863. Findings of fact were made by the court and transmitted to Congress, February 9, 1885. These findings found the charges against the treaty fund to be the same as fixed in the report of August 8, 1850, and the report of 1883, except as to the number of Eastern Cherokees whose removal was properly chargeable to said fund, the number being fixed at 17,252 instead of 18,026. After making the deductions, except as to removal and subsistence, the balance of the treaty fund was found to be as according to the report of the Secretary of the Interior, $2,532,733.21, but if it should be determined that the cost of removing that portion of the Eastern Cherokees, who were removed in pursuance of the appropriation of $1,047,067, made by the act of 1838, should not be charged, then this balance should be reduced only by the cost of removing 2495 Eastern Cherokees, who were removed prior to the act, at $53.33 *per capita*, or $133,058.35. If, on the other hand, it should be determined that the Western Cherokees were properly chargeable with those removed subsequent to the act of June, 1838, as well as before, namely, for 17,252 Cherokees, then the amount of $920,049.16 should be deducted. The account would then stand:

"Treaty fund ...		$2,532,733 21
Deduct for removal of 2495 Eastern Cherokees removed prior to act of June 12, 1838	133,058 35	
Residuum to be divided		$2,399,674 86
One-third thereof awarded to Western Cherokees		$799,891 62
Less the payment of	532,896 90	
Balance		$266,994 72"

Or,

Statement of the Case.

"Treaty fund	$2,532,733 21
Deduct for removal and subsistence of 17,252 Eastern Cherokees at $53.33 *per capita*	920,049 16
Residuum to be divided	$1,612,684 05
One-third thereof awarded to Western Cherokees	$537,561 35
Less the payment of	532,896 90
Balance	$4,664 45"

No action was taken by Congress on these findings of the Court of Claims. On February 25, 1889, the act upon which this suit is founded was approved by the President. 25 Stat. 694.

The case having come on for hearing in the Court of Claims, and been duly argued and submitted, an elaborate opinion was delivered by Nott, J., November 30, 1891, and on January 25, 1892, findings of fact and conclusions of law were filed by that court. On that day a second opinion by Nott, J., was given, the case having been reopened so far as to hear counsel and admit documentary evidence relating to the number of the Eastern Cherokees, who were removed under the treaty of 1835, and also to hear counsel with regard to the form of the decree. 27 Ct. Cl. 1, 20, 56.

The account stated by the Court of Claims is as follows:

"The treaty fund		$5,600,000 00
Less for 800,000 acres of land	$500,000 00	
For investment in the general land fund	500,000 00	
For improvements of individual Cherokees	1,540 572 27	
For ferries belonging to individuals	159,572 12	
For spoliations of individual property	264,894 09	
For expenses of Cherokee committee	22,212 76	
For removal of 16,957 Cherokees, at $20 each.	339,140 00	
		3,326,391 24
Giving as the true residuum to be divided		$2,273,608 76
Due to the Western Cherokees, one-third of residuum		$757,869 58
Less payment September 22, 1851, under the act of September 30, 1850		532,896 90
Leaving as the balance due the Western Cherokees		$224,972 68"

The differences between this account and that of August 8, 1850, and February 3, 1883, are, that the investment of the permanent land fund was found to be $500,000 instead of $500,880; the $101,348.31 for debts and claims upon the Cherokee Nation allowed in the two previous reports, and the former findings of the Court of Claims, was reduced to $22,212.76 by rejecting therefrom the items of national debt, $18,062.06, and claims of United States citizens, $61,073.49. An allowance for the removal of 16,957 Cherokees at $20 each, aggregating $339,140, was made, instead of for the removal and subsistence of 18,026 Indians at $53.33⅓ *per capita*, $961,386.66, as in the report of August 8, 1850, or the cost of removal and subsistence of 2495 Indians, at $53.33 *per capita*, $133,058.35, as shown by the report of February 3, 1883, and by the previous findings in this regard of the Court of Claims. There was added also the value of the agency reservation appropriated by the United States under the treaties of 1828 and 1833, being $4179.26. The Court of Claims also found as a conclusion of law that interest at the rate of five per cent should be allowed on the balance of the residuum of the treaty fund still due to the Western Cherokees from June 12, 1838, to the entry of judgment, but not upon the amount of $4179.26, the value of the land last mentioned. It was also found as a conclusion of law that the receipts given by individual Cherokees did not preclude them from recovering their just appropriation of the *per capita* fund within the intent of the act of February, 1889, referring their claims to the court.

The court also made the following ruling:

"The findings requested by the claimants to establish the alleged facts that the treaty of 1846 was procured as against the Western Cherokees by duress and fraud have been excluded from consideration by the court, on the ground that it has not jurisdiction of such a cause of action."

Decree was entered as follows:

"It is ordered and adjudged that the claimants recover of the defendants the sum of ($224,972.68) two hundred and twenty-four thousand nine hundred and seventy-two dollars and sixty-eight cents, being a balance of the *per capita* fund

provided by the fourth article of the treaty between the United States and the Western Cherokees, dated August 6, 1846, together with interest thereon from the 12th day of June, 1838, up to and until the entry of this decree, being the sum of $603,145.58, and likewise the sum of $4179.26 for $3343\frac{41}{100}$ acres of land in Arkansas ceded to the United States by article 4 of the treaty of May 6, 1828, amounting in the aggregate to the sum of $832,297.52. And it is at the same time ordered and adjudged that the said amount of eight hundred and thirty-two thousand two hundred and ninety-seven dollars and fifty-two cents so recovered by the claimants be held in trust by the government of the United States and be paid by the proper agent of the United States to each individual of the claimants entitled to participate in the said *per capita* fund, pursuant to and in the manner provided and required by the fifth article of the said treaty of August 6, 1846."

From this decree both parties prayed an appeal to this court.

Subsequently the claimants moved that in preparing the record for transmission, the Clerk of the Court of Claims be instructed to include in the transcript "all of the pleading, orders, evidence, findings of fact, opinions of the court, conclusions of law, and decree, as the same appear of record." This motion was overruled. Application was thereupon made to this court for a writ of *certiorari* to the Court of Claims to send up all of the evidence used in the trial and hearing of the case. The writ was granted and the evidence sent up accordingly.

Mr. Reese H. Voorhees and *Mr. A. H. Garland*, (with whom was *Mr. John Paul Jones* on the brief,) for the Old Settlers.

Mr. Solicitor General and *Mr. F. P. Dewees* for the United States.

Mr. Chief Justice Fuller delivered the opinion of the court.

In *Harvey* v. *United States*, 105 U. S. 671, 691, a claim had been considered by the Court of Claims and judgment rendered for a certain amount, but less than would have been awarded, but for certain terms of the contract counted on, which required reformation, on the ground of accident or mistake, in order fully to express the intention of the parties; and a special act was passed again referring the claim for adjudication, and stating: "To that end jurisdiction is hereby conferred on said court to proceed in the adjustment of the account between said claimants and the United States, as a court of equity jurisdiction; and may, if according to the rules and principles of equity jurisprudence, in its judicial discretion, reform said contract and render such judgment as justice and right between the claimants and the said government may require."

On appeal to this court from a decree rendered under this act, it was contended on the part of the United States that the appeal could not be heard, because there was not in the record "any finding by the Court of Claims of the facts in the case, in the nature of a special verdict, with a separate statement of the conclusions of law upon such facts." But this court held, through Mr. Justice Blatchford, that: "The rule in regard to findings of fact has no reference to a case like the present, of equity jurisdiction conferred in a special case by a special act; and, in such a case, where an appeal lies and is taken under section 707 of the Revised Statutes, this court must review the facts and the law as in other cases in equity, appealed from other courts."

In the present case the Court of Claims filed findings of fact and conclusions of law, and declined to send up the evidence. We are of opinion, however, that the rule laid down in *Harvey* v. *United States* is applicable. The claim was referred for adjudication, and jurisdiction was conferred on the Court of Claims to determine the amount, if any, justly due from the United States to the Western Cherokees, in a manner involving the statement of an account, upon the investigation of controverted items and complicated and involved facts, and it was declared that it was "the intention of this act to allow

the said Court of Claims unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of the said Indians, may be fully considered and determined."

We concur in the statement of Mr. Justice Nott in the opinion of the court below, that the latitude conferred "must be deemed the unrestricted latitude of a court of equity in stating an account, distributing a fund, and framing a decree, so comprehensive and flexible as to secure to each suitor his joint or individual rights."

The remedy in equity in cases of account is generally more complete and adequate than it is or can be at law, 1 Story Eq. Jur. § 450; *Kilbourn* v. *Sunderland*, 130 U. S. 505, and we regard the language of the act of Congress as manifestly used with the intention that equity powers should be exercised in the disposition of the case. It was upon this view that we directed the *certiorari* to issue, and in arriving at our conclusions, while we have had the advantage of the findings of the Court of Claims, we have considered and determined the case for ourselves upon an examination of the entire evidence.

The prayer of the petitioners is in the alternative: First, that they be relieved from the provisions of the treaty of 1846 on the ground of duress and fraud, and that the United States be decreed and adjudged to pay them the value of two-thirds of 13,610,795.24 acres of land at sixty-two and one-half cents per acre, being the sum of $\$5,671,164.72\frac{1}{2}$, together with the sum of $30,000 for property destroyed, and $\$9179.63\frac{1}{4}$ for the agency reservation and improvements in Arkansas, less one-third of the amount of $500,000 for additional lands and of $500,000 permanently invested, and the payment in 1851 of $532,896.90, leaving a balance of $\$4,844,113.65$, with interest at the rate of five per cent per annum from June 12, 1838, until paid; second, that, if petitioners be not entitled to that relief, the United States be decreed to pay them the sum of $330,756.94, under the provisions of the fourth article of the treaty of 1846, together with the beforementioned sums of $\$9179.16\frac{1}{4}$ and of $30,000, aggregating the amount of $\$369,936.10\frac{1}{4}$, with interest as aforesaid.

The Court of Claims declined to go behind the treaty of 1846 upon the ground that it was not within the province of a court, either of law or equity, to determine that a treaty or an act of Congress had been procured by duress or fraud, and declare it inoperative for that reason. *Fletcher* v. *Peck*, 6 Cranch, 87, 130; *Ex parte McCardle*, 7 Wall. 506, 514; *People* v. *Draper*, 15 N. Y. 545, 555; *Railroad Company* v. *Cooper*, 33 Penn. St. 278; *Wright* v. *Defrees*, 8 Indiana, 302.

And while it was conceded that Congress might confer upon that court extra-judicial powers, yet the court was of opinion that this could not be held to have been done by the act authorizing the institution of this suit, since it was therein provided that whatever judgment might be rendered, whether for the complainants or defendants, might be appealed to the Supreme Court, whose jurisdiction, as defined by the Constitution, was strictly judicial, and could neither be enlarged nor diminished by legislative authority. *Gordon* v. *United States*, 2 Wall. 561; Taney, C. J., 117 U. S. 697, Appx.; *In re Sanborn*, *ante* 222.

The contention of the petitioners is that, under the act of jurisdiction, the treaty of 1846 is to be considered as a contract in every respect similar to one made between private parties, and that the United States has no other or greater privileges or advantages than a private party would have under a similar contract, and *United States* v. *Arredondo*, 6 Pet. 691, 710, 711, 735, is cited. That was a suit for land claimed under a Spanish grant, and came to this court on appeal from the decree of the judge of the Superior Court for the Western District of the Territory of Florida, that court having been authorized by the act of Congress of May 23, 1828, to receive and adjudicate upon such claims, upon the petition of the claimant, "according to the forms, rules and regulations, conditions, restrictions and limitations prescribed to the district judge, and claimants in Missouri, by the act of the 26th May, 1824."

Reviewing the two statutes, this court said: "In conformity with the principles of justice and rules of equity, then, the court is directed to decide all questions arising in the cause,

and by a final decree to settle and determine the question of the validity of the title, according to the law of nations, the stipulations of any treaty and proceedings under the same, the several acts of Congress in relation thereto, and the laws and ordinances of the government from which it is alleged to be derived, and all other questions which may properly arise between the claimants and the United States, which decree shall, in all cases, refer to the treaty, law or ordinance under which it is confirmed or decreed against. . . . By the stipulations of a treaty are to be understood its language and apparent intention manifested in the instrument, with a reference to the contracting parties, the subject-matter, and persons on whom it is to operate. The laws under which we now adjudicate on the rights embraced in the treaty, and its instructions, authorize and direct us to do it judicially, and give its judicial meaning and interpretation as a contract on the principles of justice and the rules of equity. . . . The only question depending is whether the claimants or the United States are the owners of the land in question. By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide as between man and man, on the same subject-matter and by the rules which Congress themselves have prescribed, of which the stipulations of any treaty and the proceedings under the same, form one of four distinct ones. . . . But the court are, in this case, authorized to consider and construe the treaty, not as a contract between two nations, the stipulations of which must be executed by an act of Congress before it can become a rule for our decision, not as the basis and only foundation of the title of the claimants; but as a rule to which we must have a due regard in deciding whether the claimants have made out a title to the lands in controversy, — a rule by which we are neither directed by the law nor bound to make our decree upon, any more than upon the laws of nations, of Congress, or of Spain. The acts of 1824 and 1828 authorize and require us to decide on the pending title on all the evidence and laws before us. Congress have disclaimed its decision as a political

question for the legislative department to decide, and enjoined it on us as one purely judicial."

It will be perceived that that decision is not authority for the proposition that a court may be clothed with power to annul a treaty on the ground of fraud or duress in its execution, nor does any such question arise in the case before us. There is nothing in the jurisdictional act of February 25, 1889, inconsistent with the treaty of 1846, (or any other,) and nothing to indicate that Congress attempted by that act to authorize the courts to proceed in disregard thereof. Unquestionably a treaty may be modified or abrogated by an act of Congress, but the power to make and unmake is essentially political and not judicial, and the presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the government to judicial decision, by authorizing the stipulations in question to be overthrown upon an inquiry of the character suggested, and the act does not in the least degree justify any such inference.

The claim referred to the Court of Claims for adjudication is the claim set forth in the report of the Secretary of the Interior to Congress of February 3, 1883, and that report was made under the act of Congress of August 7, 1882, which provided that the Secretary should investigate and report to Congress what in his opinion would be an equitable settlement of the matters in dispute between these Indians and the United States, "arising from or growing out of treaty stipulations, or the laws of Congress relating thereto; and what sum or sums of money, if any, should in his opinion be paid under such settlement." The same language is used in the act, and the court is "to determine what sum or sums of money, if any, are justly due from the United States to said Indians arising from or growing out of treaty stipulations and acts of Congress relating thereto."

As a case arises under the Constitution or laws of the United States, whenever its decision depends upon the correct construction of either, *Cohens* v. *Virginia*, 6 Wheat. 264, 379; *Osborn* v. *Bank of the United States*, 9 Wheat. 737, 824, so a

case arising from or growing out of a treaty is one involving rights given or protected by a treaty. *Owings* v. *Norwood's Lessee*, 5 Cranch, 344, 348.

The settlement of a controversy arising or growing out of these Indian treaties or the laws of Congress relating thereto, and the determination of what sum, if any, might be justly due under them, certainly does not include a claim which could only be asserted by disregarding the treaties or laws, or holding them inoperative on the ground alleged.

The Court of Claims was indeed to have "unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of the said Indians may be fully considered and determined." But this did not mean that either party was entitled to have or receive by virtue of the act anything more than each was entitled to under existing stipulations, or to bring supposed moral obligations into play for the disposal of the case. The inquiry was not to be technically limited by rules of procedure, or restrained by the distinctions between law and equity. Proceeding thus untrammelled, the court was to deduct "all offsets, counter-claims, and deductions of any and every kind and character which should be allowed to the United States under any valid provision or provisions in said treaties and laws contained, or to which the United States may be otherwise entitled." And, therefore, if conflict existed between treaty provisions, or between any of them and subsequent acts of Congress, such provisions might necessarily give way and be held invalid; but the language used did not involve a confusion of the respective powers of the departments of the government, nor furnish a basis for an external attack upon the validity of executive or legislative action.

Again, the determination of what, if anything, was justly due, was to be arrived at upon a full consideration of "whether or not the said Indians have heretofore adjusted and settled their said claim with the United States." That claim was the claim referred to the court, the claim which was reported upon by the Secretary, the claim which arose and grew out of treaty stipulations, the claim which was preferred in the pro-

test of 1851, and not a claim for the loss of two-thirds of seven million acres of land and of exclusive rights in the outlet. There had been such a claim as the latter, but it had been definitively relinquished and released by the treaty.

The terms of the treaty of 1828, by which the seven million acres were guaranteed to the Cherokees, while the Western Cherokees were alone being dealt with, expressed that the purpose was to provide a home for the whole Cherokee people, including those East as well as those West. By article two of the treaty of 1835, the conveyance of land by the treaties of 1828 and 1833 is declared to have been to the Cherokee Nation of Indians, and eight hundred thousand acres additional was agreed to be conveyed in consideration of the sum of $500,000, that there might be no question as to there being a sufficient quantity of land for the accommodation of the whole nation on their removal West. That treaty was wholly inconsistent with the attitude subsequently assumed. The patent of December 31, 1838, ran to the Cherokee Nation. There are many documents in the record indicative of the view of the Indian Office that the Western Cherokees were only a contingently separate community from the Eastern body, and were subject to increase by the immigration of those East; and that they did not have, as an independent community, any ownership of the land, or rights therein, except what belonged to them in common with the whole Cherokee people. At the same time, the Western Cherokees did set up the opposite contention, and prosecuted it with the greatest vigor and ability before the political departments of the government, especially during the years 1842 to 1846. Indeed, prior to 1842, they seem to have acquiesced in the treaty of 1835, and welcomed not only the treaty party, but the great body of the Eastern Cherokees, to participation with them under existing laws. The papers presented in their behalf show, as stated by counsel, the most careful preparation and noticeable ability. In a memorial bearing date June 16, 1843, their alleged grievances were set forth *in extenso*, and it was insisted that by the forcible removal of the Eastern Cherokee Indians and their settlement among them, the Western Cherokees had

been in effect dispossessed of two-thirds of their land. But in June, 1846, the Western Cherokees offered to submit their claims to a board of commissioners, to be appointed by the President and Senate of the United States, which commission it was stipulated should be invested with full power to settle the matters in controversy, according to the treaty stipulations. The commission was appointed, and its decision was against the claim of the Western Cherokees to the exclusive ownership of and rights in the land in question. On the 3d of August, 1846, the delegates representing the Western Cherokees declared that they did not acquiesce in the decision of the commissioners on this point, and should reassert "their exclusive right to the country," "should the treaty now proposed fail from any cause"; but the treaty did not fail, and, on the contrary, was duly executed by the parties on the 6th day of the same month. And this was followed by the accounting under the treaty, the act of Congress of September, 1850, and the payments made and receipted for thereunder. True, there was a protest that the receipts then given ought not to exclude these Indians from obtaining a further amount, but that protest was chiefly based upon the deduction of the cost of subsistence from the treaty fund, and asserted no claim on account of the land, nor the invalidity of the treaty. Moreover, they remained silent, so far as appears from this record, from 1846 until 1875, and when they commenced the agitation of renewed demands the grounds assigned conceded the binding force of the treaty, but questioned the payment under it as a final settlement of what was due.

Upon the facts in this record we can discover no ground for the revival of controversy by the Western Cherokees as to their ownership of or rights in the lands west of the Mississippi, and hold that any such claim in respect thereof as is put forward in the petition cannot be successfully maintained from any point of view. If any matter ever can be put at rest, that has been, and the treaty of 1846 has presented for nearly fifty years an insuperable bar to such a contention.

The treaty declared "that the land now occupied by the Cherokee Nation shall be secured to the whole Cherokee

people for their common use and benefit"; and that whereas it had been decided by the board of commissioners appointed to examine and adjust the claims and difficulties existing against and between the Cherokee people and the United States, as well as between the Cherokees themselves, that under the provisions of the treaty of 1828 the Western Cherokees "had no exclusive title to the territory ceded in that treaty, but that the same was intended for the use of, and to be the home for, the whole nation, including as well that portion then east as that portion then west of the Mississippi"; and that the Western Cherokees had a claim upon the United States, growing out of the equitable operation of the same treaty, as having a common interest in the lands occupied by the Cherokees east of the Mississippi River, as well as having retained a common interest "in the general funds of the nation," the ascertainment of "the value of that interest" was provided for, and the government agreed to distribute it among the Western Cherokees.

In consideration of the premises, the Western Cherokees released and quitclaimed to the United States all right, title, interest or claim they might have to a common property in the Cherokee lands east of the Mississippi River, and to exclusive ownership to the lands west of the Mississippi, including the outlet west, "consenting and agreeing that the said lands, together with the eight hundred thousand acres ceded to the Cherokees by the treaty of 1835, shall be and remain the common property of the whole Cherokee people, themselves included."

In order to arrive at the amount to be distributed *per capita* to the Western Cherokees, or Old Settlers, it was agreed that from the $5,600,000, the investments and expenditures properly chargeable thereon, and enumerated in the fifteenth article of the treaty of 1835, excluding all extravagant and improper expenditures, should be deducted, and that one-third of the residuum should constitute the value of their interest, and, consequently, the amount for distribution. An accounting was had accordingly, and the amount ascertained appropriated and paid over.

Opinion of the Court.

But it is argued that the object of the suit before us was to permit a relitigation of the correctness of that amount, and a determination as to whether anything more should have been paid at that time. And we are confronted by the objection, strongly urged on behalf of the United States, that, by the terms of the jurisdictional act, if it be found that "the said Indians have heretofore adjusted and settled their said claim with the United States," such adjustment and settlement must be treated as conclusive.

We agree, as was said in the case of *Choctaw Nation*, 119 U. S. 1, 29, that where, in professed pursuance of treaties, statutes have conferred valuable benefits upon the Indians, "which the latter have accepted, they partake of the nature of agreements — the acceptance of the benefit, coupled with the condition, implying an assent on the part of the recipient to the condition, unless that implication is rebutted by other and sufficient circumstances." And it is also true that when a party, without force or intimidation, and with a full knowledge of all the facts in the case, accepts, on account of an unliquidated and controverted demand, a sum less than what he claims and believes to be due him, and agrees to accept that sum in full satisfaction, he will not be permitted to avoid his act on the ground of duress. *United States* v. *Child*, 12 Wall. 232, 244.

But we think, under all the circumstances disclosed here, that Congress being convinced that a mistake had probably been made in the accounting in a matter which the Indians from the first had called attention to, and desirous, as being the stronger party to the controversy, that that superior justice, which looks only to the substance of the right, should be done in the premises, voluntarily waived any reliance upon lapse of time or laches, and, after attempts on its own part to arrive at a satisfactory result, determined to obtain a judicial interpretation of the treaties and laws bearing upon the subject, and to be bound by judicial decision in respect of the conclusions flowing therefrom, and arrived at upon equitable principles; and that the jurisdictional act passed in effectuation of such intention left it open to the courts to

readjust the amount notwithstanding the claim might have been theretofore settled. In other words, if the adjustment and settlement were found to have been made upon an erroneous interpretation, which led to an obvious mistake, then Congress designed that the mistake should be corrected. We therefore proceed to examine the account in question in accordance with what we believe to have been the intention of Congress in the passage of this act.

As we have said, the investments and expenditures which were properly chargeable upon the $5,600,000 were to be deducted, and they were the investments and expenditures particularly enumerated in the fifteenth article of the treaty of 1835. That article provided for the deduction of the amounts "actually expended for the payment for improvements, ferries, claims for spoliations, removal, subsistence, and debts and claims upon the Cherokee Nation, and for an additional quantity of land, and goods for the poorer class of Cherokees, and the several sums to be invested for the general national funds provided for in the several articles of this treaty." The national fund of $500,000 embraced the items last mentioned, and no dispute arises here as to that sum or the sums of $500,000 for the additional quantity of land, $1,540,572.27 for improvements, $159,572.12 for ferries, and $264,894.09 for spoliations. Petitioners claim, however, that no deduction should have been made for subsistence, and that the sum allowed for removal should be limited to 2200 Indians at $20 per head; and they further insist upon an allowance of $30,000 for property destroyed, while they abandon their claim for $9179.16¼ as the value of the Arkansas agency land and improvements, and concede that the sum of $4179.26 therefor, as found by the court below, may be accepted as correct. The Court of Claims disallowed the item of $30,000, and charged for the removal of 16,957 Cherokees at $20 each, and an item for the expenses of the Cherokee committee of $22,212.76.

We concur in the rejection of the claim for $30,000, which finds its basis in a resolution of a council of the Western Cherokees of November 16, 1846, asking the government to

appropriate that sum to pay off damages and losses alleged to have been sustained by individual Indians in being compelled to leave their homes and go to the States for safety. No such claimants appear or are represented here, and the claim has no relation to *per capita* distribution. There is no color for its revival in this proceeding.

It was agreed by article four of the treaty of 1846 that, so far as the Western Cherokees were concerned, in estimating the expenses of removal and subsistence of an Eastern Cherokee to be charged to the aggregate fund, the sums for removal and subsistence stipulated in the eighth article of the treaty of 1835 as commutation money should be adopted. That commutation was placed in the eighth article at $20 *per capita* for removal and $33.33 for subsistence. The persons composing the treaty party voluntarily emigrated to the Indian Territory prior to 1838 to the number of 2200, and they took with them 295 slaves of African descent. The Court of Claims properly considered that the expenses to be deducted could only apply to Cherokees, and, therefore, that the slaves could not be included in making the deduction as between the Western Cherokees and the United States, but to the 2200 the court added the 14,757 Eastern Cherokees, who were removed in 1838, and, rejecting any deduction for subsistence, charged the commutation price of $20 for 16,957 persons. We are satisfied from a careful examination of the evidence that the number was determined with all the accuracy possible, and should not be disturbed. And in view of the decision of the Senate by the adoption, September 5, 1850, of the first resolution, reported August 8, 1850, it is obvious that the expense of subsistence should not have been and should not be deducted.

The fourth article of the treaty of 1846 fixed a commutation for subsistence as well as for removal, but the eleventh article provided that whereas the Cherokee delegates contended that the amount expended for one year's subsistence was not properly chargeable to the treaty fund, it was thereby agreed that that question should be submitted to the Senate for its decision, which should decide whether the expense

should be borne by the United States or the Cherokee funds, and the Senate, thus made the umpire, (it having been found that the $1,047,067 appropriated by the act of June 12, 1838, did not fully cover the expense of subsistence,) resolved that the Indians were entitled to $189,422.76 for subsistence, "being the difference between the amount allowed by the act of June 12, 1838, and the amount actually paid and expended by the United States, and which excess was improperly charged to the treaty fund in the report of the accounting officers of the Treasury." This decision was accepted and the money appropriated to make good the award. The act of 1838 grew out of the inducements offered in promotion of the removal of the entire body, and made the appropriation in discharge of an assumed obligation to subsist the Indians, if they would remove, notwithstanding the involuntary character of that removal. Taking the acts of 1838 and 1850, with the decision of the Senate, there can be no question that the United States concluded to bear and did bear the entire expense so far as subsistence was concerned. The Court of Claims, therefore, correctly deducted the sum of $339,140 for the removal of the whole number of Cherokees at $20 per head, and declined to deduct any charge for subsistence. It was really over this item that the sharpest controversy ensued; for by the original accounting the sum of $961,383.66 had been deducted for the removal and subsistence of 18,026 Cherokees, at $53.33⅓ per head, which was erroneous as to the number, and on account of the inclusion of the commutation of $33.33⅓ for subsistence.

In the account stated by the accounting officers of the Treasury, December 3, 1849, the sum of $101,348.31 was deducted from the fund for debts and claims upon the Cherokee Nation, made up of these items: For national debts, $18,062.06; for claims of United States citizens, $61,073.49, and for the Cherokee committee, $22,212.76. This sum of $101,348.31 was also deducted in the account stated in the report of the Senate committee of August 8, 1850, in the report of the Secretary of the Interior of February 23, 1883, and in the findings of the Court of Claims under the reference in February, 1884.

Opinion of the Court.

The Court of Claims in this suit rejected the items of $18,062.06 and $61,073.49, because, in the opinion of the court, there was no evidence to connect these items with the fund for distribution, while it held the item of $22,212.76 for the expenses of the Cherokee committee as properly chargeable under the twelfth article of the treaty of 1835, which provided for a committee to carry the treaty into effect. We are not persuaded that this conclusion was correct. Under the tenth article of the treaty of 1835, the United States agreed to pay the just debts and claims against the Cherokee Nation held by citizens of the same, and also the just claims of citizens of the United States for services rendered to the nation, and it was stated that "the sum of sixty thousand dollars is appropriated for this purpose." This should be regarded as $60,000 of the total amount, and in our judgment the debts and claims upon the Cherokee Nation mentioned in article fifteen, and to be deducted under article four of the treaty of 1846, should be confined, so far as the Western Cherokees are concerned, to $60,000, and that amount is justly chargeable against the fund; but we are not satisfied that the expenses of the committee authorized by the twelfth article of the treaty of 1835, which was a committee to recommend persons for the privilege of preëmption rights and to select missionaries, as well, indeed, as to transact all business which might arise in carrying into effect the provisions of the treaty, ought to be charged in addition.

In view of these considerations we find and state the account as follows:

The treaty fund		$5,600,000 00
Less —		
For 800,000 acres of land	$500,000 00	
For general fund	500,000 00	
For improvements	1,540,572 27	
For ferries	159,572 12	
For spoliations	264,894 09	
For debts, &c.	60,000 00	
For removal of 16,957 Cherokees at $20 each	339,140 00	
	$3,364,178 48	3,364,178 48
Giving as the residuum to be divided		$2,235,821 52

One-third due to the Western Cherokees	$745,273 84
Less payment September 22, 1851	532,896 90
Leaving a balance of	$212,376 94

And the recovery should also include the sum of $4179.26 for the Arkansas agency.

By the second resolution adopted by the Senate, as umpire, September 5, 1850, it was decided that interest should be allowed, at the rate of five per centum per annum, upon the sum found due the Western Cherokees, from June 12, 1838, until paid. As before stated, our conclusion is that the sum then found due was less than should have been found by the amount of $212,376.94.

Under section 1091 of the Revised Statutes, no interest can "be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest"; and in *Tillson* v. *United States*, 100 U. S. 43, it was held that a recovery of interest was not authorized under a private act referring to the Court of Claims a claim founded upon a contract with the United States, which did not expressly authorize such recovery. But in this case, the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself; that determination was arrived at as prescribed, was accepted as valid and binding by the United States, and was carried into effect by the payment of $532,896.90, found due, and of $354,583.25 for interest. 9 Stat. 556, c. 91.

In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due, it appears to us that the decision of the Senate in respect of interest is controlling, and that, therefore, interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated, but not upon the item of $4179.26, which stands upon different ground.

The question remains as to the character in which petitioners come into court and to whom the amount awarded should be distributed.

The "Old Settlers," or Western Cherokees, are not a gov-

ernmental body politic, nor have they a corporate existence, nor any capacity to act collectively. The money belongs to them as individual members of an Indian community, recognized as such by the treaty of 1846, and treated as distinct and separate from the Cherokee Nation, so far as necessary to enable the government to accord them their treaty rights. They are described in the fourth article of the treaty as "all those Cherokees west of the Mississippi, who emigrated prior to the treaty of 1835"; and they may be held to include those now living who so emigrated, together with the descendants of those who have died, the succession to be determined by the Cherokee law. The petition does not set forth their names, nor the extent of the rights and interests claimed, respectively, but purports to be brought by three persons, "for themselves and as commissioners" of the Western Cherokees, and they alleged that the claimants "are the remaining part of those Cherokee Indians who formed and composed the Western Cherokee Nation; and that they have maintained their separate organization so far as to adjust and settle their claims against the United States." But the evidence is quite inadequate to justify the court in treating the immediate petitioners as appointed by all the beneficiaries as their agents to receive and disburse the amount awarded.

The lands west of the Mississippi were held as communal property, not vested in the Cherokees as individuals, as tenants in common or joint tenants; but by the treaties of 1835 and 1846 the communal character of the property was terminated as to both Eastern and Western Cherokees, and the fund, taking the place of the realty, was invested in the various ways we have mentioned, leaving the remainder to be distributed *per capita*. The Western Cherokees were paid under the treaty of 1846, simply as citizens of the Cherokee Nation, entitled to receive the money, as having emigrated prior to 1835, or the descendants of such.

The Court of Claims at first decided that the decree should be in the form usually used where a suit is prosecuted by individuals for themselves and others, that is to say, that the general liability should be established, and then provision

made for the individual Old Settlers, or Western Cherokees, to come in and establish their right to share in the fund.

It was said in *Smith* v. *Swormstedt*, 16 How. 288, 302, 303, that "the rule is well established that where the parties interested are numerous and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and all the others"; but that "in all cases where exceptions to the general rule are allowed, and a few are permitted to sue, or defend, on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried." And, notwithstanding the suggestion that these so-called commissioners do not bring themselves as strictly within the rule upon this subject as they should, yet we think that they do so far represent the interests or rights involved that the case may be allowed to proceed to judgment.

The Court of Claims, after delivering its opinion, suspended the entry of the decree which it had indicated its intention to render, and after argument had upon the question, modified that opinion, and held that the fifth article of the treaty of 1846 applied as to the distribution, and entered a decree accordingly. The court was quite right in holding that the amount found due should not be decreed to be received and disbursed by the three petitioners as a commission, and that it was not necessary that the decree should require the beneficiaries to come into that tribunal and prove up against the fund. The fifth article of the treaty provided that the *per capita* allowance to be given to the Western Cherokees should be held in trust by the United States, and "paid out to each individual belonging to that party, or head of family, or his legal representatives," and "be paid directly to the persons entitled to it, or to his heirs or legal representatives," and that the persons entitled to it should be ascertained by a committee of five appointed by the President of the United States from the Western Cherokees, and an agent of the United States. The court was of opinion that the rule thus prescribed should be followed as to this balance of the amount

intended for *per capita* distribution, and it was in accordance with this view that the decree was finally entered.

We approve of this disposition of the matter as just and appropriate under the circumstances, and a competent exercise of judicial power. The court decides and pronounces the decree to be carried into effect as between the persons and parties who have brought the case before it for decision, and none the less so, because it leaves the mere matter of distribution to be conducted in the manner and through the agencies pointed out in the treaty.

The result is that we concur substantially in the conclusions reached by the Court of Claims, whose laborious and painstaking examination of the case has been of great assistance in the investigation we have bestowed upon it; and in respect of the difference in the amount found, we direct the decree to be modified so as to provide for the recovery of the defendants of the sum of two hundred and twelve thousand three hundred and seventy-six dollars and ninety-four cents ($212,376.94) instead of the sum of two hundred and twenty-four thousand nine hundred and seventy-two dollars and sixty-eight cents, ($224,972.68,) in full of the *per capita* fund provided by the fourth article of the treaty between the United States and the Western Cherokees, dated August 6, 1846, together with interest thereon at the rate of five per centum per annum from the 12th day of June, 1838, up to and until the modification of the decree, in addition to the sum of four thousand one hundred and seventy-nine dollars and twenty-six cents, ($4,179.26); and as so modified to be

Affirmed.

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

NATIONAL HAT POUNCING MACHINE COMPANY *v.* HEDDEN.

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

No. 138. Argued March 13, 14, 1893. — Decided April 3, 1893.

The fifth claim in letters patent No. 220,889, issued to Edmund B. Taylor, October 21, 1879, for improvements in machines for pouncing hats, viz.: "5. The combination of the support for the hat and the self feeding pouncing cylinder, whereby the hat is drawn over the support B in the direction of the motion of the pouncing cylinder," was anticipated by the second claim in letters patent No. 97,178, issued November 23, 1869, to Rudolph Eickemeyer.

THIS was a bill in equity to recover damages for the infringement of two letters patent for improvements in machines for pouncing hats, viz., patent No. 97,178, issued November 23, 1869, to Rudolph Eickemeyer, and patent No. 220,889, issued October 21, 1879, to Edmund B. Taylor.

In his specification Taylor states:

"The object of my invention is to dispense with feed rolls and hat blocks in machines for pouncing hats, to make the cutting or pouncing cylinder self feeding, to enable the operator to control the speed and direction in which the hats to be pounced pass over the cutting or pouncing surface by the hand with the assistance of a guard and presser pin, and to cause the material to be pounced to move in the same direction as the surface of the self feeding cutter in contact with it, thereby avoiding the injurious strain to which it is subjected in ordinary hat pouncing machines with feed rolls or their equivalents.

"With my machine not only can hats be pounced without any stretching or straining of the material to be pounced, but hats of different styles can be pounced, or different parts of the same hats can be pounced more or less, as may be desired, without any change in the adjustment of the machine. . . .

Statement of the Case.

"My machine consists of a table or supporting frame, X, which carries the bearings F for the shaft, upon which is fixed the driving pulley E and the self feeding pouncing cylinder A, which can be revolved at any desirable speed. This self feeding cylinder is covered with the pouncing or cutting material.

"A block, B, supports the hat or material to be pounced and presses it against the self feeding pouncing cylinder A. This block is adjustable upon its middle point by means of a bolt tapped into it, which passes through the bracket D, and is fastened by a nut, M. It is supported by the bracket D, which turns on a pivot, and is operated by a treadle and lever, P, and connecting rod O. . . .

"A guard, C, is placed directly over the supporting block to protect the hands of the operator from contact with the self feeding pouncing cylinder, and is adjustable upon the bracket D by the means of the nut R, which works in a stirrup in the guard. . . .

"The mode of operating my machine is as follows: The hat to be pounced is placed over the supporting block and pressed against the self feeding pouncing cylinder by means of the treadle operating the swinging bracket. The self feeding pouncing cylinder, revolving at great speed, draws the hat through the space between the supporting block and the self feeding pouncing cylinder. The hand of the operator, assisted, when necessary, by the presser pin L, retards the hat in its passage and controls its direction, by which means the pouncing surface can be caused to move over the material to be pounced at any rate of speed or in any direction that may be desired."

The only claim alleged to be infringed was the fifth, which reads as follows:

"5. The combination of the support for the hat and the self feeding pouncing cylinder, whereby the hat is drawn over the support B in the direction of the motion of the pouncing cylinder."

The following represent Figures 1 and 2 of the drawings:

Counsel for Appellees.

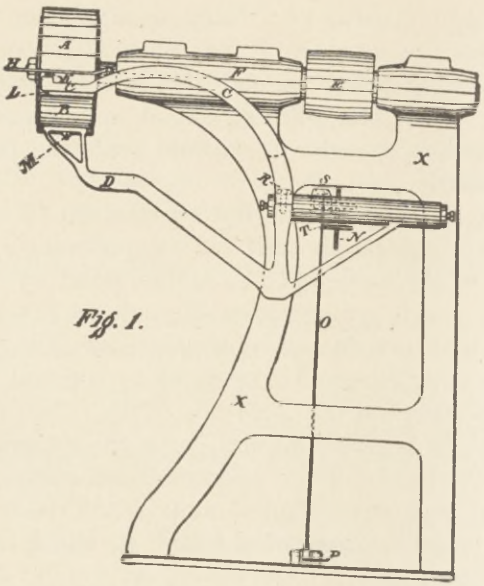


Fig. 1.

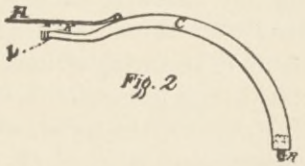


Fig. 2.

Upon a hearing upon pleadings and proofs in the Circuit Court, the court found in favor of the plaintiff upon the second claim of the Eickemeyer patent, but also found the fifth claim of the Taylor patent to be invalid for want of novelty, and dismissed the bill as to this patent. 36 Fed. Rep. 317. Defendants did not appeal from the decree against them as to the Eickemeyer patent, but plaintiff appealed from so much of the decree as related to the patent to Taylor.

Mr. Eugene Treadwell and *Mr. William W. Swan* for appellant.

Mr. Edward Q. Keasbey, (with whom was *Mr. A. Q. Keasbey* on the brief,) for appellees.

Opinion of the Court.

Mr. Justice Brown delivered the opinion of the court.

The fifth claim of the Taylor patent was held to be invalid by the court below upon the ground that it was anticipated by the second claim of the Eickemeyer patent.

The operation of cutting or grinding off the rough surface of the wool or fur of which the hat is made, by the use of pumice, is termed "pouncing." This was formerly done by pumice or sand paper held in the hand, and applied to the frame of the hat, laid upon a flat surface, and to the crown, fitted over a hat-block of corresponding shape. In time, mechanical devices began to be employed for the same purpose. Originally, this mechanism consisted simply of a block over which the hat-body was stretched, and to which a rotary motion was imparted, while the pouncing material was held in the hand and applied to the surface of the hat. The patent to Wheeler and Manley of August 14, 1866, contained an improvement upon this, and consisted in pouncing the hat-body by means of an emery cylinder or other pouncing surface moving at a high speed in contact with or against a hat-body revolving at a comparatively low speed. This machine, however, consisted of two separate devices, one for pouncing the crown of the hat, and the other for pouncing the brim. The patent to Nougaret of September 18, 1866, also provided for two separate devices, one to pounce the crown and the other the brim. Like the Wheeler and Manley crown machine, the Nougaret device for pouncing the crown contained a revolving hat-block for carrying the hat, but the subordinate devices for bringing the different parts of the hat-block in contact with the pouncing roller, differed somewhat in the two machines. The patent to Labiaux of March 26, 1867, was simply for an improvement in the crown machine of Nougaret, and consisted in the manner of hanging and operating the shafts upon which the pouncing roller and block were secured, and in the manner of securing and holding the sand paper to the pouncing roller, and in some other minor particulars.

The patent to Eickemeyer of November 23, 1869, was a decided advance upon previous devices, in the fact that the

crown of the hat was so supported that both the crown and the brim were presented by the same instrument to the pouncing cylinder. 25 Fed. Rep. 496. In his specification he stated his method of accomplishing this as follows: "My invention further consists in an arrangement of the pouncing cylinder, and a rest or supporting horn for the hat-body, which can be introduced within the crown to support it against the cutting action of the pouncing cylinder during the operation of pouncing, the arrangement being such as to dispense with the use of a hat-block in pouncing the tips and side crowns of the hats."

The second and third claims of this patent, the only ones material to be considered, read as follows:

"2. The arrangement and combination of a rotating pouncing cylinder with a vertical supporting horn, substantially as described, whereby the supporting horn may be used to support the tip, side crown, or brim during the operation of pouncing the hat.

"3. In combination with a rotating pouncing cylinder and a rest or supporting horn, a swivelling feeding mechanism, substantially as described, whereby the hat may be drawn between the pouncing cylinder in different curves or directly forward, as required."

The Taylor patent was applied for May 21, 1879. The fifth claim of the specification as originally drawn read as follows:

"5. The combination of the pouncing cylinder and the support for the hat, whereby the hat is drawn over the moving pouncing cylinder in the direction of the motion of the cylinder, substantially as described."

As thus drawn, this claim was rejected by the examiner upon reference to the Eickemeyer patent of March, 1874, which does not appear in the record, but which it may be presumed was substantially the same as the patent of 1869 in this particular. The specification was thereupon amended by inserting before the words "pouncing cylinder," wherever they occurred, the words "self-feeding," and the fifth claim was amended to read as follows:

"5. The combination of the support for the hat and the self-feeding pouncing cylinder, whereby the hat is drawn

over the moving pouncing cylinder in the direction of the motion of the cylinder, substantially as described."

In his communication to the Patent Office the patentee suggested in support of this amended claim that it differed from the claim of the Eickemeyer patent of 1874, in the fact that the cylinder was a self-feeding one, and its operation was to cause the material to be pounced to move in the same direction as the pouncing material. In reply, the examiner expressed a doubt as to what was meant by the clause in the fifth claim, "whereby the hat is drawn over the moving pouncing cylinder in the direction of the motion of the cylinder," and suggested that it should read, "whereby the hat is drawn over the support B in the direction of the motion of the pouncing cylinder." In reply, the fifth claim was withdrawn, and two other claims proposed as follows:

"5. The combination of the support for the hat and the self-feeding pouncing cylinder, substantially as described.

"6. The self-feeding pouncing cylinder, which feeds the material to be pounced to the moving pouncing surface in the direction of its own motion."

Attention was also called to the fact that this was the only machine that was self-feeding. "It does not," said the patentee, "depend upon feed rolls for pouncing the hat, but the pouncing cylinder is the only force that moves or presents the hat to the pouncing surface. The claim is for the combination of the self-feeding pouncing cylinder with the support for the hat, as described, in which the only motive power is the rapidly revolving pouncing cylinder. This is believed to differ from all previous machines which contain a feeding apparatus which controls the hat as it is applied to the pouncing cylinder. As can be seen, in Taylor's patent, but one cylinder or roll is used, and this solely for the purpose of pouncing the hats, and not in any way for feeding the hat, except by its direct motion." These claims were rejected upon the ground "that the pouncing roller of all hat-pouncing machines has a tendency to move the material acted upon in the direction of its motion, but feed rolls have been added to facilitate the feeding of the article to be operated upon to the

pouncing cylinder, and it is not deemed invention or improvement in the art to omit the feed rollers." The claim was again amended and allowed in the following form:

"5. The combination of the support for the hat and the self feeding pouncing cylinder, whereby the hat is drawn over the support B in the direction of the motion of the pouncing cylinder."

It does not clearly appear why the claim was allowed in this form, since it seems to be open to the same objections that had been previously made to it, when presented in slightly different language.

These proceedings in the Patent Office are set forth in detail for the purpose of showing the exact particulars which were then, and are now, claimed to distinguish the Taylor patent from the Eickemeyer patent of 1869. These are: 1. The omission of the feed roll of the Eickemeyer patent. 2. The self-feeding characteristic of the pouncing cylinder. An examination of the two devices shows that they are practically the same, except that, in the Taylor patent, the feeding roll of the Eickemeyer machine is omitted, and a guard and presser pin substituted. The fifth claim of the Eickemeyer patent of 1869 and the second claim of the Taylor patent are also for the same elements, namely, a pouncing cylinder, called "rotating" by Eickemeyer and "self feeding" by Taylor, and a support for the hat-block, termed a "vertical supporting horn" by Eickemeyer, though the operation of these elements is differently described in the two claims. In the Eickemeyer claim it is said that "the supporting horn may be used to support the tip, side crown or brim during the operation of pouncing the hat," and in the Taylor claim, that "the hat is drawn over the support B in the direction of the motion of the pouncing cylinder." It is insisted, however, that the feed roll, though omitted in the second claim of the Eickemeyer patent, is contained in the third, and, being an essential element of his device, should be read into the second claim as if it had been actually incorporated in it. If it were true that the feed roll were necessary to the operation of the combination of the second claim, this result would undoubt-

edly follow; in other words, if a person has invented a combination of three elements, all of which are necessary to the operation of his device, he cannot, by making a claim for two of them, forestall another who has so combined these two elements that they perform the same function that the three elements of the former patent performed.

On examination of Eickemeyer's device, however, it is difficult to see wherein the feed roll is so far essential to the operation of the machine that it would not perform practically the same function as the Taylor patent, if the feed roll were omitted. There would still be left a support for the hat by and upon which it could be held up to the pouncing cylinder. The feeding of the hat, instead of being accomplished or assisted by the feed roll, would be done entirely by hand as contemplated in the Taylor patent. Indeed, all the significance of the words "self-feeding" in this connection appears to be that, when the hat is pressed against the pouncing cylinder, it has a tendency to feed in the direction in which the cylinder revolves, and it is difficult to see why in either machine the hat may not be fed in the opposite direction.

In the Eickemeyer machine it was fed in the opposite direction by the aid of the feeding-roll, and the same thing, it would seem, may be done, by the application of a little more force, in the Taylor patent.

The case then really resolves itself into the question whether the omission of the feed roll involves invention; and in view of the fact that the hat support and pouncing cylinder of the Eickemeyer patent will accomplish practically the same functions as the Taylor device, though not so perfectly, we hold it does not — in other words, it required no invention to omit the feed roll of the Eickemeyer patent, and to make the subsidiary changes necessary to produce a working device.

The truth is, the essence of the Taylor invention was the guard C and the presser pin L, and any argument which tends to prove that the feed roll was an essential part of the Eickemeyer device is equally cogent to show that the guard and presser pin are essential to the Taylor patent, since they were designed to take the place of the feed roll and assist the

operator in bringing every part of the hat in contact with the pouncing cylinder. He himself speaks of the presser pin as "a peculiar and novel feature" of his machine, its operation being as follows: "The hat to be pounced can be caused to be revolved about it as a centre by means of the pressure exerted upon it, so that every part of the hat, except that immediately under the presser pin, would, in its rotation, come in contact with the pouncing cylinder, and by lessening the pressure the hat would be drawn under the presser pin in any desired direction, and that part of it which had formed the centre of rotation would then be pounced." As either the guard or presser pin, or both, are made an element in all the claims of his patent but the fifth, it is quite evident that this was his real invention, and that his fifth and last claim was suggested by a desire to make his patent as sweeping as possible.

It is true that the Taylor machine seems to be capable of doing more work and at less expense for labor and pouncing material than the prior devices, which it appears to have largely supplanted; but this consideration, while persuasive, is by no means decisive, and is only available to turn the scale in cases of grave doubt respecting the validity of the invention.

The decree of the court below holding the fifth claim of this patent to have been anticipated by the second claim of the Eickemeyer patent is, therefore,

Affirmed.

SMITH *v.* TOWNSEND.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 1173. Submitted March 6, 1893. — Decided April 3, 1893.

An employé of the Atchison, Topeka and Santa Fé Railroad, residing within the Territory of Oklahoma before, up to and on the 22d day of April, 1889, was thereby disabled from making a homestead entry upon the tract of land on which he was residing.

Statement of the Case.

On April 30, 1891, the appellant filed his complaint in the District Court of Oklahoma County, Territory of Oklahoma. In this complaint he alleged his citizenship, and full qualification to enter public lands under the homestead laws of the United States; that during the years 1888 and 1889 the Atchison, Topeka and Santa Fé Railroad Company was engaged in operating a railroad through the Indian Territory, having a right of way therein, granted by treaty with the Indians, and acts of Congress; that during those years he was employed as a section hand by said company, and resided in a station-house belonging to it, on the right of way, at a place known as Edmond Station; that he entered into the employment of the railroad company, and continued in such employment, and commenced living at said Edmond Station without any intent to take lands within the Indian Territory, but solely to discharge his duties as an employé of the company; that when the lands surrounding said station were open to settlement, under the acts of Congress of March 1 and 2, 1889, and the proclamation of the President, of March 23, 1889, plaintiff was at said Edmond Station, and on said right of way, and soon after the hour of noon on April 22, 1889, went upon the land in controversy and settled upon it as his homestead, and with the intention to occupy and enter it as his homestead under the laws of the United States; that pursuant to such intention he built a house thereon and otherwise improved the premises, and dwelt upon it as his home, and on April 23, 1889, duly made an entry at the proper land office at Guthrie, Indian Territory; that on the 22d of June, 1889, the defendant filed in the local land office a contest, which contest was heard in such land office on the following statement of facts:

"Alexander F. Smith had been for a long time prior to March 2, 1889, in the employ of the A., T. & S. F. R. R. Co. as a section hand, and on January 30, 1889, came to Edmond, Oklahoma Territory, in that capacity, bringing his family with him. He did not enter the Territory with the expectation or intention of taking land in the Oklahoma Territory. He remained in the employ of the railroad company until noon of April 22, 1889, Santa Fé R. R. time, when he removed

his tent to a point about one hundred and fifty yards distant from the right of way of said railroad and on the land in controversy, where he put it up and moved into it. From January 30, 1889, Smith lived with his family in his tent on the right of way of the A., T. & S. F. R. R., where it passes through the land in controversy. Prior to April 22, 1889, Smith had indicated his intention to take the land in controversy by stating the fact to his fellow-workmen, but had done no act toward carrying out said intention. A notice was posted at the station of Edmond by A., T. & S. F. R. R. Co., warning all employés that if they expected to take land they must leave the Oklahoma country, and this fact was called to Smith's notice. Smith has since noon of April 22, 1889, continued to reside upon, cultivate and improve said land, in good faith, as a homestead, and now has improvements thereon. Smith is a legally qualified homesteader unless excluded by reason of his being in the Oklahoma country prior to April, 1889. Smith is at present in the employ of the A., T. & S. F. R. R. Co., and has been most of the time since April 22, 1889."

That on the trial of said contest the local land officers decided in plaintiff's favor; but on appeal to the Commissioner of the Land Office, he reversed their decision, which ruling of the Commissioner was subsequently affirmed by the Secretary of the Interior; and on February 28, 1891, plaintiff's homestead entry was cancelled; and that the defendant, on March 12, 1891, made a homestead entry of the land, which homestead entry was, on the 30th day of April, 1891, commuted, the land paid for at a dollar and a quarter per acre, and a final receipt issued therefor. Plaintiff claims that there was error of law in the ruling of the Commissioner of the Land Office and of the Secretary of the Interior, and prays that the defendant be decreed to hold the legal title to the land in trust for his use and benefit. To this bill of complaint a demurrer was filed, which, on May 16, 1891, was sustained by the District Court, and the complaint dismissed. From the decree of dismissal an appeal was taken to the Supreme Court of the Territory, which, on the first day of February, 1892,

affirmed the decision of the District Court. From that judgment of affirmance, the appellant has appealed to this court.

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

Mr. Assistant Attorney General Parker, *Mr. John F. Stone*, *Mr. Charles A. Maxwell* and *Mr. George S. Chase* for appellee.

Mr. Justice Brewer delivered the opinion of the court.

This case turns on the construction to be given to the acts of March 1 and 2, 1889, and the proclamation of the President of March 23, 1889. The act of March 1, 1889, 25 Stat. 757, 759, c. 317, was an act ratifying and confirming an agreement with the Muscogee (or Creek) Indians in the Indian Territory, whereby a large body of their lands had been ceded to the United States. The second section of the act was in these words:

"That the lands acquired by the United States under said agreement shall be a part of the public domain, but they shall only be disposed of in accordance with the laws regulating homestead entries, and to the persons qualified to make such homestead entries, not exceeding one hundred and sixty acres to one qualified claimant. And the provisions of section twenty-three hundred and one of the Revised Statutes of the United States shall not apply to any lands acquired under said agreement. Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by act of Congress shall not be permitted to occupy or to make entry of such lands or lay any claim thereto."

In the general Indian appropriation act, passed the next day, March 2, 1889, 25 Stat. 980, 1005, c. 412, was contained this provision applicable to these lands, as well as to lands acquired from the Seminoles:

"*And provided further*, That each entry shall be in square form as nearly as practicable and no person be permitted to enter more than one quarter section thereof, but until said

lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto."

And the proclamation of the President of March 23, 1889, contained this warning: "*Warning* is hereby again expressly given, that no person entering upon and occupying said lands before said hour of twelve o'clock, noon, of the twenty-second day of April, A. D. eighteen hundred and eighty-nine, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto; and that the officers of the United States will be required to strictly enforce the provision of the act of Congress to the above effect." 26 Stat. 1546.

It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy. Thus, in *Heydon's Case*, 3 Rep. 7 *b*, it is stated that it was resolved by the Barons of the Exchequer as follows:

"For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered:

"First. What was the common law before the making of the act.

"Second. What was the mischief and defect for which the common law did not provide.

"Third. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

"Fourth. The true reason of the remedy."

And by this court, in *United States* v. *Union Pacific Railroad*, 91 U. S. 72, 79, it was said that "courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge* v. *Williams*, 3 How. 24; *Preston*

v. *Browder*, 1 Wheat. 120." And in *Platt* v. *Union Pacific Railroad*, 99 U. S. 48, 64, that "in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances." Pursuing an inquiry along this line, it will be seen that the Indian Territory lies between the State of Texas on the south and the State of Kansas on the north, and it is a matter of public history, of which we may take judicial notice, that as these two States began to be filled up with settlers, longing eyes were turned by many upon this body of land lying between them, occupied only by Indians, and though the Territory was reserved by statute for the occupation of the Indians, there was great difficulty in restraining settlers from entering and occupying it. Repeated proclamations were issued by successive Presidents, warning against such entry and occupation. Thus, on April 26, 1879, President Hayes issued a proclamation containing this warning:

"Now, therefore, for the purpose of properly protecting the interests of the Indian nations and tribes, as well as of the United States in said Indian Territory, and of duly enforcing the laws governing the same, I, Rutherford B. Hayes, President of the United States, do admonish and warn all such persons so intending or preparing to remove upon said lands or into said Territory, without permission of the proper agent of the Indian Department, against any attempt to so remove or settle upon any of the lands of said Territory; and I do further warn and notify any and all such persons who may so offend, that they will be speedily and immediately removed therefrom by the agent according to the laws made and provided; and if necessary, the aid and assistance of the military forces of the United States will be invoked to carry into proper execution the laws of the United States herein referred to." 21 Stat. 797.

A similar proclamation was issued on February 12, 1880, (21 Stat. 798,) another by President Arthur, on July 1, 1884, (23 Stat. 835,) and a fourth by President Cleveland, on March

13, 1885 (23 Stat. 843). This latter proclamation recited a fact, which is also a matter of public history, as follows: "And, whereas, it is further alleged that certain other persons or associations within the territory and jurisdiction of the United States have begun and set on foot preparations for an organized and forcible entry and settlement upon the aforesaid lands, and are now threatening such entry and occupation." And the urgency of the situation is disclosed by these closing words of the proclamation: "And if this admonition and warning be not sufficient to effect the purposes and intentions of the government as herein declared, the military power of the United States will be invoked to abate all such unauthorized possession, to prevent such threatened entry and occupation, and to remove all such intruders from the said Indian lands."

In addition to the fact disclosed by these proclamations, of the long-continued and persistent efforts to force an entry into this territory, it is well known that as the time drew near to the opening of it for occupation under and by virtue of the treaties with the Indian tribes, and in accordance with the laws of Congress, there was a large gathering of persons along the borders of this territory waiting the coming of the exact moment at which it would be lawful for them to move into it and establish homestead and other settlements. Under such circumstances as these, this legislation was passed, and what, in view thereof was the intent of Congress? As disclosed on the face of this legislation, evidently its purpose was to secure equality between all who desired to establish settlements in that territory. The language is general and comprehensive: "Any person who may enter upon any part of said lands . . . prior to the time that the same are opened to settlement . . . shall not be permitted to occupy or to make entry of such lands or lay any claim thereto." "Until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands, or acquire any right thereto." No exception is made from the general language

of these provisions; and it was evidently the expectation of Congress that they would be enforced in the spirit of equality suggested by the generality of the language.

It is urged that there is a penal element in each of these sections, and that, therefore, the statute must be strictly construed. This penal element is found in those clauses which debar one violating the provisions of the sections from ever entering any of the lands, or acquiring any rights therein. But whatever of a penal element may be found in these parts of the sections, does not extend to those which are simply declaratory of the conditions upon which entry and occupation may be made. Provisions of like character are frequently found in statutes and constitutions. The general homestead law gives a right of homestead to persons possessing certain qualifications, but it is in no sense, therefore, a penal statute as to those not possessing such qualifications. The Constitution of the United States restricts the presidency to natural-born citizens, and such as are thirty-five years of age, and have been residents of the country for fourteen years, but there is nothing in this of a penal nature as against those not possessed of these qualifications. If Congress sees fit to impose a penalty on any individual who attempts to enter a homestead without possessing the statutory qualifications, the clause imposing the penalty may require a strict construction in a proceeding against the alleged wrongdoer, but that does not give to the residue of the statute, prescribing the qualifications, a penal character. That portion which describes the qualifications for entry is to be liberally construed, in order that no one be permitted to avail himself of the bounty of Congress, unless evidently of the classes Congress intended should enjoy that bounty. This idea is expressed in 1 Bl. Com. 88, in these words:

"Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule, most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts

upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally."

Construing the statute in the light of these observations, it will be noticed, first, that the provisions apply to the land collectively. The prohibition is against entering upon "any part of said lands," meaning thereby the whole body of lands, and in this body was included the right of way of the railroad company. The company had simply an easement, not a fee in the land. Its rights sprang from the act of Congress of July 4, 1884, 23 Stat. 73, c. 179, granting the right of way to the Southern Kansas Railway Company, whose successor in interest was the Atchison, Topeka and Santa Fé Railroad Company. This act, by section 2, granted a right of way, and also provided that the land taken therefor should be used only for the construction and operation of railroad, telegraph and telephone lines; and that whenever any portion thereof ceased to be so used, it should revert to the nation or tribe of Indians from which it was taken. The act further provided, section 7, that the officers and employés might reside on the right of way, but subject to the provisions of the Indian intercourse laws, and such rules and regulations as might be established by the Secretary of the Interior in accordance therewith. And, by section 10, the grant was made conditioned that neither the company, nor its successors or assigns, should aid, advise or assist in any effort looking towards the change of the present tenure of the Indians in their lands, or attempt to secure from the Indian nations any further grant of lands or its occupancy. In other words, the entire body of lands still remained Indian lands — the fee continued in the Indians, and all that the company received was a mere right of way. So, when the treaty of cession was made between the Creek Nation of Indians and the government, it was a cession of all lands lying west of a certain line, with no exceptions, and it was this body of lands which was declared by the act of March 1, 1889, to be a part of the public domain, and thereafter subject to homestead entries; and the proclamation of the President, naming the exact hour at which the lands should

be open to settlement, describes a body of land by metes and bounds, and makes no exception of the railroad right of way, though it does of two acres, specially described and reserved for governmental use and control. Doubtless whoever obtained title from the government to any quarter section of land through which ran this right of way would acquire a fee to the whole tract subject to the easement of the company; and if ever the use of that right of way was abandoned by the railroad company the easement would cease, and the full title to that right of way would vest in the patentee of the land. But whether this be so or not, it is enough that in the cession, in the acts of Congress, and in the proclamation of the President the land was dealt with as an entirety, with certain metes and bounds, and it is that body of lands, thus bounded, which all parties were forbidden to enter upon who desired thereafter to enter any portion as a homestead.

Counsel contend that the words "enter" and "entry" have a technical meaning in the land laws; that the disqualification in the act of March 1, from entering upon any part of said lands, was modified by the act of March 2, so as to make it consist in entry and occupation, both being essential; and, quoting from the brief, "this was done to relieve the thousands of persons, or 'boomers,' as they were called, from the disability they may have incurred by an entry alone; but to keep them from selecting and occupying — that is, living on any tract of land prior to the time when the land should be opened to settlement and entry under the proclamation which the act of March 2 authorized the President to issue — the clause was inserted that 'any person entering upon and occupying the same' should be disqualified."

Their idea seems to be, that parties might go wheresoever they pleased through this body of lands, without subjecting themselves to the disqualification of the statute, providing only that before the date fixed for the opening of the lands for settlement they did not commence an actual living upon the particular tracts they desired to enter as homesteads. Under such a construction anybody might go into the Territory — every quarter section might be occupied by a resident

— and all that would be necessary to prevent the operation of the statute would be that on noon of April 22 adjoining neighbors changed their residences. Thus it would be that each party entering upon and occupying any particular tract, entered upon and occupied it for the first time after noon of April 22, and so was entitled to perfect his homestead entry. But this is simply to emasculate the statute. It treats the act of March 1 as repealed by that of March 2, and repeals by implication are not favored. It would destroy absolutely that equality which was evidently the intent of Congress in the legislation. Two parties might rightfully, immediately after the acts of Congress and the proclamation of the President, enter upon and occupy two adjoining tracts, and then change at the moment fixed, and thus create as to those respective tracts thus changed a prior occupation, as against all parties not reaching the Territory until April 22. "Enter" and "entry" may be technical words in the statute, but the expressions "enter upon" and "enter upon and occupy" are used in the ordinary sense of the words, and have no technical significance in this statute. The evident intent of Congress was, by this legislation, to put a wall around this entire Territory, and disqualify from the right to acquire, under the homestead laws, any tract within its limits, every one who was not outside of that wall on April 22. When the hour came the wall was thrown down, and it was a race between all outside for the various tracts they might desire to take to themselves as homesteads.

But it is said that the appellant was rightfully on the railroad company's right of way; that he had the express sanction of Congress to be there; and that when the hour of noon of April 22 arrived he had, as an American citizen, possessing the qualifications named in the homestead laws, the right to enter upon any tract within the Territory for the purpose of making it his homestead. While he may have had all the qualifications prescribed by the general homestead law, he did not have the qualifications prescribed by this statute; and there is nothing to prevent Congress, when it opens a particular tract for occupation, from placing additional qualifications

on those who shall be permitted to take any portion thereof. That is what Congress did in this case. It must be presumed to have known the fact that on this right of way were many persons properly and legally there; it must also have known that many other persons were rightfully in the Territory — Indian agents, deputy marshals, mail carriers and many others; and if it intended that these parties, thus rightfully within the Territory on the day named, should have special advantage in the entry of tracts they desired for occupancy, it would have been very easy to have said so. The general language used in these sections indicates that it was the intent to make the disqualifications universally absolute. It does not say "any person who may wrongfully enter," etc., but "any person who may enter" — "rightfully or wrongfully" is implied. There are special reasons why it must be believed that Congress intended no relaxation of these disqualifications on the part of those on the company's right of way, for it is obvious that, when a railroad runs through unoccupied territory like Oklahoma, which on a given day is opened for settlement, numbers of settlers will immediately pour into it, and large cities will shortly grow up along the line of the road; and it cannot be believed that Congress intended that they who were on this right of way in the employ of the railroad company should have a special advantage of selecting tracts, just outside that right of way, and which would doubtless soon become the sites of towns and cities.

It may be said that if this literal and comprehensive meaning is given to these words, it would follow that any one who, after March 2 and before April 22, should chance to step within the limits of the Territory, would be forever disqualified from taking a homestead therein. Doubtless he would be within the letter of the statute; but if at the hour of noon on April 22, when the legal barrier was by the President destroyed, he was in fact outside of the limits of the Territory, it may perhaps be said that if within the letter he was not within the spirit of the law, and, therefore, not disqualified from taking a homestead. Be that as it may, — and it will be time enough to consider that question when it is

presented, — it is enough now to hold that one who was within the territorial limits at the hour of noon of April 22 was, within both the letter and the spirit of the statute, disqualified to take a homestead therein.

The judgment of the Supreme Court of the Territory was right, and it is

Affirmed.

BENDER *v.* PENNSYLVANIA COMPANY.

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

No. 193. Submitted March 29, 1893. — Decided April 3, 1893.

An order overruling a motion to remand a case to a State Court is not a final judgment.

MOTION TO DISMISS. The case is stated in the opinion.

Mr. J. R. Carey and *Mr. F. J. Mullins* for the motion.

Mr. Lyman R. Critchfield, opposing.

THE CHIEF JUSTICE: This is a writ of error, brought May 29, 1889, to an order overruling a motion to remand the case to the State Court. Such an order is not a final judgment on the merits, and the writ of error must be dismissed. *McLish* v. *Roff*, 141 U. S. 661; *Chicago, St. Paul &c. Railway* v. *Roberts*, 141 U. S. 690; *Joy* v. *Adelbert College*, 146 U. S. 355.

Counsel for Parties.

VIRGINIA *v.* TENNESSEE.

ORIGINAL.

No. 3. Original. Argued March 8, 9, 1893. — Decided April 3, 1893.

The boundary line between the States of Virginia and Tennessee, which was ascertained and adjusted by commissioners appointed by and on behalf of each State, and marked upon the surface of the ground between the summit of White Top Mountain and the top of the Cumberland Mountains, having been established and confirmed by the State of Virginia in January, 1803, and by the State of Tennessee in November, 1803, and having been recognized and acquiesced in by both parties for a long course of years, and having been treated by Congress as the true boundary between the two States, in its districting them for judicial and revenue purposes, and in its action touching the territory in which Federal elections were to be held and for which Federal appointments were to be made, was a line established under an agreement or compact between the two States, to which the consent of Congress was constitutionally given; and, as so established, it takes effect as a definition of the true boundary, even if it be found to vary somewhat from the line established in the original grants.

The history of the Royal Grants, and of the Colonial and State Legislation upon this subject reviewed.

An agreement or compact as to boundaries may be made between two States, and the requisite consent of Congress may be given to it subsequently, or may be implied from subsequent action of Congress itself towards the two States; and when such agreement or compact is thus made, and is thus assented to, it is valid.

What "an agreement or compact" between two States of the Union is, and what "the consent of Congress" to such agreement or compact is, within the meaning of Article I of the Constitution, considered and explained.

A boundary line between States or Provinces which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive.

The case is stated in the opinion.

Mr. R. Taylor Scott, Attorney General of the State of Virginia, *Mr. William F. Rhea* and *Mr. Rufus A. Ayers*, for the State of Virginia.

Mr. George W. Pickle, Attorney General of the State of Tennessee, (with whom was *Mr. N. M. Taylor*, *Mr. H. H. Haynes*, *Mr. Thomas Curtin* and *Mr. C. J. St. John* on the

brief,) *Mr. Abram L. Demoss* and *Mr. A. S. Colyar* for the State of Tennessee.

Mr. Justice Field delivered the opinion of the court.

This is a suit to establish by judicial decree the true boundary line between the States of Virginia and Tennessee. It embraces a controversy of which this court has original jurisdiction, and in this respect the judicial department of our government is distinguished from the judicial department of any other country, drawing to itself by the ordinary modes of peaceful procedure the settlement of questions as to boundaries and consequent rights of soil and jurisdiction between States, possessed, for purposes of internal government, of the powers of independent communities, which otherwise might be the fruitful cause of prolonged and harassing conflicts.

The State of Virginia, as the complainant, summoning her sister State, Tennessee, to the bar of this court — a jurisdiction to which the latter promptly yields — sets forth in her bill the sources of her title to the territory embraced within her limits, and also of the title to the territory embraced by Tennessee.

The claim of Virginia is that by the charters of the English sovereigns, under which the colonies of Virginia and North Carolina were formed, the boundary line between them was intended and declared to be a line running due west from a point on the Atlantic Ocean on the parallel of latitude thirty-six degrees and thirty minutes north, and that the State of Tennessee, having been created out of the territory formerly constituting a part of North Carolina, the same boundary line continued between her and Virginia. And the contention of Virginia is that the boundary line claimed by Tennessee does not follow this parallel of latitude but varies from it by running too far north, so as to unjustly include a strip of land about one hundred and thirteen miles in length and varying from two to eight miles in width, over which she asserts and unlawfully exercises sovereign jurisdiction.

On the other hand, the claim of Tennessee is that the

boundary line, as declared in the English charters, between the colonies of Virginia and North Carolina was run and established by commissioners appointed by Virginia and Tennessee after they became States of the Union, by Virginia in 1800 and by Tennessee in 1801, and that the line they established was subsequently approved in 1803 by the legislative action of both States, and has been recognized and acted upon as the true and real boundary between them ever since, until the commencement of this suit, a period of over eighty-five years. And the contention of Tennessee is that the line thus established and acted upon is not open to contestation as to its correctness at this day, but is to be held and adjudged to be the real and true boundary line between the States, even though some deviations from the line of the parallel of latitude thirty-six degrees and thirty minutes north may have been made by the commissioners in the measurement and demarcation of the line.

In order to clearly understand and appreciate the force and effect to be accorded to the respective claims and contentions of the parties, a brief history of preceding measures should be given, with reference to the charters and legislation under which they were taken.

On the 23d of May, 1609, James the First of England, by letters patent, reciting previous letters, gave to Robert, Earl of Salisbury, Thomas, Earl of Suffolk, and divers other persons associated with them, a charter which organized them into a corporation by the name of The Treasurer and Company of Adventurers and Planters of the city of London, for the first colony of Virginia, and granted to them all those lands and territories, lying "in that part of America called Virginia, from the point of land called Cape or Point Comfort, along the sea coast to the northward 200 miles, and from the said point of Cape Comfort along the sea coast to the southward 200 miles, and all that space and circuit of land lying from the sea coast of the precinct aforesaid up into the land throughout, from sea to sea, west and northwest"; and, "also all the islands lying within 100 miles along the coast of both seas of the precinct aforesaid."

On the 24th of March, 1663, Charles the Second of England granted to Edward, Earl of Clarendon, and others of his subjects, all that territory within his dominion of America "extending from the north end of the island called Lucke Island, which lyeth in the Southern Virginia seas and within six and thirty degrees of the northern latitude, and to the west as far as the South Seas, and so southerly as far as the river Mathias, which bordereth upon the coast of Florida, and within one and thirty degrees of northern latitude, and so west in a direct line as far as the South Seas aforesaid," and gave them full authority to organize and govern the territory granted under the name of the Province of Carolina.

On the 30th of May, 1665, Charles the Second granted to the above proprietors of Carolina a charter, confirming the previous grant, and enlarging the same so as to include the following-described territory: All that province and territory within America, "extending north and eastward as far as the north end of Currituck River or inlet, upon a straight westerly line to Wyonoke Creek, which lies within or about the degrees of thirty-six and thirty minutes northern latitude; and so west in a direct line as far as the South Seas; and south and westward as far as the degrees of twenty-nine inclusive of northern latitude, and so west in a direct line as far as the South Seas."

The northern and southern settlements of Carolina were separated from each other by nearly three hundred miles, and numerous Indians resided upon the intervening territory, and though the whole province belonged to the same proprietors, the legislation of the settlements was by different assemblies, acting at times under different governors. Early in 1700 the northern part of the province was sometimes called the colony of North Carolina, though the province was not divided by the crown into North and South Carolina until 1732. (Story's Commentaries on the Constitution, sec. 137.) Previously to this division the settlements on the borders of Virginia, and of what was called the colony of North Carolina, had largely increased, and disputes and altercations frequently occurred between the settlers, growing out of the

unlocated boundary between the provinces. Virginians were charged with taking up lands, under titles of the crown, south of the proper limits of their province, and Carolinians were charged with taking up lands which belonged to the crown with warrants from the proprietors. The troubles arising from this source were the occasion of much disturbance to the communities, and various attempts were made by parties in authority in the two provinces to remove the cause of them. Previously to January, 1711, commissioners were appointed on the part of Virginia and North Carolina to run the boundary line between them, and proclamations were made forbidding surveys of the grounds until that line within the disputed limits should be marked. But these efforts for the settlement of the difficulties were unavailing.

In January, 1711, commissioners were again appointed, but failed for want of the requisite means to accomplish their intended object.

In 1728 an attempt to settle the difficulties was renewed, but, as on previous occasions, it failed. The commissioners of the colonies met, but they could not agree at what place to fix the latitude thirty-six degrees thirty minutes north, nor upon the place called Wyonoke, and they broke up without doing anything. The governors of North Carolina and Virginia then entered into a convention upon the subject of the boundary between the two provinces, and transmitted it to England for approval. The king and council approved of it, and so did the lords and proprietors, and returned it to the governors to be executed. The agreement was as follows:

"That from the mouth of Carrituck River, setting the compass on the north shore thereof, a due west line shall be run and fairly marked, and if it happens to cut Chowan River between the mouth of Nottaway River and Wiccacon Creek, then the same direct course shall be continued towards the mountains, and be ever deemed the dividing line between Virginia and Carolina. But if the said west line cuts Chowan River to the southward of Wiccacon Creek, then from that point of intersection the bounds shall be allowed to continue up the middle of Chowan River to the middle of the

entrance into said Wiccacon Creek, and from thence a due west line shall divide the two governments. That if said west line cuts Blackwater River to the northward of Nottaway River, then from the point of intersection the bounds shall be allowed to be continued down the middle of said Blackwater to the middle of the entrance into said Nottaway River, and from thence a due west line shall divide the two governments.

"That if a due west line shall be found to pass through islands or cut out small slips of land, which might much more conveniently be included in one province or other, by natural water bounds, in such case the persons appointed for running the line shall have the power to settle natural bounds, provided the commissioners on both sides agree thereto, and that all variations from the west line be punctually noted on the premises or plats, which they shall return to be put upon the record of both governments."

Commissioners were appointed by Virginia and North Carolina to carry this agreement into effect. They met at Currituck Inlet in March, 1728. The variation of the compass was then found to be three degrees one minute and two seconds west, nearly, and the latitude thirty-six degrees thirty-one minutes. The dividing line between the provinces struck Blackwater one hundred and seventy-six poles above the mouth of Nottaway. The variation of the compass at the mouth of Nottaway was two degrees thirty minutes. The line was afterward extended to Steep Rock Creek, 320 miles from the coast, by commissioners Joshua Fry and Peter Jefferson, on the part of Virginia, and Daniel Weldon and William Churton, on the part of North Carolina.

In 1778 and 1779 Virginia and North Carolina having become by their separation in 1776 from the British crown independent States, again took up the question of the boundary between them, and appointed commissioners to extend and complete the line from the point at which the previous commissioners, Fry and Jefferson and others, had ended their work on Steep Rock Creek, to Tennessee River. The commissioners undertook the work with which they were charged, but they could not find the line on Steep Rock Creek, owing,

as they supposed, to the large amount of timber which had decayed since it was marked. The report of their labors was signed only by the Virginia commissioners. Their report was, in substance, that after running the line as far as Carter's Valley, forty-five miles west of Steep Rock Creek, the commissioners of Carolina conceived the idea that the line was farther south than it ought to be, and, on trial, it appeared that there was a slight variation of the needle, which the Virginia commissioners thought arose from their proximity to some iron ore; that various expedients to harmonize the action of the commissioners were unavailing, and the Carolina commissioners, agreeing that they were more than two miles too far south of the proper latitude, measured off that distance directly north, and ran the line eastwardly from that place, superintended by two of the Carolina and one of the Virginia commissioners, while from the same place it was continued westwardly, superintended by the others, for the sake of expediting the business. The Virginia commissioners subsequently became satisfied that the first line run by them was correct and they, therefore, continued it from Carter's Valley, where it had been left, westward to Tennessee River. The North Carolina commissioners carried their line as far as Cumberland Mountains, protesting against the line run by the Virginia commissioners.

This was in 1779 and 1780. The line adopted by the Virginia commissioners was known as the Walker line and the line adopted by the commissioners of North Carolina was known as the Henderson line. Walker's line was approved by the legislature of Virginia in 1791, but it never received the approval of the legislature of Tennessee. Previously to the appointment of these commissioners, and on the 6th of May, 1776, the State of Virginia, in a general convention, with that generous public spirit which on all occasions since has characterized her conduct in the disposition of her claims to territory under different charters from the English government, had declared that the territories within the charters erecting the colonies of Maryland, Pennsylvania, North Carolina and South Carolina were thereby ceded and forever confirmed to the people of those colonies respectively. On the

25th of February, 1790, North Carolina ceded to the United States the territory which afterwards became the State of Tennessee, (2 Charters and Constitutions, 1664,) and which was admitted into the Union on the 1st of June, 1796. 1 Stat. 491, c. 47. Subsequently, the States of Virginia and Tennessee both took steps for the final settlement of the controversy as to the boundary between them. On the 10th of January, 1800, the house of delegates of the general assembly of Virginia adopted the following resolution: "Whereas it is represented to the present general assembly that the people living between what are called Walker's and Henderson's lines, so far as the same run between the State of Tennessee and this State, do not consider themselves under either the jurisdiction of that or this State, and, therefore, refuse the payment of any taxes to either of said States, or to the collectors of either for the general government, because the State of North Carolina, on the 25th of February, 1790, ceded the said State of Tennessee, then called the Southwestern Territory, to the government of the United States; and, therefore, the act entitled 'An act concerning the southern boundary of this State,' passed on the 7th of December, 1791, in this legislature, to establish the line commonly called Walker's line, as the boundary between North Carolina and this State, could only bind the State of North Carolina as far as her territorial limits extended on the line of this State, and could not bind the said Southwestern Territory, which had previously been conveyed, as aforesaid; and

"Whereas, Since the said cession, the general government hath erected the said Southwestern Territory into an independent State, by their act, June 1st, 1796, whereby it has become the duty of the said State of Tennessee and of this State to settle all differences between them with respect to the said boundary line:

"*Resolved, therefore*, That the executive be authorized and requested to appoint three commissioners, whose duty it shall be to meet commissioners to be appointed by the State of Tennessee, to settle and adjust all differences concerning the said boundary line, and to establish the one or the other of the

said lines as the case may be, or to run *any other line* which may be agreed on, for settling the same; and that the executive be also requested to transmit a copy of this resolution to the executive authority of the State of Tennessee."

On the 13th of January, 1800, this resolution was agreed to by the Senate.

On the 13th day of November, 1801, the general assembly of Tennessee passed an act on the same subject, Laws of Tennessee, 1801, c. 29, the first section of which is these words:

"*Be it enacted by the general assembly of the State of Tennessee*, That the governor for the time being is hereby authorized and required, as soon as may be convenient after the passing of this act, to appoint three commissioners on the part of this State, one of whom shall be a mathematician capable of taking latitude, who, when so appointed, are hereby authorized and empowered, or a majority of them, to act in conjunction with such commissioners as are or may be appointed by the State of Virginia to settle and designate a true line between the aforesaid States."

The 2d section is as follows:

"*And whereas*, It may be difficult for this legislature to ascertain with precision what powers ought of right to be delegated to the said commissioners; therefore,

"*Be it enacted*, That the governor is hereby authorized and required from time to time to issue such power to the commissioners, as he may deem proper, for the purpose of carrying into effect the object intended by this act, consistent with the true interest of the State."

On the 22d day of January, 1803, a report having been made by the commissioners, which is copied into the act, the legislature of Virginia ratified what had been done in the following act:

"Whereas, The commissioners appointed to ascertain and adjust the boundary line between this State and the State of Tennessee, in conformity to the resolution passed by the legislature of this State for that purpose, have proceeded to the execution of that business, and made a report thereof in the words following, to wit:

"'The commissioners for ascertaining and adjusting the boundary line between the States of Virginia and Tennessee appointed pursuant to public authority on the part of each, namely: General Joseph Martin, Creed Taylor and Peter Johnson, for the former, and Moses Fisk, General John Sevier and General George Rutledge, for the latter, having met at the place previously appointed for that purpose, and not uniting, from the general result of their astronomical observations, to establish either of the former lines called Walker's and Henderson's, *unanimously agreed*, in order to *end all controversy* respecting the subject, to run a due west line equally distant from both, beginning on the summit of the mountain generally known by the name of White Top Mountain, where the northeastern corner of Tennessee terminates, to the top of Cumberland Mountain, where the southwestern corner of Virginia terminates, which is hereby declared to be the true boundary line between the said States, and has been accordingly run by Brice Martin and Nathan B. Markland, the surveyors duly appointed for that purpose, and marked under the directions of the said commissioners, as will more at large appear by the report of the said surveyors, hereto annexed, and bearing equal date herewith.

"'2. And the said commissioners do further unanimously agree to recommend to their respective States, that individuals having claims or titles to lands on either side of the said line, as now fixed and agreed on, and between the lines aforesaid, shall not in consequence thereof n anywise be prejudiced or affected thereby; and that the legislatures of their respective States should pass mutual laws to render all such claims or titles secure to the owners thereof.

"'3. And the said commissioners do further agree unanimously to recommend to their States respectively that reciprocal laws should be passed confirming the acts of all public officers, whether magistrates, sheriffs, coroners, surveyors or constables, between the said lines, which would have been legal in either of the said States had no difference of opinion existed about the true boundary line.

"'4. This agreement shall be of no effect until ratified by

the legislatures of the States aforesaid. Given under our hands and seals at William Robertson's, near Cumberland Gap, December the eighth, eighteen hundred and two. (Dec. 8th, 1802.)

"'JOS. MARTIN. [L. S.]
"'CREED TAYLOR. [L. S.]
"'PETER JOHNSON. [L. S.]
"'JOHN SEVIER. [L. S.]
"'MOSES FISK. [L. S.]
"'GEORGE RUTLEDGE. [L. S.]'

"5. And whereas, Brice Martin and Nathan B. Markland, the surveyors duly appointed to run and mark the said line, have granted their certificate of the execution of their duties, which certificate is in the words following, to wit: 'The undersigned surveyors, having been fully appointed to run the boundary line between the States of Virginia and Tennessee, as directed by the commissioners for that purpose, have agreeably to their orders, run the same, beginning on the summit of the White Top Mountain at the termination of the northeastern corner of the State of Tennessee, a due west course to the top of the Cumberland Mountains, where the southwestern corner of Virginia terminates, keeping at an equal distance from the lines called Walker's and Henderson's, and have had the new line run as aforesaid marked with five chops in the form of a diamond, as directed by the said commissioners. Given under our hands and seals, this eighth day of December, eighteen hundred and two. (8th December, 1802.)

"'B. MARTIN. [L. S.]
"'NAT. B. MARKLAND. [L. S.]'

"And it is deemed proper and expedient that the said boundary line, so fixed and ascertained as aforesaid, should be established and confirmed on the part of this Commonwealth—

"6. *Be it therefore enacted by the General Assembly of the Commonwealth of Virginia*, That said boundary line between this State and the State of Tennessee, as laid down, fixed and ascertained by the said commissioners above named, in their

said report above recited, shall be and is hereby *fully* and *absolutely*, to all intents and purposes whatsoever, *ratified, established and confirmed* on the part of this Commonwealth, as the *true, certain* and *real boundary line* between the said States.

"7. All claims or titles derived from the government of North Carolina or Tennessee, which said lands by the adjustment and establishment of the line aforesaid, have fallen into this State, shall remain as secure to the owners thereof as if derived from the government of Virginia, and shall not be in anywise prejudiced or affected in consequence of the establishment of the said line.

"8. The acts of all public officers, whether magistrates, sheriffs, coroners, surveyors or constables, heretofore done or performed in that portion of the territory between the lines called Walker's and Henderson's lines, which has fallen into this State by the adjustment of the present line, and which would have been legal if done or performed in the States of North Carolina or Tennessee, are hereby recognized and confirmed.

"9. This act shall commence and be in force from and after the passing of a like law on the part of the State of Tennessee." Laws of Va. 1802–1803, c. 39.

And on the 3d of November, 1803, Tennessee passed the following ratifying act:

"Whereas, the commissioners appointed to settle and designate the true boundary between this State and the State of Virginia, in conformity to the act passed by the legislature of this State for the purpose, on the thirteenth day of November, one thousand eight hundred and one, have proceeded to the execution of said business, and made a report thereof in the words following, to wit":

(Here follows the report named in the Virginia act:)

"And it is deemed proper and expedient that the said boundary line, so fixed and ascertained as aforesaid, should be established and confirmed on the part of this State —

"1. *Be it enacted by the General Assembly of the State of Tennessee*, That the said boundary line between this State

and the State of Virginia as laid down, fixed and ascertained by the said commissioners above named in their said report above recited, shall be and is hereby fully and absolutely to all intents and purposes whatsoever, *ratified, established and confirmed* on the part of this State as the *true, certain and real* boundary line between the said States.

"2. *Be it enacted*, That all claims or titles to lands derived from the government of Virginia, which said lands, by the adjustment and establishment of the line aforesaid have fallen into this State, shall remain as secure to the owners thereof as if derived from the government of North Carolina or Tennessee, and shall not be in anywise prejudiced or affected in consequence of the establishment of the said line.

"3. *Be it enacted*, That the acts of all officers, whether magistrates, sheriffs, coroners, surveyors or constables, heretofore done or performed in that portion of territory between the lines called Walker's and Henderson's lines, which has fallen into this State by the adjustment of the present line, and which would have been legal if done or performed in the State of Virginia, are hereby recognized and confirmed." Laws of Tennessee, 1803, c. 58.

The line thus run was accepted by both States as a satisfactory settlement of a controversy which had, under their governments and that of the colonies which preceded them, lasted for nearly a century. As seen from the acts recited, both States through their legislatures declared in the most solemn and authoritative manner that it was fully and absolutely ratified, established and confirmed as the true, certain and real boundary line between them; and this declaration could not have been more significant had it added, in express terms, what was plainly implied, that it should never be departed from by the government of either, but be respected, maintained and enforced by the governments of both. All modes of legislative action which followed it indicated its approval. Each State asserted jurisdiction on its side up to the line designated, and recognized the lawful jurisdiction of the adjoining State up to the line on the opposite side. Both States levied taxes on the lands on their respective sides and

granted franchises to the people resident thereon. The people on the south side voted at state and municipal elections for representatives and officers of Tennessee, and the people on the north side at such state and municipal elections voted for representatives and officers of Virginia. The courts of the two States exercised jurisdiction, civil and criminal, on their respective sides, and enforced their process up to that line; and the legislation of Congress in the designation of districts for the jurisdiction of courts, and in prescribing limits for collection districts and for purposes of election, made no exception to the boundary as thus established. Act of July 1, 1862, 12 Stat. 432, 433, c. 119.

The line was marked with great care by the commissioners of the States, with five chops on the trees in the form of a diamond, at such intervals between them as they deemed sufficient to identify and trace the line. Not a whisper of fraud or misconduct is made by either side against the commissioners, for the conclusions they reached and the line they established. It is true that in the year 1856, fifty-four years after the line was thus settled, Virginia, reciting that the line as marked by the commissioners in 1802 had, by lapse of time, the improvement of the country, natural waste and destruction and other causes, become indistinct, uncertain and to some extent unknown, so that many inconveniences and difficulties occurred between the citizens of the respective States and in the administration of their governments, passed an act for the appointment of commissioners, to meet commissioners to be appointed by Tennessee, to again run and mark said line, — not to run and mark a new line, — and provided that where there was no growing timber on any part of the line by which it might be plainly marked, if the old marks were gone, the commissioners should cause monuments of stone to be permanently planted on the line, at least one at every five miles or less, where it might seem best to the commissioners to do so, that the line might be readily identified for its entire length. The whole purpose of the act, as is evident on its face was, not to change the old boundary line, but only to more perfectly identify it. Tennessee responded to that invi-

tation, and appointed commissioners to act with those from Virginia. The commissioners together re-run and re-marked the line as it was established in 1802, and planted such additional monuments as were deemed necessary, and they reported to their respective legislatures that they had "accurately run, re-marked and measured the old line of 1802, with all its offsets and irregularities as shown in the surveyor's report" therein incorporated and on the accompanying map therewith submitted. The legislature of Tennessee approved of the action of the commissioners, but Virginia withheld her approval and called for a new appointment of commissioners to re-run and re-mark the line, which was refused by Tennessee as unnecessary. No complaint as to the correctness of the line run and established in 1802 was made by Virginia until within a recent period. She now by her bill asks that the compact entered into between her and the State of Tennessee, as set forth in the act of the general assembly of Virginia of January 22, 1803, and which became operative by similar action of the legislature of Tennessee on the 3d of November following, be declared null and void, as having been entered into between the States without the consent of Congress, and prays that this court will establish the true boundary line between those States due east and west, in latitude 36° and 30′ north, in accordance with what it alleges to be the ancient chartered rights of that Commonwealth and the laws creating the State of Tennessee and admitting it into the Union.

The Constitution provides that "no State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Is the agreement, made without the consent of Congress, between Virginia and Tennessee, to appoint commissioners to run and mark the boundary line between them, within the prohibition of this clause? The terms "agreement" or "compact" taken by themselves are sufficiently comprehensive to

embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.

There are many matters upon which different States may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter State might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter State to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that State to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that State in that way. If the bordering line of two States should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering States to agree to unite in draining the district, and thus removing the cause of disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence, without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms "compact" or "agreement" in the Constitution do not apply to every possible compact or agreement between one State and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?

We can only reply by looking at the object of the constitutional provision, and construing the terms "agreement" and "compact" by reference to it. It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.

Looking at the clause in which the terms "compact" or "agreement" appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States. Story, in his Commentaries, (§ 1403,) referring to a previous part of the same section of the Constitution in which the clause in question appears, observes that its language "may be more plausibly interpreted from the terms used, 'treaty, alliance or confederation,' and upon the ground that the sense of each is best known by its association (*noscitur a sociis*) to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political coöperation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges"; and that "the latter clause, 'compacts and agreements,' might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of States bordering on each other." And he adds: "In such cases the consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into

any compact or agreement might be attended with permanent inconvenience or public mischief."

Compacts or agreements — and we do not perceive any difference in the meaning, except that the word "compact" is generally used with reference to more formal and serious engagements than is usually implied in the term "agreement" — cover all stipulations affecting the conduct or claims of the parties. The mere selection of parties to run and designate the boundary line between two States, or to designate what line should be run, of itself imports no agreement to accept the line run by them, and such action of itself does not come within the prohibition. Nor does a legislative declaration, following such line, that it is correct, and shall thereafter be deemed the true and established line, import by itself a contract or agreement with the adjoining State. It is a legislative declaration which the State and individuals, affected by the recognized boundary line, may invoke against the State as an admission, but not as a compact or agreement. The legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it, for example, as made upon a similar declaration of the border or contracting State. The mutual declarations may then be reasonably treated as made upon mutual considerations. The compact or agreement will then be within the prohibition of the Constitution or without it, according as the establishment of the boundary line may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority. If the boundary established is so run as to cut off an important and valuable portion of a State, the political power of the State enlarged would be affected by the settlement of the boundary; and to an agreement for the running of such a boundary, or rather for its adoption afterwards, the consent of Congress may well be required. But the running of a boundary may have no effect upon the political influence of either State; it may simply serve to mark and define that which actually existed before, but was undefined and unmarked. In that case the agreement for the running of the line, or its actual survey,

would in no respect displace the relation of either of the States to the general government. There was, therefore, no compact or agreement between the States in this case which required, for its validity, the consent of Congress, within the meaning of the Constitution, until they had passed upon the report of the commissioners, ratified their action, and mutually declared the boundary established by them to be the true and real boundary between the States. Such ratification was mutually made by each State in consideration of the ratification of the other.

The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement, as where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war. But where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given. Story says that the consent may be implied, and is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them; and observes that where a State is admitted into the Union, notoriously upon a compact made between it and the State of which it previously composed a part, there the act of Congress, admitting such State into the Union, is an implied consent to the terms of the compact. Knowledge by Congress of the boundaries of a State, and of its political subdivisions, may reasonably be presumed, as much of its legislation is affected by them, such as relates to the territorial jurisdiction of the courts of the United States, the extent of their collection districts, and of districts in which process, civil and criminal, of their courts may be served and enforced.

In the present case, the consent of Congress could not have preceded the execution of the compact, for, until the line was run, it could not be known where it would lie and whether or not it would receive the approval of the States. The preliminary agreement was not to accept a line run, whatever it

might be, but to receive from the commissioners designated a report as to the line which might be run and established by them. After its consideration each State was free to take such action as it might judge expedient upon their report. The approval by Congress of the compact entered into between the States upon their ratification of the action of their commissioners is fairly implied from its subsequent legislation and proceedings. The line established was treated by that body as the true boundary between the States in the assignment of territory north of it as a portion of districts set apart for judicial and revenue purposes in Virginia, and as included in territory in which federal elections were to be held, and for which appointments were to be made by federal authority in that State, and in the assignment of territory south of it as a portion of districts set apart for judicial and revenue purposes in Tennessee, and as included in territory in which federal elections were to be held, and for which federal appointments were to be made for that State. Such use of the territory on different sides of the boundary designated, in a single instance would not, perhaps, be considered as absolute proof of the assent or approval of Congress to the boundary line; but the exercise of jurisdiction by Congress over the country as a part of Tennessee on one side, and as a part of Virginia on the other, for a long succession of years, without question or dispute from any quarter, furnishes as conclusive proof of assent to it by that body as can usually be obtained from its most formal proceedings.

Independently of any effect due to the compact as such, a boundary line between States or Provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke, in *Penn* v. *Lord Baltimore*, 1 Vesey Sen. 444, 448; *Boyd* v. *Graves*, 4 Wheat. 513; *Rhode Island* v. *Massachusetts*, 12 Pet. 657,

734; *United States* v. *Stone*, 2 Wall. 525, 537; *Kellogg* v. *Smith*, 7 Cush. 375, 382; *Chenery* v. *Waltham*, 8 Cush. 327; Hunt on Boundaries, (3d. ed.) 306.

As said by this court in the recent case of the *State of Indiana* v. *Kentucky*, (136 U. S. 479, 510,) "it is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority." In the case of *Rhode Island* v. *Massachusetts*, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies said: "Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary."

Vattel, in his Law of Nations, speaking on this subject, says: "The tranquillity of the people, the safety of States, the happiness of the human race do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title."[1] (Book II, c. 11, § 149.) And

[1] La tranquillité des peuples, le salut des États, le bonheur du genre humain, ne souffrent point que les possessions, l'empire, et les autres droits des Nations, demeurent incertains, sujets à contestation, et toujours en état d'exciter des guerres sanglantes. Il faut donc admettre entre les peuples la prescription fondée sur un long espace de temps, comme un moyen solide et incontestable.

Wheaton, in his International Law, says: "The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question." (Part II, c. 4, § 164.)

There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home and to family, on which is based all that is dearest and most valuable in life.

Notwithstanding the legislative declaration of Virginia in 1803 that the line marked by the joint commissioners of the two States was ratified as the true and real boundary between them, and the repeated reaffirmation of the same declaration in her laws since that date, notably in the Code of 1858, in the Code of 1860 and in the Code of 1887; notwithstanding that the State has in various modes attested to the correctness of the boundary — by solemn affirmation in terms, by legislation, in the administration of its government, in the levy of taxes and the election of officers, and in its acquiescence for over eighty-five years, embracing nearly the lives of three generations, she now, by her bill, seeks to throw aside the obligation from her legislative declaration, because, as alleged, not made upon the express consent, in terms, of Congress, although such consent has been indicated by long acquiescence in the assumption of the validity of the proceedings resulting in the establishment of the boundary, and to have a new boundary line between Virginia and Tennessee established running due east and west on latitude thirty-six degrees thirty minutes north.

But to this position there is, in addition to what has already been said, a conclusive answer in the language of this court in *Poole* v. *Fleeger*, 11 Pet. 185, 209. In that case Mr. Justice Story, after observing that "it is a part of the general right of sovereignty belonging to independent nations to establish and fix the disputed boundaries between their respective territories; and the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated to all intents and purposes, as the true and real boundary," adds: "This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the States of this Union, unless it has been surrendered under the Constitution of the United States. So far from there being any pretence of such a general surrender of the right, it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress." The Constitution in imposing this limitation plainly admits that with such consent a compact as to boundaries may be made between two States; and it follows that when thus made it has full validity, and all the terms and conditions of it are equally obligatory upon the citizens of both States.

The compact in this case having received the consent of Congress, though not in express terms, yet impliedly, and subsequently, which is equally effective, became obligatory and binding upon all the citizens of both Virginia and Tennessee. Nor is it any objection that there may have been errors in the demarcation of the line which the States thus by their compact sanctioned. After such compacts have been adhered to for years neither party can be absolved from them upon showing errors, mistakes or misapprehension of their terms, or in the line established; and this is a complete and perfect answer to the complainant's position in this case.

It may also be stated that if the work of the joint commissioners, under the laws of 1800 and 1801, approved by the legislative action of both States in 1803, could be left out of consideration and a new line run, it would not follow that the

parallel of latitude thirty-six degrees thirty minutes north would be strictly followed. The charter of Charles the Second designates the northern boundary line of the province of North Carolina as extending from Currituck River or inlet upon a straight westerly line to Wyonoke Creek, which lies *within or about thirty-six degrees thirty minutes north latitude*, from which it is evident that that parallel was only to be the general direction of the line, not one to be strictly and always followed without any variations from it. The purpose of the declaration in the charter of Charles the Second was only that the northern boundary line was to be run in the neighborhood of that parallel. The condition of the country at the time the charter was granted — 1665 — would have made the running of a boundary line strictly on that parallel a matter of great difficulty, if not impossible. Nor did the needs of grantor or chartered proprietors call for any such strict adherence to the parallel of latitude designated. That neither party expected it, is evident from the agreement made between the governors of Virginia and North Carolina as to running the boundary line between them, and sent to England for approval by the king and council. That agreement provided that, if the west line run should be found to pass through islands or to cut out small slips of land, which might much more conveniently be included in one province than the other by natural water bounds, in such case the persons appointed to run the line should have power to settle natural water bounds, provided, the commissioners on both sides agreed, and that all variations from the west line should be noted on the premises or on plats which they should return, to be put on record by both governors. A possible, indeed, a probable, variation from the line of the parallel of latitude, or the straight line designated, was contemplated by both Virginia and Tennessee. With full knowledge of the line actually designated, and of the ancient charter to Carolina, and of the description in the Constitution of Tennessee, in appointing the joint commissioners, they provided that they should settle and adjust all differences concerning the boundary line, and establish either the Walker or Henderson line, or run *any other line which might be agreed on*

for settling the same; and that means any line run and measured with or without deviations from time to time from a straight line, or the line of latitude mentioned as might in their judgment be most convenient as the proper boundary for both States. It was made with numerous variations from a straight line, and from the line of the designated parallel of latitude for the convenience of the two States, and, with the full knowledge of both, was ratified, established and confirmed as the true, certain and real boundary line between them. And then, fifty-six years afterwards, in consequence of the line thus marked becoming indistinct, it was re-run and re-marked, by new commissioners under the directions of the statutes of 1800 and 1801, in strict conformity with the old line. The compact of the two States, establishing the line adopted by their commissioners, and to which Congress impliedly assented after its execution, is binding upon both States and their citizens. Neither can be heard at this date to say that it was entered into upon any misapprehension of facts. No treaty, as said by this court, has been held void on the ground of misapprehension of facts, by either or both of the parties. *Rhode Island* v. *Massachusetts*, 4 How. 591, 635.

The general testimony, with hardly a dissent, is that the old line of 1802 can be readily traced throughout its whole length; and, moreover, that line has been recognized by all the residents near it, except those in the triangle at Denton's Valley and in another district of small dimensions, in which it is stated that the people have voted as citizens of Virginia and have recognized themselves as citizens of that State. That fact, however, cannot affect the potency and conclusiveness of the compact between the States by which the line was established in 1803. The small number of citizens whose expectations will be disappointed by being included in Tennessee are secured in all their rights of property by provisions of the compact passed especially for the protection of their claims.

Some observations were made, on the argument of the case, upon the propriety and necessity, if the line established in 1803 be sustained, of having it re-run and re-marked, so as hereafter to be more readily identified and traced. But a careful exam-

ination of the testimony of the numerous witnesses in the case, most of them residing in the neighborhood of the boundary line, as to the marks and identification of the line originally established in 1802, and re-run and re-marked in 1859, satisfies us that no new marking of the line is required for its ready identification. The commissioners appointed under the act of Virginia of 1856, and under the act of Tennessee of 1858, found all the old marks upon the trees in the forest through which the line established ran, in the form of a diamond; and whenever they were indistinct, or, in the judgment of the commissioners, too far removed from each other, new marks were made upon the trees, or if no trees were found at particular places to be marked, monuments in stone were planted. Besides this, the State of Virginia does not ask that the line agreed upon in 1803 shall be re-run or re-marked, but prays that a new boundary line be run on the line of 36° 30'. Tennessee does not ask that the line of 1803 be re-run or re-marked. Nevertheless, under the prayer of Virginia for general relief, there can be no objection to the restoration of any marks which may be found to have been obliterated or become indistinct upon the line as herein defined.

Our judgment, therefore, is that the boundary line established by the States of Virginia and Tennessee by the compact of 1803 is the true boundary between them, and that on a proper application, based upon a showing that any marks for the identification of that line have been obliterated or have become indistinct, an order may be made, at any time during the present term, for the restoration of such marks without any change of the line.

A decree will, therefore, be entered declaring and adjudging that the boundary line established between the States of Virginia and Tennessee by the compact of 1803 is the real, certain and true boundary between the said States, and that the prayer of the complainant to have the said compact set aside and annulled, and to have a new boundary line run between them on the parallel of 36° 30' north latitude should be and is denied at the cost of the complainant; and it is so ordered.

CHICOT COUNTY *v.* SHERWOOD.

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

No. 170. Submitted March 24, 1893. — Decided April 3, 1893.

An action will lie in a Circuit Court of the United States in the State of Arkansas at the suit of a citizen of New York, against a county in Arkansas, to recover on bonds and coupons issued by the county to aid in the construction of a railroad and held by the citizen of New York, notwithstanding the provisions in the act of the Legislature of Arkansas of February 27, 1879, repealing all laws authorizing counties within the State to be sued; requiring all demands against them to be presented to the County Courts of the several counties for allowance or rejection; and allowing appeals to be prosecuted from the decisions of those courts.

An answer to a declaration on such bonds and coupons setting out the statutory provisions under which the bonds were issued and averring that the election under which they were claimed to have been authorized was not a free and fair election but was a sham "as shown by papers filed with the county clerk," and reciting various irregularities which were alleged to appear "by reference to certified copies of the papers sent into the clerk's office" from some of the various precincts of the county, and concluding "and so the county says that there was in fact no election held in said county on February 27, 1872, to determine whether or not the county would subscribe to the capital of said railroad company and issue bonds to pay the same" presents no issuable question of fact, going to the merits of the suit, and if demurred to, the demurrer should be sustained.

While matters of fact, well pleaded, are admitted by a demurrer, conclusions of law are not so admitted.

THE case is stated in the opinion.

Mr. D. H. Reynolds for plaintiff in error.

No appearance for defendants in error.

MR. JUSTICE JACKSON delivered the opinion of the court.

This was an action by the defendants in error, citizens of the State of New York, against Chicot County, Arkansas, upon 17 bonds and 80 interest warrants or coupons thereto attached, forming a portion of an issue of bonds made and executed by that county, in 1872, for the amount of a stock subscription made by it to the Mississippi, Ouachita and Red

River Railroad Company. The bonds and coupons sued on were in the following form:

"UNITED STATES OF AMERICA, *State of Arkansas.*

"No. 3. $500.

"It is hereby certified that the county of Chicot is indebted unto and will pay the Mississippi, Ouachita and Red River Railroad Company or bearer, on the first day of January, 1887, five hundred dollars, lawful money of the United States of America, with interest at the rate of six per centum per annum, payable semi-annually, on the first days of January and July of each year, at the Union Trust Company, in the city of New York, on the presentation and surrender of the proper coupon hereto annexed. This bond is one of a series of two hundred, numbered from one to two hundred, inclusively, of like date, tenor and amount, issued under an act of the general assembly of the State of Arkansas, entitled 'An act to authorize counties to subscribe stock in railroads,' approved July 23, 1868, and in obedience to the vote of the people of said county, at an election held in accordance with the provisions of said act, authorizing the subscription of one thousand dollars to the capital stock of said railroad company.

"In witness whereof, the said county has caused to be affixed hereto its seal, and has caused the same to be attested by the signature of its county and probate judge, countersigned by the signature of its county clerk, who also signs the coupons hereto annexed, at their office, in said county, this 11th day of May, 1872. JAS. W. MASON,

"*County and Probate Judge.*

"M. W. GRAVES, *County Clerk.*

"Receivable in payment of all county taxes.

"STATE OF ARKANSAS:

"The treasurer of the county of Chicot will pay fifteen dollars to bearer at the office of the Union Trust Company, in the city of New York, on the first day of January, 1887, being amount—interest on bond No. 3.

"M. W. GRAVES, *County Clerk.*"

Opinion of the Court.

Judgment was rendered in favor of the plaintiffs for the amount of the bonds and coupons sued on, and the county prosecutes this writ of error therefrom, assigning as grounds of reversal, first, that the Circuit Court had no jurisdiction to entertain the suit, and, secondly, that said court erred in sustaining the plaintiffs' demurrer to the plea or answer of the county, and in rendering judgment against it, upon its declining to make further answer in bar or defence of the action.

After being summoned in the usual manner the defendant moved to dismiss the suit on the grounds that, since the passage of an act of the legislature of Arkansas, on February 27, 1879, Gannt's Dig. (1884), 350, repealing all laws authorizing counties in the State to sue and be sued, the county could not be sued or proceeded against in any court, state or federal, by complaint and summons, or otherwise than in the manner provided by said act; that the county had not been brought into the Circuit Court in any manner authorized by law, so as to acquire jurisdiction over the same; that the plaintiffs had not presented their demand to the county court of Chicot County, duly verified according to the requirements of the statute, for *allowance* or *rejection*, and that without such verification and demand no case against, or controversy with, the county could arise of which any state or federal court could take cognizance or jurisdiction. The second section of the act of February 27, 1879, on which this motion was based, provided "that hereafter all persons having *demands* against any county shall present the same, duly verified according to law, to the county court of such county for *allowance* or *rejection*. From the order of the county court therein, appeals may be prosecuted as now provided by law. If in any appeal the *judgment* of the county court is reversed the judgment of reversal shall be certified by the court rendering the same to the county court, and the county court shall thereupon enter the judgment of the superior court as its own."

The Circuit Court overruled this motion to dismiss the suit, and this action of the court constitutes the first error relied on for reversal of its judgment. It is claimed for plaintiff in error that, inasmuch as the courts of general jurisdiction in Arkansas

have no original jurisdiction to hear and determine cases like the present, since the passage of said act of February 27, 1879, the courts of the United States can exercise no such jurisdiction. In the case of *Nevada County* v. *Hicks*, 50 Arkansas, 416, 420, it was said by the Supreme Court of Arkansas that, "whilst it is true, by the act of February 27, 1879, counties cannot be sued, in the ordinary way of bringing suits, still *judgments* may be and are rendered against them. *Every allowance of a claim* by *the county* is a *judgment;* and, unquestionably, when an appeal is prosecuted from the action of the county court in allowing or rejecting a claim, the decision of the appellate court is a judgment; and when the judgment of the county court is reversed the judgment of reversal, when certified to the county court, is required to be entered as the judgment of the county court."

If, under this construction of the act, the allowance or rejection by the county court of any demand against the county, duly verified according to law, has the force and effect of a judgment for or against the county, from which an appeal will lie, it would seem that the making or presenting a demand against the county to the county court is, to all intents and purposes, such a legal proceeding as would permit the application of the rule which plaintiff in error invokes to defeat the jurisdiction of the federal court; for in the case of *Gaines* v. *Fuentes*, (92 U. S. 10, 20,) cited and relied on to support its position, it is said, "if by the law obtaining in the State, customary or statutory, they [suits] can be maintained in a state court, whatever designation that court may bear, we think they may be maintained by original process in a federal court where the parties are, on one side, citizens of Louisiana and, on the other, citizens of other States."

If, however, the presentation of a demand against the county, duly verified, according to law, to the county court thereof, "*for allowance* or *rejection*" is not the beginning of a suit or does not involve a trial *inter partes*, it is *then* only a preliminary proceeding to a suit or controversy which, by the appeal of either side, is or may be carried to an appellate court, before which there is an actual trial between the parties inter-

ested. The right to maintain this revisory trial in the state court, even under the principle contended for, will be sufficient to maintain a like suit by original process in a federal court where the requisite diverse citizenship exists. In *Delaware County* v. *Diebold Safe Co.*, 133 U. S. 473, 486, 487, Mr. Justice Gray, speaking for this court, and commenting upon a somewhat similar statutory provision, said: "It was also objected that the petition for removal was filed too late, after the case had been tried and determined by the board of county commissioners. But, under the statutes of Indiana then in force, although the proceedings of county commissioners in passing upon claims against a county are in some respects assimilated to proceedings before a court, and their decision, if not appealed from, cannot be collaterally drawn in question, yet those proceedings are in the nature, not of a trial *inter partes*, but of an allowance or disallowance, by officers representing the county, of a claim against it. At the hearing before the commissioners there is no representative of the county, except the commissioners themselves; they may allow the claim, either upon evidence introduced by the plaintiff, or without other proof than their own knowledge of the truth of the claim; and an appeal from this decision is tried and determined by the circuit court of the county as an original cause, and upon the complaint filed before the commissioners. . . . It follows, according to the decisions of this court in analogous cases, that the trial in the circuit court of the county was 'the trial' of the case, at any time before which it might be removed into the Circuit Court of the United States under clause 3 of section 639 of the Revised Statutes."

If, therefore, the presentation of a demand to the county court under the Arkansas statute is not the commencement of a suit against the county, then, under the rule stated in *Delaware County* v. *Diebold Safe Co.*, just quoted, the court to which such demand may be carried after allowance or rejection receives and determines it as an *original cause*. In either case the suit is so maintainable in the state courts as to be cognizable by original process in a federal court, where the parties have the proper citizenship to confer jurisdiction. Any other

view of the subject would prevent citizens of other States from resorting to the federal courts for the enforcement of their claims against counties of the State, and limit them to the special mode of relief prescribed by the act of February 27, 1879. The jurisdiction of the federal courts is not to be defeated by such state legislation as this. In *Hyde* v. *Stone*, 20 How. 170, 175, it is said: "But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases state laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the States, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. *Suydam* v. *Broadnax*, 14 Pet. 67; *Union Bank* v. *Jolly's Administrators*, 18 How. 503." This principle has been steadily adhered to by this court.

In the case under consideration the state statute relied on to defeat the jurisdiction of the United States Circuit Court was passed after the bonds sued on were issued and put in circulation, and if its requirement of presenting the bonds to the county court of Chicot County "for allowance or rejection" was binding upon citizens of other States holding such bonds, it would present a very grave question whether it was not such a substantial and material change in the remedy in force when the contract was made, as to impair its obligations. But it is not necessary to consider and determine that question, as the objection to the jurisdiction of the Circuit Court, for the reasons already stated, is not well taken.

The second assignment of error is to the action of the Circuit Court in sustaining the demurrer to the answer of the county. The answer, after setting out the constitutional and statutory provisions of the State, under which the county was authorized

to issue the bonds in question, and the proceedings of the county court in reference to the submission of the question of subscribing $100,000 to the capital stock of the railroad company, and the election had thereunder by the people of the county, together with the result of the vote, which, according to the returns, as ascertained and found by the county court, showed a majority of 320 votes in favor of the county making the subscription, proceeds to set forth a mass of irrelevant matter, such as the occurrence of a riot at a former election; the occupation of the county-seat by a force of state troops to protect life and property when the order for the election under which the subscription voted was made, and continued so occupied till after the election; and alleges "that a condition of affairs existed in the county that precluded a free and fair election, and the veriest sham of an election was held at some of the various precincts on February 17, 1872, (the day of the election,) *as shown by papers filed with the county clerk*, and which upon their face show that there was not a legal election at any precinct in the county of Chicot on said February 17, 1872, and that no poll-books were furnished to the several precincts as required by law"; together with various other recited irregularities, alleged to be shown by papers filed, but by whom filed is not averred; nor is it stated how, or in what way, as matter of fact, such irregularities affected the vote actually cast and counted, on which the subscription was carried. After a recital of these matters, which, it is said, appear "by *reference to certified copies of the papers* sent into the clerk's office from some of the various precincts in the county," numerous papers are marked as exhibits and made part of the answer, and from which is drawn the conclusion set up in the answer, as follows: "And so the county says that there was in fact no election held in said county on February 27, 1872, to determine whether or not the county would subscribe to the capital of said railroad company and issue bonds to pay the same."

It is further averred in the answer that the county court was not the proper tribunal to determine whether an election had been held in pursuance of the statute regulating the mat-

ter; that the false recitals on the face of the bonds, to the contrary, did not estop the county; that the terms and conditions of the order submitting the question of subscription to a vote of the people were not complied with, so that the county was not legally bound to pay the bonds or any part thereof; and that the railroad company had delivered the stock to the county court before the election was held, and, after said election, had obtained the bonds illegally and fraudulently, etc. The answer also sets out proceedings had in the county court *after* the bonds were issued, and reports made to it in relation thereto, which are made exhibits to the answer, and which, it is claimed, show that the bonds were not issued in conformity to law.

To this answer there was interposed a demurrer, which was sustained, and the county electing to stand on its answer, and say nothing further in bar of the plaintiffs' right to recover, judgment was thereupon rendered in favor of the plaintiffs, for the amount of the bonds and coupons sued on, with interest and costs of suit.

It is urged by the plaintiff in error that this action of the lower court was erroneous, for the reason that the answer set forth sufficient facts to invalidate the bonds within the rule laid down in *Dixon County* v. *Field*, 111 U. S. 83, 92, 93. We do not take this view of the answer. It abounds in recitals, in statements of what papers made exhibits thereto purport to show, and in conclusions of law, which are not admitted by the demurrer, the rule being well settled that only matters of *fact* well pleaded are admitted by a demurrer, while conclusions of law are not. *United States* v. *Ames*, 99 U. S. 35, 45; *Interstate Land Co.* v. *Maxwell Land Grant Co.*, 139 U. S. 569, 578.

The answer was of such a character as to present no issuable questions of fact going to the merits of the suit, and was properly demurred to, and there was no error in sustaining the demurrer.

Our conclusion is, that the judgment should be

Affirmed.

LASCELLES *v.* GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 1262. Argued March 16, 1893. — Decided April 3, 1893.

A fugitive from justice who has been surrendered by one State of the Union to another State, upon requisition charging him with the commission of a specific crime, has, under the Constitution and laws of the United States, no right, privilege or immunity to be exempt from indictment and trial, in the State to which he is returned, for any other or different offence from that designated in the requisition, without first having an opportunity to return to the State from which he was extradited.

This case was brought here by writ of error to the Supreme Court of the State of Georgia. The single federal question presented by the record, and relied on to confer upon this court the jurisdiction to review the judgment of the Supreme Court of Georgia, complained of by the plaintiff in error, was whether a fugitive from justice who has been surrendered by one State of the Union to another State thereof upon requisition, charging him with the commission of a specific crime, has, under the Constitution and laws of the United States, a right, privilege or immunity to be exempt from indictment and trial in the State to which he is returned, for any other or different offence than that designated and described in the requisition proceedings, under which he was demanded by and restored to such State, without first having an opportunity to return to the State from which he was extradited.

The facts of the case on which this question is raised were briefly these: In July, 1891, two indictments were regularly found by the grand jury of the county of Floyd, State of Georgia, against the plaintiff in error under the name of Walter S. Beresford, which respectively charged him with the offence "of being a common cheat and swindler," and with the crime of "larceny after trust delegated," both being criminal acts by the laws of Georgia, and alleged to have been committed in the county of Floyd. At the time these indict-

ments were found the plaintiff in error was residing in the State of New York. In September, 1891, the governor of the State of Georgia made a requisition on the governor of the State of New York for the arrest and surrender of the plaintiff in error to designated officials of the former State, naming him, as he was named in the indictment, Walter S. Beresford. In the requisition, as well as in the warrant for his arrest, the offences for which his rendition was demanded were stated and designated as charged in the indictment. After being arrested, in pursuance of the warrant, he was duly delivered to the agent of the State of Georgia, was brought to the county of Floyd in said State, and there delivered to the sheriff of the county, by whom he was detained in the county jail. While so held, and before trial upon either of the indictments on which the requisition proceedings were based, the grand jury of the county, on October 6, 1891, found a new indictment against him for the crime of forgery, naming him therein as Sidney Lascelles, which was his true and proper name. Thereafter he was put upon his trial in the Superior Court of the county of Floyd upon this last indictment. Before arraignment he moved the court to quash said indictment "on the ground that he was being tried for a separate and different offence from that for which he was extradited from the State of New York to the State of Georgia, without first being allowed a reasonable opportunity to return to the State of New York." This motion was overruled and he was put upon trial. Thereupon he filed a special plea setting forth the foregoing facts, and averring that he could not be lawfully tried for a separate and different crime from that for which he was extradited. This plea was overruled, and, having been put upon his trial under the indictment, he was found guilty of the offence charged. His motion for a new trial being overruled and refused, he filed a bill of exceptions, and carried the case to the Supreme Court of Georgia, the court of highest and last resort in that State, before which he again asserted his exemption from trial upon the indictment, upon the grounds stated in his motion to quash and in his special plea, but the Supreme Court of Georgia sustained the action of the lower

court therein, and in all respects affirmed the judgment of the Superior Court.

Mr. W. W. Vandiver, (with whom was *Mr. L. A. Dean* on the brief,) for plaintiff in error.

There is no natural or inherent right in one State to demand of another a fugitive from justice. The power to extradite a person for crime is purely statutory, and what is not authorized or required by a fair construction of the statute, cannot be presumed. Without the provisions of the Constitution of the United States for delivering up fugitives from justice, and the enactments of Congress in furtherance thereof, the State would be powerless to recover her fugitive criminals from other States whence they had fled. Each State of the Union is an asylum to its citizens and inhabitants against the demands of all other States or countries except to meet the provisions of the Constitution of the United States, the laws enacted thereunder, and the treaties with other nations.

Without strict compliance with the provisions of law, no person can be delivered over to another State for trial for a crime committed in such other State. Section 5278, Rev. Stat., requires that before a fugitive is delivered up, a copy of the indictment or affidavit charging the party demanded with having committed treason, felony or other crime shall be certified by the governor of the demanding State and presented to the governor upon whom the demand is made. The Constitution of the United States, Article 4, Section 2, provides that "upon demand," etc., the fugitive shall "be delivered up to be removed to the State having jurisdiction of *the* crime." Thus considering the Constitution and the statute together, it seems clear that before extradition can be had a particular crime must be set forth as a basis for such extradition. In support of this contention the following authorities are confidently referred to: Spear on Extradition, (1st. ed.,) 349; *Ex parte McKnight*, 48 Ohio St. 588; *Kansas* v. *Hall*, 40 Kansas, 338; *In re Canon*, 47 Michigan, 481; *Compton* v. *Wilder*, 40 Ohio St. 130; *Commonwealth* v. *Hawes*, 13 Bush, 697; *United*

States v. *Rauscher*, 119 U. S. 407; *In re Fitton*, 45 Fed. Rep. 471.

Mr. D. B. Hamilton and *Mr. J. M. Terrell* filed a brief for defendant in error; but the court declined to hear them.

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

The plaintiff in error prosecutes the present writ of error to review and reverse this decision of the Supreme Court of Georgia, claiming that in its rendition a right, privilege or immunity secured to him under the Constitution and laws of the United States, specially set up and insisted on, was denied. The particular right claimed to have been denied is the alleged exemption from indictment and trial except for the specific offences on which he had been surrendered.

The question presented for our consideration and determination is whether the Constitution and laws of the United States impose any such limitation or restriction upon the power and authority of a State to indict and try persons charged with offences against its laws, who are brought within its jurisdiction under interstate rendition proceedings. While cases involving questions of international extradition and interstate rendition of fugitives from justice have frequently been before this court for decision, this court has not passed upon the precise point here presented. The second clause of Section 2, Article 4 of the Constitution of the United States declares that "a person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." To carry this provision into effect Congress passed the act of February 12, 1793, 1 Stat. 392, c. 7, the first and second sections of which have been re-enacted and embodied in sections 5278 and 5279 of the Revised Statutes of the United States, prescribing the methods of procedure on the part of

the State demanding the surrender of the fugitive, and providing that "it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear," and providing further that the agent "so appointed, who shall receive the fugitive into his custody, shall be empowered to transport him to the State or Territory from which he has fled."

Upon these provisions of the organic and statutory law of the United States rest exclusively the right of one State to demand, and the obligation of the other State upon which the demand is made to surrender, a fugitive from justice. Now, the proposition advanced on behalf of the plaintiff in error in support of the federal right claimed to have been denied him is, that, inasmuch as interstate rendition can only be effected when the person demanded as a fugitive from justice is duly charged with some particular offence, or offences, his surrender upon such demand carries with it the implied condition that he is to be tried *alone* for the designated crime, and that in respect to all offences other than those specified in the demand for his surrender, he has the same right of exemption as a fugitive from justice extradited from a foreign nation. This proposition assumes, as is broadly claimed, that the States of the Union are independent governments, having the full prerogatives and powers of nations, except what have been conferred upon the general government, and not only have the right to grant, but do, in fact, afford to all persons within their boundaries an asylum as broad and secure as that which independent nations extend over their citizens and inhabitants. Having reached, upon this assumption or by this process of reasoning, the conclusion that the same rule should be recognized and applied in interstate rendition as in foreign extradition of fugitives from justice, the decision of this court in *United States* v. *Rauscher*, 119 U. S. 407 *et seq.*, is invoked as a controlling authority on the question under consideration.

If the premises on which this argument is based were sound, the conclusion might be correct. But the fallacy of the argument lies in the assumption that the States of the Union occupy towards each other, in respect to fugitives from justice, the relation of foreign nations, in the same sense in which the general government stands towards independent sovereignties on that subject; and in the further assumption that a fugitive from justice acquires in the State to which he may flee some state or personal right of protection, improperly called a right of asylum, which secures to him exemption from trial and punishment for a crime committed in another State, unless such crime is made the special object or ground of his rendition. This latter position is only a restatement, in another form, of the question presented for our determination. The sole object of the provision of the Constitution and the act of Congress to carry it into effect is to secure the surrender of persons accused of crime, who have fled from the justice of a State, whose laws they are charged with violating. Neither the Constitution, nor the act of Congress providing for the rendition of fugitives upon proper requisition being made, confers, either expressly or by implication, any right or privilege upon such fugitives under and by virtue of which they can assert, in the State to which they are returned, exemption from trial for any criminal act done therein. No purpose or intention is manifested to afford them any immunity or protection from trial and punishment for any offences committed in the State from which they flee. On the contrary, the provision of both the Constitution and the statutes extends to *all* crimes and offences punishable by the laws of the State where the act is done. *Kentucky* v. *Dennison*, 24 How. 66, 101, 102; *Ex parte Reggel*, 114 U. S. 642.

The case of *United States* v. *Rauscher*, 119 U. S. 407, has no application to the question under consideration, because it proceeded upon the ground of a right given impliedly by the terms of a *treaty* between the United States and Great Britain, as well as expressly by the acts of Congress in the case of a fugitive surrendered to the United States by a foreign nation. That treaty, which specified the offences

that were extraditable, and the statutes of the United States passed to carry it and other like treaties into effect, constituted the supreme law of the land, and were construed to exempt the extradited fugitive from trial for any other offence than that mentioned in the demand for his surrender. There is nothing in the Constitution or statutes of the United States in reference to interstate rendition of fugitives from justice which can be regarded as establishing any compact between the States of the Union, such as the Ashburton treaty contains, limiting their operation to particular or designated offences. On the contrary, the provisions of the organic and statutory law embrace crimes and offences of every character and description punishable by the laws of the State where the forbidden acts are committed. It is questionable whether the States could constitutionally enter into any agreement or stipulation with each other for the purpose of defining or limiting the offences for which fugitives would or should be surrendered. But it is settled by the decisions of this court that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties or laws of the United States which exempts an offender, brought before the courts of a State for an offence against its laws, from trial and punishment, even though brought from another State by unlawful violence, or by abuse of legal process. *Ker* v. *Illinois*, 119 U. S. 436, 444; *Mahon* v. *Justice*, 127 U. S. 700, 707, 708, 712, 715; *Cook* v. *Hart*, 146 U. S. 183, 190, 192.

In the case of *Mahon* v. *Justice*, 127 U. S. 700, a fugitive from the justice of Kentucky was kidnapped in West Virginia and forcibly carried back to Kentucky, where he was held for trial on a criminal charge. The governor of West Virginia demanded his restoration to the jurisdiction of that State, which, being refused, his release was sought by *habeas corpus*, and it was there contended that, under the Constitution and laws of the United States, the fugitive had a right of asylum in the State to which he fled, which the courts of the United States should recognize and enforce, except when removed in accordance with regular proceedings author-

ized by law. Instead of acceding to this proposition, this court said: "But the plain answer to this contention is that the *laws* of the United States do not recognize any such right of asylum as is here claimed, on the part of the fugitive from justice in any State to which he has fled; nor have they, as already stated, made any provision for the return of parties, who, by violence and without lawful authority, have been abducted from a State." And the court further said: "As to the removal from the State of the fugitive from justice in a way other than that which is provided by the second section of the fourth article of the Constitution, which declares that 'a person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime,' and the laws passed by Congress to carry the same into effect — it is not perceived how that fact can affect his detention upon a warrant for the commission of a crime within the State to which he is carried. The jurisdiction of the court in which the indictment is found is not impaired by the manner in which the accused is brought before it. There are many adjudications to this purport cited by counsel on the argument, to some of which we will refer." (pp. 707, 708.) After reviewing a number of cases on this question, the court proceeded: "Other cases might be cited from the same courts holding similar views. There is, indeed, an entire concurrence of opinion as to the ground upon which a release of the appellant in the present case is asked, namely, that his forcible abduction from another State, and conveyance within the jurisdiction of the court holding him, is no objection to the detention and trial for the offence charged. They all proceed upon the obvious ground that the offender against the law of the State is not relieved from liability because of personal injuries received from private parties, or because of indignities committed against another State. It would indeed be a strange conclusion, if a party charged with a criminal offence could be excused from answering to

the government whose laws he had violated, because other parties had done violence to him, and also committed an offence against the laws of another State." (p. 712.) The same principle was applied in the case of *Ker* v. *Illinois*, 119 U. S. 436.

If a fugitive may be kidnapped or unlawfully abducted from the State or country of refuge, and be, thereafter, tried in the State to which he is forcibly carried, without violating any right or immunity secured to him by the Constitution and laws of the United States, it is difficult to understand upon what sound principle can be rested the denial of a State's authority or jurisdiction to try him for another or different offence than that for which he was surrendered. If the fugitive be regarded as not lawfully within the limits of the State in respect to any other crime than the one on which his surrender was effected, still that fact does not defeat the jurisdiction of its courts to try him for other offences, any more than if he had been brought within such jurisdiction forcibly and without any legal process whatever.

We are not called upon in the present case to consider what, if any, authority the surrendering State has over the subject of the fugitive's rendition, beyond ascertaining that he is charged with crime in the State from which he has fled, nor whether the States have any jurisdiction to legislate upon the subject, and we express no opinion on these questions. To apply the rule of international or foreign extradition, as announced in *United States* v. *Rauscher*, 119 U. S. 407, to interstate rendition involves the confusion of two essentially different things, which rest upon entirely different principles. In the former the extradition depends upon treaty contract or stipulation, which rests upon good faith, and in respect to which the sovereign upon whom the demand is made can exercise discretion, as well as investigate the charge on which the surrender is demanded, there being no rule of comity under and by virtue of which independent nations are required or expected to withhold from fugitives within their jurisdiction the right of asylum. In the matter of interstate rendition, however, there is the binding force and obligation, not of

contract, but of the supreme law of the land, which imposes no conditions or limitations upon the jurisdiction and authority of the State to which the fugitive is returned.

There are decisions in the state courts and in some of the lower federal courts which have applied the rule laid down in *United States* v. *Rauscher*, *supra*, to interstate rendition of fugitives under the Constitution and laws of the United States, but in our opinion they do not rest upon sound principle, and are not supported by the weight of judicial authority.

The cases holding the other and sounder view, that a fugitive from justice surrendered by one State upon the demand of another, is not protected from prosecution for offences other than that for which he was rendered up, but may, after being restored to the demanding State, be lawfully tried and punished for any and all crimes committed within its territorial jurisdiction, either before or after extradition, are the following: *In re Noyes*, 17 Albany L. J. 407; *Ham* v. *The State*, [Texas,] 4 Tex. App. 645; *State ex rel. Brown* v. *Stewart*, 60 Wisconsin, 587; *Post* v. *Cross*, 135 N. Y. 536; *Commonwealth* v. *Wright*, [Sup. Court of Mass.,] 33 N. E. Rep. 82; and *In re Miles*, 52 Vermont, 609.

These authorities are followed by the Supreme Court of Georgia in the clear opinion pronounced by Lumpkin, Justice, in the present case.

The highest courts of the two States immediately or more directly interested in the case under consideration hold the same rule on this subject. The plaintiff in error does not bear in his person the alleged sovereignty of the State of New York, from which he was remanded, *Dow's Case*, 18 Penn. St. 37, but if he did, that State properly recognizes the jurisdiction of the State of Georgia to try and punish him for any and all crimes committed within its territory. But aside from this, it would be a useless and idle procedure to require the State having custody of the alleged criminal to return him to the State by which he was rendered up in order to go through the formality of again demanding his extradition for the new or additional offences on which it desired to prosecute him. The Constitution and laws of the United States impose no

such condition or requirement upon the State. Our conclusion is that, upon a fugitive's surrender to the State demanding his return in pursuance of national law, he may be tried in the State to which he is returned for any other offence than that specified in the requisition for his rendition, and that in so trying him against his objection no right, privilege or immunity secured to him by the Constitution and laws of the United States is thereby denied.

It follows, therefore, that the judgment in the present case should be

Affirmed.

GRANT *v.* WALTER.

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

No. 187. Argued March 28, 1893. — Decided April 10, 1893.

Letters patent, No. 267,192, issued November 7, 1882, to James M. Grant for "certain new and useful improvements in the art of reeling and winding silk and other thread" are void for want of patentable novelty, the alleged discovery being only that of a new use for the old device of a cross-reeled and laced skein; and while the fact that the patented article has gone into general use may be evidence of its utility, it cannot control the language of the statute, which limits the benefit of the patent laws to things which are new, as well as useful.

Features in a patented invention which are not covered by the claims are not protected by the letters patent.

IN EQUITY, to restrain the infringement of letters patent. Decree dismissing the bill, from which the plaintiff appealed. The case is stated in the opinion.

Mr. William E. Simonds for appellant.

Mr. Henry Grasse for appellee.

MR. JUSTICE JACKSON delivered the opinion of the court.

This is a suit in equity, in the usual form, for the alleged infringement of letters patent No. 267,192, issued to the

appellant, James M. Grant, on the 7th of November, 1882, for "certain new and useful improvements in the art of reeling and winding silk and other thread." The bill averred that the defendant had infringed the patent by making, using, vending and putting in practice, without complainant's license, improvements described and claimed in the patent. The prayer was for an injunction and for an account of profits and damages. The answer set up, amongst other defences not necessary to be noticed, a denial that Grant was the original inventor of the improvements described in the patent; that there was a want of novelty in the invention, and a prior use of the improvements claimed as patentable by various designated parties. Replication was duly filed, proof taken, and the court below, upon the hearing of the cause, found in favor of the defendant, and accordingly dismissed the bill. 38 Fed. Rep. 594. From this decree the present appeal is prosecuted, and the appellant assigns for error the lower court's "denial of patentability to the skein which Grant claims, while awarding it to the process which he does not claim." The court, however, did not decide that it was a valid process-patent, but suggested that if the improvement was a valid invention it was in the process and not in the product.

The material parts of the specification and the claims based thereon are as follows:

"My invention relates to a novel manner of winding silk or other thread upon the reels in a reeling-machine preparatory to its being dyed.

"The object of my invention is to provide an improved skein of silk whereby a greater quantity can be reeled upon the same machine in a given time, and to provide at the same time for making these skeins in a proper form to receive the dye in the best manner, and be ready after the dyeing to be placed upon the swift for unwinding upon bobbins in the customary manner.

"In the present method of manufacturing silk the thread, previous to dyeing, is wound into skeins upon a reeling-machine, in which some twenty or more small skeins containing generally one thousand yards, or less, are wound upon

a set of parallel bars set around an axis forming a long reel. Each skein is tied up by itself, and the reel is taken down or collapses to release the separate skeins. These small skeins are then dyed and then placed separately upon swifts to again unwind them. Larger skeins than above named have been found inconvenient, if not impracticable, on account of becoming tangled in the dyeing and difficult to unwind. By means of my improvement I am enabled to wind skeins of twenty-four thousand yards, or more, in each separate skein upon the reels, thus saving a great amount of labor in taking down the reels to remove the skeins, and the larger skeins wound in my improved manner can be placed at once upon the swifts and unwound without difficulty.

"My improvement consists in winding the silk or other thread upon the reel in the form of a wide band, in which the thread crosses from side to side as it is wound, somewhat in the manner now employed, but so arranged as not to form single skeins by passing one layer over the other. I prefer to have the thread cross in five-sixths of one revolution of the reel, although other proportions will answer. When the required quantity has been wound, I lace the skein or band, before it is removed from the reel, in one or more places, generally on opposite sides of the reel, so as to divide it into a number of parts and hold it in its flat or band-like condition. This lacing constitutes the chief point of my invention, and is what preserves the skein in its shape, and prevents its becoming entangled in the process of dyeing. After lacing, the skein is removed from the reel, and passes into the hands of the dyer. After winding in the manner above described the skein is so laid, one thread crossing the other, that its texture is more open even than the small skeins wound in the ordinary manner, and although much larger the dye easily penetrates to every part and insures a uniform color. The several threads cannot become matted together, as with the ordinary skein wound in the customary manner.

"By means of my invention a great saving is made in the expense of manufacture, the waste of silk is greatly reduced, and less skill is required in the winding after the dyeing,

thereby dispensing with the high-priced skilled operatives now employed upon this work.

"What I claim as my invention is:

"(1.) A skein of silk, or other thread, wound upon a reel diagonally from side to side, in the manner described, and laced back and forth across its width to preserve its form, substantially as set forth.

"(2.) The combination of the lacing B with a wide skein of silk or other thread in which the strands are diagonally crossed, substantially as described."

At the hearing of the case a disclaimer was filed in the Patent Office by the appellant "to so much of said claim as does or might make such claim apply to a skein which by reason of being coated with gum, or by reason of the manner of its lacing, or for any other reason, is not in condition for dyeing for ordinary manufacturing purposes." By stipulation of the parties it was provided "that this disclaimer may be made a part of the record in this suit, *nunc pro tunc*, as of the date of hearing thereof, as if the same had been filed on that date, to indicate the willingness of the complainant to limit his patent by said disclaimer, and as an aid in the construction of his patent, but without prejudice to the rights of this defendant on the question of delay in filing said disclaimer."

The Circuit Court held that the claims of the patent covered a product and not a process, and that the patent was void for want of patentable novelty, for the reason that the form of skein described in the specification and covered by the claims was well known and in use long prior to Grant's invention, which consisted in the method of dyeing and winding silk by the use of such well-known form of skein and not in the skein itself, and if valid to any extent, it was only upon the process. The court further held that the disclaimer could neither operate to give validity to the patent for the skein, nor change it into one for the process, and accordingly dismissed the bill.

As found by the Circuit Court, the evidence fully and clearly established the fact that skeins of silk diagonally reeled and laced across the width, so as to separate the skein into two or more sections, were in use and well known to the silk trade

long prior to Grant's improvement. The form of such skeins was substantially the same as that adopted by Grant. These anticipating skeins were in their construction similar to the construction of the skeins of the patent. They were produced in the same manner by the horizontal to-and-fro motion of a guide-bar for carrying the thread in front of the reel as the latter revolved, thus causing the diagonal or cross-reeling in the formation of the skein. They were laced into two or three sections across their width. The object and purpose of this diagonal reeling and lacing was to preserve the form of the skein and to prevent entanglement and snarling in the handling and future winding of the silk. These old skeins were made of raw silk, that is, silk coated with or carrying the silkworm's gum, and were smaller in size, and more tightly laced across their width than the Grant skeins in question. The diagonal reeling was somewhat wider in the skein of the patent than in the old skeins. The raw silk having a more delicate thread and much more liable in handling to become entangled, and therefore less easily wound than when the silk had been brought to a condition of thread, necessitated this cross-reeling and lacing to preserve the form of the skein and to facilitate the transportation and future handling of the silk in its further development in the process of manufacturing. Nor could the raw silk be dyed, because the filaments would separate, the gum which holds them together would be dissolved out, so that they would become snarled or entangled without this cross-reeling and lacing in the process of ungumming, and could not be subsequently wound without great difficulty and loss. It had to be first "boiled off," as it is called, or the gum removed, by being immersed for some period in soap and water or other liquid.

The process of manufacturing silk thread is thus described by a witness for the complainant:

"The silk in the shape in which it is formed by the silkworm exists in the shape of cocoons. These cocoons in the countries in which silk is grown are soaked in a suitable bath, and the filaments of silk that compose the cocoons are unwound from the cocoons and formed in skeins on reels or

swifts. In this shape it forms the raw silk of commerce and is imported into America in large quantities, mostly from Europe and Asia. The skeins of raw silk are treated by the manufacturer of silk thread (I do not mean by this term 'thread' sewing silks and braids only, but rather that known as tram and organzine that is used in making textile fabrics) usually as follows: The raw silk is ungummed; it is dried to a sufficient degree, and is then, in skein form, put on swifts, from which it is wound on to spools or bobbins. The silk, according to the use to which it is to be put, is further doubled, in which operation it goes from spool to spool, is twisted, in which operation it goes from spool to spool, and when of sufficient size as to number of threads and of condition as to twisting it is reeled from the spool or bobbin into skein form. In this skein form it is dyed, and with the old form of skeins is then parted to separate the several small skeins that compose the larger skein, such as I now produce, and is then put on 'risers,' so called, and wound on to bobbins, in which shape the silk is used usually in the manufacture of textile fabrics. I will state that the 'risers,' as used in this old process of manufacture that I am describing, consisted of two small drums or pulleys, usually of about five or six inches in diameter, and that the skein was wound from these 'risers.'

"In this art the term 'winding' means the changing of the silk from the skein form to its form on a bobbin or spool, and by 'reeling' is meant the putting of the silk into the skein form."

The contention of the appellant is that the skein of the patent should be considered in connection with the specification and knowledge of the art possessed by the persons to whom the specification is addressed, and if the prior art requires limitations in order to leave validity in the patent, then it is right and proper for the court to read such limitations into the claims by construction, and on the basis of this proposition it is urged that Grant's skein differed from the earlier skeins shown by the testimony in at least two particulars: First, that the earlier skeins were gummed, and Grant's skeins are ungummed, which prevented the former from being dyed,

while the latter can be; and, secondly, that the earlier skeins were laced tightly for the purposes of transportation and handling, while Grant's skeins are laced loosely so that they are in a condition for dyeing. The Grant skein is shown to be an improvement over the earlier skeins for the purposes of dyeing, but neither the specification nor the claims of the patent limit it to that purpose. The disclaimer undertakes so to do, or rather to limit it to a condition in which the skein may be dyed.

The court below properly held that the disclaimer did not give any increased validity to the patent for the skein, or change it into one for a process. And the simple question presented is whether Grant's skein possesses features of patentable novelty over the earlier skeins shown by the testimony. The cross-reeling and lacing in the skein of the patent perform substantially the same function in substantially the same way as in the earlier skeins, but at a later and different stage or condition of the silk thread forming the skein. It is perfectly manifest that if a patent had existed on the earlier skein, the skein of the patent would be an infringement thereof, as being simply for a double or analogous use. Such analogous use, under the authorities, is not patentable. *Brown* v. *Piper*, 91 U. S. 37; *Pennsylvania Railroad* v. *Locomotive Truck Co.*, 110 U. S. 491; *Miller* v. *Foree*, 116 U. S. 22; *Dreyfus* v. *Searle*, 124 U. S. 60. And the same result must follow, although the earlier skein is not patented, if it embodies substantially the same form, and for a like use.

The function and purpose of the prior skein and the patented device were exactly analogous, operated in the same way, and were serviceable in both cases to preserve the skein from entanglement, the patented skein being applicable to a later stage of the thread. This, within the principle announced in *Smith* v. *Nichols*, 21 Wall. 112, would constitute simply a mere carrying forward or extended application of the original device with the change only in degree, but doing substantially the same thing in the same way by substantially the same means with some better results, and would not, therefore, be patentable.

The difference insisted upon in support of the patent, that the looser lacing of the skein across the band to preserve its form and keep it in condition suitable for dyeing the thread, is clearly a matter of mechanical skill which does not involve invention. It is said by one of complainant's witnesses that such loose lacing, as is insisted upon as a requisite for effective dyeing, is neither shown in the drawings, nor in the specification nor claims, but that it should be read into the patent, because "a man that understands his business must know that it must be laced loosely or that the silk would be spoiled in dyeing," and that, if this were not noticed or not known, it would be taught him by the first experiment. It is perfectly evident that it would readily occur to any one skilled in the art that, as the skeins are increased in size or width of band, the necessity for lacing in order to preserve the form and keep the skein in a condition for dyeing would be correspondingly increased, and that the looser the lacing the more perfect would be the dyeing. Such changes in degree, merely, would not constitute an invention. *Estey* v. *Burdett*, 109 U. S. 633.

It is settled that distinct and formal claims are necessary to ascertain the scope of the invention. *Merrill* v. *Yeomans*, 94 U. S. 568; *Western Electric Co.* v. *Ansonia Brass & Copper Co.*, 114 U. S. 447.

If, therefore, the elements of "boiling off," or ungumming the silk, or the dyeing thereof, and of improving the winding facility, were patentable, in view of the prior skeins, they should have been covered by the claims of the patent. *James* v. *Campbell*, 104 U. S. 356, and authorities cited above.

The disclaimer takes away nothing from the claims except what is not in condition for dyeing, and no silk thread is in condition for dyeing by simply being cross-reeled and laced. The patent, notwithstanding the disclaimer, is still for an old device of a cross-reeled and laced skein for whatever purpose it may be designed, and is void for want of patentable novelty. The counsel for the appellant, while claiming the benefit of his disclaimer, and insisting that Grant's skein is distinguishable from the earlier anticipating skeins, for the reason that the latter were coated with gum and were not loosely laced, states that

Opinion of the Court.

"Grant's specification addresses its direction wholly to the skein-maker, never to the dyer. It says: 'My invention relates to a novel manner of winding silk or other thread upon the reels in a reeling machine preparatory to its being dyed.' . . . 'My improvement consists in winding the silk or other thread upon the reel in the form of a wide band.' . . . 'When the required quantity has been wound, I lace the skein or band . . . so as to divide it into a number of parts and hold it in its flat or band-like condition.' Grant had a clear idea of the real nub of his invention. He says: 'This lacing constitutes the chief point of my invention, and is what preserves the skein in its shape and prevents its becoming entangled in the process of dyeing.' Grant gives no instruction to the dyer or the winder, for the simple reason that in dyeing his skein and afterwards winding it upon bobbins the procedure is identical with the procedure of the old art. *All that is novel is found in the skein*, and that answers the question, Is Grant's improvement a skein or a process? That answer is: Grant's improvement is a new skein." So that the whole invention must be tested by the simple question whether the looser lacing for the purpose of dyeing, over the more tightly laced skeins for the purpose of preserving their form and winding qualities, while being "boiled off" or ungummed, constitutes a patentable invention. Considering the purpose for which it is now claimed, it cannot be anything more than a mere application of an old process to a new use, which does not rise to the dignity of invention, the looser lacing for the purposes of dyeing being perfectly apparent to any one skilled in the art of silk manufacture, or in the preparation of thread for that purpose. But while it is thus claimed that the Grant specification addresses itself to the direction wholly of the skein-maker, and never to the dyer, the disclaimer undertakes to confine such direction solely to the dyer, rather than to the skein-maker, as the effect of the disclaimer is intended to exclude skeins "which, by reason of being coated with gum or by reason of the manner of its lacing or for any other reason, is not in condition for dyeing for ordinary manufacturing purposes." So that, under the operation of the disclaimer,

the specification and claims would have to be read as addressed to the dyer rather than to the skein-maker. This would involve a complete change of what was covered by the specification and claims, which must be held controlling.

The most that can be said of this Grant patent is that it is a discovery of a new use for an old device which does not involve patentability. However useful the nature of the new use to which the skein is sought to be confined by the disclaimer, compared with the former uses to which the old skein was applied at the date of the improvement, it forms only an analogous or double use, or one so cognate and similar to the uses and purposes of the former cross-reeled and laced skein as not to involve anything more than mechanical skill, and does not constitute invention, as is well settled by authorities already referred to.

The advantages claimed for it, and which it no doubt possesses to a considerable degree, cannot be held to change this result, it being well settled that utility cannot control the language of the statute, which limits the benefit of the patent laws to things which are new as well as useful. The fact that the patented article has gone into general use is evidence of its utility, but not conclusive of that and still less of its patentable novelty. *McClain* v. *Ortmayer*, 141 U. S. 419, 425, and authorities there cited.

Our conclusion is that there was no error in the decree of the court below, and the same is accordingly

Affirmed.

KREMENTZ *v.* THE S. COTTLE COMPANY.

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

No. 161. Argued and submitted March 23, 1893. — Decided April 10, 1893.

Letters patent No. 298,303, issued May 6, 1884, to George Krementz for a new and improved collar button, protect a patentable invention, which was not anticipated by the invention described in letters patent No. 171,882

issued to Robert Stokes January 4, 1876, nor by the invention described in letters patent No. 177,253, issued May 9, 1876, to John Keats.

When the other facts in the case leave the question of invention in doubt, the fact that the device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, is sufficient to turn the scale in favor of invention.

IN EQUITY to restrain the infringement of letters patent. Decree dismissing the bill, from which plaintiff appealed. The case is stated in the opinion.

Mr. Louis C. Raegener and *Mr. Charles E. Mitchell* for appellant.

Mr. Edwin H. Brown, for appellee, submitted on his brief.

MR. JUSTICE SHIRAS delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing a bill filed to restrain the infringement of letters patent of the United States, No. 298,303, granted May 6, 1884, to George Krementz, of Newark, New Jersey, for a new and improved collar button.

Complainant's evidence, tending to show that the collar button made by the defendants was within the claim of the patent in suit, and constituted an infringement, was not contradicted or disputed, but it was held by the court below that the patent was invalid for want of novelty. 39 Fed. Rep. 323.

In his specification the patentee states that his invention consists in a collar button having a hollow head and stem, the said button being formed and shaped out of a single continuous plate of sheet metal. The method or process of making the button is thus described:

"By means of suitable dies a metal plate is pressed into the shape shown in Figure 2 — that is, the plate is provided with a hollow stem, B, the sides of which are pressed together at about the middle, in some suitable manner, to form a head, C, at the end of the stem, as in Figure 3; then the head is pressed toward the base plate or back, D, whereby the head will be upset, and will have the shape shown in Figures 4 and 5. By

this operation the head is hardened. The base plate or back, D, is then rounded out and finished, and its edge is turned over, as shown in Figure 5."

In the accompanying diagram Figure 1 is a side view of the completed button. Figures 2, 3, 4 and 5 are cross-sectional elevations of the same in the different stages of the operation of making it.

Fig. 1.

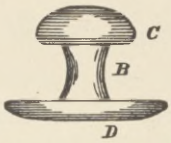


Fig. 2

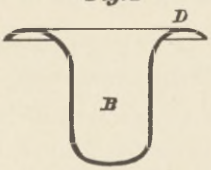


Fig. 3.

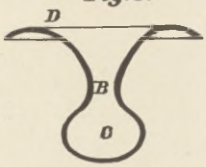


Fig. 4.

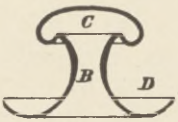
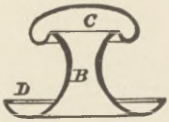


Fig. 5.



The advantages attributed to the invention are the doing away with soldered joints, the lightness of the hollow stem and head as compared with buttons having solid stems and head, and the cheapness arising from the use of less material, with equal or superior strength, which, when gold is used, is quite appreciable.

The learned judge in the court below contented himself with comparing Krementz's invention with two earlier patents, one to Stokes, No. 171,882, granted January 4, 1876, and one to Keats, No. 177,253, granted May 9, 1876, in which patents, he thinks, are to be found the special features claimed by Krementz.

Opinion of the Court.

The Stokes patent was for an improvement in making a stud fastening known as Thomson's unbreakable busk fastening, and whereby, instead of fastening the parts of the stud together by rivets, the entire busk was made out of one piece of metal, by striking up or raising the stud out of a strip of malleable sheet metal. The structure thus produced is a solid rivet-like and flat head, intended to resist a great strain, and evidently not designed to be used as a collar button where a well-defined round head, adapted to be used where there is no strain, is necessary and essential.

In the Keats process the button is not made of a continuous piece of sheet metal, but has side seams in the post, and has a base plate composed of two separate parts, and the head is open on the under side. It could not be used as a collar button, but is intended to be permanently fastened either to eyelet holes, or to the fabric with which it is connected.

We cannot see in these devices, taken separately or together, an anticipation of the Krementz button. Indeed, the court below concedes that "Krementz was the first to make a stud from a single continuous piece of metal in which the head was hollow and round in shape."

The learned judge was, however, of the opinion that "any competent mechanic, versed in the manufacture of hollow sheet-metal articles, having before him the patents of Stokes and Keats, could have made these improvements and modifications, without exercising invention, and by applying the ordinary skill of the calling."

It is not easy to draw the line that separates the ordinary skill of a mechanic, versed in his art, from the exercise of patentable invention, and the difficulty is specially great in the mechanic arts, where the successive steps in improvements are numerous, and where the changes and modifications are introduced by practical mechanics. In the present instance, however, we find a new and useful article, with obvious advantages over previous structures of the kind. A button formed from a single sheet of metal, free from sutures, of a convenient shape, and uniting strength with lightness, would seem to come fairly within the meaning of the patent laws.

The tools to be used in making the button are not described, but they are not claimed to be new. And the method or process of manufacture is described with sufficient particularity to enable any one skilled in the art to follow it. Buttons made of several pieces are liable to break at the soldered joints, and it is stated by an experienced witness that the metal by the process of soldering becomes soft and liable to bend. The different pieces are set together by hand, and are not always uniform or put together truly.

The view of the court below, that Krementz's step in the art was one obvious to any skilled mechanic, is negatived by the conduct of Cottle, the president of the defendant company. He was himself a patentee under letters granted April 16, 1878, for an improvement in the construction of collar and sleeve buttons, and put in evidence in this case. In his specification he speaks of the disadvantages of what he calls "the common practice to make the head, back and post of collar and sleeve buttons separate, and to unite them by solder." His improvement was to form a button of two pieces, the post and base forming one piece, and then soldering to the post the head of the button as the other piece. Yet, skilled as he was, and with his attention specially turned to the subject, he failed to see, what Krementz afterwards saw, that a button might be made of one continuous sheet of metal, wholly dispensing with solder, of an improved shape, of increased strength, and requiring less material.

It was also made to appear that the advantages of the new button were at once recognized by the trade and by the public, and that very large quantities have been sold.

The argument drawn from the commercial success of a patented article is not always to be relied on. Other causes, such as the enterprise of the vendors, and the resort to lavish expenditures in advertising, may coöperate to promote a large marketable demand. Yet, as was well said by Mr. Justice Brown, in the case of *Consolidated Brake-Shoe Co.* v. *Detroit Co.*, 47 Fed. Rep. 894, "when the other facts in the case leave the question of invention in doubt, the fact that the device has gone into general use and has displaced other devices which

had previously been employed for analogous uses, is sufficient to turn the scale in favor of the existence of invention."

Loom Co. v. *Higgins*, 105 U. S. 580, 591, was a case where the patented device consisted in a slight modification of existing mechanism, and it was contended that this slight change did not constitute a patentable invention; but this view did not prevail, the court saying:

"It is further argued, however, that supposing the devices to be sufficiently described, they do not show any invention; and that the combination set forth in the fifth claim is a mere aggregation of old devices already well known; and therefore it is not patentable. This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed, — one which would occur to any mechanic skilled in the art. But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not for years occur in this light to even the most skilful persons. It may have been under their very eyes; they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. Who *was* the first to see it, to understand its value, to give it shape and form, to bring it into notice and urge its adoption, is a question to which we shall shortly give our attention. At this point we are constrained to say that we cannot yield our assent to the argument, that the combination of the different parts or elements for attaining the object in view was so obvious as to merit no title to invention. Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result never attained before, it is evidence of invention. It was certainly a new and useful result to make a loom produce fifty yards a day when it never before had produced more than forty; and we think that the combination of elements by which this was effected, even if those elements were sepa-

rately known before, was invention sufficient to form the basis of a patent."

Consolidated Valve Co. v *Crosby Valve Co.*, 113 U. S. 157; *Magowan* v. *New York Belting Co.*, 141 U. S. 332; *Barbed Wire Patent*, 143 U. S. 275; *Gandy* v. *Main Belting Co.*, 143 U. S. 587, are all to the same effect.

In the very recent case of *Topliff* v. *Topliff*, 145 U. S. 156 163, 164, where there was a contest between two patents, with but a slight difference between them, the court said:

"Trifling as this deviation seems to be, it renders it possible to adapt the Augur device to any side-spring wagon of ordinary construction. While the question of patentable novelty in this device is by no means free from doubt, we are inclined, in view of the extensive use to which these springs have been put by manufacturers of wagons, to resolve that doubt in favor of the patentee and sustain the patent." We think, therefore, we are within the principle and reasoning of these cases in reversing the decree of the court below dismissing the bill and in remanding the record, with directions to proceed in the case in conformity with this opinion.

Reversed.

UNITED STATES *v.* UNION PACIFIC RAILWAY COMPANY.

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

No. 149. Argued March 20, 21, 1893. — Decided April 10, 1893.

The right conferred by the act of July 1, 1862, 12 Stat. 489, c. 120, as subsequently amended, upon the corporation afterwards known as the Union Pacific Railway Company, Eastern Division, to construct its road substantially in a direct line to Denver, and from thence northerly, to connect with the Union Pacific Railroad at Cheyenne, and to acquire a grant of public lands thereby upon each side of its railroad as constructed, was not affected by the act of March 3, 1869, 15 Stat. 324, c. 127, in such a way as to make the Union Pacific, Eastern Division, terminate at Denver, and

Statement of the Case.

to cause its land grants to terminate there; but, on the contrary, the act of 1862, being a grant *in præsenti*, the Company's right to lands upon each side of its road became fixed from the moment it proceeded, under the act of 1866, to establish its line of definite location so as to make the same extend from Kansas City westwardly to Denver, and thence northwardly to Cheyenne, and the act of 1869 is not to be construed as breaking the continuity of the line.

If there were any doubt with regard to the interpretation of the act of 1869, the construction placed upon it by the Land Department for eighteen years, under which lands have been put upon the market and sold, would be entitled to considerable weight.

This case arose upon demurrers and a plea to a bill in equity filed by the United States against the Union Pacific Railway Company, and 173 other corporations and individuals, to procure the surrender and cancellation of certain land patents issued to the Kansas Pacific Railway and the Denver Pacific Railway and Telegraph Company, and for a decree declaring all conveyances of such lands clouds upon the title of the United States.

The bill averred in substance that, by an act of Congress of July 1, 1862, 12 Stat. 489, c. 120, incorporating the Union Pacific Railroad Company, such company was authorized to construct a road from a point on the one hundredth meridian longitude, between the south margin of the valley of the Republican River and the north margin of the valley of the Platte River, in the Territory of Nebraska, to the western boundary of Nevada, and was granted every odd-numbered section of land amounting to *five* alternate sections of land per mile, afterwards extended to *ten* sections by the act of July 2, 1864, 13 Stat. 356, c. 216, on each side of said railroad, on the line thereof, and within the limits of *ten* miles, (subsequently increased to *twenty*,) on each side of the road; and that whenever the company should have completed *forty* consecutive miles of its road, (afterwards reduced to *twenty*, by the same act of 1864,) patents should issue for such public lands as had been granted to it, and had been earned in accordance with the provisions of the act.

By the same act it was further provided that the Leavenworth, Pawnee and Western Railroad Company, which had

been chartered by the Territory of Kansas, in 1855, was authorized to construct a line of road from the Missouri River, at the mouth of the Kansas River, to the aforesaid point, on the one hundredth meridian. The corporate name of the said Leavenworth, Pawnee and Western Railroad Company of Kansas was, subsequently to the passage of this act, changed to that of the Union Pacific Railway Company, Eastern Division.

On July 3, 1866, Congress passed another act, 14 Stat. 79, c. 159, amending those of July 1, 1862, and July 2, 1864, and providing that the Union Pacific Railway Company, Eastern Division, should be authorized to so change the line of its definite location as to connect with the Union Pacific Railroad at a point not more than fifty miles westward from the meridian of Denver in Colorado.

The bill further averred that after the passage of this act of July 3, 1866, the Union Pacific Railway Company, Eastern Division, so changed its line of definite location as to make the same extend from its point of beginning at Kansas City, Missouri, westward, and substantially in a direct line to the city of Denver, Colorado, and from that point northward and substantially in a direct line to a connection with the Union Pacific Railroad at Cheyenne, Wyoming, and proceeded to build its road on that line towards Denver.

Before the Union Pacific had completed its line to Denver, and on March 3, 1869, Congress passed another act, 15 Stat. 324, c. 127, authorizing the Union Pacific Railway Company, Eastern Division, to contract with the Denver Pacific Railway and Telegraph Company, a Colorado corporation, for the construction, operation and maintenance of that part of its line of railroad and telegraph between Denver and its point of connection with the Union Pacific Railroad at Cheyenne, and to adopt the road-bed already graded by the said Denver Pacific Railway and Telegraph Company as said line, and to grant to said Denver Pacific Railway and Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all its rights and privileges subject to all the obligations pertaining to said part of its line. It was also made the

duty of such road to extend its railroad and telegraph to a connection at the city of Denver, so as to form with that part of its line herein authorized to be constructed a continuous line of railroad and telegraph from Kansas City, by way of Denver, to Cheyenne. It was further declared, section 2, that "all the provisions of law for the operation of the Union Pacific Railroad, its branches and connections, as a continuous line, without discrimination, shall apply the same way as if the road from Denver to Cheyenne had been constructed by the said Union Pacific Railway Company, Eastern Division." It was further provided that each of said companies should receive patents to alternate sections of land along their respective lines of road, as therein defined, in like manner and within the same limits as provided by law in the case of lands granted to the Union Pacific Railway Company, Eastern Division. Upon the same day, a joint resolution was passed, 15 Stat. 348, authorizing the Union Pacific Railway Company, Eastern Division, to change its name to the Kansas Pacific Railway Company.

In pursuance of these acts the new Kansas Pacific Railway Company entered into a contract with the Denver Pacific of the nature and for the purpose set out and authorized by the acts, and, in pursuance thereof, the Kansas Pacific completed its line to Denver, and the Denver Pacific completed its line from Denver to Cheyenne.

The bill thereupon charges that, in procuring the passage and accepting the terms of the act of March 3, 1869, the Kansas Pacific abandoned its intention of building a line of road to connect with the Union Pacific at Cheyenne, and, therefore, that Denver became the terminus of its road, and the company surrendered all its rights to that portion of the land grant lying beyond its terminus at Denver, and, by operation of this act, sections of public land within prescribed limits were granted to the Denver Pacific as a new and independent grant; that the Kansas Pacific and the Denver Pacific having completed their lines of road, they respectively became entitled to certain portions of the land grant independently of each other, notwithstanding the fact that, through their con-

nections at Denver, they formed a continuous line of railway from Kansas City to Cheyenne; and their rights to public lands, under the several acts aforesaid, extended only laterally along the lines of said roads respectively, and were comprised and limited by lines drawn through the terminus of each of said roads at right angles to the general direction of the lines of said roads. The bill then referred to a map, Exhibit A, as showing the lines of said roads as connected at the city of Denver, their general courses and directions as they extend eastwardly and northwardly from the city of Denver, and the lines by which the rights of said respective companies to public lands, under the acts aforesaid, are limited; that west of the legal terminal limit of the Kansas Pacific land grant, and south of the legal terminal limit of the Denver Pacific land grant, lies a large triangular tract of land of about 200,000 acres, substantially within a radius of 20 miles of the point of connection of the two roads at Denver, which the bill alleges was not within the legal limit of the land grant to either of the two companies, and to the odd-numbered sections of which they asserted claim, and for which they procured patents from the Interior Department, the surrender and cancellation of which said patents it was the object of the bill to secure.

The bill further alleged the consolidation, in January, 1880, of the Kansas Pacific and the Denver Pacific and the Union Pacific Railroad Company into one corporation, under the corporate name of the Union Pacific Railway Company, which became the successor in interest of the three prior corporations; that certain persons, who were made defendants to the bill, claimed title to certain lands of this tract by direct or mesne conveyances from these companies, of the exact nature of which titles plaintiff is ignorant; that, under an act of March 3, 1887, providing for the adjustment of land grants made by Congress to aid in the construction of railroads, etc., the Secretary of the Interior ascertained that the lands described in the bill had been erroneously and illegally patented, as herein set out, and thereupon made a demand upon the Union Pacific Railway Company, as successor in interest to

the others, for a reconveyance of the tracts of land so erroneously patented, which was refused.

The persons claiming title under these patents having been made parties to the bill, it prayed that the patents and other outstanding deeds and other evidences of title be decreed to be void and surrendered for cancellation as clouds upon the plaintiff's title, and for such other relief as might seem proper.

To this bill demurrers were filed by most or all the defendants, except one Standley, who filed a plea setting up divers statutes and decisions in the land office upon which it is claimed the patents rested, but which need not be specifically stated. Upon the hearing upon these demurrers and plea, the court made an order sustaining them, 37 Fed. Rep. 551, and the plaintiff having elected to stand by its bill as originally filed, it was further ordered that the same be dismissed. Thereupon the plaintiff appealed to this court.

Mr. Assistant Attorney General Maury for appellant.

Mr. John F. Dillon, (with whom was *Mr. Harry Hubbard* on the brief,) for the Union Pacific Railway Company and Joseph Standley.

Mr. Oscar Reuter filed a brief for Joseph Standley and others.

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

The object of this bill is to procure the surrender and cancellation of certain patents issued for a triangular tract of land of about 200,000 acres in extent, lying upon the outside of the right angle, or elbow, made by the junction at Denver of the Kansas Pacific Railway, whose general course is east and west, with the Denver Pacific Railway and Telegraph Company, whose general course is north and south. These roads are now consolidated under the name of the Union Pacific Railway Company.

By the original act of July 1, 1862, incorporating the Union Pacific Railroad Company, 12 Stat. 489, c. 120, this company was empowered to construct a road from a point on the one hundredth meridian, between certain north and south limits, to the western boundary of Nevada, and by the same act a Kansas corporation was empowered to construct its line from the Missouri River westwardly to the initial point of the Union Pacific at the one hundredth meridian, and to connect with the latter road at that point. Subsequently, and in 1866, the Kansas corporation, whose name had meantime been changed to the Union Pacific, Eastern Division, was authorized to so change its line as to connect with the Union Pacific at a point not more than fifty miles westward from the meridian of Denver. Acting upon this, the company did change its line so as to make the same extend from Kansas City westward in a direct line to Denver, and thence northward in a direct line to Cheyenne. By the original act, the Union Pacific was to receive a grant of five alternate sections of land for every mile, (subsequently raised to ten,) on each side of the road, and as the Kansas corporation was to construct its road "upon the same terms and conditions in all respects" as the Union Pacific, it followed that it was entitled to the same land grant. The act authorizing the Kansas corporation to change its line of road, 14 Stat. 79, c. 159, provided that, upon the filing of a map, showing the general route of the road, the lands along the entire line thereof, so far as the same might be designated, should be reserved from sale by order of the Secretary of the Interior, showing clearly that it was designed to preserve the land grant to which the road was entitled under the original act.

In this condition of things the act of 1869 was passed, which authorized this corporation, then known as the Union Pacific, Eastern Division, to contract with the Denver Pacific, a Colorado corporation, for the construction of that portion of its line between Denver and Cheyenne, (hereby clearly recognizing the validity of the change of location,) to adopt its road-bed, to grant to the Denver Pacific a "perpetual use of its right of way and depot grounds, and to transfer to it

all the rights and privileges, subject to all the obligations appertaining to such part of its line." Even supposing that the act of 1866 did not, upon its face, authorize the change that was actually made, that is, westwardly to Cheyenne, by the way of Denver, it is clear that, by the act of March, 1869, this line was recognized as a proper compliance with the act of 1866, and as a valid and continuous line from Kansas City to Cheyenne.

The position of the government in this connection is that the act of 1869 separated the grant of lands to the Denver Pacific from that in aid of the Eastern Division of the Union Pacific, and thereby made them two distinct and independent lines of road, each with its own land grant. This construction would disentitle the Kansas Pacific Company to any lands west of its terminus at Denver, or west of a north and south line across its twenty-mile limit, and the Denver Pacific to any lands south of its terminus at the same place, leaving a triangular piece of about 200,000 acres to revert to the government. These are the lands in dispute.

We do not, however, so read the act. It did not declare that the Union Pacific, Eastern Division, should end at Denver or that the Denver Pacific should begin at Denver, but simply that the former might contract with the latter for the construction, operation and maintenance of a part of its line. Under the interpretation contended for, if that part had been between the one hundredth meridian and Denver, instead of between Denver and Cheyenne, it would thereby have made it a distinct and independent line of road, though running in the same direction.

It is true that, under the original act of 1862, the grant was limited to the odd-numbered sections "on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road," but it does not follow that if the road makes a curve or right angle, the grant ceases in any way to be operative at that point. The railroad is entitled to its grant of ten alternate sections to each mile of road, and is entitled to have it selected within the limits of twenty miles on each side; but there is no requirement that

the lands shall be reached by a line run at right angles to the road. Considerable light is thrown upon the interpretation of the statute of 1869 by the phraseology of section 2, which provides that the Union Pacific, Eastern Division, shall extend its line to Denver, "so as to form with that part of its line herein authorized to be constructed" by the Denver Pacific "a *continuous line* of railroad and telegraph from Kansas City, by way of Denver, to Cheyenne," and that "all the provisions of law for the operation of the Union Pacific Railroad, its branches and connections, as a *continuous line*, without discrimination, shall apply the same as if the road from Denver to Cheyenne had been constructed by the Union Pacific Railway Company, Eastern Division." So far from this language indicating that this was not to be considered a single line, it is difficult to see how Congress could have expressed more clearly, by inference, that they were not to be treated as independent roads. This construction is also reinforced by the amendatory act of June 20, 1874, 18 Stat. 111, which provides that "for all the purposes of said act," (of 1862,) "and of the acts amendatory thereof, the railway of the Denver Pacific Railway and Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad, to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March third, 1869."

Indeed, it is difficult to avoid the conclusion that the act of 1862, being a grant *in præsenti*, the rights of the Union Pacific, Eastern Division, to the lands upon each side of its road became fixed from the moment it proceeded, under the act of 1866, to establish its line of definite location so as to make the same extend from Kansas City westwardly to Denver, and thence northwardly to Cheyenne; and, in fact, that was practically the ruling of this court in *Missouri, Kansas &c. Railway* v. *Kansas Pacific Railroad Company*, 97 U. S. 491, 496, 497, 498. But however this may be, it is entirely clear that the act of 1869 should not be construed to have the effect of breaking the continuity of the line unless its language impera-

tively requires it. So far from this being the case, the very title of the act, "to authorize the transfer of lands," granted to the Union Pacific, to the Denver Pacific, "and to expedite the completion of railroads to Denver," indicates that it was never intended to operate as a forfeiture, or as a reduction in amount, of any lands to which the Union Pacific, Eastern Division, had become entitled by filing its line of definite location, or to create distinct lines of road, but was merely designed to permit the Union Pacific to contract with the Denver Pacific for the construction, operation and maintenance of a portion of its line. It is true that by the 3d section, which authorizes the "said companies" to mortgage "their respective portions of said road," and provided that "each of said companies shall receive patents to the alternate sections of land along their respective lines," the two *corporations* were thereby recognized as independent, yet, at the same time, it recognized them as two corporations engaged in the construction of the same line of road, and evidently contemplated a division between them of the land grant appropriated to such line. The special proviso of section 3 was doubtless inserted to entitle the Denver Pacific to take patents for its portion of the land granted, direct from the United States.

In addition to all this, the facts set forth in the plea of Joseph Standley, which, for the purposes of this case, may be taken as true, indicate very strongly an acquiescence of the Interior Department from the date of the act of March 3, 1869, down to December, 1887, a period of over eighteen years, in the construction of the act contended for by the defendant. The plea set forth that, in compliance with the act of 1866, the Union Pacific, Eastern Division, filed with the Secretary of the Interior a map of the *general route* of its line, from the western boundary of Kansas, through Denver, to Cheyenne, and that the Secretary of the Interior on the same day directed the withdrawal of lands in Colorado on the designated line of said route; that, in pursuance of said direction, the Commissioner of the Land Office prepared a diagram showing the line of route, and the map of the land grant, and forwarded the same to the register and receiver of the land office at Denver,

directing the odd-numbered sections to be withdrawn on account of this grant; that, included in said diagram, are all the lands mentioned in the bill; that these lands were so withdrawn in accordance with these instructions; that this map of the general route was the only one ever filed; that the directions to withdraw these lands were never vacated; that on August 21, 1869, the Denver Pacific filed its map of definite location of the section between Denver and Cheyenne, which was approved by the Secretary of the Interior; that on May 26, 1870, the Kansas Pacific also filed its map of definite location between the boundary of Kansas and Denver, which was approved by the Secretary of the Interior; that, under his directions, the Commissioner of the General Land Office prepared maps showing the limits of the land grants; that, included in these maps, were all the lands described in the bill; and that in 1870, a contest having arisen between the two roads as to the ownership of certain sections, an adjustment was had by the Department of the Interior of their several rights.

The plea further avers that, in 1873, in a case then pending in the General Land Office between the Kansas City Pacific and one William Hodge and John Tracy, the Commissioner of the Land Office formally decided that the act of 1869 did not sever the original grant to the Union Pacific, but that the grant was a continuous one through Denver to Cheyenne; that his ruling in that particular was affirmed in 1874 by the acting Secretary of the Interior; and that this was the uniform construction put upon the act until 1887, when the Department reversed its former decision, and for the first time held that the lands covered by the bill were not included within the land grant to either road.

If there were any doubts with regard to the interpretation of the act of 1869, the construction placed upon it by the Land Department for eighteen years, under which construction these lands have been put upon the market and sold, would undoubtedly be entitled to considerable weight.

We have no doubt of the correctness of the conclusion reached by the court below, and its decree is, therefore,

Affirmed.

GERMAN BANK OF MEMPHIS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 693. Submitted March 30, 1893. — Decided April 10, 1893.

The United States cannot be held liable in the Court of Claims for the amount of registered bonds which the Register of the Treasury cancels without authority of law, not being liable for non-feasances, or misfeasances or negligence of its officers.

The only remedy in such case is by appeal to Congress.

The plaintiffs, having been held liable to the owners of bonds so improperly cancelled as parties to the transaction, are not entitled to be subrogated to the heirs of the estate in the suit against the United States; since a person who invokes the doctrine of subrogation must come into court with clean hands.

THIS was a petition by the German Bank of Memphis, as successor of the German National Bank of Memphis, and the Chemical National Bank of New York, against the United States, to recover the amount of three registered bonds alleged to have been wrongfully cancelled by the Register of the Treasury under the following circumstances:

In 1869, one Henry P. Woodward died in Shelby County, Tennessee, leaving a will in which he directed that certain insurance money due his estate should be invested in United States interest-bearing bonds, with coupons attached, which coupons were to be given to his wife, Sallie, as they fell due, for her support and the support and education of her child; and that when the child should arrive at the age of 21 years, the bonds should be divided between the said child and its mother, equally, one Marcus E. Cochran being appointed sole executor of the will.

The will was admitted to probate in November, 1869, and Cochran qualified as executor. Having a balance of insurance remaining after paying the debts, he invested the same in three registered bonds of five thousand dollars each, in which it was certified that "the United States of America are

indebted unto M. E. Cochran, executor or assigns, the sum of five thousand dollars," etc. "This debt is authorized by act of Congress, approved March 3, 1865, and is transferable on the books of this office."

Cochran collected the interest on these bonds regularly, and paid the same to the widow of the testator, as provided in the will, until May, 1873, when he died. On September 9, one James A. Anderson, public administrator, was appointed by the probate court administrator *de bonis non* of Woodward's estate, duly qualified as such, and three days thereafter obtained these bonds from the Union and Planter's Bank of Memphis, in whose custody they had been, and by which the interest had been collected and paid over, giving therefor a receipt as administrator. He subsequently gave another receipt to the attorney of Mrs. Cochran, as administrator of her deceased husband.

In December, 1876, Anderson, who had long been a depositor in the German National Bank, and a man of high standing, took two of these bonds to this bank and requested it to sell them, saying that he wanted to invest for a better interest; that he could get ten per cent for the money, at the same time showing a paper from the Treasury Department at Washington, which in some way recognized his authority to transfer the bonds, but by whom the paper was written and the exact terms of it do not appear, no copy of the same being in evidence. The bank sent the bonds to the Chemical National Bank of New York by express, with a letter directing them to sell the same and place the proceeds to their credit, adding, "Judge J. A. Anderson filed the proper papers with the department, as per memo. enclosed. We do not wish to be responsible after paying the funds over here for any irregularity in papers."

On receiving these bonds, the Chemical National Bank wrote to the Register of the Treasury, notifying him of the receipt of the bonds from the German National Bank, describing them as "No. 7701, to order M. E. Cochran, executor, of Memphis, Tenn. $5000 do. No. 6081, to order of M. E. Cochran, executor, $5000, which said bank request us to sell,

but distinctly state they do not want to be held responsible after paying the funds over for any irregularity in papers, which I herewith enclose. We desire to comply with the wishes of the German Nat., but do not wish to be responsible for regularity, etc., and therefore refer the case to you. Please inform us what action to take. The certificates are assigned in blank by J. A. Anderson, adm'r of H. P. Woodward, deceased, and appear to have been witnessed by a notary public, having his official seal attached. If you are willing, we will forward them for registration in our own name, as in their present shape they are not a good delivery in this market."

The Register replied to this, and stated: "There is on file in this office satisfactory power in favor of your bank to transfer the bonds referred to, and a reassignment by your Mr. Jones as pres't to any party purchasing will be recognized, or if preferred new bonds will be issued to your bank under the present assignment." The bank replied to this letter, under date of December 28, 1876, and requested the Register to issue new bonds in the name of "the Chemical National Bank of N. Y."

In January, 1877, Anderson took the third bond to the German National Bank, by which it was transferred to the Chemical National Bank with similar instructions. The latter bank transferred the bond to the Treasury Department, which thereupon issued to the Chemical National Bank three new bonds, in which it was certified that "the United States of America are indebted to the Chemical National Bank of New York, or assigns, in the sum of five thousand dollars," etc. The Chemical National Bank of New York having thus obtained title to these bonds, sold the same and transferred the proceeds, $16,840.60, to the German National Bank of Memphis, where they were passed to the personal credit of said Anderson, drawn out by him from time to time on his personal checks, and lost to the beneficiaries by conversion to his own use.

The original bonds had borne upon their back a blank form of assignment, executed by Anderson, with certain instruc-

tions, among which were that the execution of the assignment must be witnessed by a public officer, attested by his official seal, and that "executors, administrators and trustees, when the stock stands in the name of the person they represent, must furnish legal evidence of their official character to be filed." The regulations of the Treasury Department at this time required that "in case of death or successorship, the representative or successor must furnish official evidence of decease and appointment. An executor or administrator may assign stock standing in the name of a deceased person. Where there is more than one legal representative all must unite in the assignment, unless, by a decree of court or provision of will, some one is designated to dispose of the stock. If the stock was held by the deceased as a fiduciary, the letters of administration must be accompanied by an order of the court authorizing the transfer."

When taken to the German National Bank of Memphis the blank form of assignment had been filled out, (except the name of the assignee, for which a blank was left), signed by Anderson, and executed before a notary public.

In 1872, the widow of said Woodward married Thomas H. Covington, who died in 1884. Anderson paid her the interest on the bonds up to 1880, when he failed, and the payments ceased. During that year a bill was filed in the equity court by Covington and wife and Henriella P. Woodward, minor child of testator, against Anderson, who had become insolvent, the German National Bank of Memphis, the Chemical National Bank of New York, and others, defendants, charging Anderson with a breach of trust in the sale of the bonds and the conversion of the proceeds to his own use, and the two banks with participating therein by receiving and selling the bonds charged with notice of the trust. The final result of this suit after trial in the Chancery Court of Memphis, and in the Supreme Court of Tennessee on appeal, was a decree against the two banks in favor of the plaintiffs in the sum of $23,211.82, that being the principal and interest of the bonds so converted. *Covington* v. *Anderson*, 16 Lea, 310.

Subsequently, the two banks paid the amount of this judgment to a trustee appointed by the Chancery Court, and on November 22, 1888, filed a petition in the Treasury Department for the payment of the money here claimed. The petition was referred to the Solicitor of the Treasury, who advised that the amount for which the bonds were sold should be paid by the government, but the Secretary of the Treasury thought the claim presented was not of such a nature as to be properly adjudicated by him. On March 12, 1889, another petition was presented to the Treasury Department, which decided that the government was not liable, and this suit was begun.

Upon a finding of facts, of which the above statement is the substance, the Court of Claims dismissed the petition, 26 C. Cl. 198, and the claimants appealed to this court.

Mr. William S. Flippin, *Mr. A. H. Garland* and *Mr. H. J. May* for appellants.

Mr. Assistant Attorney General Maury for appellees.

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

The question in this case is whether the government can be held liable for the amount of certain registered bonds which the Register of the Treasury had cancelled without authority of law, plaintiffs themselves having been held liable to the owners of the bonds for having been parties to the transaction.

Briefly stated, the facts are that the bonds were originally issued to "M. E. Cochran, executor or assigns"; that Cochran having died, one Anderson was appointed administrator *de bonis non;* obtained possession of the bonds; took them to the German National Bank, and requested the bank to sell them for him, exhibiting a paper from the Treasury Department at Washington to the effect that, as the successor of Cochran in the administration of the estate, he had power to

transfer them. The bank sent them to the Chemical National Bank of New York, with a similar request to sell. The Chemical National Bank transmitted them to the Register of the Treasury, stating that neither the German National Bank nor the Chemical National Bank wished to be responsible for any irregularities in the papers. In reply, the Register stated that there was on file in that office satisfactory power in favor of the bank to transfer the bonds, and subsequently, at the request of the bank, issued new bonds to the "Chemical National Bank, New York, or assigns." These bonds were sold, the proceeds transmitted to the German National Bank at Memphis, passed to the personal credit of Anderson, and embezzled by him. Suit was thereupon begun against the two banks by the heirs of the estate represented by Cochran and Anderson, upon the theory that, as the bonds ran to "M. E. Cochran, executor or assigns," the banks were apprised of the fact that there was a trust of some kind impressed upon them, which could be ascertained by a reference to the will; and that they bore the unmistakable brand of the rights of ownership of others, without the slightest evidence of claim of any character on the part of Anderson.

Having paid the judgment against them, the banks filed this petition, claiming to be subrogated to the rights of the parties who had recovered against them, and to hold the government liable upon the ground that they were induced, by the act and conduct of the Register of the Treasury, to do what had been adjudged to be wrong on their part, and on account of which a decree had been taken against them.

Under these circumstances, are the plaintiffs entitled to maintain this suit against the government? Plaintiffs were held liable by the Supreme Court of Tennessee to the heirs of Woodward for the unlawful conversion of the bonds, the court holding that the banks received the bonds and disposed of them under circumstances showing that a breach of trust was meant by Anderson, and under such circumstances as to put them upon inquiry as to his title to the bonds and the motive prompting him to offer them for sale. The court held further that the fact that the bonds were payable to M. E.

Cochran, as executor, put them upon inquiry as to whose estate Anderson was administrator of; why there was no assignment upon the bonds; how Anderson came by them; by what authority he proposed to dispose of bonds created by a will when he was not himself the executor; why the bonds had been kept off the market so long; for whose benefit Anderson proposed to invest in securities at a greater rate of interest; and why he should do so when the bonds were a certain security. "These suggestions," said the court, "would have led at once to an inspection of the records, which would have discovered that Anderson had no right whatever to manage or control the bonds, and that his purposes were anything but honest. It was impossible to have read the bonds, however casually, without discovering that there was a trust of some character impressed upon them, which trust could be ascertained by reference to the will."

Plaintiffs now seek to hold the government liable upon the ground that the Register of the Treasury participated with them in such conversion. In other words, it is an attempt on the part of one wrongdoer, not merely to enforce contribution from another, but to hold him liable for the entire amount of damages occasioned by their joint negligence. It is only upon the theory that the Register exceeded his power that the plaintiffs have any possible standing. If his conduct in cancelling the original and issuing the new bonds was within the scope of his authority as Register of the Treasury, there is no possible reason for charging him or his principal with liability. Assuming, however, that he was guilty of negligence in reissuing these bonds upon insufficient evidence of the authority of the holder to demand such reissue, (as to which we express no opinion,) it was an act of negligence for which the government is not liable to these plaintiffs. It is a well settled rule of law that the government is not liable for the nonfeasances or misfeasances or negligence of its officers, and that the only remedy to the injured party in such cases is by appeal to Congress. This rule was applied in the cases of *United States* v. *Kirkpatrick*, 9 Wheat. 720, 735; *United States* v. *Vanzandt*, 11 Wheat. 184; *United States* v. *Nicholl*, 12 Wheat. 505; and

Dox v. *Postmaster-General*, 1 Pet. 318, cases of laches in failing to prosecute delinquent officers within a reasonable time; in *Gibbons* v. *United States*, 8 Wall. 269, to a case of alleged duress by a military officer; in *Jones* v. *United States*, 18 Wall. 662, to the negligence of the government in permitting a dishonest postmaster to remain in office; in *Hart* v. *United States*, 95 U. S. 316, to the negligence of an officer of the United States in permitting the removal of distilled spirits from a distillery warehouse before the payment of taxes; in *Minturn* v. *United States*, 106 U. S. 437, to the unlawful act of a customs officer in giving up goods without the payment of duty; in *Moffat* v. *United States*, 112 U. S. 24, to certain frauds by officers of the United States in issuing land patents; and in *Robertson* v. *Sichel*, 127 U. S. 507, to the negligence of an officer of the customs in keeping a trunk of a passenger on the pier instead of sending it to the public store, so that it was destroyed by fire.

If this be treated as a case of *tort*, then it is clear that the government is not liable, not only upon the ground above stated, but because under the act of Congress conferring jurisdiction upon the Court of Claims, 24 Stat. 505, c. 359, there is an express exception of cases sounding in tort.

Plaintiffs, however, take the further ground that if, instead of suing the banks, Covington and his wife and daughter had sued in the Court of Claims upon the original bonds, the government could not have shown in defence that the bonds had been cancelled and reissued to the Chemical National Bank, since such cancellation was without authority. Therefore they insist that, having paid these bonds themselves, they are entitled to be subrogated to the claim of the heirs of the estate, and to recover in their own names upon these bonds. There are difficulties, however, in sustaining this position. In the first place, the plaintiffs themselves had no contract with the government, and if they had, such contract was fully performed by the issuing of the new bonds to them. They are not entitled to be subrogated to the heirs of the estate, since their right of subrogation arises from certain conduct of theirs which was adjudged by the Supreme Court of Tennessee to be tortious.

Syllabus.

It is said that a person who invokes the doctrine of subrogation must come into court with clean hands. Sheldon on Subrogation, § 44; *Railroad Co.* v. *Soutter*, 13 Wall. 517; *Wilkinson* v. *Babbitt*, 4 Dillon, 207; *Guckenheimer* v. *Angevine*, 81 N. Y. 394. They are unfortunately put in the position of claiming through the judgment of the Supreme Court of Tennessee, which held them liable for having participated in the alleged misconduct of the Register of the Treasury. As we hold that tney are not entitled to invoke the doctrine of subrogation, it becomes unnecessary for this court to determine as an independent question whether the Register acted within the scope of his authority in cancelling and reissuing the bonds. The opinion of the Supreme Court of Tennessee would not be conclusive upon that point, the government not having been a party to that action.

Under no view that we have been able to take of this case can we hold the government liable, and the judgment of the Court of Claims is, therefore,

Affirmed.

LONERGAN *v.* BUFORD.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 203. Submitted March 30, 1893. — Decided April 10, 1893.

A contract being entered into for the sale of extensive ranch privileges and of all the cattle on the ranches except 2000 steers reserved in order to fulfil a previous contract, it is competent, in an action founded upon it, to show that the steers contracted by the previous contract to be sold were to be of the age of two years and upwards; and, that being established, if there were not enough of that age to fulfil the previous contract, the seller could not take animals of other ages from the rest of the herd to make up the requisite number.

The contract further provided that payment of the larger part of the consideration money was to be made in advance, and that delivery was to be made on the purchaser's making the final payment on a given day. On the day named, having made the previous payment, he made the final one under protest that, inasmuch as the seller declined to make any delivery

without receiving the contract price in full, he made it in order to obtain delivery, and with the distinct avowal that it was not due. *Held*, that this was not a voluntary payment, which could not be recovered back in whole or in part.

On December 10, 1886, the defendants in error commenced suit in the District Court of the county of Salt Lake, Utah Territory, to recover from the defendants, now plaintiffs in error, the sum of $14,110 for breach of a contract of sale. Defendants appeared and answered. A trial was had before a jury, and on November 14, 1888, a verdict was returned in favor of the plaintiffs for $6631.63, upon which verdict judgment was duly entered. An appeal was taken to the Supreme Court of the Territory, by which court the judgment was affirmed, and from that court the case has been brought here on error. The allegation in the complaint was, that on July 17, 1886, the parties entered into a contract of which the parts material to the questions presented are as follows:

"This agreement made this seventeenth day of July, A. D. 1886, by and between Simon Lonergan and William Burke, of the city of Salt Lake, Territory of Utah, parties of the first part, and the Promontory Stock Ranch Company, a partnership composed of M. B. Buford, J. W. Taylor and George Crocker, all of the State of California, parties of the second part, witnesseth:

"Whereas said first parties are the owners of large herds of cattle now ranging on their ranches in the counties of Oneida, in Idaho, and Box Elder, in Utah, and have contracted and agreed, as hereinafter set forth, to sell the same to said second parties, the exact number of said cattle being unknown; and whereas said first parties have heretofore sold two thousand head of steers from said herds, one thousand head of which have been separated therefrom and delivered, and one thousand head thereof still remain to be delivered; and whereas said second parties have agreed to purchase the said herds, excepting said undelivered one thousand head of steers, on the terms and conditions hereinafter set forth:

"Now, therefore, the said parties do by these presents, in consideration of ten thousand dollars to them in hand paid,

the receipt whereof is hereby acknowledged, the same to be credited on the first payment, as hereinafter set forth, contract and agree to and with the said parties of the second part that they will sell, transfer, convey and deliver to said second parties —

"1. All of the possessory right which said first parties have heretofore held, enjoyed and possessed of, in, and to any and all ranches or ranges in said county of Oneida, in Idaho, and in said county of Box Elder, Utah, with all water rights, fences and improvements thereon or thereto belonging, and further agree that they or either of them will not hereafter herd, keep or drive any cattle thereon or in any way interfere with the exclusive right, possession or occupation thereof by said second parties.

"2. That they will sell, transfer and deliver to said second parties all of their said herds of cattle (excepting said reserved and undelivered one thousand head of steers) now on said ranges in said counties of Oneida and Box Elder, said reserved one thousand head of steers to be by first parties separated from said herds and driven off of said ranches within ninety days from July 15, 1886.

* * * * *

"The said second parties agree and hereby contract to and with said first parties to purchase the said properties from said first parties and to pay therefor, as full consideration for the whole thereof, the sum of thirty dollars per head of cattle delivered, in sight draft on San Francisco, California, to be promptly paid on presentation.

"And it is mutually agreed, that as a basis of estimating the number of cattle sold and the amount to be paid by said second parties said first parties have already this year branded fifteen hundred calves, and shall continue to brand the calves from said herds until they shall have branded in all the number twenty-two hundred and fifty head or until December 1, A. D. 1886, but shall brand no calves after that date, and shall make delivery of all said properties to said second parties so soon as said Lonergan and Burke shall have branded said twenty-two hundred and

fifty calves, or in any event said delivery shall be made not later than December 1, A. D. 1886.

"And it is agreed that said herds shall be estimated to contain three head of cattle for every calf so branded, or three times the number of calves branded this season and prior to December 1, 1886, but in no event to exceed 2250 calves, including the fifteen hundred head now branded.

"The said second parties agree to pay the said first parties as full consideration for all of said properties, including said calves, a sum equal to thirty dollars per head of all cattle, the number being ascertained by the number of the calves branded as aforesaid, the first payment on fifteen hundred calves already branded representing 4500 head of cattle, equal to $135,000, less the cash payment of $10,000 made at the date hereof, on August 1, 1886, on all calves branded over and above said fifteen hundred head; the third and last payment at the same rate, so soon as said first parties shall have finished their branding and shall have made delivery of the entire property hereby contracted to be sold."

It further stated that the 2000 steers mentioned as reserved and excepted were intended and understood by all the parties to be steers of two years old and upward, and not otherwise. Full performance by the plaintiffs was alleged; and a failure on the part of defendants to deliver, among other things, 422 head of yearling steers. The answer denied that the 2000 steers mentioned as reserved in the contract were understood and intended to be of two years old and upward; but, on the contrary, it was intended and understood by all the parties that yearling steers, as well as others, were included. The answer also denied the other allegations in the complaint, except as to the making of the contract, and as to that alleged full performance by the defendants. On the trial the plaintiffs introduced this contract:

"CHICAGO, ILLINOIS, *June* 29th, 1886.

"We have this day sold to William E. Hawkes, of the city of Bennington, State of Vermont, one thousand (1000) head of steers, four hundred (400) two years old, four hundred and

fifty (450) three years old, and one hundred and fifty (150) four years old, branded ⊙ on the left side and M on the left side. Said cattle are on our ranch in Box Elder County, Utah, and Oneida County, Idaho, and are part of a large herd. The sale is for the sum of twenty-five thousand dollars ($25,000) in cash, to be paid on delivery of the cattle, and delivery to be made on the 15th day of July, 1886.

"And whereas the said Hawkes has purchased the said cattle with the intention of transferring them to a corporation to be formed by him:

"Now, in consideration of the premises and one dollar to us in hand paid by the said Hawkes, we further agree to sell to such company as soon as the same is incorporated and its securities are negotiated and within not more than ninety days from the date hereof and the said company shall then purchase from us one thousand (1000) additional head of steers, four hundred (400) two years old, four hundred and fifty (450) three years old, and one hundred and fifty (150) four years old, branded in the like manner as above specified, and being a part of the cattle now on our ranch as above described, for the sum of thirty-five thousand dollars, ($35,000,) delivery of the last-named one thousand (1000) head to be made at Soda Springs, Idaho, and payment thereof to be made on delivery.

"(Signed) LONERGAN & BURKE.
"WM. E. HAWKES."

They also offered the testimony of certain witnessses to the effect that Lonergan, one of the defendants, stated to one of the plaintiffs, in conversations prior to the execution of the contract sued on, that the steers which had been sold to Hawkes, and were to be excepted out of the sale to plaintiffs, were two years old and upwards. All this testimony was objected to, on the ground that it tended to contradict or vary the terms of the written agreement between the parties to the suit, and was incompetent, irrelevant and immaterial. These objections were overruled, the testimony admitted, and exceptions taken.

On December 10, 1886, the very day on which this suit was commenced, Taylor, one of the plaintiffs, made the final payment to the defendants, at the same time serving them with this protest:

"To S. J. Lonergan and Wm. Burke, Esqs.

"GENTLEMEN: You will please take notice that in payment to you this date of $27,000 as the balance of the purchase price of certain ranges and herds of cattle in pursuance of a contract made by us with you on July 17, 1886, we do not pay the whole thereof voluntarily. From information possessed by us we are induced to believe that the entire number of cattle and horses by the contract aforesaid contemplated to be delivered to us on the 1st day of December, A. D. 1886, cannot be and is not by you so delivered — *i. e.* that four hundred and twenty-two yearlings, forty cows, heifers, and steers, and two buggy-horses, all of the value of $14,110, are not delivered. Now, therefore, inasmuch as you decline to make any delivery under your contract, except upon the payment by us of the entire purchase price, and because we have already paid you a larger proportion thereof, to wit, $175,500, we do hereby pay $14,110 of said $27,000 under protest and with the distinct avowal that the same is not due you.

"PROMONTORY STOCK RANCH CO.,

"By JOHN W. TAYLOR.

"Salt Lake City, December 10, 1886."

It was claimed by the defendants that, notwithstanding this protest, the payment was voluntary on the part of the plaintiffs, and that, therefore, no money could be recovered back.

Mr. John A. Marshall for plaintiffs in error.

I. The contract being plain, unambiguous, and susceptible of legal construction, no evidence should have been admitted to vary and control its terms, giving to it a different construc-

tion from that which its language imported. *Wilson* v. *Deen*, 74 N. Y. 531; *Veazie* v. *Forsaith*, 76 Maine, 179; *Dow* v. *Humbert*, 91 U. S. 294.

II. Attention is called first to the protest of payment to the objection to its admission; and to the ninth assignment of error as to such admission. The coercion or duress which will render a payment involuntary must consist of some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person making the payment, from which the latter has no means of immediate relief except by making payment. *Radich* v. *Hutchins*, 95 U. S. 210; *Brumagim* v. *Tillinghast*, 18 California, 265; *S. C.* 79 Am. Dec. 176; *Mays* v. *Cincinnati*, 1 Ohio St. 268; *Silliman* v. *United States*, 101 U. S. 465, 469.

To entitle a party to recover back money paid under a claim that it was a forced or compulsory payment, it must appear that it was paid upon a wrongful claim or unjust demand, under the pressure of an actual or threatened seizure, or interference with his property of serious import to him, and that he could escape from or prevent the injury only by making such payment. *Kreamer* v. *Deustermann*, (Minn.,) 35 N. W. Rep. 276; *Tapley* v. *Tapley*, 10 Minnesota, 448; *S. C.* 88 Am. Dec. 76; *Farguson* v. *Winslow*, 34 Minnesota, 384; *Emmons* v. *Scudder*, 115 Mass. 367; *Heysham* v. *Dettre*, 89 Penn. St. 506. See, also, *Miller* v. *Miller*, 68 Penn. St. 486; *Wolfe* v. *Marshal*, 52 Missouri, 171; *Peyser* v. *Mayor*, 70 N. Y. 497; *Silliman* v. *United States*, 101 U. S. 469.

The conduct of the parties and the evidence show that the payment sought to be recovered back by the defendants in error was made by them to plaintiffs in error while the title to the property was in the plaintiffs in error, and with a full knowledge on the part of defendants in error of all the facts given in evidence; wherefore viewed and determined by the rules as stated in the foregoing authorities, such payment was voluntary and cannot be recovered back. In other words, there being no duress of person, or property, or law, the defendants in error failed to make their case, and therefore were not entitled to recover.

Mr. Samuel A. Merritt for defendants in error.

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

There was no error in admitting in evidence the contract of sale to Hawkes of the 2000 steers, that being, according to the testimony, unquestionably the sale referred to in the exception and reservation named in the contract in suit, nor the statements made by Lonergan, the defendant, in reference to the ages of the steers which defendants had sold prior to such last contract, and which they were to except therefrom. This was not testimony varying or contradicting the terms of the written agreement between the parties; it only interpreted and made certain those terms; it simply identified the property which was to pass thereunder to plaintiffs. The exception was not one by quantity, and simply of 2000 steers — an exception which might or might not give to the defendants the right to select such steers as they saw fit — but it was an exception by description, to wit, of steers that had been sold, and it was necessary to prove what had been sold in order to determine what could be and were included within the contract. Until the exception was made certain, that which was conveyed could not be certain. Take a familiar illustration: A deed conveys a tract of land by metes and bounds, but in terms excepts therefrom a portion thereof theretofore conveyed by the grantor; the former deed is referred to and described, but the boundaries of the tract conveyed thereby are not specified. Now, in order that what is conveyed by the deed in question may be known, the land excepted therefrom must be known, and for that the deed referred to containing the excepted land must be produced. The production of such prior deed is no contradiction, and involves no variance of the terms of the latter, but is necessary to make certain that which is in fact conveyed thereby. Or another illustration: Suppose a written contract is made for the sale of a herd of cattle at $30 a head, excepting therefrom all yearling steers — would not parol testimony of the number of yearling steers

in the herd be necessary in order to show the number of cattle sold, and the aggregate sum to be paid? Evidence that the herd contained 1000 head would not end the question, and parol testimony of the number of yearling steers would not be evidence contradicting the contract; on the contrary, it would be in support thereof, to make certain that which by the terms of the instrument was not certain.

Again, it is objected that the plaintiffs were not injured by the failure of the defendants to deliver the four hundred and twenty-two yearling steers, the idea seeming to be that steers two years old and upward were delivered instead of such yearlings. Of this, however, there was no evidence, and the court expressly charged the jury that "the plaintiffs are entitled to recover from the defendants for such steers of the age called for in the contract so failed to be delivered the value thereof as the testimony and the admission in the answer shall justify you to determine, provided that you do not find that the defendants, in lieu of the steers under the age set forth in the contract so taken away, not delivered, left other steers of the age called for by the terms of the contract, and, if so, then the plaintiffs are not entitled to recover for any steers so left in the place of those taken away, provided the value of the steers so left (if you find that to be the case) was equal to the value of the steers said to have been taken away by the defendants Lonergan and Burke." The defendants paid for the cattle at an estimate of three head of cattle for calves branded within a specified time. They were entitled to all the cattle belonging to defendants ranging in the places named, excepting those specially reserved; and if there were not enough of steers in those herds, of the kind described, to satisfy the contract which they had made with Hawkes, they could not make good the deficiency by taking steers of a different description, all of which they had sold to plaintiffs before any attempt at delivery to Hawkes. There was no error in the ruling in this respect.

Finally, it is objected that the last payment was voluntary, and, therefore, cannot be recovered, either in whole or in part, although it was in terms made under protest. It appears

from the testimony that the defendants refused to deliver any of the property without full payment. This was at the commencement of the winter. The plaintiffs had already paid $175,500, and without payment of the balance they could not get possession of the property, and it might be exposed to great loss unless properly cared for during the winter season. Under those circumstances, we think the payment was one under duress. It was apparently the only way in which possession could be obtained, except at the end of a lawsuit, and in the meantime the property was in danger of loss or destruction. The case comes within the range of the case of *Radich* v. *Hutchins*, 95 U. S. 210, 213, in which the rule is thus stated: "To constitute the coercion or duress which will be regarded as sufficient to make the payment involuntary, . . . there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the Court of Appeals of Maryland, the doctrine established by the authorities is, that 'a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.' *Mayor and City Council of Baltimore* v. *Lefferman*, 4 Gill, (Md.,) 425; *Brumagim* v. *Tillinghast*, 18 Cal. 265; *Mays* v. *Cincinnati*, 1 Ohio St. 268."

In *Stenton* v. *Jerome*, 54 N. Y. 480, the defendants, who were stockbrokers, held two United States bonds belonging to the plaintiff, which they threatened to sell unless she paid a balance claimed by them on account. On p. 485 the court says: "Great stress, however, is laid upon the payment by the plaintiff of the balance shown by the account, as rendered, to be due from her. This payment was in one sense voluntary, as she was not compelled by physical duress to pay it. But the defendants held her two bonds, which they threatened at once to sell unless she would pay this balance. She had great need for the bonds and could not well wait for the slow process of the law to restore them to her, and she

paid this balance, not assenting to the account and not assenting that it was justly due, for the sole purpose of releasing her bonds. Under such circumstances it is well settled that the law does not regard a payment as voluntary."

In *Harmony* v. *Bingham*, 12 N. Y. 99, 117, it is said: "If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment by compulsion." See, also, *Baldwin* v. *Liverpool &c. Steamship Co.*, 74 N. Y. 125; *McPherson* v. *Cox*, 86 N. Y. 472; *Spaids* v. *Barrett*, 57 Illinois 289; *Hackley* v. *Headley*, 45 Michigan, 569.

These are all the questions in this case. We see no error in the proceedings below, and the judgment is

Affirmed.

ATCHISON BOARD OF EDUCATION *v.* DE KAY.

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

No. 176. Argued and submitted March 24, 1893. — Decided April 10, 1893.

The bonds issued by the city of Atchison, Kansas, January 1, 1869, pledging the school fund, etc., of the city for payment were valid obligations.

The legislation of Kansas relating to cities of the first class, and to cities of the second class, and to Boards of Education, reviewed.

An error of a single word in the title of a statute in copying it into a municipal bond does not vitiate the deliberate acts of the proper officers of the municipality, as expressed in the promise to pay which they have issued for money borrowed.

It is a general rule that, where a municipal charter commits the decision of a matter to the council of the municipality, and is silent as to the mode of decision, it may be done by a resolution, and need not necessarily be by an ordinance; and the decision in *Newman* v. *Emporia*, 32 Kansas, 456, is not in conflict with this rule.

When municipal bonds have been issued in reliance upon a consent of the proper municipal authorities, as shown by the municipal records, and for

years thereafter, interest had been duly paid upon such bonds, the courts will not, after the lapse of twenty years, in a suit upon the bonds, pronounce them invalid on purely technical and trivial grounds.

An express power conferred upon a municipal corporation to issue bonds bearing interest, carries with it the power to attach interest coupons to those bonds.

This action is properly brought against the Board of Education of the city of Atchison, which is a distinct corporation, and the proper one to be sued for a debt like this.

On January 1, 1869, the Board of Education of the city of Atchison issued $20,000.00 of bonds. They were in this form:

"No. —. *School Bond.* $1000.00.

"City of Atchison, State of Kansas.

"Know all men by these presents, that the city of Atchison, Kansas, for value received, is indebted to the bearer in the sum of one thousand dollars, which it promises to pay on the 1st day of January, A.D. 1884, at the National Park Bank, in the city of New York, with interest at the rate of ten per cent per annum, payable semi-annually, on the 1st day of January and on the 1st day of July of each year upon presentation at the said National Park Bank of the interest coupons hereto attached as they mature; the last instalment of interest payable with this bond. This bond is issued under and by virtue of an act of the legislature of the State [of] Kansas, entitled 'An act to organize cities of the second class, approved February 28, 1868,' and is secured by pledge of the school fund and property of said city of Atchison for the payment of the principal and interest thereof, as the same may become due.

"Dated at Atchison, this 1st day of January, 1869.

"(Signed) Jno. A. Martin,

"*President of the Board of Education.*

"W. F. Downs, *Clerk.*

"Countersigned:

"Frank Smith, *Treasurer.*"

Each bond had interest coupons attached. On June 30, 1885, plaintiff, Francis M. De Kay, claiming to be the owner of certain of these bonds and coupons, commenced suit in the

Circuit Court of the United States for the District of Kansas. The defendant answered, a trial was had, and on June 6, 1889, judgment was entered in favor of the plaintiff for $31,699.40, from which sum $1325 was thereafter remitted, as excessive interest. To reverse this judgment, defendant sued out a writ of error from this court.

Mr. Henry Elliston for plaintiff in error. After hearing *Mr. Elliston* the court declined to hear further argument.

Mr. David Martin filed a brief for plaintiff in error.

Mr. Thomas J. White for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

Two questions are presented: First. Were the bonds and coupons valid obligations? Second. If valid, was the Board of Education of the city of Atchison the proper defendant, and could judgment be rightfully entered against it for the sum of these bonds and coupons?

The bond on its face purports to be the obligation of the city of Atchison, secured by pledge of the school fund and property of the city, and was executed by the president and clerk of the Board of Education. It is insisted that the Board of Education had no power to bind the city by such a promise to pay. To a clear understanding of this question an examination must be made of the statutes of Kansas. The city of Atchison was incorporated under an act of the Territory of Kansas of February 12, 1858. Private Laws, 1858, p. 172. By an act passed the same day, providing for the organization, etc., of common schools, (Public Laws, 1858, pp. 47 and 51, c. 7, §§ 15, 37,) each county superintendent of common schools was authorized to divide his county into school districts, and every school district organized in pursuance of the act was declared to be a body corporate, possessing the usual powers of a corporation for public purposes, with the name and style of "School District No. —, County of ——." Under that act "school district number 1, Atchison County," was organized with territorial limits, the same as those of the city of Atchison.

On February 23, 1867, an act was passed to incorporate cities of the second class, that class being of those cities having more than 1000 and less than 15,000 inhabitants, to which class the city of Atchison belonged. Laws of 1867, p. 107. Section 14 is as follows: "Each city shall constitute at least one school district, and the city shall not be divided into more than one school district without the consent of a majority of the council, but such council may divide the city into as many school districts as it may deem expedient." On February 26, 1867, a supplemental act was passed, (Laws, 1867, p. 128,) providing for a Board of Education in cities of the second class, to have charge of school matters. Particular reference to the provisions of this act is unnecessary, as both these acts were superseded in the revision of 1868. General Statutes of Kansas, p. 154, c. 19. This act was entitled: "An act to incorporate cities of the second class." This was a new enactment, though practically only a consolidation and revision of the statutes of 1867, in reference to such cities. It contained section 14, heretofore quoted, of the law of 1867, and placed, as did the supplementary act of 1867, the entire control of school matters in a board of education.

Noting the act a little in detail, section 55 provides that "at each annual city election, there shall be a Board of Education, consisting of two members from each ward, elected," etc. Section 57: that such board shall "exercise the sole control over the schools and school property of the city." By section 67, the Board of Education was empowered to estimate the amount of funds necessary to be raised by taxation for school purposes, and report the same to the city council, by which body the amount was levied and collected as other taxes. Under section 68, the moneys thus collected were paid into the hands of the city treasurer, subject to the order of the Board of Education. Sections 69, 70, 71, 76 and 77 are as follows:

"Sec. 69. The whole city shall compose a school district for the purposes of taxation.

"Sec. 70. The title of all property held for the use or benefit of public schools shall be vested in the city.

"Sec. 71. No school property of any kind shall be sold or

conveyed by the mayor or councilmen, except at a regular meeting of the same, and not then without the concurrence of the Board of Education."

"SEC. 76. Whenever it shall become necessary, in order to raise sufficient funds for the purchase of a school site or sites, or to erect a suitable building or buildings thereon, it shall be lawful for the Board of Education of every city, coming under the provisions of this act, with the consent of the council, to borrow money, for which they are hereby authorized and empowered to issue bonds, bearing a rate of interest not exceeding ten per cent per annum, payable annually or semiannually, at such place as may be mentioned upon the face of said bonds, which bonds shall be payable in not more than twenty years from their date, and the Board of Education is hereby authorized and empowered to sell such bonds at not less than seventy-five cents on the dollar.

"SEC. 77. The bonds, the issuance of which is provided for in the foregoing section, shall be signed by the president and clerk of the Board of Education, and countersigned by the treasurer; and said bonds shall specify the rate of interest, and the time when the principal and interest shall be paid, and each bond so issued shall be for a sum not less than fifty dollars."

Section 78 peremptorily required the Board of Education in its annual estimate, authorized in section 67, to include a sufficient amount to pay the interest on such bonds and create a sinking fund, and such amount the city council was required to levy and collect. Section 81 reads: "The school fund and property of such city is hereby pledged to the payment of the interest and principal of the bonds mentioned in this article, as the same may become due."

What, now, are the specific objections to the validity of these bonds and coupons? First, it is objected that the bond purports to be issued under authority of an act entitled "An act to organize cities," etc., approved February 28, 1868; that no such act is to be found in the statutes of that year; and that, therefore, the bonds were issued without authority of law, and are not valid obligations. This is trifling. There was an act giving authority to the Board of Education

to borrow money and issue bonds, and whose title was exactly as described in this bond, except in place of the word "organize" the word "incorporate" was used. *Falsa demonstratio non nocet. Commissioners* v. *January*, 94 U. S. 202. An error in copying into an instrument a single word in the title of a statute does not vitiate the deliberate acts of the proper officers of a municipality as expressed in the promise to pay, which they have issued for money borrowed.

Again, it is insisted that the Board of Education had no power to bind the city of Atchison as a municipal corporation, but only that other and quasi-corporation, known as School District No. 1, Atchison County. The argument is that there were two corporations: First, a school district corporation whose name and corporate existence were prescribed by the laws of 1858; and another, a strictly municipal corporation, known as the city of Atchison, with the ordinary powers attached to such a municipality; that though they embraced within their limits the same territory and population, they were in fact distinct corporate entities; and that the Board of Education, having control of the affairs of the one corporation, had no power to bind the other by its promises to pay. It may well be doubted whether there were two distinct corporations. Section 14 of the acts of 1867 and 1868, incorporating cities of the second class, provided that "each city shall constitute at least one school district." There is no pretence, under the power reserved in that section, that the city of Atchison was ever divided into districts; so, by that section, Atchison city constituted a school district. The members of the Board of Education were to be elected at the annual city election, and to the board was given full control of the school affairs of the city. Section 57. In other words, it was the city's schools and the city's school property which were placed under the management of the Board of Education. Upon the report of the Board of Education, the city council levied and collected the school taxes, Section 67; and when they were collected they were retained by the city treasurer in his custody. Section 68. The title to all school property was vested in the city. Section 70.

No bonds could be issued without the consent of the city council. Section 76. And the school fund and property of such city was pledged to the payment of the bonds. Section 81. The whole idea of the statute seems to have been the mingling of the schools and the school interests with the ordinary municipal functions of the city of Atchison, giving to the Board of Education, as an administrative body of the city, the management of the schools and the school property. Further, when, in 1872, a new act was passed in respect to the incorporation of cities of the second class, by section 100, Laws of 1872, p. 221, it was expressly provided that "the public schools of each city organized in pursuance of this act, shall be a body corporate, and shall possess the usual powers of a corporation for public purposes by the name and style of 'The Board of Education of the city of ———, of the State of Kansas'; and in that name may sue," etc. This legislation seems to imply that up to that time there was in cities of the second class no separate school corporation.

But even if this be a misconstruction of the statute, it is clear that the school district and the city were coterminous; that, by the act of 1868, the Board of Education was authorized to borrow on the credit of the school property, with the consent of the city council, and to issue bonds in payment therefor. They did proceed, as appears from the recital in the bonds, under authority given by that act, and if there were a misrecital of the name of the obligor, such mere misrecital would not vitiate the obligations. Proceeding strictly under that act, they bound the corporation whose officers they were and for which they assumed to act, and whether the name of that corporation was technically "The City of Atchison" or "School District No. 1, Atchison County," by the issue of bonds they bound that corporation.

This is not the case, as counsel suggest, of a written declaration of A. that B. is indebted, and that B. promises to pay; nor a case where two corporations are so entirely distinct that the name of one in an instrument carries no possible suggestion that the other was intended, but it is the case where officers of a corporation having power to borrow and issue promises

to pay have at the best only misrecited the name of the corporation for which they issued and were authorized to act.

Another objection is, that there was no legal consent of the city council, as required by section 76. The record shows that on Monday, October 5, 1868, none of the councilmen being present, the city clerk adjourned the council to Monday, October 12. On Monday, October 12, the mayor and five of the eight councilmen appeared, the minutes of all previous meetings not theretofore read were read and approved, and the council adjourned until Monday, October 19. On Monday, October 19, council met pursuant to adjournment, and another adjournment was had until October 26, and, so, from October 26 to October 28, and thence to November 2, and to November 9. At none of these meetings were all of the city council present. At the meeting on November 9, the mayor and five councilmen, being a majority of the council, were present, and a resolution was passed giving the consent of the council to the issue of these bonds. Now, it is insisted that consent could only be given by an ordinance, and not by resolution, and in support thereof the case of *Newman* v. *Emporia*, 32 Kansas, 456, is cited; that even if a resolution were sufficient, there was no legal meeting of the council, because all the members were not present, and it does not appear that all were notified, or that a special meeting had been duly called; that it was not at a regular, but apparently an adjourned, meeting; and that the first adjournment, on October 5, was without validity, because none of the councilmen were present, and the adjournment was ordered by the clerk alone, and in support of the proposition that notice to or presence of all the members is essential to a valid special meeting, the cases of *Paola & Fall River Railroad* v. *Anderson County Comm'rs*, 16 Kansas, 302, and *Aikman* v. *School District*, 27 Kansas, 129, are cited.

In respect to the first of these contentions: The general rule is, that where the charter commits the decision of a matter to the council, and is silent as to the mode, the decision may be evidenced by a resolution, and need not necessarily be by an ordinance. *State* v. *Jersey City*, 27 N. J. Law, (3 Dutcher,) 493; *Butler* v. *Passaic*, 44 N. J. Law, (15 Vroom,) 171; *Bath*

Wire Co. v. *Chicago, Burlington &c. Railway*, 70 Iowa, 105; *Sower* v. *Philadelphia*, 35 Penn. St. 231; *Gas Company* v. *San Francisco*, 6 California, 190; *First Municipality* v. *Cutting*, 4 La. Ann. 335; *Green Bay* v. *Brauns*, 50 Wisconsin, 204; 1 Dillon's Municipal Corporations, (4th ed.,) § 307 and notes. Nor is there anything in the case in 35 Kansas in conflict with this. That simply holds that when a charter requires that certain things be done by ordinance, they cannot be done by resolution. In this act incorporating cities of the second class there is nothing which either in terms or by implication requires that the consent of the city council should be given only by ordinance. A resolution was, therefore, sufficient.

Neither is the other contention of any force. The record of the city council was produced, showing a series of meetings extending from October 5 to November 9, at some of which meetings general business was transacted. The act of 1868, section 13, provides that regular meetings of the city council shall be held at such times as the council may provide by ordinance. No evidence was offered showing what were the dates of regular meetings, as provided by ordinance. We are left to infer that these meetings were not regular meetings from the language at the commencement of the records thereof —"that council met pursuant to adjournment." The first adjournment was made by the city clerk alone, no member of the city council being present. We are not advised by the testimony as to what rules, if any, had been prescribed by the city council in respect to such matter. It is not an uncommon thing for legislative bodies, such as a city council, to provide by rule that in the absence of all members the clerk or secretary shall have power to adjourn. That probably such a rule as that was in existence is evidenced by the fact that at succeeding meetings — which, giving full weight to the language used at the commencement of the record, were simply adjourned meetings — the council, all but one of whom were present at one of the meetings, approved the records. All these entries of meeting appear to have been kept upon the regular record of the city council, and it is obvious that either because an adjournment by the clerk in the absence of the council was

authorized by rule, or because the days of the subsequent meetings were, in fact, the regular days therefor, such meetings were accepted and recognized by the council as legal. Certain is it, that when bonds have been issued in reliance upon a consent thus evidenced, and when for years thereafter interest has been duly paid upon such bonds, the courts will not, after the lapse of twenty years, in a suit on the bonds, pronounce them invalid on such technical and trivial grounds. The cases cited from 16 and 27 Kansas do not militate against these views. In the case in 16 Kansas, which was an action by the county against the railway company to cancel a subscription for stock, and for the return and cancellation of bonds of the county on deposit with the state treasurer, the matter was submitted on demurrer to the petition, and that petition averred that the subscription was ordered at a special session of the board, at which only two of the three commissioners were present; that no call for such session was made, nor anything done to authorize a call; that B. M. Lingo, the absent commissioner, was in the county, at his residence, but had no knowledge or notice of such intended special session; "that knowledge and notice of such intended special session was intentionally and fraudulently concealed and kept from said B. M. Lingo by the said railway company and its agents; and said session was not a regular session of said board, nor was it an adjourned session from any regular session thereof, nor from any duly called special session of said board." The court held that the subscription ordered under those circumstances was not binding upon the county. In that case, the contract was executory, and the bonds had not been delivered, but were still within the control of the county. The special session, with only a fraction of the board present, was fraudulently intended and fraudulently brought about, and the railway company was the wrongdoer. The illegality of the session was not a matter of inference, but a fact alleged and admitted.

The case in 27 Kansas is even stronger. That was a suit on a written contract, signed by two members of a school district board, the board consisting of three. Such a contract could only be made by the district board, as a board. It appeared

affirmatively that there was no meeting of the board; that it was signed by the two members, not after consultation, but by each separately, and at a different time from the other.

More in point is the case of *Scott* v. *Paulen*, 15 Kansas, 162, 167, in which a session of a board of county commissioners was held to be valid, at which only two out of the three members were present; and the record failed to show either an adjournment to that date, or a call for a meeting at that time, but did show that it was not held on the regular days of session; but its validity was not challenged until some time thereafter. In the opinion in that case, written by the same judge who wrote the opinion in the case in 16 Kansas, is this language: "Hence it seems to us that when a quorum of the county board, with the clerk, is present, assuming to act as a county board, and at a time and place at which a legal session is possible, and to such board in actual session a proper and legal petition is presented for a county-seat election, and an election ordered, and thereafter full and legal notice given of such election, two elections had, generally participated in by the electors, the result canvassed and declared, and no objection made thereto for more than a year, it will be too late to question the validity of the election on the ground that the record of the proceedings of the commissioners shows that the chairman was absent, and fails to show a session pursuant to a legal adjournment from a regular session, or that the session was a special session and duly called by the chairman on the request of two members." We think, therefore, that the bonds in suit were valid obligations, and that the Circuit Court did not err in overruling these objections to them.

But it is further insisted that even if the bonds were valid the coupons were not, because coupons are not named in the section of the statute authorizing the issue of the bonds. But coupons are simply instruments containing the promise to pay interest, and the express authority was to issue bonds bearing interest. While it is true that the power to borrow money granted to a municipal corporation does not carry with it by implication the power to issue negotiable bonds, (*Brenham* v. *German American Bank*, 144 U. S. 173,) we are of opinion

that the express power to issue bonds bearing interest carries with it the power to attach to those bonds interest coupons.

The final objection is, that the proper defendant is not sued. The claim here is, that while by the act of 1872 the public schools of cities of the second class were organized into a body corporate, by the name and style of "The Board of Education of the City of ——, of the State of Kansas," and at that time, if not before, the real debtor was this distinct corporate entity, yet, at the time of the commencement of this action, the city of Atchison had passed, by reason of the growth of its population, from a city of the second to a city of the first class; and that in such cities there was no separate school corporation, but the Board of Education was simply an administrative body, having charge of the school affairs of the city. The case of *Knowles* v. *Topeka*, 33 Kansas, 692, is a sufficient answer to this contention. Topeka, like Atchison, had been a city of the second class, and became by mere increase in population a city of the first class; and in the opinion of the court in that case, delivered by Chief Justice Horton, it is declared that "the Board of Education of the city of Topeka is a distinct corporation from the municipal corporation of the city of Topeka." That case came to the Supreme Court from the Superior Court of Shawnee County; and in the opinion in the latter court, delivered by Webb, Judge, an opinion which is found in the report of the case, and referred to with approval by the Supreme Court, is this discussion of the question: "Topeka remained a city of the second class until January, 1881, when it became a city of the first class. Article 10 of said chapter 122, Laws of 1876, relates to 'public schools in cities of the first class.' Its provisions, as to the powers and duties of the Board of Education, are very similar to those contained in article 11 relating to 'public schools in cities of the second class.' But there is no provision in said article 10, declaring that 'the public schools' or the 'school district' of cities of the first class shall be bodies corporate. Nor has the writer of this opinion been able to find any such provision in any act or statute, although the powers conferred by said article 10 are those usually conferred upon incorporated school districts, and the gov-

ernment of the public schools in incorporated cities has been in the hands of 'Boards of Education' since 1867. There has been no legislation respecting Boards of Education of cities of the first class since Topeka became a city of that class, except that which regulates the number of members, and fixes their terms. But it will hardly be contended that the corporate powers lawfully conferred upon the Board of Education of the city of Topeka, when said city was a city of the second class, have been lost or destroyed by reason of the transition of the city from a city of such class to a city of the first class. It will, therefore, be considered, for the purposes of this case, that the public schools of the city of Topeka are 'a body corporate under the name and style of the Board of Education,' and that, therefore, said chapter 56 of the Laws of 1885 is not void for want of a proper body corporate to which it can apply."

That which was true of Topeka is of course true of Atchison, and the Board of Education of the city of Atchison is a distinct corporation, and the proper one to be sued for the enforcement of a debt like this. Indeed, if it were not a corporate entity, by what right does it come into court and carry on this litigation?

We think this is all that needs to be said in reference to the questions presented. The defences interposed are purely technical, and, as we think, without foundation.

The judgment is affirmed.

SWAN LAND AND CATTLE COMPANY *v.* FRANK.

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

No. 150. Argued March 21, 1893. — Decided April 10, 1893.

A party having a claim for unliquidated damages against a corporation which has not been dissolved, but has merely distributed its corporate funds amongst its stockholders and ceased or suspended business, cannot maintain a suit on the equity side of the United States Circuit Court

against a portion of such stockholders, to reach and subject the assets so received by them to the payment and satisfaction of his claim, without first reducing such claim to judgment, and without making the corporation a defendant and bringing it before the court.

Corporations are indispensable parties to a bill which affects corporate rights or liabilities.

A claim purely legal, involving a trial at law before a jury, cannot, until reduced to judgment at law, be made the basis of relief in equity.

The general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, is for the court to express in its decree that the dismissal is without prejudice.

THE case is stated in the opinion.

Mr. Richard D. Jones for appellant. *Mr. William H. Swift* filed a brief for same.

Mr. J. M. Woolworth and *Mr. L. Mayer* for appellees.

MR. JUSTICE JACKSON delivered the opinion of the court.

The appeal in this case presents for our consideration and determination the question whether the Circuit Courts of the United States can properly entertain jurisdiction of a suit in equity which unites and seeks to enforce both legal and equitable demands, when the right to the equitable relief sought rests and depends upon the legal claim being first ascertained and established, and where the person against whom such legal demand is asserted is not made a party defendant; or, stated in another form more directly applicable to the present case, can a party having a claim for unliquidated damages against a corporation, which has not been dissolved, but has merely distributed its corporate funds amongst its stockholders, and ceased or suspended business, maintain a suit on the equity side of the United States Circuit Court against a portion of such stockholders, to reach and subject the assets so received by them to the payment and satisfaction of his claim, without first reducing such claim to judgment and without making the corporation a defendant and bringing it before the court? This question, which hardly needs or requires more than its bare

statement to indicate the answer that must be made thereto, arises as follows:

The appellant, the Swan Land and Cattle Company, Limited, a corporation organized under the Companies' Acts of Great Britain and being a citizen of that kingdom, filed its bill in equity in the court below against the appellees, all of whom are citizens of Illinois, except two who are citizens of Wyoming, containing substantially the following material averments: That in November, 1882, three Wyoming corporations, known, respectively, as the Swan and Frank Live Stock Company, the National Cattle Company, and the Swan, Frank and Anthony Cattle Company, being the owners of large herds of cattle and other property in Wyoming, and engaged there in the business of raising and selling what are known as range cattle, entered into an agreement in writing with one James Wilson, of Edinburgh, Scotland, acting in his own behalf and for others to be thereafter associated with him in a limited liability company to be formed under the Companies' Acts, of Great Britain, by the terms of which said company, when organized, was to purchase of the Wyoming corporations, for the sum of $2,553,825, "all and singular the lands and tenements, water rights, improvements upon lands, houses, barns, stables, corrals, and other improvements and grazing privileges; also, all live stock, consisting of neat cattle, horses and mules belonging to the said three Wyoming corporations, or any or either of them; also, all live stock, brands, tools, implements, wagons, harnesses, ranches, camps, round-up outfits, and branding irons," belonging to said Wyoming corporations, all of such property being particularly enumerated and described in certain inventories annexed to said agreement. In regard to all the property sold, except the live stock, the agreement provided that the representations in those inventories should be verified by a competent inspector or inspectors to be named by the British company, prior to the transfer of the title to such property, and that deficiencies, if any, in such representations should be made good or supplied by the Wyoming companies. The agreement then provided, "as to all live stock mentioned and described in said inventories

that said first parties [the Wyoming corporations] shall and do hereby agree and guarantee to and with said second party [the British corporation] that the herd-books of said first parties, showing the acquisitions, increase, disposition of, and number of cattle now on hand of said first parties, respectively, have been truly and correctly kept"; a copy of which herd-books were required to be furnished to the party of the second part.

The bill then averred that, after the making and delivery of this agreement, the vendor companies proceeded to make the necessary arrangements for the turning over of their property to the purchaser, in accordance with the terms of the agreement; and that, in pursuance of the agreement, the said Wilson returned to Scotland and organized a limited liability company, completing its organization March 30, 1883. In effecting this organization Wilson was aided in inducing parties to take stock in the new company by a certain report in relation to the properties that were the subject of the negotiation, made by one Lawson in December, 1882, who had previously visited and inspected said properties, and who, it was averred, was acting in the interests of the vendor corporations, and was in their employ, having received from them the large sum of $12,000 for said report; and also by Alexander H. Swan, the president of each of the vendor corporations, who, at that time, was in Scotland, and represented that the number of cattle the vendors would turn over, under the agreement, was 89,167, as was shown by alleged copies of the herd-books which he produced and also by certain alleged inventories of the stock on the ranches, and that any death losses in the herds would be more than made good by the number of calves on the ranches that escaped branding at the usual branding season, and who also made certain estimates as to the prospective increase in the herds, which representations and estimates were implicitly relied upon by the parties forming the new corporation. By a supplemental agreement, also in writing, between the contracting parties, it was provided, among other things, that Swan should become the general manager of the new com-

pany at a salary of $10,000 a year, and he and the vendor companies should subscribe for 10,000 shares of stock in the new company; and the vendors then agreed that if the number of calves branded in 1883 belonging to the herds sold should be fewer than 17,868, then they should be jointly and severally bound to pay to the new company $31.68 for each deficiency in that number.

The bill then averred that the vendors represented that it would be impossible to count the cattle upon the ranches, and that the new company would be obliged to take possession of them, wherever they might be ranging, without any count being made; and that, relying upon all these representations made by the vendors, and in their behalf, as above set forth, the new company received delivery of the property so purchased by it, and paid the purchase price it had agreed to pay, in the manner agreed upon, and did and performed all the things it was required to do and perform by the terms of the aforesaid agreements.

The bill then averred that the representations made by the vendors, and in their behalf, as respects the number of cattle on the ranches, and which were relied upon by the parties forming the new company, were grossly untrue, and known at the time by the vendor companies to be so, and that the number of cattle actually turned over to the new company, under the agreement, was, at least, 30,000 less than was represented by the vendors, whereby it had suffered loss and damage in the sum of, at least, $800,000.

The bill then proceeded as follows: "Your orator further showeth that said vendors had no other business except the management of the herds sold to your orator, and no other assets, or substantially none, except the properties sold by them to your orator; and your orator showeth that, after the sale of their said properties to your orator, and the receipt by them of the purchase price, as aforesaid, said three vendors paid whatever liabilities they had outstanding, except their liability to your orator herein set forth, and distributed the money and stock obtained from your orator as the proceeds of said sale and all their other assets amongst their respective

shareholders, and the same were received by said shareholders, and since that time said three corporations have not, nor has either of them, made any use whatever of their franchises, but they have abandoned the same, and neither of said corporations has any officer or agent upon whom process can be served, and they have not, nor has either of them, any assets of any kind out of which any judgment at common law against them, or either of them, could be satisfied. Your orator further showeth that the assets of said corporation were in the hands of said corporations a trust fund, held by said corporations in trust to satisfy the claim of your orator herein set forth, before the shareholders of said corporations were entitled to receive any portion of the same, and said shareholders, in receiving said assets, did take and now hold the same as trustees in place of said corporations, and subject to the lien of your orator's aforesaid claim, and should account for the same to your orator, and apply the same, so far as necessary, in satisfaction of your orator's claim herein set forth."

The bill prayed that the several defendants be required to answer certain interrogatories thereto attached, but not under oath, and that whatever property each and every one of them may have received from the vendor corporations, or any of them, in the distribution of the assets aforesaid, be decreed to have been taken and to be held by them in trust for the payment of the claim of the plaintiff, and "be applied, so far as shall be necessary, in satisfaction of the damages which shall be found due to your orator from the vendors aforesaid upon final hearing hereof," and for other and further relief, etc.

The three vendor corporations were not made parties defendant to the suit. The two Wyoming defendants were not served with process, and did not appear in the case. The Illinois defendants who were served with process entered a special appearance, and demurred to the bill upon three grounds: (1) That the bill did not state a case within the equity jurisdiction of the court, or one entitling the complainant to any discovery or equitable relief as prayed; (2) that the several vendor corporations, and each of them, were necessary parties

to the suit; and (3) that the averments of the bill are too general in their nature to charge the defendants or either of them as a trustee of any portion of the assets of any one of the vendor corporations.

The demurrer was sustained by the Circuit Court and the bill dismissed, (39 Fed. Rep. 456,) and an appeal from that decree brings the case here.

The grounds upon which the court below based its decision and decree were: (1) that the complainant had no standing in a court of equity without first reducing its claim for damages to a judgment; and (2) that even if that position be untenable, still the vendor corporations were necessary and indispensable parties to the suit.

The bill does not seek to hold the defendants below personally liable for the alleged fraud committed by the vendor corporations in which they were stockholders. There is no averment or even intimation in the bill that the defendants in any way participated in the fraudulent misrepresentations of the vendor companies, on which it is charged the complainant relied and acted to its injury. They are, therefore, not personally responsible for any damage resulting to the complainant by reason of the alleged fraud.

The theory of the bill is, that the assets of the vendor corporations which have been distributed to and received by the defendants as stockholders constitute a *trust fund* for the payment of all debts and demands against the companies, and may, therefore, be followed in the hands of, and recovered from, such stockholders, to the extent necessary to discharge valid claims against the corporations from which they were received. The funds sought to be reached are undoubtedly applicable, under proper proceedings against all necessary parties, to the payment, so far as may be needed, of outstanding indebtedness against the corporations which distributed the same; but the difficulty here is that the complainant has not adopted the requisite and necessary procedure to subject said funds thereto. It has no judgment against the corporations by which it was defrauded, nor are such corporations made parties defendant to the suit or brought before the

court. The stockholder defendants, who have been served with process and entered their appearance, do not undertake to represent, and cannot in any way represent, the corporations against whom the claim for damages is asserted. *Bronson* v. *La Crosse & Milwaukee Railroad*, 2 Wall. 283, 301, 302.

Now, it is too clear to admit of discussion that the various corporations charged with the fraud which has resulted in damage to the complainant are necessary and indispensable parties to any suit to establish the alleged fraud and to determine the damages arising therefrom. Unless made parties to the proceeding in which these matters are to be passed upon and adjudicated, neither they nor their other stockholders would be concluded by the decree. The defendants cannot be required to litigate those questions which primarily and directly involve issues with third parties not before the court. As any decree rendered against them would not bind either the corporations or their co-shareholders, it would manifestly violate all rules of equity pleading and practice to pursue and hold the defendants on an unliquidated demand for damages against companies not before the court. The complainant's right to follow the corporate funds in the hands of the defendants depends upon its having a valid claim for damages against the vendor corporations. That demand is not only legal in character, but can be settled and determined and the amount thereof ascertained by some appropriate proceeding to which the corporations against which it is made are parties and have an opportunity to be heard. Stockholders cannot be required to represent their corporations in litigation involving such questions and issues. The corporations themselves are indispensable parties to a bill which affects corporate rights or liabilities. Thus, in *Deerfield* v. *Nims*, 110 Mass. 115, it was held that the corporation was a necessary party in a bill by a creditor of the corporation against its officers or stockholders who had divided its assets among themselves. So, in *Gaylords* v. *Kelshaw*, 1 Wall. 81, 82, it was held by this court that in a bill to set aside a conveyance as made without consideration and in fraud of creditors, the alleged fraudulent grantor is

a necessary defendant, because it was his debts that were sought to be collected and his fraudulent conduct that required investigation.

The general rule that suits in equity cannot be entertained and decrees be rendered, when necessary or indispensable parties, whether corporations or individuals, are not brought before the court, is not affected by section 1 of the act of February 28, 1839, c. 36, re-enacted in section 737 of the Revised Statutes of the United States, as this court has repeatedly held. *Shields* v. *Barrow*, 17 How. 130, 141; *Coiron et al.* v. *Millaudon*, 19 How. 113, 115; *Ogilvie* v. *Knox Ins. Co.*, 22 How. 380; *Barney* v. *Baltimore*, 6 Wall. 280; *Davenport* v. *Dows*, 18 Wall. 626. The same rule is applied in respect to averments as to citizenship of necessary parties to confer jurisdiction or the right of removal. *Thayer* v. *Life Association of America*, 112 U. S. 717, 719; *St. Louis & San Francisco Railway* v. *Wilson*, 114 U. S. 60, 62.

To take the present case out of the operation of the general rule, it is argued on behalf of appellants that the bill discloses such a practical abandonment of their franchises as to amount to a dissolution of the vendor corporations. We cannot so construe the bill. The dissolution of corporations is or may be effected by expirations of their charters, by failure of any essential part of the corporate organizations that cannot be restored, by dissolution and surrender of their franchises with the consent of the State, by legislative enactment within constitutional authority, by forfeiture of their franchises and judgment of dissolution declared in regular judicial proceedings, or by other lawful means. No such dissolution is alleged in the bill. The averments that said corporations paid all other liabilities, and thereafter distributed their remaining assets amongst their respective stockholders, and have since made no use of their franchises, and have no agent or officer upon whom process can be served, and no assets out of which any judgment against them could be satisfied, fall far short of a dissolution such as would prevent a suit against the corporations or their trustees as provided by the laws of Wyoming, to establish the validity and amount of the appellants' claim

for damages. (Secs. 506, 515.) The cases cited to the point that, when the corporation is dissolved, the necessity for making it a party is dispensed with, need not, therefore, be reviewed. They are not applicable to the present case. It does not help the matter that complainant could not get the vendor corporations before the Circuit Court for the Northern District of Illinois. That fact in no way affects the question of their being necessary parties, without whose presence no decree could be rendered against the appellees. We do not deem it necessary to refer to the Wyoming statutes further than to say we think they provide the means by which the vendor corporations could there have been sued.

We are also clearly of opinion that the court below was correct in sustaining the demurrer to the bill upon the other ground assigned, that the complainant had not previously reduced its demand against the vendor corporations to judgment. That claim was purely legal, involving a trial at law before a jury. Until reduced to judgment at law, it could not be made the basis of relief in equity. This is well settled by the decisions of this court in *Taylor* v. *Bowker*, 111 U. S. 110; *National Tube Works Co.* v. *Ballou*, 146 U. S. 517, 523; and *Scott* v. *Neely*, 140 U. S. 106, 115. In this latter case the subject is fully reviewed and the question settled so far as the federal courts are concerned.

Our conclusion is that there is no error in the decree of the Circuit Court sustaining the demurrer to the bill, but we are of opinion that the bill, instead of being dismissed generally, should have been dismissed without prejudice. In *Durant* v. *Essex Company*, 7 Wall. 107, 113, it is said that the general practice in this country and in England, when a bill in equity is dismissed without a consideration of the merits, is for the court to express in its decree that the dismissal is without prejudice, and that the omission of that qualification in a proper case will be corrected by this court on appeal, in support of which numerous authorities are cited. In *Kendig* v. *Dean*, 97 U. S. 423, 426, the same practice was adopted.

The decree must, therefore, be modified at appellants' costs, and the cause remanded with directions to dismiss the bill without prejudice, and it is so ordered.

Dissenting Opinion: Brown, J.

Mr. Justice Brown dissenting.

I concur in the opinion of the court that the question involved in this case needs little more than its bare statement to indicate the answer that should be made to it. But I do not concur in the answer made by the court. Admitting to the fullest extent the proposition that the mere discontinuance of business by a corporation, the sale of its assets, the failure to re-elect officers and the non-user of its franchise, do not, *ipso facto*, work a dissolution of the corporation, it seems to me that this is aside from the merits of the case. I agree, too, that before resorting to the stockholders a judgment should, if possible, be obtained against the principal debtors, which in this case are the three Wyoming corporations. But the law does not compel that which is impossible, and if the facts alleged in the bill show that no judgment can be obtained against the corporations, and that it is useless to pursue them, the bare existence of such corporations ought not to defeat the recovery of a just claim. I do not understand it to be denied that if the corporations had been formally dissolved by the decree of a competent court, the plaintiff might have maintained this bill, and the fact that it had no judgment against the corporations would be no defence.

Now, the allegations of the bill in this case are such as to show, not only that the Wyoming corporations are practically dissolved, and exist only in name, but that it would be impossible to obtain a judgment against them in the jurisdiction where they were organized. The Revised Statutes of Wyoming (sec. 2431) provide that "A summons against a corporation may be served upon the president, mayor, chairman or president of the board of directors or trustees, or other chief officer, or if its chief officer be not found in the county, upon its cashier, treasurer, secretary, clerk or managing agent; or if none of the aforesaid officers can be found, by a copy left at the office or other place of business of said corporation, with the person having charge thereof." In that connection the allegation of the bill is, "that after the sale of their said properties to your orator and the receipt by them of the pur-

chase price as aforesaid, said three vendors paid whatever liabilities they had outstanding except their liability to your orator herein set forth, and distributed the money and stock obtained from your orator as the proceeds of said sale and all their other assets amongst their respective shareholders, and the same were received by said shareholders, and since that time said *three corporations have not nor has either of them made any use whatever of their franchises, but they have abandoned the same, and neither of said corporations has any officer or agent upon whom process can be served*, and they have not nor has either of them any assets of any kind out of which any judgment at common law against them or either of them could be satisfied." Now, if there be no officer or agent of a corporation upon whom process can be served, it follows that there can be no office or other place of business of such corporation within the meaning of section 2431, since the only object of an office or place of business is for the accommodation of an officer or agent. The act does not authorize service upon a trustee, but only upon the president of the board of trustees who would, of course, be an officer of the corporation. The allegations of the bill in these particulars may be shown to be untrue, but upon demurrer they must be taken as true.

It is true that by section 2435 "service by publication may be had . . . in actions against a corporation incorporated under the laws of this Territory, which has failed to elect officers, or to appoint an agent, upon whom service of summons can be made, . . . and which has no place of doing business in this Territory."

But, while such service by publication might be effective so far as to charge any property of the corporation within the Territory, it would not create a general liability against the corporation which would be available elsewhere. This court has repeatedly held that a personal judgment is without any validity if it be rendered against a party served only by publication of a summons, but upon whom no personal service of process within the State was made, and who did not appear. *Pennoyer* v. *Neff*, 95 U. S. 714; *Harkness* v. *Hyde*, 98 U. S. 476; *St. Clair* v. *Cox*, 106 U. S. 350.

Syllabus.

The cases relied upon to sustain this decree do not touch this question, and the authorities which require corporations to be made parties to a bill against the stockholders, have no application to cases in which it is not only useless but impossible to make them parties. I do not think the defendants in this case, who are charged with receiving the proceeds of a gross fraud, should be permitted to take refuge in the shadow of these defunct corporations.

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

CASEMENT *v.* BROWN.

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

No. 173. Submitted March 24, 1893. — Decided April 10, 1893.

A contractor agreed with a railroad company to construct piers for a bridge over the Ohio River of sizes and forms, in places, and of materials, in accordance with plans and specifications furnished by the company, and to furnish the materials and perform the work of preparing and keeping in place, buoys and lights to warn against danger. By reason of a flood one of these piers was submerged, and the buoy and light placed to give warning of it were carried away. The contractors failed to place a new buoy and light. One of the barges in a tow struck on the pier and was lost. In an action against the contractor to recover damages therefor, *Held*,

(1) That the defendants were independent contractors, and not employés of the company; and as such were liable for injuries caused by their own negligence;

(2) That having omitted to replace the buoy, although they knew of the necessity therefor and had ample time to do so, or otherwise to warn of the danger, they were guilty of negligence, and responsible for injuries resulting therefrom;

(3) That there was no contributory negligence on the part of those navigating the vessel destroyed; as it would be placing too severe a condemnation on the conduct of the pilots in charge to hold that an error of judgment, a dependence upon the appearance of the stream and a reliance upon the duty of the contractors to place suitable buoys and other warnings, were such contributory negligence as would relieve the contractors from liability.

Statement of the Case.

THIS was an action to recover the value of three barges of coal, lost, as claimed, through the negligence of the defendants. The case was commenced in the Court of Common Pleas of Scioto County, Ohio, and removed to the Circuit Court of the United States for the Southern District of Ohio. There it was tried by the court without a jury; findings of fact were made, and from those findings the conclusion was reached that the defendants were guilty of negligence. Whereupon judgment was entered in favor of the plaintiffs for the amount of the loss.

These facts appeared in the findings: Early in the year of 1882, two railroad corporations, one an Ohio and the other a West Virginia corporation, obtained proper authority from those States and from the United States government for the construction of a railroad bridge across the Ohio River, opposite the village of Point Pleasant, in West Virginia. The plan of the bridge and the number and size of the stone piers were submitted to the proper officers of the United States government, and approved, and the bridge and piers were duly constructed as authorized by such officers.

"There were six stone piers provided and built for the support of said bridge, one of which stood on top of the bluff bank of the river on the West Virginia side, another on top of the bluff bank on the Ohio side, and the other four between said banks of the river. Said four piers between the banks are known as 'A,' 'B,' 'C,' and 'D.' Said pier 'A,' being on the West Virginia side of the river, was located and built at the outer edge of low-water mark; pier 'B,' 250 feet west therefrom; pier 'C,' 250 feet west of pier 'B,' and pier 'D' at the edge of the water at low-water mark on the Ohio side, at the distance of 500 feet from said pier 'C,' the west side of pier 'A' and the east side of pier 'D' reaching to the edge of the water at low-water mark. The long span between piers 'C' and 'D' was duly established as the channel span after notice duly given and consultation with those engaged in the navigation of the Ohio River, as required by law."

On January 27, 1882, these corporations entered into a written contract with the defendants for furnishing the ma-

terial and building these piers. This contract in terms provided that defendants were "to furnish all material of every kind, name and description necessary for the construction of the same, said material to be subject to the approval of said engineer and to be of such quality as may best insure the durability of said structure; to be at the expense of and subject to all expenses incident to and connected with said work of construction, the said work to be done and completed according to the plan and specifications hereto annexed, marked A, and subject to the inspection and approval of the said engineer of said companies in charge of said work, and which said plans and specifications are hereby expressly made a part of this contract." It further provided that "the work throughout will be executed in the most thorough, substantial and workmanlike manner, under the direction and supervision of the engineer of the company, who will give such directions from time to time during the construction of the work as may appear to him necessary and proper to make the work complete in all respects, as contemplated in the foregoing specifications. Said directions of the engineer will in all respects be complied with. The engineer will also have full power to reject or condemn all work or materials which, in his opinion, do not conform to the spirit of the foregoing specifications, and shall decide every question that may arise between the parties relative to the execution of the work, and his decision in the nature of an award shall be final and conclusive on both parties to this contract."

Under this contract the defendants had, at the time of the injury, completed the two piers on the banks, and partly constructed the four piers between the banks. For two weeks before the injury the river had been rising rapidly, and the water was very high. Business on the river had been partially suspended on account thereof. On the Ohio side the bank was under water, which extended inland a quarter of a mile or more. The stage of the water in the river was then fifty-five feet above low-water mark. Three of the piers were from thirty-seven to forty-seven feet below the surface of the water, while pier "D" on the Ohio side, which had been completed

to forty-eight feet above low-water mark, was covered to the depth of only about seven feet.

"5. There is a very slight curve in the river at Point Pleasant, the Ohio shore being on the convex side, and at high stages of water it is customary and proper for coal fleets to 'run the points,' running near the shore on the Ohio side at a distance of a quarter of a mile and more above the bridge in descending the river and bearing out to the left of channel pier D and between channel pier D and C and running in near the shore on the West Virginia side about two miles below said village of Point Pleasant, and the channel of the river was between said channel piers C and D, and the usual and proper course was to run between said piers C and D, running the points as before stated.

"6. The night before the accident, the plaintiffs' three steamboats — the 'Resolute,' the 'Alarm,' and the 'Dexter' — with coal barges in tow, tied to shore during the night some distance above the bridge.

"The 'Resolute,' with its tow, was in advance of the other two, passing the bridge on the morning of the accident between eight and nine o'clock. The 'Alarm,' with its tow, reached the bridge about 10 o'clock in the morning. Its tow consisted of six coal barges, three abreast, each barge being twenty-six feet wide and drawing between seven and eight feet of water. The front middle barge ran upon and struck said channel pier D, which caused the injury complained of.

"The steamer 'Dexter,' with its tow, passed shortly after between said channel piers C and D, where the 'Resolute,' with its tow, had previously passed, and while one of the 'Alarm's' barges that struck said pier D was still lying on said pier in plain view.

"7. The morning of the accident was clear and calm, and the Alarm, with its tow, was steaming and handling well. The pilot in charge was well acquainted with the Ohio River at that point and from Pittsburg to all points below, and while the work of constructing said pier was going on had passed there twice a week and saw and knew where said piers were located and to what extent the work had progressed and where

the channel span had been established and its length, and also knew that prior to the location of said bridge the usual channel for coal fleets in passing down the river was further to the left, between piers B and C and near to said pier B.

"8. As the Alarm approached the bridge no halt was made nor was any one sent forward in a skiff or otherwise to take observations or make inquiry. The pier standing on the Ohio bank, twenty-four feet out of water, was in plain view and was seen by said pilot and others in the pilot-house, and the same was the case as to the pier on the east bank of the river.

"The village of Point Pleasant and its buildings, well known to pilots and other rivermen, were also in plain view.

"There were also on the Ohio side, between the top of the bank, both above and below the bridge, growing trees, the tops of which were some distance out of water, that were in plain view and were noticed by said pilot, but for the distance of about a quarter of a mile immediately above and below said bridge the line of trees did not extend. At the time of the accident there were present in the pilot-house, aiding and assisting the pilot in charge, the other pilot of the Alarm and three other pilots, who were on the lookout, making observations and consulting as to the passage of the bridge, none of whom saw any buoys or break to indicate where the pier was. Another man acted as lookout, was on the extreme front of the tow, and he saw no buoys or break to indicate the location of said pier D.

"9. During the building of said four piers between the banks of the river proper buoys had been kept upon the same, to which, during the night, proper lights had been attached as signals to warn passing boats and other water craft of danger; but for some days prior to the accident, on account of the height of the water and the large quantity of floating drift, the buoys had been carried off and floated down the river, but had been secured and replaced till the night preceding the accident or the night previous to that, when the buoy on pier D had again been washed off and had not been replaced at the time of the accident, and the fact of its absence was known to the defendants early in the morning of the accident, and they

made no effort to restore it till after the accident, and that they might have done so; neither did they send any one up the river or adopt any other plan, as they might have done, to notify approaching boats of the absence of said buoy, or adopt any other plan.

"10. The said railroad companies provided, employed and paid for the services of a chief and an assistant engineer to superintend said work, one of whom was at all times on the ground and gave directions as to the mode and manner of constructing said stone piers and decided as to the quantity of stone, the height and size and shape of the piers, and performed all the duties specified in said written contract. Said railroad companies, through said engineers as their agents, duly authorized, took charge of, directed and controlled as to providing buoys and lights to be kept upon said piers, the character of the same and the mode and manner of fastening them to said piers and keeping them in place. Said engineers of said railroad company, however, on behalf of said railroad company, employed the defendants to furnish the materials and perform the work in preparing said buoys and lights, and in putting them up and in keeping them in place when and as directed by said engineers. The defendants were paid for said materials and work, an account of which was kept by defendants and was carried into their monthly bills with the stone-work, and was settled and paid for with the other work.

"Prior to said accident said engineers had given to the defendants such directions as to the character of such buoys to be used, and as to the mode and manner of putting them and keeping them up, and it was the duty of defendants to see that they were kept up and replaced when washed away, under said instructions previously given and without waiting for future instructions, and which they had undertaken to do."

Upon these facts, the court found as conclusions of law:

"1. That the defendants, by the terms of said written agreement made with said railroad companies, are independent contractors, and are liable to the plaintiffs for the injury complained of.

"2. That the agreement made by defendants with said railroad companies to furnish the material and do the work in preparing, putting up and keeping up said buoys and lights on said piers created the relation of independent contractors, and made the defendants liable to the plaintiffs for the injury complained of.

"3. That it was the duty of defendants to have kept a buoy upon said pier D, and if washed off by drift or otherwise to have replaced it, or, if this could not have been done, on the morning of the accident, before the injury, they could and should have sent some one up the river a sufficient distance above the bridge, or adopted some other plan, to notify approaching boats of the loss of such buoy and of the location of the piers, and their failure to do so constitutes negligence on their part, and under such circumstances those in charge of plaintiffs' coal boats were not chargeable with negligence in failing to make accurate calculations as to the location of said pier D from the other objects in view and seen by them or that they might have seen.

"4. That the plaintiffs and their agents in charge of the tow were at the time in the exercise of reasonable and proper care in the management and navigation of the tow, and were not guilty of contributory negligence; that at the time of the accident the plaintiffs' boat Alarm, with its coal tow, was in the usual and proper place of navigation at that stage of water."

Judgment having been entered in accordance with these findings and conclusions, defendants sued out a writ of error from this court.

Mr. W. A. Hutchins and *Mr. J. W. Bannon* for plaintiffs in error.

Mr. Thornton M. Hinkle for defendants in error.

Mr. Justice Brewer delivered the opinion of the court.

The defendants contend: First, that they were not independent contractors, but employés of the railroad companies,

and that, therefore, the railroad companies and not themselves were responsible for any negligence; second, that they were not guilty of any negligence; and, third, that if they were, the plaintiffs were also guilty of contributory negligence, and therefore debarred from any recovery.

With reference to the first contention: Obviously, the defendants were independent contractors. The plans and specifications were prepared and settled by the railroad companies; the size, form and place of the piers were determined by them, and the defendants contracted to build piers of the prescribed form and size and at the places fixed. They selected their own servants and employés. Their contract was to produce a specified result. They were to furnish all the material and do all the work, and by the use of that material and the means of that work were to produce the completed structures. The will of the companies was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the companies, the contract provided for their daily supervision and approval of both material and work. The contract was not to do such work as the engineers should direct, but to furnish suitable material and construct certain specified and described piers, subject to the daily approval of the companies' engineers. This constant right of supervision, and this continuing duty of satisfying the judgment of the engineers, do not alter the fact that it was a contract to do a particular work, and in accordance with plans and specifications already prepared. They did not agree to enter generally into the service of the companies, and do whatsoever their employers called upon them to do, but they contracted for only a specific work. The functions of the engineers were to see that they complied with this contract — "only this, and nothing more." They were to see that the thing produced and the result obtained were such as the contract provided for. *Carman* v. *Steubenville & Indiana Railroad Company*, 4 Ohio St. 399, 414; *Corbin* v. *American*

Mills, 27 Connecticut, 274; Wood on Master and Servant, 610, § 314.

It is unnecessary to inquire whether, because of the supervision retained by the companies through their engineers, or because the work which was done was work done on a public highway, the companies might also be responsible for any negligence in the progress of the work. 2 Dillon on Municipal Corporations, 4th ed., § 1030; *Cleveland* v. *King*, 132 U. S. 295; *Chicago* v. *Robbins*, 2 Black, 418; *Robbins* v. *Chicago*, 4 Wall. 657; *Water Company* v. *Ware*, 16 Wall. 566. It is enough for this case that these defendants contracted to do the work, and to produce a finished structure according to certain plans and specifications, and having made such contract, and engaged in such work in accordance therewith, they are responsible for all injuries resulting from their own negligence. While doubtless the original written contract would cast upon the defendants as contractors the duty of taking all reasonable precaution, by buoys or otherwise, to warn those travelling on this public highway of any danger arising from their work, yet, in addition, it appears that there was a special contract by which they agreed to furnish the material and perform the work of preparing and keeping in place buoys and lights to warn against all danger. Surely, having made a contract to do the entire work, and in addition a special agreement to keep proper buoys and lights in place to warn persons of danger, it does not lie in their mouths to say that their negligence and omission of this contractual duty cast no responsibility upon themselves, but was only the negligence and omission of duty of the railroad companies, for which the latter, and the latter alone, were responsible.

Secondly, equally clear is it that they were guilty of negligence in failing to replace the buoy over this submerged pier. According to the findings, they knew that that which had been there had been carried away, and had ample time to put another in its place. They knew of the submerged pier, and of the danger to boats therefrom; they knew what was necessary to guard against that danger, for they had previously been taking the proper precautions. Having omitted to replace

the buoy, although they knew of the necessity therefor and had ample time to do so, or otherwise to warn of the danger, they were guilty of negligence, and responsible for all injuries which resulted therefrom.

But the stress of this case arises on the third of their contentions, and that is, that the plaintiffs were guilty of contributory negligence. It is said that the river was so high that it was dangerous to attempt to run a steamboat with barges down the current; that the piers on the shores, on either side, were visible, and in fact seen by the pilots, and thus they knew the line on which were placed the then submerged piers in the river; that they were familiar with the river at this place, knew that a bridge was being constructed, and during its construction had passed there twice a week, and saw and knew where the piers were located, and to what extent the work had progressed; that the day was clear, and the steamer under control, steaming and handling well; and that although approaching where they knew were these partially constructed piers, and seeing that they were submerged, no halt was made, nor any one sent forward to take observations or make inquiry. In view of these facts, it is strenuously urged that the pilots and officers of the steamboat were guilty of negligence which contributed directly to the injury, and that, therefore, the plaintiffs, being responsible for the negligence of their agents and employés, cannot recover. It must be conceded that these facts, thus grouped together, point in the direction of negligence on the part of the pilots and officers. They knew that there was danger there, and, therefore, were bound to take suitable precautions to guard against it; they knew that pier "D" was near the Ohio shore, and that its construction had progressed further than that of the other piers, and still they did not direct the course of the boat away from that shore, and into the unobstructed channel.

On the other hand, it must be observed that the mere fact of high water does not establish negligence on the part of the plaintiffs. Indeed, as water is a necessity for and means of steamboat navigation, it would seem that the more water the less danger. If it be said that the increased volume of water

increases the current, and, therefore, the difficulty of controlling the motions of the vessel, it is enough to say that the findings show that there was no difficulty or danger in this case on that account. The injury resulted from a submerged obstruction, and the more water there is, apparently the less danger from such sources. It is true, the findings state that business on the river was partially suspended on account of the high water. That may have been because prudent men were unwilling to risk the dangers arising therefrom, or because everything on the river driven by steam power was needed to prevent the high water from carrying away personal property along the shore, and to collect that which was being borne away. Whatever may have been the reasons, the fact that business was only partially suspended is satisfactory evidence that it was not in and of itself negligence for these plaintiffs to attempt to run their boats down the river. If it be said that the pilots ought to have taken the boats farther out into the channel, it is sufficient answer that it is found as a fact that it was both customary and proper for coal fleets, such as these, to keep somewhat near the Ohio shore at this place, "running the points," as the expression is, and the fact that, in this case, they miscalculated the exact location of the submerged pier does not subject them to the condemnation of negligence. It seems from this finding that they were pursuing the proper as well as the customary course, and a mere error of judgment is not, under such circumstances, negligence. While it is true the findings state that the pilots knew where the piers were located, and to what extent the work had progressed, having been in the habit of passing there twice a week during the construction, yet it is not to be assumed therefrom that the court meant to find that these pilots knew the exact height to which pier "D" had been carried, the exact stage of the water at the time, and, therefore, the exact depth of the water above the pier, and also its exact location in the river. All that can reasonably be inferred from the language is, that they possessed such knowledge of the location and construction of the piers as they would acquire from passing up and down the river twice a week in boats. And in reviewing a judgment

it is not proper to place any narrow, strained or strict construction on the language with which the court describes its findings of fact, in order to sustain the contention that they do not support the conclusions of law and the judgment. On the contrary, if any reasonable and fair construction thereof will sustain the judgment, such construction should be recognized and adopted by the appellate court as the true construction. If it be said that, knowing, as they did, that somewhere in the line between the two shore piers was this submerged pier "D," they should have ascertained for a certainty its exact position before proceeding on their course, it may be replied that the fact that this was an artificial obstruction, placed there by parties still engaged in the construction of a bridge across the river, and, therefore, having a present duty of caring for the structures and seeing that no one was injured thereby, is a fact of significance. If it was a natural obstruction, one in respect to which no party had any duty of preservation or warning, it might be that the obligation resting upon the pilots would be of a different and more stringent character. But they knew that here a great work was being constructed by these defendants; that it was their duty to give all needful warning to persons and boats going up and down the river; and that, if there were no buoys in place or other warning given, they might fairly conclude that all of these piers were so far submerged as to threaten no danger to passing boats.

Further, as appears from the findings, they saw no break in the water, nothing which would indicate that the top of the submerged pier was near the surface. And still further, one of the boats in the fleet had but shortly before passed there in safety. They evidently relied on two facts: First, that the appearance of the water in the course they were taking indicated that the pier, if in that course, was so far submerged as to threaten no danger; and, secondly, that if there were any danger to be apprehended from such an obstruction, the parties in charge of the work would have indicated by buoys or otherwise the place of the danger. Shall they be condemned because they relied upon the defendants' faithful discharge of the duty of giving suitable warning, and in the absence of such warning

believed there was no danger, and seeing nothing in the appearance of the water to suggest danger, pursued that which was the customary and proper course for boats to pursue in passing from above to below the line of the bridge? It appears from the findings that the lookout was not confined to one person, but that several were gathered in the pilot-house, on the lookout for all indications of danger, and all customary guards and warnings.

We are of opinion that the conclusion of the Circuit Court was right, and that it would be placing too severe a condemnation on the conduct of the pilots in charge of the boats, to say that their error of judgment, their dependence on the appearance of the stream, and their reliance upon the duty of the defendants to place suitable buoys or other warnings, was such contributory negligence as would relieve the defendants from liability for the results of their almost confessed, and certainly undoubted, negligence.

The judgment is affirmed.

HUMPHREYS *v.* PERRY.

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

No. 167. Argued and submitted March 23, 24, 1893. — Decided April 10, 1893.

A travelling salesman for a jewelry firm bought a passenger ticket for a passage on a railroad, and presented a trunk to be checked to the place of his destination, without informing the agent of the company that the trunk contained jewelry, which it did, and without being inquired of by the agent as to what it contained. He paid a charge for overweight as personal baggage, and the trunk was checked. It was of a dark color, iron bound, and of the kind known as a jeweler's trunk. It had been a practice for jewelry merchants to send out agents with trunks filled with goods, the trunks being of similar character to the one in question, and, as a rule, they were checked as personal baggage. But there was no evidence tending to show that the railroad companies, or their agents, knew what the trunks contained: *Held*,

(1) There was no evidence showing, or tending to show, that the agent

of the railroad had any actual knowledge of the contents of the trunk;

(2) There was no evidence from which it could fairly be said that the agent had reason to believe that the trunk contained jewelry;

(3) The agent was not required to inquire as to the contents of the trunk, so presented as personal baggage;

(4) The company was not liable for the loss of the contents of the trunk.

The cases on the subject, reviewed.

THE case is stated in the opinion.

Mr. Richard S. Tuthill, (with whom was *Mr. Frederick C. Hale* on the brief,) for appellees.

Mr. Wells H. Blodgett, for appellants, submitted on his brief.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an intervening petition, filed May 28, 1886, in the Circuit Court of the United States for the Northern District of Illinois, by John H. Perry, Arthur J. Perry, James K. Perry and Frank A. Perry, copartners under the firm name of Perry Brothers, in the suit pending in said court, of the Wabash, St. Louis and Pacific Railway Company against the Central Trust Company of New York and others, in which suit Solon Humphreys and Thomas E. Tutt had been appointed receivers of said railway.

The intervening petition was filed against the receivers by leave of the court. It sets forth that the principal office of the firm of the petitioners is at Chicago; that on January 30, 1885, Arthur J. Perry, one of the firm, in carrying on its business, bought and paid for a ticket for his passage from Springfield, Illinois, to Petersburg, Illinois, over and upon the railroad of the company running between those two places, and at the same time checked with the company a trunk containing jewelry, watches and merchandise of the firm, such as was necessary for him to take with him in prosecuting the business of the firm, and such as is usually taken as baggage by travelling salesmen in prosecuting business similar to that of

the petitioners, for transportation by the company from Springfield to Petersburg; that for the transportation of the trunk he paid the company a sum of money additional to that which he had already paid for his ticket; that thereupon he entered the coach of the company, and the trunk was placed by its agents in the baggage-car of the company en route for Petersburg; that shortly before reaching that place, by the negligence and carelessness of the company in constructing and repairing its roadbed and track, and in running that train, the cars containing said Arthur J. Perry and said trunk were derailed, and the baggage-car containing the trunk was overturned and rolled down an embankment, and at the foot thereof, by the negligence and carelessness of the company in using in the car an unsafe, improper and dangerous kind of stove, and in having said stove unsecured or improperly secured, the baggage-car caught on fire and was totally consumed, together with said trunk, and the watches, jewelry and merchandise of the petitioners in the trunk were almost totally destroyed; that the value of the trunk and its contents was $9818.46; that the petitioners recovered from the debris of the baggage-car a part of the merchandise, so that their loss amounts to $9218.46; that the receivers were appointed May 29, 1884, and had possession of and were operating said road from Springfield to Petersburg at the time of the loss of the trunk; and that they had refused to allow the claim of the petitioners. The prayer of the petition is that the receivers answer the claim for damages.

The answer of the receivers sets forth that at the time in question they were not prepared to carry articles of jewelry and watches as baggage, and did not undertake or advertise themselves to the public as ready or willing to transport the same; that by the rules of the receivers, then in force and well known to the intervenors, the agents and servants of the receivers were not allowed to take trunks containing jewelry, watches and valuable merchandise as baggage; that on January 30, 1885, Arthur J. Perry, one of the intervenors, presented to the agent of the receivers, at Springfield, Illinois, the trunk in question and demanded a check therefor, and the

receivers then and there undertook to carry the trunk as containing only the personal baggage of said Perry; that he then and there wrongfully concealed from the said agent the fact that the trunk contained jewelry, watches or valuable merchandise, and by such wrongful conduct and fraudulent concealment of the contents of the trunk and their value, secured a check for it from the agent as baggage; that, because it was so checked, it was placed by the agent in a baggage-car and transported as ordinary baggage by the receivers over said line of road; that, before reaching Petersburg, on said day, the train containing the baggage-car in which the trunk had been placed became derailed, without fault or negligence on the part of the receivers or their agents or servants; and that, without any such fault or negligence, the baggage-car caught fire after being so derailed, and a portion of the contents of the trunk, so wrongfully and fraudulently shipped as baggage, was destroyed. The answer denies that the intervenors are entitled to any relief.

On June 30, 1886, the court made an order referring the intervening petition to E. B. Sherman "to take proof and report the same to the court." Mr. Sherman was one of the masters in chancery of the court. He took proofs and made a report to the court, accompanied by the proofs, and filed October 23, 1888. In his report, he recites the order of reference as directing him to take evidence and report to the court "with his findings in the premises." He did report the evidence and also findings by him both of fact and of law. The receivers excepted to the report because (1) the findings were contrary to the evidence, (2) the findings were contrary to law, (3) the findings were contrary to the law and the evidence, (4) the finding should have been that the intervening petition be dismissed, (5) the intervenors were not entitled to the relief prayed for, and (6) the amount found by the master was excessive and not warranted by the testimony. The master found that the intervenors were entitled to recover from the receivers $7287.87, with costs. There was no exception to the fact that the master had found the facts and the law, or had departed from the order of reference, and neither

of the parties nor the court took any objection in that respect.[1]

The case was heard before the Circuit Court, held by Judge Gresham, 39 Fed. Rep. 417, on the report of the master and the exceptions thereto; and a decree was made, July 29, 1889, overruling the exceptions, confirming the report of the master, and decreeing in favor of the intervenors for $7287.87, and for the payment of that sum to them by the receivers, with costs, and $150 for master's fees. From this decree the receivers have appealed.

On January 30, 1885, Arthur J. Perry, a member of the intervenors' firm, was in Springfield, Illinois, with a trunk of jewelry containing a stock of goods from which he was to make sales and deliveries to their customers. He there bought a passage ticket from the agent of the receivers, for his transportation to Petersburg, on their road, and presented his trunk to be checked to Petersburg as his personal baggage. The trunk was of a dark color, iron bound, weighed 250 pounds, and as to size was described in the evidence as being "what a sample-man would call small." The agent gave him a check for the trunk and collected from him 25 cents on account of its extra weight, only 150 pounds of personal baggage being carried free for each passenger. Nothing was said to the agent by Perry concerning the contents of the trunk, nor did he make any inquiries of Perry in regard to its contents. When the train had reached a point a few miles from Petersburg, the car in which the trunk was being conveyed was thrown from the track and was ignited from the fire in a stove on board, and the trunk and contents, to the value of $7287.87, were destroyed. There was evidence tending to show that the stove was cracked and that its door was without a latch or other fastening. As to the cause of the derailment, there was evidence tending to show that the night was cold, and that, as the train was rounding a curve, a rail broke under it. There was also evidence tending to show that many of the

[1] The master states that a stipulation was made before him by the parties that he should report his findings in the premises, though no such stipulation is found in the record.

cross-ties in the track, at the place of the accident, were so decayed that they did not firmly hold the spikes, and that the disaster was caused by the rails spreading. The master, in his report, attributed it to the latter cause, and found that the condition of the track was so unsafe that the receivers were presumed to have known of its condition. He found as a fact, however, that the condition of the track had been improved by the receivers, and at the time of the accident was better than when they were appointed.

There was evidence tending to show that it was, and had been for a number of years, a practice among the wholesale jewelry merchants of Chicago and other places to send out agents or members of their firms among their country customers, with trunks filled with goods, and that such agents had been accustomed to sell and deliver goods from the stocks thus carried about. The evidence tended to show that such stocks of goods were generally carried in trunks similar in character to the one used by Perry, and that as a rule they had been checked as personal baggage. But there was no evidence tending to show that the railroad companies or their agents knew what the trunks contained; and John H. Perry, one of the firm, who testified as to what had been the custom, also testified that he did not know of any railroad in the country that he could go to and say, "Here is a trunk containing $10,000 worth of jewelry; I want a check," and get a check for the trunk. No witness testified that, after the appointment of the receivers, and before the occurrence of this loss, he had received a check over the Wabash, St. Louis and Pacific Railway for a trunk containing jewelry; nor was there any evidence tending to show that the receivers knew of any custom under which trunks containing stocks of jewelry were checked as personal baggage.

Arthur J. Perry, in his testimony, gave the following evidence as to the trunk in question: "Q. What kind of a trunk was that? A. It was a heavy iron trunk — iron-bound, dark trunk, small size. Q. Had it any particular designation that you know of? A. It is a trunk that we used in our business, is about all; very small and heavy. Q. The

kind of a trunk known as a jeweler's trunk, is it? A. Commonly used and known as a jeweler's trunk."

He also testified as follows: "Q. Are you acquainted with the wholesale and retail jewelry trade as conducted in Chicago? A. Since 1880. Q. Just state how the wholesale jewelers in Chicago conduct their business with the outlying towns with which they have trade. A. The majority of them conduct it the same as we do, that is, they put goods in trunks and send them with men on the road. Q. They send travelling men or members of the firm with a jeweler's stock in a trunk? A. Yes, sir. Q. And go to different towns and sell from that trunk? A. Yes; sell, deliver and bill. Q. And, to your knowledge, that has been the custom since 1880? A. My knowledge goes further back than that. Q. How far beyond? A. Since 1873. Q. Is that their manner in conducting business now? A. Yes, sir. Q. Did I understand you to say you sell by samples? A. It isn't the rule; there are a few that do it — not one in ten. Q. They send a stock of jewelry and sell from that stock? A. Yes, sir; they sell from the stock. Q. And what is the usage in regard to the transportation of these jewelry trunks? A. We check them the same as other sample trunks. Q. Check as baggage? A. Yes; they allow us, as commercial baggage — they allow us 200 pounds when we have a thousand-mile ticket; when we have a local ticket they allow us 150 pounds, and we have to pay for all over that. Q. They have been carried as baggage and checked as baggage since when? A. Since 1873. Q. Had you travelled over this road before and carried your trunk in the same manner? A. I had. Q. Do you know of others transacting the same kind of business? A. Yes, sir; met them in Springfield many times, and at different points on the road; it is a common occurrence. Q. Was it or not the common and invariable usage, so far as you know? A. Yes, sir; that is the way the business is conducted." On cross-examination he testified as follows: "Q. You say that was a small trunk? A. Yes, sir. Q. What was its color? A. A dark trunk — a black or gray. Q. Was it a small trunk or an ordinary size trunk? A. It was a small trunk for the

weight of it, and what sample-men would call a small trunk."

Another witness, Theodore Kearney, testified as follows: "Q. Are you familiar with the custom or usage throughout the United States of selling goods at wholesale? A. Yes, sir. Q. By travelling men? A. Yes, sir. Q. State what that usage has been for that time. A. The usual custom is to carry the stock of goods of various values, according to the class of the house, and sell from that stock to the customers. It is the universal custom. Q. What proportion of the dealing in jewelry is done in that manner? A. I think nine-tenths in the jobbing trade. Q. And how is this jewelry carried from place to place? A. Carried as baggage — trunks checked as baggage; carried in compartments made in the trunk for that particular purpose. Q. What kind of trunks are they carried in? A. What is known as the Crouch and Fitzgerald trunks — wooden trunks. I think they are made for that express purpose — almost universally made and used for that purpose. Q. Iron bound? A. Iron strapped, not bound. Properly, iron corners and strips covered by three or four strips in various ways."

John H. Perry, one of the intervenors, testified as follows: "Q. I will ask you if you are familiar with the usages and customs of the wholesale and jobbing jewelers in reference to selling their goods. A. To a fair extent I am. Q. How are they sold? A. Our goods have been sold in that way. Q. How? A. Sold by travelling men from trunks on the road; stock carried by travelling men and delivered as the sales were made and bills sent in to the house. Q. How are these trunks transported from place to place? A. Checked as baggage." The same witness also testified that some railroads had refused to receive and check such trunks unless they were given indemnifying bonds. On cross-examination, he testified as follows: "Q. Mr. Perry, do you know of any railroad in this country that you could go to with a trunk and say, 'Here is a trunk containing $10,000 worth of jewelry — I want a check,' and get a check for it? A. I am not acquainted with any such road. Q. You don't know of any such road? A. No,

sir." On his redirect examination, he testified as follows: "Q. You said you didn't know of any road that would receive a trunk if a man would say it contained $10,000 worth of jewelry. Did you ever know of a railroad refusing to check a jewelry trunk? A. No. I did not."

J. W. Patterson, the baggage agent of the receivers at Springfield, testified as follows: "Q. What business were you engaged in during the time you have lived in Springfield? A. Station baggageman for the Wabash. Q. Were you engaged in that business on the 30th of January, 1885? A. Yes, sir. Q. Did you check a trunk on that day from Springfield to Petersburg? A. Yes, sir; that is, I checked a piece of baggage; couldn't say it was a trunk. Q. Do you know the number of that check? A. Yes, sir. Q. What is it? A. It is 10,763. Q. Do you know Mr. Perry? A. No, sir; not that I know of; don't know him by name; might know him if I saw the gentleman. Q. Was that the only piece of baggage checked for Petersburg that day? A. Yes, sir. Q. That was for the evening train? A. Yes, sir; evening train, 2.10. Q. Did you know whether or not at the time you checked this trunk or piece of baggage that it contained jewelry? A. No, sir; I did not know what it contained. Q. Was it checked in the ordinary way that baggage is checked? A. Yes, sir." On cross-examination, the same witness testified as follows: "Q. When you see a trunk, a heavy trunk, heavily iron bound, with heavy iron corners and iron clasps, iron along the corners and iron bandages all around it and two or three strong locks in front, what kind of baggage would you suppose to be in the trunk? A. Well, we couldn't suppose what was in the trunk. Q. You wouldn't suppose that contained ordinary wearing apparel, would you — a trunk of that sort? A. Well, I don't know as I would. Q. Are not trunks of that description trunks that are carried by commercial travellers generally? A. Bless you, they carry all kinds, sizes and sorts. Q. Don't they carry that kind of trunk? A. Yes, sir; lots of that kind of trunks on the road. Q. Those are not the trunks ordinarily used by travellers carrying wearing apparel? A. No; but there is — once in a while you find a castaway sample trunk

that is picked up, parties carrying them, but it is not very often the case. Q. What do you mean by sample trunks? What is a sample trunk? A. What we call — that is, a trunk that contains different kinds of samples. Q. How do you know when you see them? A. Well, we don't know them without some party opens the trunk. Q. When you see a trunk of that sort you naturally suppose it has samples in it? A. Yes, sir. Q. They are made much stronger than ordinary trunks, are they not — different build? A. Yes, sir; different built trunk. Q. Well known to all baggagemen and railroad men as sample trunks, are they not? A. Yes, sir. Q. You know, as a matter of fact, do you not, that jewelry firms have transported their stock of jewelry in trunks of that make? A. Yes, sir. Q. Passing over your lines daily? A. Yes, sir. Q. Checked as ordinary baggage? A. Yes, sir; at that time, but not now.

* * * * *

"Q. Don't you know, from your experience of 11 years, if a trunk containing jewelry came into your possession and you handled it you would be able to tell what was in it? A. No, sir; and nobody else. Q. If a trunk came into your possession of that sort, at least its character is so well known to you, you would make inquiry about it, wouldn't you? A. Of course, once in a while; we do not every time.

* * * * *

"Q. You know at that time there were a great many jewelry trunks on the road, and had been previous to that time, in carrying stocks of jewelry in trunks? A. Couldn't say a great many, because I never saw but very few of them; couldn't see what they contained. Q. You know, as a general thing, that jewelers travel on the road with their stocks, don't you? A. Yes, sir. Q. They transported their goods from town to town in trunks? A. Yes, sir. Q. And sold from their trunks? A. I couldn't say about that; don't know anything about that — checked the baggage." On redirect examination, he testified: "Q. As a fact, from your knowledge of trunks, could you tell from looking at that trunk that it contained jewelry? A. I could not."

Opinion of the Court.

The Circuit Court said, in its opinion, that the nature and contents of the trunk were not expressly disclosed to the agent at Springfield; that he made no inquiries on that subject; that the trunk was 3 by 2½ feet, iron bound, weighed 250 pounds, and was known in the trade and to baggagemen as a jeweler's or commercial traveller's trunk; that the evidence showed that the intervenors and other merchants of the same class, then and prior thereto, sold their goods, in the main, directly from trunks transported from place to place over railroads, and that this road had previously and frequently checked and carried such trunks for the intervenors and others as personal baggage. The opinion then said: "If the station agent did not know that the trunk contained jewelry, he had reason to believe it did. He received it, knowing that Perry was not entitled to have it carried as personal baggage. The agent did not believe the trunk contained wearing apparel only. It is plain from the evidence that he recognized it as a jeweler's trunk, and that he understood it contained a stock of jewelry. He was not, therefore, deceived, and the receivers were not defrauded. Having checked the trunk by their agent as personal baggage, knowing or having reason to believe that it contained jewelry, the receivers became bound to safely transport it to its destination, which they did not do, and they are liable for the damages that resulted from a breach of the contract. They sustained to the trunk and its contents the relation of a carrier, and they are liable for the property destroyed by their negligence, just as if the trunk had contained nothing but wearing apparel, or as if they had undertaken to carry it as freight."

The receivers contend that the Circuit Court erred in basing its judgment, either wholly or in part, on the assumption that the baggage agent at Springfield had actual knowledge of what the trunk contained, and that he knew, or had reason to believe, that it contained a stock of jewelry.

There is no evidence showing or tending to show, that the baggage agent had any actual knowledge of the contents of the trunk. Arthur J. Perry did not suggest that he either told the agent what the trunk contained or opened it in the

agent's presence. He testified to no fact from which the inference could be drawn that the agent had actual knowledge that the trunk contained a stock of jewelry. Patterson, the agent, testified expressly that at the time he checked the trunk he did not know what it contained. The master states in his report that Perry did not disclose the character of the contents of the trunk, or say anything in regard thereto, but simply presented the trunk, as had been customary with him and other salesmen, to be received and checked as ordinary baggage, as it had been customary for agents to do on this and other roads; and the court said, in its opinion, that the nature and contents of the trunk were not expressly disclosed to the agent, and that he made no inquiries on that subject. It is clear, therefore, that the liability of the receivers cannot be founded on the proposition that the agent had actual knowledge of what the trunk contained.

It is further contended that the Circuit Court erred in holding that the agent ought to have known what was in the trunk, by its external appearance. The Circuit Court says, in its opinion, that it is plain, from the evidence, that the agent recognized the trunk as a jeweller's trunk and understood that it contained a stock of jewelry; and that, their agent having checked the trunk as personal baggage, knowing, or having reason to believe, that it contained jewelry, the receivers became bound to transport it safely to its destination.

Is there any evidence in the case from which it can fairly be said that the agent had reason to believe that the trunk contained jewelry? It is clear that Perry, in purchasing a ticket for a passenger train, and then tendering his trunk to the agent to be checked, tendered it as containing his personal baggage. The agent was not informed to the contrary by Mr. Perry or by any other person. As the agent did not know what the contents were, the allegation that he recognized the trunk as a jeweller's trunk, and understood that it contained a stock of jewelry, necessarily implies that such recognition and understanding must have arisen from the outward appearance of the trunk. The testimony on that subject is as follows: Arthur J. Perry testified: "Q. What kind of a trunk was that? A. It was a heavy iron trunk — iron-bound,

dark trunk, small size. Q. Had it any particular designation that you know of? A. It is a trunk that we used in our business, is about all; very small and heavy. Q. The kind of a trunk known as a jeweller's trunk, is it? A. Commonly used and known as a jeweller's trunk." He also said, on cross-examination: "Q. You say that was a small trunk? A. Yes, sir. Q. What was its color? A. A dark trunk, a black or gray. Q. Was it a small trunk, or an ordinary-sized trunk? A. It was a small trunk for the weight of it, and what sample-men would call a small trunk." That is all the testimony that was given as to the size, shape or appearance of the trunk.

Kearney, a witness for the intervenors, testified as follows, as to the kind of trunk generally carried by travelling men in the jewelry trade: "Q. Are you familiar with the custom or usage throughout the United States of selling goods at wholesale? A. Yes, sir. Q. By travelling men? A. Yes, sir. Q. State what that usage has been for that time. A. The usual custom is to carry the stock of goods of various values, according to the class of the house, and sell from that stock to the customers. It is the universal custom. Q. What proportion of the dealing in jewelry is done in that manner? A. I think nine-tenths in the jobbing trade. Q. And how is this jewelry carried from place to place? A. Carried as baggage — trunks checked as baggage; carried in compartments made in the trunk for that particular purpose. Q. What kind of trunks are they carried in? A. What is known as the Crouch and Fitzgerald trunks — wooden trunks. I think they are made for that express purpose — almost universally made and used for that purpose. Q. Iron bound? A. Iron strapped, not bound. Properly, iron corners and strips covered by three or four strips in various ways."

Patterson, the baggage agent at Springfield, testified that he checked a piece of baggage on the day in question, from Springfield to Petersburg; and he said, on cross-examination, that he had no particular recollection about the trunk of Perry, and that he did not recollect Perry.

The evidence, therefore, is, that the trunk which Perry delivered to be checked as his personal baggage was a wooden

trunk, of dark color, iron bound, heavy for its size, and in size what a sample-man would call small; and the question arises, on these facts, whether the agent was bound to know, or to be presumed to know, that such a trunk contained a stock of jewelry. If he was, it must be presumed, contrary to the positive evidence, that he could tell what was in the trunk by looking at it or handling it, and this, notwithstanding the agent testified as follows, on cross-examination: "Q. Don't you know, from your experience of 11 years, if a trunk containing jewelry came into your possession and you handled it you would be able to tell what was in it? A. No, sir; and nobody else."

The hypothetical trunk put to Patterson on cross-examination was described as a trunk with heavy iron corners and iron clasps, iron along the corners and iron bandages all around it, and two or three strong locks in front. That hypothetical trunk does not appear to be such a trunk as Perry delivered to the agent.

Perry, as a passenger on a passenger train, was bound to act in good faith in dealing with the carrier. He presented the trunk to the baggage agent as containing his personal baggage and got a check for it as such; and, that being so, he cannot recover for the loss of a stock of jewelry contained in it. No circumstances occurred, according to the evidence, which required the baggage agent to make inquiries as to the contents of the trunk, so presented as personal baggage. The presentation of the trunk, under the circumstances, amounted to a representation that its contents were personal baggage. The fact that Perry and other persons, on other occasions, had obtained, on passenger tickets, checks from other railroad companies for trunks containing merchandise, by representing them as containing personal baggage, furnishes no good reason for permitting a recovery in the present case. There is no evidence to show that, on the occasions when Perry and other travellers received checks, on passenger tickets, for trunks containing jewelry, the carrier knew what were the contents of the trunks. The testimony is that John H. Perry did not know of a railroad company which would receive and check a trunk as a passenger's baggage, which was filled with valuable jewelry.

Opinion of the Court.

In the present case, the trunk was offered as containing the personal baggage of a passenger; the passenger did not inform the baggage agent as to the actual contents of the trunk; the agent did not know what the trunk contained; there is no evidence that any agent of the receivers had theretofore received and checked a trunk as the personal baggage of a passenger, knowing that it contained a stock of jewelry; and it does not appear that any railroad company would issue a check to a passenger for a trunk, if previously informed that the trunk contained a valuable stock of jewelry.

The 25 cents extra paid by Mr. Perry on account of the weight of the trunk, was paid merely for the overweight, and not at all in respect of the contents of the trunk. It was paid for so much overweight of personal baggage.

It has long been the law that the principle which governs the compensation of carriers is that they are to be paid in proportion to the risk they assume. So long ago as the case of *Gibbon* v. *Paynton*, 4 Burrow, 2298, in 1769, it was held, in the King's Bench, Lord Mansfield delivering the opinion, that a bailee was only obliged to keep goods with as much diligence and caution as he would keep his own, but that a carrier, in respect of the premium he was to receive, ran the risk of them, and must make good the loss, though it happen without any fault in him, the reward making him answerable for their safe delivery; that his warranty and insurance were in respect of the reward he was to receive; and that the reward ought to be proportionable to the risk. In that case, the sum of £100 was hidden in some hay in an old nail bag and sent by a coach and lost. The carrier had not been apprised that there was money in the bag. The same principle was applied in *Batson* v. *Donovan*, 4 B. & Ald. 21, in 1820, where it was held that a carrier was not liable for bank-notes contained in a parcel, when he had not been informed of the contents of the parcel.

This principle is commented on in Story on Bailments, 9th ed., § 565, where it is said: "It is the duty of every person sending goods by a carrier to make use of no fraud or artifice to deceive him, whereby his risk is increased, or his care and diligence may be lessened. And if there is any such fraud or

unfair concealment, it will exempt the carrier from responsibility under the contract, or, more properly speaking, it will make the contract a nullity."

There is a uniform series of cases on this principle, in the Supreme Judicial Court of Massachusetts. In *Jordan* v. *Fall River Railroad*, 5 Cush. 69, it was laid down that a common carrier of passengers was not responsible for money included in the baggage of a passenger, beyond the amount which a prudent person would deem proper and necessary for travelling expenses and personal use, or intended for other persons, unless the loss was occasioned by the gross negligence of the carrier or his servants.

In *Collins* v. *Boston & Maine Railroad*, 10 Cush. 506, it was held that the term "baggage," for which passenger carriers were responsible, did not include articles of merchandise not intended for personal use; and that a carrier was not liable for the loss of merchandise sent by a passenger train, by a person who expected to go himself in the same train, but did not, the goods having been lost without any gross negligence in the carrier or any conversion by him.

In *Stimson* v. *Connecticut River Railroad*, 98 Mass. 83, it was held that a railroad company was not liable to either owner or agent, on its ordinary contract of transportation of a passenger, for losing a valise delivered into its charge as his personal luggage, but which contained only samples of merchandise, and, with its contents, was owned by a trader whose travelling agent the passenger was, to sell such goods by sample, nor in tort for the loss, without proof of gross negligence.

In *Alling* v. *Boston & Albany Railroad*, 126 Mass. 121, the above cases in 5 Cush., 10 Cush. and 98 Mass. were cited and applied, and it was held that if a passenger delivered to a railroad company a trunk containing samples of merchandise, belonging to a third person, whose agent he was, to be transported to a place for which the agent had a ticket, the only contract entered into was for the transportation of the personal baggage of the agent, and the company was not liable in contract to the owner of the trunk for its loss, nor in tort, except for

gross negligence; and that evidence that a large part of the company's business consisted in transporting passengers known as commercial travellers, with trunks like the one lost, containing merchandise, that such trunks were known as sample trunks and were of special construction, and that such travellers purchased tickets for the ordinary passenger trains, and received checks for their trunks, and were transported for the price of the tickets, was immaterial.

In *Blumantle* v. *Fitchburg Railroad*, 127 Mass. 322, 326, it was held that evidence that a passenger delivered to the baggage-master of a railroad corporation a package of merchandise and received a check for it on showing his passenger ticket, that the baggage-master knew it was merchandise, and that other passengers had similar packages, would not warrant a jury in finding that the corporation agreed to transport the merchandise, or became liable for it as a common carrier, in the absence of evidence of an agreement that the merchandise should be carried as freight, or that the baggage-master had authority to receive freight to be carried on a passenger train, or to bind the corporation to carry merchandise as personal baggage. In the opinion of the court, delivered by Chief Justice Gray, the earlier Massachusetts cases, and other cases, English and American, were cited, and it was said: "In the case at bar the plaintiff offered and delivered the bundles as his personal baggage, and requested that they might be checked as such; and the baggage-master gave him checks for them accordingly, as he was bound to do for personal baggage of passengers by the St. of 1874, c. 372, sec. 136. There was no evidence that either the plaintiff or the baggage-master agreed or intended that they should be carried as freight, or that the baggage-master had any authority to receive freight on a passenger train, or to bind the corporation to carry merchandise as personal baggage. The case cannot be distinguished in principle from the previous decisions of this court, already cited. Evidence tending to show that the baggage-master knew or supposed the bundles to contain merchandise, or that other passengers had similar bundles, would not warrant the jury in finding that the defendant agreed to transport the

plaintiff's merchandise or become liable therefor as a common carrier."

In *Hawkins* v. *Hoffman*, 6 Hill, 586, it was held that the usual contract of a carrier of passengers included an undertaking to receive and transport their baggage, though nothing was said about it; that if it was lost, even without the fault of the carrier, he was responsible; but that the term "baggage" in such case did not embrace samples of merchandise carried by the passenger in a trunk, with a view of enabling him to make bargains for the sale of goods.

In *Belfast &c. Railway* v. *Keys*, 9 H. L. Cas. 556, a railway passenger, with knowledge that the company, although allowing each passenger to carry free of charge a certain amount of luggage, required all merchandise to be paid for, took with him, as if it was personal luggage, a case of merchandise, and did not pay for it as such, and it was held that no contract whatever touching the same arose between him and the company, and that, therefore, on the merchandise being lost, he was not entitled to recover the value of it from the company.

In *Cahill* v. *London & Northwestern Railway*, 10 C. B. (N. S.) 154, in the Court of Common Pleas, where a railway company was accustomed to allow each passenger to take with him his ordinary luggage, not exceeding a given weight, without any charge for the carriage of it, a passenger took with him as luggage a box containing only merchandise, but not exceeding in weight the limit prescribed for personal luggage. He gave no information to the company's servants as to the contents of the box, nor did they inquire, although the word "glass" was written on the box in large letters. In an action to recover against the company for the loss of the box, it was held that, inasmuch as it contained only merchandise, and not personal luggage, there was no contract on the part of the company to carry it, and the company was not liable for the loss. That decision was affirmed in the Exchequer Chamber, 13 C. B. (N. S.) 818.

In *Mich. Central Railroad* v. *Carrow*, 73 Illinois, 348, a passenger on a railroad had brought to the depot a trunk which

contained costly jewelry, gave no notice of its contents, and had it checked as ordinary baggage, and there was nothing about the trunk indicating its contents. It was consumed by fire while being carried, the company not being guilty of gross negligence, and it was held that the company was not liable for the contents of the trunk. It was further held, that a carrier of passengers is not bound to inquire as to the contents of a trunk delivered to the carrier as ordinary baggage, such as is usually carried by travellers, even if the same is of considerable weight, but may rely upon the representation, arising by implication, that the trunk contains nothing more than baggage; that it is the duty of a passenger having valuable merchandise in his trunk or valise, and desiring its transportation, to disclose to the carrier the nature and value of the contents; that, if the carrier then chooses to treat it as baggage, without extra compensation, the liability of the carrier will attach, but not otherwise; and that where a person, under the pretence of having baggage transported, places in the hands of the agents of a railroad company merchandise, jewelry and other valuables, without notifying them of the character and value of the same, he practises a fraud upon the company which will prevent his recovery in case of a loss, except it occurs through gross negligence.

In *Haines* v. *Chicago, St. Paul &c. Railway*, 29 Minnesota, 160, it was held that a carrier of passengers for hire was bound only to carry their "personal baggage"; that, if a passenger delivered to the carrier as baggage a trunk or valise containing merchandise, not his personal baggage, of which fact the carrier had no notice, the carrier, in the absence of gross negligence, would not be liable for its loss; and that the carrier was not bound to inquire, in such a case, as to the nature of the property, but had a right to assume that it consisted only of the personal baggage of the passenger.

In *Pfister* v. *Central Pacific Railroad*, 70 California, 169, it was held that a railroad ticket entitling the purchaser to transportation in the first-class passenger coaches of the seller between the points indicated thereon, gave the purchaser the right to have his luggage, not exceeding the quantity specified

in the ticket, transported at the same time free of charge, but that it did not give him the right to transport, either in his own charge or that of the railroad company, any merchandise or property not included in the term "luggage."

In the present case, there is no allegation in the intervening petition of any gross negligence in the receivers, nor does the evidence make out any.

Various cases are cited on the part of the intervenors; but either we do not concur in the views expressed in them, or they are distinguishable from the present case. Thus, in *Kuter* v. *Michigan Central Railroad*, 1 Bissell, 35, it was said by Judge Drummond, in a charge to a jury, that, if the railroad company knew that immigrants, like the plaintiff, were in the habit of putting valuable articles and money among their household goods, and from such knowledge might have inferred that the box of the plaintiff might contain money, then it became the duty of the company to make inquiry in order to relieve itself from liability. But we do not think that view is sound.

In *Minter* v. *Pacific Railroad*, 41 Missouri, 503, the merchandise in question was fully exposed, and it was known to the railroad company's agent what it was.

In *Hannibal Railroad* v. *Swift*, 12 Wall. 262, it was held by this court that where a railroad company received for transportation, in cars which accompanied its passenger trains, property of a passenger, other than his baggage, in relation to which no fraud or concealment was attempted or practised upon its employés, it must be considered to have assumed, with reference to that property, the liability of a common carrier of merchandise. But that is not the present case.

So, also, the case of *Stoneman* v. *Erie Railway*, 52 N. Y. 429, was one where a carrier of passengers, in addition to passage money, demanded and received from a passenger compensation as freight for the transportation of packages containing merchandise and baggage; and it was held, in the absence of evidence of fraud or concealment on the part of the passenger as to the contents of the packages, that such carrier, in case of loss, was liable for the merchandise as well as the baggage.

The same principle was applied in *Sloman* v. *Great Western Railway*, 67 N. Y. 208.

In *Millard* v. *Missouri, Kansas & Tex. Railroad*, 86 N. Y. 441, the same principle was applied in a case where the railroad company's agent was advised by a person who had purchased a passenger ticket, of the fact that a trunk contained merchandise, and the agent demanded and received extra compensation for its transportation.

The same rule was applied in *Texas & Pacific Railroad* v. *Capps*, 2 Tex. Ct. App. Civil Cases, § 34. In *Jacobs* v. *Tutt*, 33 Fed. Rep. 412, the suit was against the same receivers as in the present case, to recover the value of a trunk and contents, which were stolen, and the trunk was the trunk of a jewelry salesman, containing his stock in trade; the agent who took it knew that fact, and the plaintiff had made no effort at concealment; and it was held that the receivers were liable as for the loss of ordinary baggage on the railroad.

We have examined the other cases cited on behalf of the intervenors, namely, *Butler* v. *Hudson River Railroad*, 3 E. D. Smith, 571; *Hellman* v. *Holladay*, 1 Woolworth, 365; *Railroad Co.* v. *Fraloff*, 100 U. S. 24; and *Talcott* v. *Wabash Railroad*, 21 N. Y. Suppl. 318, and do not think they have any application to the present case.

The case of *Switzerland Marine Ins. Co.* v. *Louisville, Cincinnati & Lexington Railway Co.*, 13 Int. Rev. Record, 342, is a charge to a jury that the item "baggage" does not include articles of merchandise for sale or for use as samples, and not designed for the use of the passenger, and that, if the passenger has such articles checked and received by the carrier as baggage, the carrier will not be liable for them if lost or injured, unless it was informed or was presumed to have known that the articles were merchandise, or unless it was the established custom or usage of the defendant to receive and transfer them as baggage, or unless they were lost by the gross negligence of the defendant. After a verdict and judgment for the plaintiff the case was brought to this court by a writ of error, and affirmed here by a divided court. 131 U. S. 440; 31 L. C. P. Co. 204.

Statement of the Case.

The decree of the Circuit Court must be reversed, and the case be remanded to it with a direction to dismiss the petition of the intervenors.

ISAACS *v.* JONAS.

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

No. 142. Argued March 14, 15, 1892. — Decided April 10, 1892.

Cigarette paper, of suitable size and quality to be used in making cigarettes, and pasteboard covers therefor, of corresponding size, imported separately and entered together with the intention to combine them with paste into cigarette books for the use of smokers, are subject to a duty of seventy per cent *ad valorem* as "smokers' articles" under schedule N, and not to a duty of fifteen per cent *ad valorem* as "manufactures of paper" under schedule M, of the Tariff Act of March 3, 1883, c. 121.

THIS was an action brought December 17, 1885, by Isaacs against the collector of the port of New Orleans, to recover back an alleged excess of duties paid, under protest, upon twenty-five cases of cigarette paper, and upon twenty-three cases of pasteboard covers for cigarette paper, both imported by the plaintiff in June, 1885; the paper at the port of New Orleans, and the covers at the port of New York and thence transferred in bond to New Orleans; and the two entered by the plaintiff simultaneously at New Orleans for withdrawal for consumption.

The collector, and the Secretary of the Treasury on appeal, held both importations to be subject to the duty of seventy per cent *ad valorem*, imposed by schedule N of the Tariff Act of March 3, 1883, c. 121, on "pipes, pipe bowls, and all smokers' articles whatever, not specially enumerated or provided for in this act." 22 Stat. 513.

The plaintiff contended that both importations were within schedule M of the same act, imposing a duty of fifteen per cent *ad valorem* on "paper, manufactures of, or of which paper is a

component material, not specially enumerated or provided for in this act." 22 Stat. 510.

At the trial before a jury, it was agreed by the parties, without contention, "that the paper, when imported, was cut into small pieces of the size proper for making cigarettes, and was put up in packages wrapped in paper, the packages being about six or eight inches square, and that these packages were again enclosed in large cases or boxes for sea transportation; that the contents of each of the smaller packages referred to were made up of said small pieces of paper, cut to the size proper and of the proper character of paper for making cigarettes; that said cigarette paper, as imported, was in no manner attached together in any form of binding, but was separated into divisions of about 250 pieces of paper, by the interposition of a piece of paper of a different color, cut of the same size, so that it subdivided the paper into the divisions of the proper size and number of leaves for the contents of the book of leaves of cigarette paper, of the ordinary size of such books as sold in the markets."

The plaintiff introduced evidence "tending to show that the paper of which the small cut papers were made was made of a peculiar material, and by a process fitting it to be used as wrappers for cigarettes; and that the paper was manufactured in large sheets, and afterwards cut into the form of small pieces of paper as imported, before importation, by machines contrived for that purpose; that the paper was so cut to adapt it to use as wrappers for cigarettes; that cigarettes, as manufactured, consist of a small quantity of disintegrated tobacco leaves, wrapped about and held in place by the paper, and that in consumption both the tobacco and the paper are set on fire and both consumed or smoked by the smoker; that it was the intention of the plaintiff, at the time of importation, and his motive in making said importation in said form, to manufacture the said material into what are known as cigarette books; that the process of such manufacture is to separate the paper, as imported, where the colored leaves or subdivisions are located in the paper as imported, and with a brush cover one edge of the paper with flour paste, glue, or some adhesive cement

adapted to cement leaves together at one edge, and then cement the paper into the covers as they are imported; that as to and concerning this particular importation a large portion thereof was so put up and cemented into books by the plaintiff after the same came into his possession by withdrawal and payment of duties; that this was done at the expense of about $400 for hire of workmen to do the work; that a portion of the paper as imported was sold directly to manufacturers of cigarettes, to be used in their factories in making cigarettes for sale as a manufacture and article of commerce; that as to this particular kind or manufacture of paper the plaintiff was the sole importer thereof into the United States, by special arrangement with the foreign manufacturers thereof; that as an article of retail sale, or jobbing and sale to the retail dealers, the paper has always been sold in this country in the form of books consisting of a certain number of leaves of the paper, cemented together and to the cover; and that in use thereof by the smoker the leaves are separately torn from the book used in the manufacture of cigarettes by the smoker, and when the leaves are all expended the cover is thrown away as useless; that the function of the cover is simply to protect the leaves from becoming scattered or injured by being handled or carried in the pockets of the smokers, and had no other function or use." The plaintiff thereupon rested his case.

The defendant called as a witness a person connected with the office of the appraisers at the custom house in New Orleans, who testified that for many years he had been a cigarette smoker, rolling and making his own cigarettes by combining the tobacco and paper himself, and who produced packages of cigarette paper of another kind and greater stiffness than the goods imported, bought at cigar shops in New Orleans, without covers, and held in place as a package by a flexible band; and was permitted by the court, against the plaintiff's objection and exception, to testify that those packages could be used by smokers in the condition in which they were produced, and also that "it was possible to use the paper in controversy in this case in the form in which it was imported, without pasting

together the edge, or pasting or gluing the paper to connect the cover to make a cigarette book."

The bill of exceptions set forth many instructions requested by either party and given by the court with modifications, as well as other instructions given to the jury, the substance of all which sufficiently appears by the following instructions given, to each of which the plaintiff excepted:

"If you find that the smoker himself, by simply placing the package of small leaves of cigarette paper within the cover, and placing the rubber band which adheres to the cover around the cover and the package of small leaves of cigarette paper, can use the book of cigarette paper for all the purposes to which a book of cigarette paper is put by smokers, then the jury should find for the defendant."

"To find that the things imported are smokers' articles, the jury must find that they are ordinarily and distinctively used by smokers in or in connection with smoking, and that they are ready to be so used."

"If the merely laying them together enables the smoker to use them, and he did use them without any process except that of laying them together, they would be smokers' articles; but if, on the other hand, there was a process of manufacture or combination beyond laying together, then they would be materials for smokers' articles, and not smokers' articles."

"If the jury find that the things separately imported are imported separately as matter of business, and not as an evasive device, then they are the materials for the articles, but not the articles themselves; but if the jury find the things, though imported separately, were designed, without any expenditure beyond being put together, to be put and sold together, and were imported separately, merely to escape a higher rate of duty, and not from motives of business, then the separate things are to be classed as parts of a whole, and not simply as materials."

The jury returned a verdict for the defendant, upon which judgment was rendered; and on May 16, 1889, the plaintiff sued out this writ of error.

Mr. W. Wickham Smith, (with whom were *Mr. Charles Curie* and *Mr. D. Ives Mackie* on the brief,) for plaintiff in error.

Mr. Assistant Attorney General Parker for defendant in error.

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

Had there been any question in this case necessary for the consideration and decision of a jury, the plaintiff would have no just ground of exception to the admission of the testimony of an habitual cigarette smoker, accustomed to roll his own cigarettes, that other cigarette paper, sold in similar packages but without covers, could be used by smokers in that condition, and that the pieces of paper now in question could be so used without being pasted together or into a cover; or to the instructions under which the case was submitted to the jury.

But the several exceptions taken become immaterial, because upon the plaintiff's own case the jury might well have been instructed, as matter of law, that the defendant was entitled to a verdict.

The facts which were either admitted by both parties, or which the evidence introduced in behalf of the plaintiff tended to prove, were in substance as follows: The importation of cigarette paper consisted of packages of separate pieces of a paper made of a peculiar material and by a special process, suitable to be used as wrappers for cigarettes, cut into the proper size, and separated into divisions of about 250 pieces by the interposition of pieces of paper of the same size and of different color. The other importation consisted of pasteboard covers of corresponding size, to be used with the paper in making cigarette books, by brushing one edge of each subdivision of the paper with paste or other adhesive substance, and then cementing the paper into the covers, from which the leaves are torn by the smoker as desired, and then the cover (which is useful only to protect the papers) is thrown away.

The plaintiff, by arrangement with the foreign manufacturers of this paper, was the sole importer thereof into the United States; his intention and motive in importing it were to make it up into cigarette books; and that was the only form in which such paper had been sold at retail. A large part of this importation was so made up into books by the plaintiff, at an expense of about $400 for the hire of workmen; but a part of it, as imported, was sold directly to manufacturers of cigarettes.

The question is, whether upon these facts the cigarette paper and the pasteboard covers for it were "manufactures of paper," within schedule M, or were "smokers' articles," within schedule N, of the Tariff Act of 1883.

Each of the two clauses containing the words "not specially enumerated or provided for in this act," and the clause concerning smokers' articles being the more specific and definite, this clause must of course prevail over the other in the case of a subject falling within both descriptions.

It is manifestly not requisite, in order to bring an article under this clause, that it should, of and by itself, be capable of being used for smoking; for the clause includes not only "pipes," which are ready to be filled and smoked, but "pipe bowls," which cannot be smoked without putting stems to them, "and all smokers' articles whatever."

In the case at bar, the cigarette papers, as well as the covers to hold them, were made, adapted and intended to be used by smokers in rolling and smoking cigarettes. The plaintiff himself imported both the papers and the covers, and entered and paid the duties upon the two simultaneously; and his intention at the time of importing them, as well as his motive in importing them in the form that he did, was to combine them into cigarette books for the use of smokers. The leaves of paper were fit for nothing else but to be made into cigarettes, and smoked with the tobacco wrapped in them; and they were used in the same way, whether never put into a cover at all, or first pasted into a cover and afterwards torn out one by one. The covers were fit for nothing, except to hold and protect the papers until made by the smoker into cigarettes. The mere pasting together of

the papers and the covers was in no proper sense a process of manufacture, and did not change the use or the character of the articles.

To decide that these cigarette papers and their covers, or either of the two, are not "smokers' articles," would contravene the plain language, as well as the manifest intent and purpose of the Tariff Act.

The cases of *Robertson* v. *Gerdan*, 132 U. S. 454, and *United States* v. *Schoverling*, 146 U. S. 76, cited for the plaintiff, went no further than to hold other provisions of the Tariff Act, describing a complete instrument, to be inapplicable to the importer of a part thereof only. In *Robertson* v. *Gerdan*, the point decided was that ivory keys, sold to manufacturers of pianos and organs, to be scraped and glued to the wood, were not themselves musical instruments. In *United States* v. *Schoverling*, the point decided was that gunstocks, although intended to be put with barrels to form complete guns, yet no question of the importation of gun barrels being involved, were not guns; and there was no intimation that if the stocks and barrels had both been imported by the same person and entered at the same time, with the intention of himself putting them together as guns, they would not have been dutiable as such; or that gunstocks should not be considered as gunners' or sportsmen's articles.

Judgment affirmed.

UNITED STATES *v.* ISAACS.

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

No. 391. Argued March 15, 1893. – Decided April 10, 1893.

Cigarette paper, made of a quality, and cut into a size, fit for wrapping cigarettes, and which, in the condition and form in which it is imported, can be used by smokers in making their own cigarettes, is subject to the duty of seventy per cent *ad valorem*, imposed on "smokers' articles"

Statement of the Case.

by schedule N of the Tariff Act of March 3, 1883, c. 121, and not to the duty of fifteen per cent *ad valorem*, imposed on "manufactures of paper" by schedule M of the same act.

THIS was an action brought June 15, 1886, by the United States against Isaacs, to recover additional duties upon sixteen cases of cigarette paper, which he had imported and entered for consumption at the port of New Orleans in June, 1885, and had paid a duty of fifteen per cent *ad valorem* upon, as "manufactures of paper," under schedule M, and which the collector, in liquidating the entry, held to be dutiable at seventy per cent *ad valorem* as "smokers' articles," under schedule N of the Tariff Act of 1883.

At the trial before a jury, the only controversy was under which description the merchandise was dutiable, upon the following facts agreed by the parties:

"The goods in question consisted of paper of a quality suitable for wrapping cigarettes filled with tobacco, and was cut into sizes fit for that use, and could have been used for that purpose, or in manufacturing cigarettes, but is not usually and in the ordinary course of trade put on the market for sale to smokers in the condition and form in which it was imported; but such paper is fitted for market and sale to smokers by being separated into lots or parcels of from one hundred to two hundred and fifty leaves of paper, after which one edge of the parcel of leaves is connected together with paste, glue or some other adhesive cement, and afterwards cemented to a protective cover, making, when the manipulation is complete, what is known in commerce as cigarette books, and from which the leaves are torn, one at a time, for the manufacture of cigarettes by smokers or manufacturers. It was, however, possible for any smoker to have taken the separate leaves of paper in form as imported, and used the same in making cigarettes, without having been first made up in books as above described. In fact, a part of this shipment and importation was sold directly to manufacturers of cigarettes in bulk for use in cigarette factories. And if the classification or rate of duty to be imposed is or can be in any

manner affected by the intention of the importer as to future use after importation, the defendant admits that at the time of importation and entry it was his intention to use said paper in the manufacture of cigarette books; and that, in fact, a large portion of said paper was so used by him after importation, and was by him sold in that form in the United States."

The United States requested the court to instruct the jury that upon the facts agreed the paper in question was a smoker's article, and liable to a duty of seventy per cent *ad valorem*, and that they should find a verdict for the United States. But the court declined so to instruct the jury; and ruled that upon the facts agreed the goods should be classified as a manufacture of paper, and that the defendant, having paid a duty upon it as such, was entitled to a verdict, which was returned accordingly. The United States alleged exceptions, and on February 11, 1890, sued out this writ of error.

Mr. Assistant Attorney General Parker for plaintiff in error.

Mr. W. Wickham Smith, (with whom were *Mr. Charles Curie* and *Mr. D. Ives Mackie* on the brief,) for defendant in error.

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

It having been admitted by the parties, at the trial, that the paper in question in this case was made of a quality, and cut into a size, fit for wrapping cigarettes, and could, in the condition and form in which it was imported, be used by smokers to make their own cigarettes — although it is not, in the usual and ordinary course of trade, put on the market for sale to smokers in that condition and form, but is usually prepared for sale to smokers by being made up into cigarette books, or else sold to manufacturers of cigarettes to be used in their factories — it must, under the opinion just delivered in *Isaacs* v. *Jonas*, *ante*, 648, be held, to come within the clause of the Tariff Act, which imposes a duty of seventy per cent *ad*

valorem on "smokers' articles." The jury having been instructed otherwise, 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.

GIOZZA *v.* TIERNAN.

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

No. 185. Submitted March 28, 1893. — Decided April 10, 1893.

The provisions in the legislation of the State of Texas, respecting the taxation of persons engaged in the sale of spirituous, vinous or malt liquors, or medicated bitters, do not violate the Constitution of the United States.

Francois Giozza was indicted in the criminal district court of Galveston County, Texas, upon the charge of having pursued the occupation of selling spirituous, vinous and malt liquors in quantities less than one quart, without having first obtained a license therefor; and was tried, convicted and fined in the sum of $450. He thereupon carried the case by appeal to the Court of Appeals of Texas, the court of last resort in criminal cases, which affirmed the judgment. Subsequently he was arrested and held in custody by Patrick Tiernan, as sheriff of Galveston County, by authority of a capias issued by the criminal court, until the fine and costs were paid. Thereupon he applied for and obtained from the Circuit Court of the United States for the Eastern District of Texas a writ of *habeas corpus*.

The petition for the writ set forth that by the laws of the State no person is permitted to obtain a license to pursue the occupation of selling liquor, until such person has given a bond in the sum of $5000 payable to the State of Texas, and containing, among other conditions, the condition in substance that the persons giving such bond will not sell spirituous, vinous

or malt liquors, or medicated bitters capable of producing intoxication, to any person, after having been notified in writing, through the sheriff or other peace officer, by the wife or mother or daughter or sister of such person, not to sell to such person; that such bond may be sued on at the instance of any person so notifying and aggrieved by the violation of such condition in said bond, and such person so notifying shall be entitled to recover the sum of $500 as liquidated damages for an infraction of such condition, etc. And petitioner charged that it was not competent for the legislature of the State of Texas to impose the condition above stated as a condition precedent to the obtaining of a license to pursue said occupation, and that the statute, in so far as it imposed such conditions, operated as a denial of the equal protection of the laws, and deprived petitioner of his property without due process of law, and was repugnant to the Fourteenth Amendment of the Constitution of the United States. Petitioner further alleged that, in order to obtain a license to pursue the occupation aforesaid, all persons desiring to engage therein are required to pay the occupation tax imposed thereon in advance, for a period not less than twelve months, and to pay the tax imposed by the State and by the commissioners' courts of the several counties, and by the cities and towns wherein such occupation is carried on, and to obtain a license from the county clerk of the county in which said occupation is carried on, for which license the sum of twenty-five cents is required to be paid, while all other persons pursuing all other occupations than the one pursued by petitioner are permitted by the laws of said State to pay the occupation tax on said occupations for each three months or quarterly, and no persons pursuing other taxable occupations than that pursued by appellant in cities and towns are required to pay the occupation tax imposed by such cities or towns, as a prerequisite to obtaining a license to pursue such occupations, and no person pursuing any taxable occupation other than that pursued by petitioner are required to obtain a license from such county clerk or to pay therefor any sum.

Petitioner charged that under the laws aforesaid he was

Statement of the Case.

denied the equal protection of the laws and deprived of his property without due process of law, and that those laws were repugnant to the Constitution and laws of the United States.

The petition further averred that the laws of the State of which petitioner complained had been pronounced and adjudged by the Court of Appeals to be valid laws, and not contrary to and not inhibited by the Constitution of the United States.

A copy of the indictment was annexed to the petition, wherefrom it appeared that Giozza was charged with unlawfully and wilfully pursuing the occupation aforesaid, without first having obtained a license, and that he had not paid the tax thereon, and was indebted to the State in the sum of $300 occupation tax, and to the county in the sum of $150 occupation tax, the commissioners' court of Galveston County having levied a tax on said occupation of one-half the amount levied by the State thereon.

The sheriff made due return that he held Giozza in his custody by the authority aforesaid, and attached thereto copies of the indictment, the capias, and the judgment of the Court of Appeals.

Upon the hearing, the Circuit Court adjudged that Giozza was not unlawfully restrained of his liberty and remanded him to the custody of the sheriff, and he thereupon brought the case to this court by appeal.

The statute in question provided in its first section for the levy upon any person, firm or association of persons engaged in the occupation of selling spirituous, vinous or malt liquors, or medicated bitters, of an annual tax of $300 for selling such liquors or bitters in quantities less than one quart. Under the second section the commissioners' court had power to levy and collect taxes upon the occupations named, equal to one-half of the state tax, and cities and towns were empowered to levy an additional tax. By the third section, all the taxes were required to be paid in advance for a period of not less than twelve months. The fourth section required the giving of a bond, as sufficiently stated in the petition. Under section five, the county clerks in the several counties were authorized

to issue licenses upon payment by the applicant of all occupation taxes levied by or under the act. The evidence of the payment of the taxes upon such application was the receipt of the county collector of taxes. For issuing the license the clerk was entitled to receive a fee of twenty-five cents for each license. Art. 3226*a*, 2 Sayles' Tex. Civ. Stat. 124.

Art. 110 of the Texas Penal Code reads: "Any person who shall pursue or follow any occupation, calling or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined in any sum not less than the amount of the taxes so due, and not more than double that sum;" and by Art. 112 it is provided that any person prosecuted shall have the right at any time before conviction to have the prosecution dismissed on payment of the taxes and costs of prosecution, the procuring of the license, etc. Willson's Cr. Tex. Stat. Part I, p. 47.

Section 20 of article 16 of the constitution of Texas is as follows: "The legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice's precinct, town or city, by a majority vote, from time to time, may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits."

Section 42 of the same article provides that "the legislature may establish an inebriate asylum, for the cure of drunkenness and reform of inebriates."

It was contended also that the court should take judicial notice that in 1887 a vote was taken upon a proposed amendment to the state constitution prohibiting the manufacture, sale and exchange of intoxicating liquors, except for medical, sacramental and scientific purposes, which was rejected by a large majority.

Mr. J. M. Burroughs for appellant.

Mr. C. A. Culberson, Attorney General of the State of Texas, and *Mr. R. L. Batts*, for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court.

Opinion of the Court.

As upon the face of the petition it appeared that the validity of the statute of which appellant complains was drawn in question in the state court on the ground of its repugnancy to the Constitution of the United States, and the decision was in favor of its validity, the remedy which should have been sought was by writ of error. But since the Circuit Court held that petitioner was not illegally restrained of his liberty, and the contention was that the proceedings against him were wholly void because the statute regulating the sale of liquors was void, we will not dispose of the case on the narrower ground.

Irrespective of the operation of the federal Constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of the legislature of a State, except those imposed by its written constitution. There is nothing in the constitution of Texas restricting the power of the legislature in reference to the sale of liquor, and it is well settled that the legislature of that State has the power to regulate the mode and manner and the circumstances under which the liquor traffic may be conducted, and to surround the right to pursue it with such conditions, restrictions and limitations as the legislature may deem proper. *Ex parte Bell*, 24 Texas App. 428; *Bell* v. *State*, 28 Texas App. 96. In these cases, and in the case before us, the law in question was held to be within the legislative power; and, so far as the state constitution is concerned, that conclusion is not re-examinable here. But it is contended that the act conflicts with the provisions of the Fourteenth Amendment, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States,

and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship. *Bartemeyer* v. *Iowa*, 18 Wall. 129.

The amendment does not take from the States those powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order. *Barbier* v. *Connolly*, 113 U. S. 27, 31; *In re Kemmler*, 136 U. S. 436.

Nor, in respect of taxation was the amendment intended to compel the State to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates; or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one as against another of the same class. *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232; *Home Insurance Co.* v. *New York*, 134 U. S. 594; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339. And due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government. *Leeper* v. *Texas*, 139 U. S. 462.

This statute affects all persons in Texas engaged in the sale of liquors in exactly the same manner and degree. Whether considered as imposing restrictions upon the sale in the exercise of the police power of the State, or as levying taxes upon occupations under authority of the legislature in that behalf, petitioner was not arbitrarily deprived of his property nor denied the equal protection of the laws.

Repeated decisions of this court have determined that such legislation is not in violation of the Constitution. *Crowley* v. *Christensen*, 137 U. S. 86; *Eilenbecker* v. *Plymouth Co.*, 134 U. S. 31; *Kidd* v. *Pearson*, 128 U. S. 1; *Mugler* v. *Kansas*, 123 U. S. 623; *Foster* v. *Kansas*, 112 U. S. 201.

The decree of the Circuit Court is *Affirmed.*

MARTIN *v.* SNYDER.

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

No. 131. Argued and submitted March 9, 10, 1893. — Decided April 10, 1893.

A defendant residing within a State in which an action is commenced in a court of the State, is not entitled, under the act of March 3, 1887, 24 Stat. 552, c. 373, to have the suit removed to the Circuit Court of the United States.

The case is stated in the opinion.

Mr. D. W. Voorhees and *Mr. L. B. Hilles*, (with whom was *Mr. Reese H. Voorhees* on the brief,) for appellants. *Mr. G. W. Kretzinger* also filed a brief for appellants.

Mr. Allan C. Story for appellee.

The Chief Justice: This was a bill of complaint filed by Samuel F. Engs, George Engs and Henry Snyder, Jr., of the city, county and State of New York, against Morris T. Martin and Carrie E. Martin, in the Circuit Court of Lake County in the State of Illinois, on the 27th of October, 1887.

November 7, 1887, the defendants preferred a petition for the removal of the cause to the United States Circuit Court within and for the Northern District of Illinois on the ground of diverse citizenship, and the case was transferred accordingly.

The petition stated "that the controversy in said suit is between citizens of different States, and that the petitioners were at the time of the commencement of this suit and still are citizens of the State of Illinois, and that all the plaintiffs were then and still are citizens of the State of New York."

Under the act of Congress of March 3, 1887, 24 Stat. 552, c. 373, it is the defendant or defendants who are non-residents

of the State in which the action is pending, who may remove the same into the Circuit Court of the United States for the proper district. The defendants here were not entitled to such removal, and the decree, which was in favor of complainants and from which the defendants prosecuted this appeal, must be reversed for want of jurisdiction, with costs against the appellants, and the case remanded to the Circuit Court with directions to render a judgment against them for costs in that court, and to remand the case to the state court. *Torrence* v. *Shedd*, 144 U. S. 527, 533.

Judgment reversed and cause remanded accordingly.

MEXIA *v.* OLIVER.

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

No. 182. Submitted March 28, 1893. — Decided April 17, 1893.

In Texas, a married woman, who owns land in her own right, cannot convey it by her husband, as her attorney, under a power of attorney from her to him, without herself signing and acknowledging privily the deed, although her husband joins in the deed individually.

Where a suit is brought in Texas by a married woman and her husband, to recover possession of land, her separate property, and the petition is endorsed with a notice that the action is brought as well to try title as for damages, it is error to admit in evidence against the plaintiffs such a power of attorney and deed, although there is an issue as to boundary and acquiescence and ratification.

It does not appear beyond a doubt that such error could not prejudice the rights of the plaintiffs.

THE case is stated in the opinion.

Mr. William S. Flippin and *Mr. A. H. Evans* for plaintiffs in error.

Mr. S. L. Samuels and *Mr. A. C. Prendergast* for defendant in error.

Opinion of the Court.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the Circuit Court of the United States for the Northern District of Texas, by Sarah R. Mexia and her husband, Enrique A. Mexia, citizens of Mexico, against T. J. Oliver, a citizen of Texas, for the possession of a piece of land. The "first amended original petition" in the suit, filed November 30, 1888, is endorsed with a notice to the defendant that the action is brought as well to try title as for damages. The petition states that on January 1, 1878, the plaintiffs were seized and possessed in fee, in right of said Sarah R. Mexia, of the following described tract of land, situated in Limestone County, Texas, being some 4000 acres, more or less, out of 11 leagues of the land granted originally to Pedro Varella, "beginning at a stake and mound on the eastern boundary of the Pedro Varella 11-league grant, 2253 varas south, 45° east, from the northeast corner of said 11-league grant, said stake and mound being also the southeast corner of a 6000-acre tract in the name of Jose M. Cabellero out of said 11-league grant, as the same was originally surveyed and established in June, 1855, by G. H. Cunningham, surveyor, at the instance of E. A. Mexia, agent for J. M. Cabellero and plaintiffs' vendors, thence south 45° west with the south boundary line of said 6000-acre tract, . . . (according to a block of surveys made by G. H. Cunningham in 1856 in sectionizing and subdividing said 11-league grant, and set apart to plaintiff Sarah R. Mexia by deed of partition between Adelaide M. Hammekin, George L. Hammekin, Sarah R. Mexia and E. A. Mexia dated March 30, 1874;)" thence proceeding with the boundary around said land to the place of beginning, "said boundaries including sections Nos. 1, 2, 3, 4, 5, and a part of section No. 6, of the subdivision and partition of the said Pedro Varella 11-league grant, as shown on the records of the said Limestone County." The petition sets forth also that on February 11, 1850, "Adelajde M. Hammekin, joined by her husband George L. Hammekin, being at that time the owners of said 11-league grant, made, executed and delivered to one Jose M. Cabellero a conveyance for 6000

acres of said 11-league grant, out of the northeast corner of same, before any actual survey was made of said 6000-acre tract, and that the same was never actually surveyed on the ground until the month of June, 1855, at which time said 6000-acre tract was actually surveyed on the ground and cut off from said 11-league grant, and the south or southwest boundary line thereof was well established on the ground in accordance with the field-notes as hereinbefore set forth, and the same has ever since been held and regarded and acquiesced in as the south boundary of said 6000-acre tract and as the division line between the same and the remainder of said 11-league grant on the south and west thereof, and from that time to the present said line and survey has been acquiesced in by the adjacent owners of the land north and south of said line"; that said survey was made, and said line thus established, by G. H. Cunningham, then surveyor of the land district in which said land was situated, and this was done by request and authority of said J. M. Cabellero and the said Hammekins, and said survey and lines were afterwards ratified, and ever since acquiesced in, by them and their vendees; that such title as the defendant claims under is derived from Cabellero under said conveyance for 6000 acres; that the defendant will claim and insist in this cause that the south boundary line of said 6000-acre tract, in the name of Cabellero, should be at a point about 277 varas further south than as heretofore established and as claimed by the plaintiffs; that on January 1, 1878, the defendant illegally entered on the land and ejected the plaintiffs therefrom, to their damage in the sum of $10,000; and that the land claimed is of the value of $20,000. The petition prays judgment for the land, damages and costs, for a writ of possession, and for other relief.

The defendant filed a "first amended original answer" on April 17, 1889, by which he demurred to the plaintiffs' first amended original petition as insufficient in law, denied all the allegations of the petition, pleaded not guilty, and alleged that he had been in quiet, peaceable, continuous and adverse possession for more than three years before the filing of the suit, of so much of the land described in the petition as was

included within the boundaries following, to wit: "In Limestone County, about 6 miles above the town of Springfield, on the northern or left of the river Navasota, being a part of the 11-league grant by the States of Coahuila and Texas to Pedro Varella, and commencing on the left bank of the eastern (or northern) branch of the Navasota at the point where the original line of said 11-league grant from the second to the third corners crossed the said creek; thence N. 45° E., following the original line of said 11-league grant, to the original 3rd corner; thence S. 45° E. two thousand five hundred and thirty (2530) varas, following the original line of the said 11-league grant; thence S. 45° W., being a line parallel with the first line of this survey, to the left bank of the Navasota; thence up said river to the beginning"; that, as to all not included in said boundaries, he did not set up any claim; that he pleaded the three-years and the five-years statutes of limitation; that he and those whose estate he had in the lands sued for had adverse possession of the land described in his plea of three years' limitation, for one year next before the commencement of the suit, claiming the land in good faith; that he and they had made permanent and valuable improvements thereon, to the amount of $5000, which he asked to have valued and allowed to him under the statute; and that, as to all land not included in the boundaries given in the answer, he made disclaimer.

The answer further alleged, that on July 27, 1874, he purchased from Mrs. Maria Dolores Felicite Conti, the only daughter and only heir of Jose M. Cabellero, the land described in the answer, paying therefor to her $5000 cash, in gold, and received a deed, with said field-notes from her and her husband J. M. Conti; that, if the Hammekins and said Cabellero ever agreed that the said 6000-acre tract should be surveyed, and the same was so surveyed as to make its southern boundary 277 varas farther north than the southern boundary as called for by said deed from the Hammekins to Cabellero, and they afterwards acquiesced in and ratified the same, which is not admitted but expressly denied, then the defendant avers that, at and before the time he paid such

purchase money and received the deed from Mr. and Mrs. Conti, he had no notice, actual or constructive, of such agreement, survey or ratification of the survey, nor that the Hammekins or the plaintiffs claimed any right to, or interest in, said 6000-acre tract or any part thereof, as set out by metes and bounds in the deed to Cabellero; that the defendant was a *bona fide* purchaser for value of the land as so described, and believed that he was acquiring the full and complete title to the land as described in the deed to Cabellero, and believed that he had a right to rely on the description of said land, as set out in said deed, as correct; that on ———, 187—, he learned that Whitfield Scott claimed to have title to said land, derived from the Hammekins, and he purchased said title from Scott, paying valuable consideration therefor, and without notice, actual or constructive, at the time he paid such consideration or received his deed from Scott, that any one else claimed title to any part of said land, and without notice, actual or constructive, of the agreement, survey or ratification set out in the answer; that he received from Scott a deed with the same field-notes as set out in said deed to Cabellero; and that, in purchasing from Scott, he was, as to the claims set up by the plaintiffs, a *bona fide* purchaser for a valuable consideration.

The plaintiffs filed their "first supplemental petition," which demurred to the defendant's first amended original answer, filed April 17, 1889, as insufficient in law, and denied all the averments contained in said answer, and in replication to the defendant's averments and claims of title under the statutes of limitation of three and five years, said that if the defendant had possession, under title or color of title, of any of the land described in the petition, for three or five years before the suit was instituted, (all of which the plaintiffs denied,) such possession was no bar, because ever since the defendant acquired title, color of title or possession, the plaintiff Sarah R. Mexia had been the lawful wife of the other plaintiff, and had been a married woman for ten years before the institution of the suit, and for several years before the defendant acquired any title, color of title or possession of any of the land de-

scribed in the petition; and that she was still such lawful wife of her co-plaintiff. They prayed judgment as in their petition.

No disposition appears to have been made of the demurrer to the petition or the demurrer to the answer; but the case was tried in April, 1889, before the court and a jury. A verdict was found for the defendant, whereupon a judgment was entered that the plaintiffs take nothing by their suit, and that the defendant recover his costs, with execution upon either the common property of the wife and the husband or the separate property of the wife. The plaintiffs have sued out a writ of error from this court.

There is a bill of exceptions, which sets forth that on the trial the defendant offered to introduce in evidence a power of attorney executed by Adelaide M. Hammekin to her husband, George L. Hammekin, empowering him to dispose of, in her name, certain real property belonging to her separately; that the defendant also offered to introduce in evidence a deed to the lands in controversy, made by said George L. Hammekin, as attorney for his wife and personally for himself, in which deed he acted for his wife under said power of attorney, and conveyed the 6000-acre Cabellero tract of land, by metes and bounds, as claimed by the defendant, to Whitfield Scott, on March 18, 1875, and a deed from Scott to the defendant, dated March 20, 1875, conveying the same land conveyed to Scott by George L. Hammekin for himself and wife; and that the plaintiffs objected to the introduction of said testimony, because: "First. Said power of attorney did not vest in the husband any authority to act for the wife in executing deeds to her separate property, such a power being inconsistent with and in contravention of our statute requiring the signature and privy acknowledgment of the wife joined by her husband to convey such property. 2d. The deed to Whitfield Scott executed by George L. Hammekin, for himself and as attorney-in-fact for his wife, was without authority of law, was not privily acknowledged by the wife, as is required in cases of the conveyance of the separate property of the wife, and conveyed none of her title. 3d. The deed

from Whitfield Scott to defendant T. J. Oliver, being based upon the foregoing instruments, should fail with them, and was not evidence of any title." The court overruled the objections and admitted the instruments in evidence, and the plaintiffs excepted. After the verdict was rendered, the plaintiffs appear to have moved the court to set aside the verdict and to grant a new trial, for the following reasons: "1. Said verdict is contrary to the law in this case as given in charge to the jury by the court, and is contrary to the evidence in the case of all the legitimate positive testimony in the case showing clearly and beyond a doubt that the lower line of the Cabellero 6000-acre tract of land was actually run upon the ground and marked off by the surveyor, G. H. Cunningham, in 1855, and that said line was subsequently acquiesced in by said Cabellero and the Hammekins, the adjacent owners of the lands on both sides of said line, as the true division line between said tracts. 2. Because the court erred in admitting in evidence over plaintiffs' objections the power of attorney made by Adelaide M. Hammekin to her husband, Geo. L. Hammekin, authorizing him to act for her in the sale and disposition of her real property, and in admitting in evidence over plaintiffs' objection the deed from said Adelaide M. Hammekin, acting by her said husband as attorney-in-fact, to Whitfield Scott, conveying the land here in controversy, said power of attorney being in contravention of the policy of our laws as decided by our courts, and said deed, under our said decisions, being insufficient to bind a married woman or to convey her separate property, having never been privily acknowledged by her. 3. The court erred in permitting the defendant Oliver and the witness Roberts to testify as to lengths of the various section lines of Pedro Varella eleven-league section, said proof being wholly immaterial to the ascertainment of whether a line had actually been run and acquiesced in by the adjacent owners, as claimed by plaintiffs, but, on the contrary, said proof tending to confuse the minds of the jurors and cause them to consider whether plaintiffs had their quantity of land in the various sections, instead of the true location of the division lines between the Cabellero

tract and the balance of the eleven leagues." The record does not show that any disposition was made of that motion; nor is it shown by the record why the court made the rulings which it did make. We are furnished with a brief for the defendant.

It is assigned as error that the court allowed the introduction in evidence of the power of attorney from Mrs. Hammekin to her husband, of the deed to Scott by the latter, acting for himself and as agent for his wife, and of the deed from Scott to the defendant, because, "1, said power of attorney from Adelaide M. Hammekin to her husband, Geo. L. Hammekin, could not authorize him to act for her and as her agent in conveying her separate property, said instrument being void under the statute and decisions of Texas requiring the privy acknowledgment of married women to transfers of their separate real property; 2, the deed from Geo. L. Hammekin, acting for himself and wife, to W. Scott, not being signed by her and acknowledged by her privily and apart from her said husband, did not, under said statute and decisions, convey her separate property; and, 3, said deed from Scott to defendant, being based on the foregoing invalid instruments, must fall with them."

The location of the south boundary line of the 6000-acre tract, (out of the northeast corner of the 11-league grant to Varella,) conveyed by Mrs. Hammekin and her husband in 1850 to Cabellero, appears to be the issue in the action; and the defendant claims in accordance with the call in that deed. The plaintiffs claim that, at the time of the sale of the land to Cabellero, it had not been surveyed; that there was no survey of it until June, 1855, when it was surveyed and marked on the ground by the Hammekins and Cabellero, the south boundary line being at a distance of 2253 varas south, 45° east, from the northeast corner of the 11-league grant; and that the line thence south, 45° west, was thereafter recognized by the Hammekins and Cabellero as the true south boundary line of the Cabellero tract, and its location there was acquiesced in by the then adjacent owners of the lands; that the land south of that line was sectionized for the

Hammekins in 1856, by Cunningham, the same surveyor who established the line for the Hammekins and Cabellero in 1855; that, in sectionizing, he began section No. 1 at the southeast corner of the Cabellero tract, at a point in the eastern boundary line of the 11-league grant, 2253 varas from the northeast corner of that grant; and that all the sections lying south of said 6000-acre tract, being sections 1, 2, 3, 4, 5 and part of 6, were set apart to the plaintiffs by deed of partition between them and the Hammekins, dated March 30, 1874.

The defendant claims the 6000-acre tract in accordance with the calls in the original deed conveying it from the Hammekins to Cabellero, in 1850; and alleges that he acquired title to it, first, through the deed to him from Mrs. Conti, dated July 27, 1874, and, second, through the deed from the Hammekins to Scott and that from Scott to the defendant, dated respectively March 18 and 20, 1875.

Article 559 of Sayles' Civil Statutes of Texas reads as follows: "The husband and wife shall join in the conveyance of real estate, the separate property of the wife; and no such conveyance shall take effect until the same shall have been acknowledged by her privily and apart from her husband before some officer authorized by law to take acknowledgments to deeds for the purpose of being recorded and certified to in the mode pointed out in chapter two, title lxxxvi [title 86]." Title 86, chap. 2, art. 4310, provides as follows: "No acknowledgment of a married woman to any conveyance or other instrument purporting to be executed by her shall be taken unless she has had the same shown to her, and then and there fully explained by the officer taking the acknowledgment, on an examination privily and apart from her husband; nor shall he certify to the same unless she thereupon acknowledges to such officer that the same is her act and deed, that she has willingly signed the same, and that she wishes not to retract it." Art. 4311 makes requirements as to the certificate, and Art. 4313 prescribes the form of certificate of acknowledgment by a married woman.

Art. 559 has been interpreted by the Supreme Court of Texas in *Cannon* v. *Boutwell*, 53 Texas, 626 and *Peak* v.

Brinson, 71 Texas, 310. In the first case, the title of the defendant depended, as it does here, upon the validity of a power of attorney executed and privily acknowledged by the wife, authorizing the husband to sell and convey her separate property, and the validity of a deed made by the husband under the power, acting for himself and his wife, the deed being executed by him without her privy acknowledgment thereof. In its opinion, the court said: "A deed or power of attorney, signed by the wife alone, is not such an instrument as the statute makes effective to pass her estate. The decisions under similar statutes have been uniform in holding the separate conveyance of the wife invalid, notwithstanding it may have been clearly shown that she acted with her husband's assent," citing several decisions. The opinion further said: "The statute does not attempt to provide for either conveyances or powers of attorney from the wife to the husband, and we think it would be a departure from the policy of the law, wholly unauthorized by anything in the statute, to allow the husband, by means simply of a general power of attorney from the wife, to dispose of her separate estate at his will." Under that decision, the power of attorney from Mrs. Hammekin to her husband would appear to be ineffectual to pass to him any right to transfer her separate property, without her privy acknowledgment of the deed, and the deed from Mr. Hammekin to Scott to be invalid. The same ruling was made in *Peak* v. *Brinson*. The first case was in regard to instruments made in 1856 and 1858, while the second case applied to instruments made between 1870 and 1880.

We cannot say that these errors were immaterial, as it does not appear beyond doubt that they were errors which could not prejudice the rights of the plaintiffs. *Deery* v. *Cray*, 5 Wall. 795, 807; *Gilmer* v. *Higley*, 110 U. S. 47, 50. The Circuit Court, by overruling the objections made to the instruments in question, virtually held that they gave the defendant a valid title; and the evidence afforded by those instruments may have had the effect upon the jury of disproving the acquiescence of Mrs. Hammekin in the boundary line as claimed by the plaintiffs, while it does not appear that she knew any-

thing about the alleged sale by her husband as her attorney-in-fact. The acquiescence and agreement on the part of Mrs. Hammekin formed an issue in the case.

It is contended on the part of the defendant, that there was no question of title in the case, and that the sole question was one of boundary; also, that the question being whether the south boundary of the 6000-acre tract was changed from that called for in the original deed from the Hammekins to Cabellero by their request and authority and ratification, the power of attorney from Mrs. Hammekin to her husband, and their deed, were admissible to show that they and Cabellero had not changed the line; that the instruments were not offered or admitted to prove title; and that the above authorities do not apply to a question which is not one of title. But we have remarked sufficiently on this subject. The petition demands judgment for the land and the notice on it says that the action is brought to try title.

The record is very meagre, but we have arrived at a satisfactory conclusion on the case as presented.

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

SMITH *v.* WHITMAN SADDLE COMPANY.

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

No. 188. Argued and submitted March 28, 1893. — Decided April 17, 1893.

Where a new and original shape or configuration of an article of manufacture is claimed in a patent issued under Rev. Stat. § 4929, its utility is an element for consideration in determining the validity of the patent. *Gorham Manufacturing Co.* v. *White*, 14 Wall. 511, distinguished.

The test of identity of design in the invention covered by such a patent is the sameness of appearance to the eye of an ordinary observer.

The saddle, the design for which is protected by letters patent No. 10,844, issued September 24, 1878, to Royal E. Whitman for an improved design for saddles, was made by taking the front half of a saddle previously

Statement of the Case.

known as the Granger tree, and the rear half of a saddle known as the Jenifer or Jenifer-McClellan saddle, changing the Granger tree part so as to have a perpendicular drop of some inches at the rear of the pommel.

In view of this previous condition of the art, the new and material thing protected by those letters patent was the sharp drop of the pommel at the rear, and they were not infringed by the saddles constructed by the plaintiffs in error.

The Whitman Saddle Company, a corporation organized and existing under and by virtue of the laws of the State of New York, brought this bill of complaint in the Circuit Court of the United States for the district of Connecticut, against Charles D. Smith and Benjamin A. Bourn, citizens of the State of Connecticut, and doing business in the city of Hartford, under the firm name and style of Smith, Bourn & Co., for the alleged infringement of a patent for a "design for saddles," No. 10,844, dated September 24, 1878.

The Circuit Court sustained the patent, adjudged that complainant was entitled to recover of the defendants as infringers, and rendered a decree perpetually enjoining them, and for an amount found due for profits, costs, charges and disbursements, from which decree an appeal was taken to this court. The opinion of Judge Shipman is reported in 38 Fed. Rep. 414.

The specification and claim are as follows:

"Be it known that I, Royal E. Whitman, of Springfield, Hampden County, State of Massachusetts, have invented an improved design for saddles, of which the following is a specification:

"The nature of my design is fully illustrated in the accompanying photographic picture, to which reference is made.

"Figure 1 is a side profile view, and Fig. 2 a partial front view.

"The pommel B rises at the fork to a point on, or nearly on, a horizontal level with the raised and prolonged cantle. The pommel on its rear side falls nearly perpendicularly for some inches, when it is joined by the line forming the profile of the seat. The straight inner side of the pommel (marked *b*) is joined at *c* by the line C of the seat. The line C de-

scribes a gradual curve to the centre of the seat, from thence gradually rising to the highest point of the cantle D. The cantle is defined in side profile by the lines *ef*, starting from its outer end in continuous curves, which separate to define the thickness of the cantle before uniting at a point *g*, near the centre of the saddle, the line *f* forming the outside and rear edge of the saddle until joined by the line *h*, which, leaving the line *f* at an angle, bends to form the rear bearing of the saddle. The line from the front of the pommel B inclines outward for some distance in a nearly straight line, *m*, before being rounded toward the rear to join the line *h*, at the point where the stirrup-strap is attached, to thus define the bottom line of the saddle, the outline given by line *m* from the pommel being the general form of the English saddle-tree known as the 'cut-back.'

"A plan view of the saddle shows a centre longitudinal slot extending from pommel to cantle.

"I am aware that portions of the curves employed by me have been used in the designing of saddles; but, when combined with a longitudinally-slotted tree, the lines I employ to give the profile form a new design for saddles, and giving the general idea in the front, lower and rear lines of a sea-fowl or vessel modelled upon the same curves, and by these curves and lines giving the impression of lightness, grace and comfort that could not as well be conveyed by any others, as the impression of comfort is given by the large amount of bearing-surface obtained without undue elevation above the back of the animal, combined with the large seat for the rider, and lightness and grace by the small surface of tree shown in vertical plan, coupled with the form in which it is presented.

"Now, having described my invention, what I claim is —

"The design for a riding saddle, substantially as shown and described."

The following is the picture referred to:

Fig. 1.

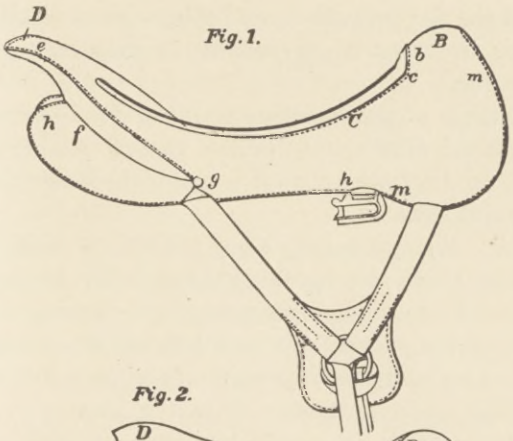


Fig. 2.

Mr. W. E. Simonds for appellant.

Mr. Samuel A. Duncan for appellee submitted on his brief.

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

Section 4929 of the Revised Statutes provides that: "Any person who, by his own industry, genius, efforts and expense, has invented and produced any new and original design for a manufacture, bust, statue, alto-relievo or bas-relief; any new and original design for the printing of woollen, silk, cotton or other fabrics; any new and original impression, ornament, pattern, print or picture to be printed, painted, cast or otherwise placed on or worked into any article of manufacture; or any new, useful and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication, may, upon

payment of the fee prescribed and other due proceedings had, the same as in cases of inventions or discoveries, obtain a patent therefor."

The first three of these classes plainly refer to ornament, or to ornament and utility, and the last to new shapes or forms of manufactured articles; and it is under the latter clause that this patent was granted.

In *Gorham Manufacturing Co.* v. *White*, 14 Wall. 511, 524, it was said by this court, speaking through Mr. Justice Strong, that the acts of Congress authorizing the granting of patents for designs contemplated "not so much utility as appearance, and that, not an abstract impression, or picture, but an aspect given to those objects mentioned in the acts. . . . And the thing invented or produced, for which a patent is given, is that which gives a peculiar or distinctive appearance to the manufacture, or article to which it may be applied, or to which it gives form. The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public. It, therefore, proposes to secure for a limited time to the ingenious producer of those appearances the advantages flowing from them. Manifestly the mode in which those appearances are produced has very little, if anything, to do with giving increased salableness to the article. It is the appearance itself which attracts attention and calls out favor or dislike. It is the appearance itself, therefore, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense." This language was used in reference to ornamentation merely, and moreover the word "useful," which is in section 4929, was not contained in the act of 1842, under which the patent in *Gorham Co.* v. *White*, was granted. So that now where a new and original shape or configuration of an article of manufacture is claimed, its utility may be also an element for consideration. *Lehnbeuter* v. *Holthaus*, 105 U. S. 94.

But as remarked by Mr. Justice Brown, then District Judge for the Eastern District of Michigan, in *Northrup* v. *Adams*, 12 O. G. 430, and 2 Bann. & Ard. 567, 568, which was a bill for the infringement of a design patent for a cheese safe, the law applicable to design patents "does not materially differ from that in cases of mechanical patents, and 'all the regulations and provisions which apply to the obtaining or protection of patents for inventions or discoveries . . . shall apply to patents for designs.' (Sec. 4933.)" And he added: "To entitle a party to the benefit of the act, in either case, there must be originality, and the exercise of the inventive faculty. In the one, there must be novelty and utility; in the other, originality and beauty. Mere mechanical skill is insufficient. There must be something akin to genius — an effort of the brain as well as the hand. The adaptation of old devices or forms to new purposes, however convenient, useful or beautiful they may be in their new role, is not invention." Many illustrations are referred to, as, for instance, the use of a model of the Centennial Building for paper weights and ink stands; the thrusting of a gas-pipe through the leg and arm of the statue of a shepherd boy, for the purpose of a drop light; the painting upon a familiar vase of a copy of Stuart's portrait of Washington — none of which were patentable, because the elements of the combination were old. The shape produced must be the result of industry, effort, genius or expense, and new and original as applied to articles of manufacture. *Foster* v. *Crossin*, 44 Fed. Rep. 62. The exercise of the inventive or originative faculty is required, and a person cannot be permitted to select an existing form and simply put it to a new use any more than he can be permitted to take a patent for the mere double use of a machine. If, however, the selection and adaptation of an existing form is more than the exercise of the imitative faculty and the result is in effect a new creation, the design may be patentable.

In *Jennings* v. *Kibbe*, 10 Fed. Rep. 669, and 20 Blatchford, 353, Mr. Justice Blatchford, when Circuit Judge, applied the rule laid down in *Gorham Manufacturing Co.* v. *White*, *supra*, stating it thus, that "the true test of identity of design is

sameness of appearance, — in other words, sameness of effect upon the eye; that it is not necessary that the appearance should be the same to the eye of an expert, and that the test is the eye of an ordinary observer, the eyes of men generally, of observers of ordinary acuteness, bringing to the examination of the article upon which the design has been placed that degree of observation which men of ordinary intelligence give." *Ripley* v. *Elson Glass Co.*, 49 Fed. Rep. 927.

In this case it appeared from the evidence that among other trees and saddles that were old in the prior art was one called the Granger tree, which had a cut-back pommel and a low, broad cantle, and was well known; and another called the Jenifer tree or Jenifer-McClellan saddle, which was also well known, and had a high, prominent pommel and a high-backed cantle, or hind protuberance, in the shape of a duck's tail.

The exhibits embrace, among others, a slotted Granger saddle, the Jenifer-McClellan, the Sullivan-Black-Granger tree, and the saddle sold by the defendants, the latter being substantially the Granger saddle with the Jenifer cantle.

The saddle design described in the specification differs from the Granger saddle in the substitution of the Jenifer cantle for the low, broad cantle of the Granger tree. In other words, the front half of the Granger and the rear half of the Jenifer, or Jenifer-McClellan, make up the saddle in question, though it differs also from the Granger saddle in that it has a nearly perpendicular drop of some inches at the rear of the pommel, that is, distinctly more of a drop than the Granger saddle had.

The experienced judge by whom this case was decided conceded that the design of the patent in question did show prominent features of the Granger and Jenifer saddles, and united two halves of old trees, but he said: "A mechanic may take the legs of one stove, and the cap of another, and the door of another, and make a new design which has no element of invention; but it does not follow that the result of the thought of a mechanic who has fused together two diverse shapes, which were made upon different principles, so that new lines and curves and a harmonious and novel whole are

produced, which possesses a new grace and which has a utility resultant from the new shape, exhibits no invention." And he held that this was effected by the patentee and that the shape that he produced was, therefore, patentable. But we cannot concur in this view.

The evidence established that there were several hundred styles of saddles or saddle-trees belonging to the prior art, and that it was customary for saddlers to vary the shape and appearance of saddle-trees in numerous ways according to the taste and fancy of the purchaser. And there was evidence tending to show that the Granger tree was sometimes made up with an open slot and sometimes without, and sometimes with the slot covered and padded at the top and sometimes covered with plain leather; while it clearly appeared that the Jenifer cantle was used upon a variety of saddles, as was the open slot. Nothing more was done in this instance (except as hereafter noted) than to put the two halves of these saddles together in the exercise of the ordinary skill of workmen of the trade, and in the way and manner ordinarily done. The presence or the absence of the central open slot was not material, and we do not think that the addition of a known cantle to a known saddle, in view of the fact that such use of the cantle was common, in itself involved genius or invention, or produced a patentable design. There was, however, a difference between the pommel of this saddle and the pommel of the Granger saddle, namely, the drop at the rear of the pommel, which is thus described in the specification: "The pommel, on its rear side, falls nearly perpendicularly for some inches, when it is joined by the line forming the profile of the seat. The straight inner side of the pommel (marked *b*) is joined at *c* by the line C of the seat." The specification further states: "The line from the front of the pommel B inclines outward for some distance in a nearly straight line, *m*, before being rounded toward the rear to join the line *h*, at the point where the stirrup-strap is attached, to thus define the bottom line of the saddle, the outline given by line *m* from the pommel being the general form of the English saddle-tree known as the 'cut-back.'"

Syllabus.

The shape of the front end being old, the sharp drop of the pommel at the rear seems to constitute what was new and to be material. Now, the saddles of the defendants, while they have the slight curved drop at the rear of the pommel, similar to the Granger saddle, do not have the accentuated drop of the patent, which "falls nearly perpendicularly several inches," and has a "straight inner side." If, therefore, this drop were material to the design, and rendered it patentable as a complete and integral whole, there was no infringement. As before said, the design of the patent had two features of difference as compared with the Granger saddle, one the cantle, the other the drop. And unless there was infringement as to the latter there was none at all, since the saddle design of the patent does not otherwise differ from the old saddle with the old cantle added, an addition frequently made. Moreover, that difference was so marked that in our judgment the defendants' saddle could not be mistaken for the saddle of the complainant.

There being no infringement the decree must be reversed and the cause remanded, with a direction to dismiss the bill, and it is

So ordered.

BUSHNELL *v.* CROOKE MINING & SMELTING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 195 Argued and submitted April 4, 5, 1893. — Decided April 17, 1893.

A federal question, suggested for the first time in a petition for a rehearing, after judgment in the highest court of a State, is not properly raised so as to authorize this court to review the decision of that court.

The decision in the state court in this case clearly presented no federal question; as no right, immunity or authority under the Constitution or laws of the United States was set up by the plaintiffs in error, or denied by the Supreme Court of the State, nor did the judgment of the latter court necessarily involve any such question, or the denial of any such right.

Opinion of the Court.

MOTION to dismiss. The case is stated in the opinion.

Mr. A. R. Bushnell in person for himself and others plaintiffs in error, and in opposition to the motion.

Mr. Frederic D. McKenney, for defendant in error and in support of the motion.

Mr. C. S. Thomas and Mr. *W. H. Bryant* filed a brief in support of the motion.

MR. JUSTICE JACKSON delivered the opinion of the court.

This was an action of ejectment brought by the defendant in error in the district court of Hinsdale County, State of Colorado, against the plaintiffs in error to recover possession of a certain portion of the surface location of a mining claim on Ute Mountain in said county and State. The suit grew out of conflicting and interfering locations of mining claims by the parties. The defendant in error was the owner or claimant of a mining location, called the Annie lode, while the plaintiffs in error were the owners of a claim called the Monitor lode. The claim of the latter was first located, but when the plaintiffs in error applied for a patent the defendant in error filed an adverse claim to a portion of the same location, and thereafter, under section 2326 of the Revised Statutes of the United States, and within the time prescribed therein, the defendant in error commenced this action in the state court to recover possession of the portion of the surface location which was in interference and in controversy between the parties.

In its complaint or declaration it is alleged that it is the owner of the Annie lode mining claim, and that defendants below had, at a certain date, entered upon and ever since wrongfully held possession of a part of said claim specifically described, and that the action was in support of plaintiff's adverse claim to such portion of the surface location. The answer of the defendants (plaintiffs in error) interposed a gen-

eral denial of all the allegations contained in the complaint or declaration.

The question presented on the trial of the controversy, under the pleadings, was purely one of fact, and had reference to the true direction which the Monitor lode or vein took after encountering a fault, obstruction or interruption at a point south of the discovery shaft sunk thereon. It was claimed by the plaintiff below that the true vein or lode of the Monitor claim did not bear westwardly so as to cross the Annie lode, but that its true direction was southeastwardly across the line of its location, and was not within the distance of one hundred and fifty feet from the centre of the Annie lode.

The court charged the jury fully and clearly upon this question of fact, as follows:

"1st. The court charges you that the defendants have applied for a patent from the United States on what is claimed by them as the Monitor lode mining claim, in Galena mining district in this county. The plaintiff company has brought this action in ejectment in support of an adverse claim made and filed by it to a part thereof described in the complaint as lying within the boundaries of what is claimed by the plaintiff as the Annie lode.

"2d. The court charges you that if the original locators of the Monitor lode within the time required by law sunk a sufficient discovery shaft thereon, posted at the point of discovery a sufficient location notice, and properly put out their boundary posts marking their surface boundaries, and, on June 20, 1875, recorded their claim in the office of the county recorder by a sufficient location certificate, in compliance with the law, and the owners thereof have ever since then performed labor or made improvements thereon each year to the amount of one hundred dollars or more, then the plaintiff company's original grantor, John Dougherty, in attempting to locate the Annie lode to include a part of such surface ground and in sinking the discovery shaft thereon in October, 1878, was *prima facie* a trespasser in so doing, and the plaintiff cannot recover in this action unless it shows that he was not a trespasser in so doing.

Opinion of the Court.

"3d. The court charges you that the plaintiff claims that the Monitor lode claim was never properly located, and that the vein on which its discovery shaft is sunk does not run down through its surface ground as located to the southwest, but that it runs off from its surface ground through its southeast side line at a point about — feet from its discovery shaft, and that by reason thereof Dougherty [plaintiff's grantor] was not a trespasser in locating the Annie lode discovery shaft and a part of its surface ground within the boundary stakes of the Monitor lode."

"9th. The court charges you that the question here is: Is the course of the Monitor vein from the discovery shaft down the mountain towards the southwest, along the line claimed by defendants, or off through the southeast side line of the Monitor lode surface grounds or otherwise, as claimed by plaintiff? And the court further charges you that upon this question the presumption is that the course of the vein is as located, and the plaintiff company must prove that the course of the vein is not as located; otherwise, on this point, plaintiff cannot recover, and your verdict shall be for the defendants.

"10th. The court charges you that it is not sufficient that the plaintiff merely raises a doubt in your minds as to whether the Monitor vein runs as the lode is staked or not. The plaintiff must satisfy you by a preponderance of the testimony that the lode does not run as staked; otherwise, upon this question, you will find for the defendants.

"11th. The court charges you that the discoverer and prior locator of a lode or vein has a right to stake his lode according to his best judgment as to where it runs.

"12th. Such prior locator has a right to move and change his boundary stakes upon his lode and take his ground thereon within the legal limits to suit himself at any time within sixty days after the date of his location or discovery notice."

"14th. The court charges you that when a vein branches in its course a prior locator has a legal right to follow with his location whichever branch of it he chooses at the time of making such location."

"16th. The court instructs the jury in the law of this case

that if the locators of the Monitor mine made the location on the Monitor lode or vein and staked it as running down the mountain in the direction of the Annie vein in controversy, and uniting therewith or running parallel thereto substantially through the centre of the surface ground of the Monitor lode claim, the said Monitor locators or their assignees are entitled to the whole of said vein as staked, even if the alleged Enterprise vein crosses said Monitor vein and runs in the course of the Monitor vein as staked, provided that at such crossing the said veins course so together that it is simply conjectural that said 'Monitor' lode is crossed by said so-called 'Enterprise' vein and does not continue in its course as staked."

"18th. The court instructs you that it is of no consequence where the so-called Annie vein runs in any part of its course if Dougherty [the plaintiff's grantor] was a trespasser in locating it. A trespasser's location is entirely void."

The court then refused to give the following instructions for the plaintiffs in error:

"13. The court charges you that a prospector in locating his vein is not required to follow it through a fault or other obstruction which interposes solid country rock in its course, but in such case he may follow with his location any vein that continues on from the point of such obstruction in the general course of his original vein."

"15. The court charges you that if a prospector in locating his lode discovered by a first location secures continuous vein matter substantially along through the centre of his surface ground in a continuous general direction, and so that the extension of his end lines will include between them all of his surface ground, he will hold the same and every part thereof against all subsequent claimants."

It thus appears that the question at issue, under the pleadings and at the trial, was as to the true course of the Monitor lode or vein down the mountain south of its discovery shaft. The jury found the following verdict in favor of the defendant in error: "We, the jury, find the issues joined for the plaintiff, and that it is the owner of and entitled to the possession of the ground described in the complaint."

Opinion of the Court.

The plaintiffs in error moved for a new trial on the ground of error in the charge to the jury, and because of the refusal of the court to instruct the jury as requested, and for various reasons, such as the admission of improper testimony offered by the plaintiff below, and the refusal to admit proper testimony offered by the defendants below, and other alleged errors and irregularities committed in the progress of the trial, which are not brought under review in the present case.

A new trial being refused an appeal was taken to the Supreme Court of Colorado, which held that there was no error in the instructions given to the jury, nor in the refusal to give those requested by the plaintiff in error, and affirmed the judgment of the lower court. The Supreme Court of Colorado rested its judgment and affirmance upon the general proposition that the trial court had correctly stated to the jury the principal point in controversy, and had left it properly to them to determine as a matter of fact what was the course of the Monitor lode. The Supreme Court said: "The controlling issue in the case, we think, was fully understood by the jury, and was clearly stated by the court in the 9th instruction, viz.: 'The principal point in the controversy is, upon what vein was the Monitor claim located or what is the course of said vein. The defendants allege and seek to prove that the location was made upon a vein which runs from the discovery shaft of the Monitor across and towards the vein upon which the Annie claim was located, while the plaintiff asserts and seeks to prove that the location was made upon a vein which runs from the Monitor shaft down and nearly parallel with the Annie lode, and which empties into or connects with the Ulê lode. This is the principal point in controversy, and to determine which claim is best supported by testimony and reason is the province and duty of the jury.'"

After the decision had been rendered by the Supreme Court of the State a petition for rehearing was presented by the plaintiffs in error, which, for the first time, sought to present the question whether section 2322 of the Revised Statutes of the United States gave to the appellants "'the exclusive right

of possession' and enjoyment of all other veins and lodes having their apexes within the Monitor surface ground, which would give to these appellants beyond all question the so-called 'Enterprise' that is alleged to 'cross' the 'Monitor' on the surface; and certainly a vein that is thus our own cannot be used by one who has no interest either in the 'Monitor' or 'Enterprise' title to create any question of lode crossing between them or any other question of conflict. Under such circumstance there is but one grant, and it is all the 'Monitor' grant and its rights and title, and such grant is in nowise severable into a part 'Monitor' and a part 'Enterprise,' no separate life or vitality being given to the said so-called 'Enterprise.'"

The application for rehearing being denied, the present writ of error was brought to have the judgment of the Supreme Court of Colorado reviewed and reversed. The defendants in error have moved to dismiss the writ or affirm the judgment. The motion to dismiss is based upon several grounds. The principal and only ground which need be noticed, however, is that the record presents no question of a federal character such as will give this court jurisdiction to review the judgment complained of.

It is plainly manifest that neither the pleadings nor the instructions given and refused present any federal question, and an examination of the opinion of the Supreme Court affirming the action of the trial court as to instructions given, as well as its refusal to give instructions asked by the defendants below, fails to disclose the presence of any federal question. It does not appear from the record that any right, privilege or immunity under the Constitution or laws of the United States was specially set up or claimed by the defendant below, or that any such right was denied them, or was even passed upon by the Supreme Court of the State, nor does it appear, from anything disclosed in the record, that the necessary effect in law of the judgment was the denial of any right claimed under the laws of the United States.

The decision of the Supreme Court of Colorado in no way brought into question the validity or even construction of any

federal statute, and it certainly did not deny to the plaintiffs in error any right arising out of the construction of the federal statutes. It was said by the Chief Justice, in *Cook County* v. *Calumet and Chicago Canal Co.*, 138 U. S. 635, 653: "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

The attempt to raise for the first time a federal question in a petition for rehearing, after judgment, even assuming that the petition presented any such question, is clearly too late. It has been repeatedly decided by this court that a federal question, when suggested for the first time in a petition for rehearing after judgment, is not properly raised so as to authorize this court to review the decision of the highest court of the State. *Texas & Pacific Railway* v. *Southern Pacific Railroad*, 137 U. S. 48, 54; *Butler* v. *Gage*, 138 U. S. 52; *Winona & St. Peter Railroad* v. *Plainview*, 143 U. S. 371; *Leeper* v. *Texas*, 139 U. S. 462.

In the case of *Doe* v. *City of Mobile*, 9 How. 451, it was held that under the twenty-fifth section of the Judiciary Act this court "cannot reëxamine the decision of a state court upon a question of boundary between coterminous proprietors of lands depending upon local laws."

The question involved in the present case turned largely upon the provisions of § 3149, 2 Mills' Annotated Stats. of Colorado, 1788, and the decisions of the Supreme Court of that State construing the same, as shown by the case of *Patterson* v. *Hitchcock*, 3 Colorado, 533, which limited the width of mining claims to 150 feet in width on each side of the centre of the lode or vein at the surface. The controverted question in the case at bar turned upon which direction the Monitor lode properly ran south of the discovery shaft, and it being found by the jury that the lode or vein did not bear westwardly toward the Annie lode, but southeastwardly and across the western side line of the Monitor claim at a distance exceeding 150 feet from the centre of the Annie lode, it followed that the claim of the plaintiff below was sustained,

and the jury accordingly returned its verdict that the plaintiff below was entitled to the possession thereof.

The question thus presented and decided involved no construction of any federal statute, nor did it become necessary to determine the rights of the parties under the federal mining statutes.

In *Roby* v. *Colehour*, 146 U. S. 153, 159, Mr Justice Harlan, speaking for the court, said: "Our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment."

Applying this rule to the case at bar, there is clearly presented no federal question, for no right, immunity or authority under the Constitution or laws of the United States was set up by the plaintiffs in error, or denied by the Supreme Court of Colorado, nor did the judgment of that court necessarily involve any such question, or the denial of any such right. We are, therefore, of opinion that the motion to dismiss is well made, and should be allowed, and it is accordingly so ordered.

Dismissed.

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

PHINEAS PAM-TO-PEE *v.* UNITED STATES.

POTTAWATOMIE INDIANS OF MICHIGAN AND INDIANA *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 1125, 1133. Argued January 9, 10, 1893. — Decided April 17, 1893.

The decision of the Court of Claims respecting the amount of money to be awarded to the Indians in these cases is affirmed; and it is further suggested, as to the distribution of that amount among the several claimants that it is a question of law, to be settled by the court; but as the facts are not presented in an authoritative form, this court acquiesces in the suggestion of the court below that it be dealt with by the authorities of the government.

THE questions involved in this case grow out of the stipulations of certain treaties entered into between the United States and the Pottawatomie Indians within the period covered by the years 1795 to 1846, inclusive. In some of the treaties various tribes united with the Pottawatomies, but the tribes were recognized by the government as being distinct from one another, and their respective rights and duties under the treaties were therein defined and set forth. In others the Pottawatomie Indians were included in the tribe designated as the united nation of Chippewa, Ottawa and Pottawatomie Indians, but the government seems to have dealt with the united nation as though it were identical with the Pottawatomie tribe, and we shall so consider it in the present case. By the various treaties the Indians ceded lands to the government, and received for the same other lands, money, etc., and also pledges of specified annuities. By a treaty made on September 26, 1833, the said united nation ceded to the United States a tract of land on the western shore of Lake Michigan, containing 5,000,000 acres, and received as the consideration for the cession a reservation 5,000,000 acres in extent, west of the Mississippi River, various sums of money,

and the promise from the government of $280,000, to be paid in annuities of $14,000 a year for twenty years. It was provided by the treaty that a just proportion of the annuity money named therein, as well as a just proportion of the annuities stipulated for in the former treaties, should be paid west of the Mississippi to such portion of the nation as should have removed thither within three years, and that after the expiration of that time the whole amount of the annuities should be paid at the reservation west. On the day following the execution of that treaty an article supplementary thereto was made on behalf of the chiefs and head men of the nation, by which they ceded to the United States certain lands in the Territory of Michigan, south of the Grand River, containing about 164 sections. It was agreed that the Indians making this cession should be considered as parties to the treaty of the preceding day, and be entitled to participate in the benefits of the provisions therein contained, as part of the united nation. To the supplemental article another provision was added, as follows:

"On behalf of the chiefs and head men of the United Nation of Indians who signed the treaty to which these articles are supplementary, we hereby, in evidence of our concurrence therein, become parties thereto.

"And, as since the signing of the treaty a part of the band residing on the reservations in the Territory of Michigan have requested, on account of their religious creed, permission to remove to the northern part of the peninsula of Michigan, it is agreed that in case of such removal the just proportion of all annuities payable to them under former treaties and that arising from the sale of the reservation on which they now reside shall be paid to them at l'Arbre Croche."

Upon the basis of provisions contained in the various treaties, claims for unpaid annuities have been presented to Congress from time to time on behalf of Indians alleged to represent the part of the band mentioned in the last provision of the said supplemental article, and for the purpose, presumably, of having all questions connected with those claims finally settled, Congress passed an act, which was approved

March 19, 1890, 26 Stat. 24, c. 39, entitled "An act to ascertain the amount due the Pottawatomie Indians of Michigan and Indiana." The act is as follows:

"Whereas representatives of the Pottawatomie Indians of Michigan and Indiana, in behalf of all the Pottawatomie Indians of said States, make claim against the United States on account of various treaty provisions which, it is alleged, have not been complied with: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Court of Claims is hereby authorized to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the said Pottawatomie Indians of Michigan and Indiana, and to render judgment thereon; power is hereby granted the said court to review the entire question of difference *de novo*, and it shall not be estopped by the joint resolution of Congress approved twenty-eighth July, eighteen hundred and sixty-six, entitled 'Joint resolution for the relief of certain Chippewa, Ottawa and Pottawatomie Indians,' nor by the receipt in full given by said Pottawatomies under the provisions of said resolution, nor shall said receipt be evidence of any fact except of payment of the amount of money mentioned in it; and the Attorney General is hereby directed to appear in behalf of the Government, and if the said court shall decide against the United States the Attorney General may, within thirty days from the rendition of the judgment, appeal the cause to the Supreme Court of the United States; and from any judgment that may be rendered the said Pottawatomie Indians may also appeal to said Supreme Court: *Provided*, That the appeal of said Pottawatomie Indians shall be taken within sixty days after the rendition of said judgment, and the said courts shall give such cause precedence.

"Sec. 2. That said action shall be commenced by a petition stating the facts on which said Pottawatomie Indians claim to recover, and the amount of their claims, and said petition may be verified by a member of any 'Business Committee' or authorized attorney of said Indians as to the existence of

such facts, and no other statements need be contained in said petition or verification."

On behalf of the Pottawatomie Indians of Michigan and Indiana, John Critcher filed a petition in the Court of Claims, April 14, 1890, averring that he was the authorized attorney of the said Indians, as, he stated, would appear by an agreement between himself and the business committee of the Indians, dated September 29, 1887, and claiming certain unpaid annuities under the said treaties. The claimants exhibited a table showing by periods of five years, from 1836 to 1872, inclusive, an enumeration of the Indians in Michigan and of those west of the Mississippi, from which it appeared that the average number of the former during that time was 291, and of the latter 2812. The petition contains a statement in detail of the various annuities claimed to be due, and asks for a judgment against the United States in the sum of $223,035.46, as being in the ratio of 291 to 2812 to the entire amount alleged to have been pledged to all the Pottawatomie Indians under the various treaties, plus the amount of $38,000, the sum of the annuities for nineteen years under the treaty of 1833. The latter sum was claimed on the assumption that the claimants should receive, of the annuities arising from the cession of their lands in southern Michigan, not a just proportion, but the whole amount. The claimants averred that the main tribe of Indians moved to their reservation west of the Mississippi, and that the part of the band which was to remove to the north did so remove in obedience to the terms of the provision supplementary to the treaty of 1833; that they are the representatives of that part of the band, and, as such, are entitled to all the benefits secured by the said supplemental provision.

On November 5, 1890, another petition was filed in the name of Phineas Pam-to-pee and 1371 other Pottawatomie Indians of Michigan and Indiana, by John B. Shipman, their attorney, alleging that they were entitled to share in the annuities secured to the Pottawatomie Indians by the said treaties; that they were not represented in the petition first filed, and that the attorney named in that petition had no

authority to act for them in the premises. This petition was filed on behalf of certain Indians, citizens of the United States, who were individually described by name and residence, alleged to be all the Pottawatomie Indians, so far as could be ascertained, resident in the said States, except not exceeding 250, from 91 of whom they alleged that the attorney named in the first petition derived his authority to act. The claimants stated, however, that their petition was intended for the benefit of all Indians included in the provisions of the act of Congress who might choose to take part in the proceedings in the said court. They averred that the Indians designated in the act, or their ancestors, were parties to all the said treaties, and entitled to share *per capita* in the annuities secured thereby to the Pottawatomies, and that the conditions imposed upon them by the treaties had been complied with. The claimants alleged that they were entitled to a just proportion of all the annuities provided for by the treaties in question. They interpreted the last provision of the treaty of 1833, as did the claimants in the first petition, to be that the Indians exempted from the requirement of removal west should receive the entirety of the annuity stipulated for in that provision. Under the treaty of 1833 they, therefore, claimed the sum of $38,000, being $2000 per year for the nineteen years the same remained unpaid. They also contended that the perpetual annuities provided for should be capitalized and the amounts thereof, in the sum of $446,000, added to the sum of the past unpaid determinate and perpetual annuities, namely, $2,021,200. Under a treaty made subsequently to 1833, to wit, on June 17, 1846, with the said Indians who emigrated west, the petitioners claimed that the Indians who remained in Michigan were entitled to the sum of $446,974.80. It is averred that by that treaty the said reservation west of the Mississippi was ceded to the United States by the said Indians, who were promised therefor, in addition to a perpetual annuity of $300, the sum of $850,000, less certain deductions provided for in the treaty; that after making such deductions, the balance remaining was $643,000, which was to be held by the government as a trust fund for

the Indians, and was to bear interest at 5 per cent, payable annually for thirty years, and until the nation should be reduced below one thousand souls; that the first instalment of interest became payable in 1849; that the total amount of interest up to and including the year 1890 was $1,350,300, and the value of the same as a capitalized annuity was $643,000, making an aggregate of $1,993,300. The petitioners averred that when the final provisions of the treaty of 1833 were executed, the number, as nearly as they could ascertain, of the Indians removing west of the Mississippi was 3840, and the number of those remaining in Michigan was 1110. They, therefore, alleged that the gross amounts stated, (with the exception of the said amount of $38,000,) should be apportioned between the Indians who removed west and those who remained in Michigan in the ratio of 3840 to 1110. They deduct from the total of the amounts ascertained as above the sum of $75,162.50, which they admit that the Indians remaining in Michigan received from the government under the treaties of July 29, 1829, and September 26, 1833, and under the act of Congress of July 28, 1866, leaving the sum of $963,058.50. This is the amount alleged to be due the Indians exempted from the requirement of removal west, upon the assumption that their number has remained the same as it was in 1833. The petitioners claimed to represent the Indians only who went north, whose number they alleged to have been the difference between 1110 and the number of those who remained in southern Michigan, and, therefore, the petitioners asked for a judgment for themselves in the sum of $804,383.80.

On January 8, 1891, the United States moved the Court of Claims to consolidate the cases, and on January 19, 1891, made a motion to dismiss the case presented by the last-named petition. The motions were reserved to be decided on the trial, and the court ordered that the cases be tried together. Upon the trial the motion to consolidate the cases was allowed, and the motion to dismiss the second case overruled. The court was of opinion that the purpose of the act of March 19, 1890, was to have all questions of difference arising from the

claims of the Pottawatomie Indians of Michigan and Indiana settled in an authoritative and judicial form, and that any proceeding which would accomplish that purpose, irrespective of technical rules of pleading, was proper under the act of Congress. It was further observed by the court that in each case it appeared that by special appointment the attorneys named in the petitions represented some of the Pottawatomie Indians who remained in the States of Michigan and Indiana, and that the essential requirements of the statute were thus fulfilled.

After due proceedings were had in the consolidated case, the Court of Claims, on March 28, 1892, 27 C. Cl. 403, found, in substance, the following facts: In obedience to the last provision of the article supplementary to the treaty of September 26, 1833, a few of the Pottawatomie Indians of Michigan and Indiana removed to the northern part of the peninsula of Michigan, but the great body of them remained in southern Michigan. To this failure to remove the government did not object, and did not force them to remove. Within the period from 1843 to 1866, inclusive, the Indians remaining in southern Michigan were there paid, by government agents, an aggregate amount of $75,162.50, $39,000 of which was the amount provided for by the joint resolution of Congress referred to in the act giving the Court of Claims jurisdiction in this case. The remaining amount, $36,162.50, was paid to the Indians as their proportion of annuities secured to them by the treaties of July 29, 1829, and the supplemental provision of the treaty of 1833. During the said period, as shown by a table in the office of the Second Auditor of the Treasury, the average number of Indians in southern Michigan was 253, and of those west of the Mississippi, 2834, and payments were made to the Indians in Michigan in this ratio. None of the Indians so paid permanently removed to the northern part of Michigan. During the period from 1836 to 1872, the average number of Indians in Michigan who remained under the treaty of 1833 was 291, and the average number west of the Mississippi was 2812. A number of other Indians residing on the reservation in Michigan in 1833 remained in the State of Michigan. Those Indians, and the 291

who stayed on account of their religious creed, numbered in all 1100. Many of the Indians who were in Michigan at the time the treaty of 1833 was made were dissatisfied with the requirement that they should emigrate west with the main tribe, and refused to go. It was necessary for the government to use force to compel them to leave, and in the struggle caused by this attempt to enforce the treaty many of the Indians, in evading the officers and agents of the government, scattered into different portions of the State, and many went to the northern portion. Those Indians did not come within the supplemental provisions of the said treaty, as construed by the agents of the United States. What their number was cannot be ascertained, but they outnumbered the Indians who remained by consent of the government as coming within the final provision of the treaty of 1833. The United States never made any tender to any Indians at l'Arbre Croche, nor in the northern part of Michigan. The agents of the government did not insist upon the removal of the Indians as a condition of their right of payment at any time.

Since 1835 the Pottawatomie Indians of Michigan and Indiana have received no payments of annuities provided for by the treaties of the following dates: August 3, 1795, 7 Stat. 49, Art. 4; September 30, 1809, 7 Stat. 113, Art. 3; October 2, 1818, 7 Stat. 185, Art. 3; August 29, 1821, 7 Stat. 218, Art. 4; September 20, 1828, 7 Stat. 317, Art. 2; October 20, 1832, 7 Stat. 378, Art. 3; October 26, 1832, 7 Stat. 394, Art. 3. Of the annuities promised by the treaties of October 16, 1826, 7 Stat. 295, Art. 3, and June 17, 1846, 9 Stat. 853, they have received no payments. The court also finds, specifically, that the said Indians have not been paid any money of an annuity of $2000 under the treaty of October 16, 1826, for the year 1848; nor of an annuity of $1000 under the treaty of September 20, 1828, for the year 1848; nor of an annuity of $15,000 under the treaty of October 20, 1832, for the years from 1843 to 1852, inclusive; nor of an annuity of $20,000 under the treaty of October 26, 1832, for the year 1852; nor of an annuity of $15,000 under the treaty of October 27, 1832, for the year 1844.

The claimants in both cases included in the list of treaties under which they requested the court to find annuities to be due them for the time subsequent to 1836, the last-named treaty, to wit, that of October 27, 1832, but the court made no finding with regard to payments made thereunder except as to the year 1844.

Upon the foregoing facts the court determined, as a conclusion of law, that the Pottawatomie Indians of Michigan and Indiana were entitled to recover the sum of $104,626, and gave judgment for the said Pottawatomie Indians in that amount. From that judgment the claimants in both petitions appealed to this court.

Mr. John B. Shipman for Phineas Pam-to-pee and others, appellants in No. 1125.

Mr. John Critcher and *Mr. George S. Boutwell* for the Pottawatomie Indians of Michigan and Indiana, appellants in No. 1133.

Mr. Assistant Attorney General Parker for appellees.

Mr. Justice Shiras delivered the opinion of the court.

The act of March 19, 1890, entitled "An act to ascertain the amount due the Pottawatomie Indians of Michigan and Indiana," conferred jurisdiction upon the Court of Claims to "try all questions of difference arising out of treaty stipulations with the said Pottawatomie Indians of Michigan and Indiana, and to render judgment thereon." The act granted power to said court to "review the entire question of difference *de novo*," and provided for an appeal to this court by either party.

In pursuance of the provisions of this statute, on the 14th of April, 1890, a petition was filed in the Court of Claims by the Pottawatomie Indians, by their agent and attorney, John Critcher, and on the 5th of November, 1890, another petition by the Pottawatomie Indians, by their agent and attorney, John B. Shipman.

The United States objected to the filing of two petitions,

and the court below, overruling a motion to dismiss the later petition, consolidated the causes, and dealt with them as one. The two classes of claimants unite in the appeal to this court.

They agree in complaining of the insufficiency of the sum allowed the Indians by the decree of the court below, but they disagree, as between themselves, in respect to the division of the moneys awarded by the decree. The Indians represented by John Critcher claim the entire fund; those represented by John B. Shipman claim a right to participate in the fund, and claim, likewise, as we understand them, that only 91 Indians are really represented in the first petition. We shall first consider the merits of the appeal as against the United States, and afterwards deal with the question of distribution.

The first controverted question is as to whom is due the annuity of $2000 for twenty years, granted by the last clause of the supplemental treaty of September 27, 1833. The petitioners claim the entire amount, $38,000. The United States contend that this amount is distributable between the Indians who went west under the provisions of the treaty of September 26, 1833, and those who remained in Michigan under the supplemental treaty of September 27, in proportion to their respective numbers.

To answer this question, we must resort to the language of the treaties. The 4th article of the treaty of September 26, 1833, is as follows:

"A just proportion of the annuity money, secured as well by former treaties as the present, shall be paid west of the Mississippi to such portion of the nation as shall have removed thither during the ensuing three years. After which time the whole amount of the annuities shall be paid at their location west of the Mississippi." 7 Stat. 431.

The articles supplementary, of September 27, provided as follows, 7 Stat. 442:

"Article 1st. The said chiefs and head-men cede to the United States all their land situate in the Territory of Michigan south of Grand River, being the reservation at Notawa-

sepe, of 4 miles square, contained in the 3d clause of the 2d article of the treaty made at Chicago on the 29th day of August, 1821; and the ninety-nine sections of land contained in the treaty made at St. Joseph on the 19th day of Sept., 1827; and also the tract of land on St. Joseph River opposite the town of Niles, and extending to the line of the State of Indiana, on which the villages of To-pe-ne-bee and Pokagon are situated, supposed to contain about 49 sections.

"Article 2d. In consideration of the above cession it is hereby agreed that the said chiefs and head-men and their immediate tribes shall be considered as parties to the said treaty to which this is supplementary, and be entitled to participate in all the provisions therein contained as a part of the United Nation; and further, that there shall be paid by the United States the sum of one hundred thousand dollars, to be applied as follows:" (Here follows a specific disposition of $60,000 of it.)

And then this is added:

"And forty thousand dollars to be paid in annuities of two thousand dollars a year for twenty years, in addition to the two hundred and eighty thousand dollars inserted in the treaty, and divided into payments of fourteen thousand dollars a year.

"Article 3d. All the Indians residing on the said reservations in Michigan shall remove therefrom within three years from this date, during which time they shall not be disturbed in their possession, nor in hunting upon the lands as heretofore. In the meantime no interruption shall be offered to the survey and sale of the same by the United States. In case, however, the said Indians shall sooner remove the government may take immediate possession thereof."

On page 445 appears the following, signed by eight Indians but not signed by the commissioners:

"On behalf of the Chiefs and Head-men or the United Nation of Indians who signed the treaty to which these articles are supplementary, we hereby, in evidence of our concurrence therein, become parties thereto.

"And as since signing of the treaty a part of the band

residing on the reservations in the Territory of Michigan have requested, on account of their religious creed, permission to remove to the northern part of the peninsula of Michigan, it is agreed that in case of such removal the just proportion of all annuities payable to them under former treaties, and that arising from the sale of the reservation on which they now reside shall be paid to them at l'Arbre Croche."

The court below held, with the United States, that under these provisions these claimants were entitled, not to the whole, but to "a just proportion" of this annuity provided for in the supplemental articles of September 27, 1833; and in this view we concur.

It was admitted that the one year's annuity, $2000, had been paid, leaving to be paid $38,000, of which amount the court awarded in favor of the claimants, as "a just proportion thereof," the sum of $3653.60. The court arrived at this particular sum by taking the number of the Indians who went west at 2812 and the number of those who were permitted to remain east as 291.

It is claimed that the court below erred in this method of computation, because it gives an interest to Indians who were not entitled, under the supplemental treaty of September 27, 1833, to participate in this fund. An examination of that treaty shows that the annuity of $2000 for twenty years was in part consideration of the cession by the Indians who took part in it of 49 sections of reservations on which they were then settled; and it is claimed with considerable force that the proceeds of the sale of such reservations, so far as this annuity was concerned, should be distributed among the Indians on whose behalf the supplemental treaty was made, to the exclusion of those who had made the treaty of the day before.

However, we think the court below was right in refusing to adopt this view of the case, and in regarding the two treaties as substantially one, and that, therefore, this annuity was distributable among both classes, giving to those who were permitted to remain east "a just proportion thereof."

The conclusion arrived at by the court below, in its 8th

finding, was that, under the several treaties and upon the entire account, there had accrued to the entire tribe, those who had gone west and those who had remained in Michigan and Indiana, the sum of $1,432,800; that the portion of this that belonged to the petitioners was $134,368.26. To this is to be added the proportion awarded the petitioner of the $2000 annuity under the supplemental treaty of September 27, 1833, being, as we have already seen, $3653.60. The court below further awarded the petitioners, as their proportionate share of the money due and unpaid of the perpetual annuities under the treaties of September 26 and 27, 1833, the sum of $41,626. As against these sums the court below charged the petitioners with the sum of $75,162.50, which amount it is admitted has been received. The court below was urged to decree that the perpetual annuities under said treaties should be reduced to a cash basis, as of the present time, and be now paid. Such a disposition of these annuities would be a very convenient one, and all the claims of the petitioners would thereby be finally closed. But the court properly held that no power had been given it to convert the perpetual annuities into a sum for present payment; and that matter must be left to be hereafter dealt with by Congress.

As the United States took no appeal, the several contentions on their behalf are not before us for consideration.

Accepting, as we must do, the facts of the case as found by the court below, we perceive no error in its decree establishing the sum due to the petitioners.

How the moneys so awarded shall be distributed among the several claimants it is not easy for us to say. The findings of the court below, and the contradictory statements of the several briefs filed by the appellants, have left this part of this subject in a very confused condition. The court says:

"The second section provides that said action shall be commenced by petition, stating the facts, and that the same may be verified by a 'Business Committee,' or authorized attorney of said Indians. Each of the petitions in this proceeding is verified by the affidavit of the attorney appearing in each case, and in that particular are identical. In each

case it appears that by special appointment the attorneys represent some of the Pottawatomies who remained in the States of Indiana and Michigan, under the supplementary article to the treaty of September 27, 1833. In this view of the statute the court allows the motion of the defendants to consolidate the cases, made on the 8th day of January, 1891, and overrules the motion to dismiss cause No. 16,842, made on the 19th of January, 1891.

"This brings the issue by both petitioners to the consideration of the court, to be disposed of upon one broad ground of the right of all the Pottawatomies of Michigan and Indiana. Congress have recognized by the very title of the act a claimant designated as the 'Pottawatomie Indians of Michigan and Indiana,' and under that generic head is to be determined the aggregate right of such claimant, leaving the question of distribution to that department of the government, which by law has incumbent on it the administration of the trust which in legal contemplation exists between the United States and the different tribes of Indians."

On the other hand, it is contended, with great show of reason, by the petitioners who are represented in case No. 1125, (16,842 in the court below,) that the question of what Indians are entitled to participate in the fund is one of law, to be settled by the court, and should not be left to clerical functionaries. Our difficulty, in disposing of this part of the subject, is that we have neither findings nor concessions that enable us to deal with it intelligently.

It is to be observed that the court below found, as a fact, (see finding 10,) that the average proportion between the Indians who removed west and those who remained was as 2812 of the former to 291 of the latter, and the court used that relative proportion of numbers as a factor in computing the amount due the petitioners.

The petitioners, however, number 1371 in case No. 1125, but the number represented in No. 1133 (16,473 in the court below) is not precisely stated. It is alleged in the brief filed in behalf of petitioners in case No. 1125 that only 91 Indians are actually represented in case No. 1133, and that

the other 200 Indians are among those represented in case No. 1125.

But these facts are not found for us in any authoritative form. Nor, indeed, would it seem that the court below was furnished with information sufficient to enable it to define what Indians or what number of Indians, entitled to distribution, are represented by the respective attorneys or agents.

Unable as we are to safely adjudicate this question as between these classes of claimants, we can do no better than acquiesce in the suggestion of the court below, that it is one to be dealt with by the authorities of the government when they come to distribute the fund.

As these petitioners no longer have any tribal organization, and as the statutes direct a division, of the annuities and other sums payable, by the head, and as such has been the practice of the government, perhaps the necessities of the situation demand that the identification of each claimant entitled to share in the distribution shall be left to the officers who are the agents of the government in paying out the fund. *United States* v. *Old Settlers*, *ante*, 427.

The decree of the court below is *Affirmed.*

APPENDIX.

In Memoriam.

LUCIUS QUINTUS CINCINNATUS LAMAR, LL.D.

Mr. Justice Lamar died at Macon, Georgia, the evening of the 23d of January, 1893. On the coming in of the court on the following morning the Chief Justice said:

"It again becomes my melancholy duty to announce the death of a member of this court. Mr. Justice Lamar died at Macon, Georgia, last evening, at 8.50 o'clock. No business will be transacted, but the court will now adjourn until Monday next."

On Friday, the 29th of January, Mr. Justice Lamar was buried at Macon, the Chief Justice and Justices Blatchford, Brewer and Brown attending the funeral.

At noon, on Saturday, the 11th day of March, 1893, the bar of the Supreme Court of the United States and the officers of the court met in the court room in the Capitol. Mr. William F. Vilas, of Wisconsin, was called to the chair, and Mr. James H. McKenney, Clerk of the court, acted as Secretary. Mr. E. C. Walthall, Mr. J. Z. George, Mr. Adlai E. Stevenson, Mr. A. H. Garland, Mr. John B. Gordon, Mr. William M. Stewart, Mr. James L. Pugh, Mr. J. C. Bancroft Davis, Mr. T. C. Catchings, Mr. J. Randolph Tucker, Mr. William E. Earle and Mr. Jeremiah M. Wilson were appointed a committee to prepare and report resolutions for consideration. Thereupon the meeting was adjourned to Saturday, the 18th of March, 1893, at the same place.

On Saturday, the 18th of March, 1893, the meeting was again convened, pursuant to adjournment. Mr. J. Z. George, on behalf of the committee, reported a series of resolutions, which, after

remarks by Mr. J. Z. George, Mr. E. C. Walthall, Mr. T. C. Catchings, Mr. John H. Mitchell, Mr. William M. Stewart, Mr. Leroy F. Youmans, Mr. J. Randolph Tucker, Mr. Charles E. Hooker and Mr. A. H. Garland were unanimously adopted. The meeting was then adjourned.

On Monday, the 24th of April, 1893, Mr. Attorney General Olney, in compliance with the request of the bar, presented these resolutions to the court with the following remarks:

I have been requested, if your honors please, to present to the court the resolutions of the bar upon the occasion of the death of Mr. Justice Lamar. In undertaking that duty I have no hesitation in saying that the resolutions, which I shall presently read, do but simple justice to the character of your late associate, and in no way exaggerate either the great loss of the whole community or the profound affliction of a very large circle of friends and acquaintances. Under any circumstances, the death of a justice of this court is of preëminent importance. Though the court remains, an element disappears which had vitally affected its deliberations and its results, to be succeeded by a new one different to some extent in the nature of things, and possibly of a wholly diverse character. Thus, as one departs and another assumes his place, a new order of things arises, all the more surely because it comes insensibly and almost by stealth. It is a new order of the greatest moment because, in the scope and extent of its jurisdiction and power, as touching on the one hand the private rights of every one of sixty millions of people, and dealing on the other with the collective rights of numerous populous communities and sovereign States, no court like it or even strongly resembling it has ever existed among men. To have sat upon such a court without reproach and without discredit, may well fill to the full the measure of the loftiest ambition.

With Mr. Justice Lamar has passed away not merely a lawyer and a judge, but a notable historical figure. It may have been his misfortune as a lawyer, though certainly his good fortune as a man, that his lot was cast in tempestuous times — in times which, however adverse to the acquisition of technical knowledge and technical skill, always and inevitably develop whatever there is in a man of intellectual and moral greatness. He was born when the echoes of the sectional contest over the admission of Missouri into the Union — that issue which startled Jefferson "like a fire bell in the night" — were still resounding throughout the land. He was a

mere youth when the Missouri Compromise was succeeded by another, and the spectre of disunion was laid for a time by the mingled firmness and moderation of General Jackson. He had hardly entered upon the practice of the law when North and South again came into violent collision over the fugitive-slave law and the extension of slavery into the Territories. He went with his section and his State in the civil war that followed only ten years later, and supported their cause with equal devotion on the battlefield and in the forum. Always and under all circumstances he was a leader, not merely followed and obeyed, but implicitly trusted and sincerely loved.

He continued to lead even more decisively and on a larger field when arms were laid down, and to him more than to any other one man, North or South, is due the adoption by both victors and vanquished of those counsels of moderation, magnanimity and wisdom which have made the edifice of our constitutional Union more impregnable to all assault than ever before. But this eventful and stormy career, these engrossing and exciting occupations and achievements of the soldier and statesman and patriot, necessarily interrupted and prevented that exclusive devotion to the science of jurisprudence, and that constant familiarity with its practical application in the administration of justice, which that jealous mistress, the law, inexorably exacts of all her followers.

I do not believe that Mr. Justice Lamar ever practised law, as his sole or chief occupation, for any one term of five consecutive years. I am unable to discover that he could have made the practice of the law his sole or principal pursuit for more than ten or twelve years in all. And it is the highest possible tribute to his natural genius, to his legal instincts, and extraordinary intellectual gifts, that, in spite of all the disadvantages under which he labored, Mr. Justice Lamar performed his part as a member of this high court of judicature, not only to the acceptance of the bench and the bar, but with such intelligent and well-directed zeal and devotion that only failing health and strength could have prevented his ultimately attaining decided judicial eminence.

The resolutions I have the honor to present are as follows:

Resolved, That by the death of Mr. Justice Lamar the country loses a judge whose career on the bench, though brief, showed that he had a rare judicial mind and temperament, with a great power of legal analysis, and a faculty of expressing himself in nervous English, which left no room for misunderstanding. His long service

in public life fitted him to deal with the great questions of constitutional law which make a seat upon the bench of the Supreme Court so important and so responsible. He entered early into the public service and soon became prominent. When the war closed no one was more conspicuous than he in efforts to allay distrust, to do away with division and coldness, and to produce, throughout the Union, a feeling of confidence and good will. For this he labored and spoke in the Senate; and, with this ever before his eyes, he administered the Department of the Interior. We offer this tribute to his memory with no wish to perform a mere perfunctory duty. Over and above his intellect, his trained faculties, his knowledge, his wit and his power, he was an affectionate, loving and lovable man, dear to all who knew him. He is mourned not only by his friends, but by many who had no personal acquaintance with him.

Resolved, That the Attorney General be requested to lay these resolutions before the court, and to ask that they be spread upon the record.

Resolved, That the chairman be requested to transmit a copy of them to the family of Mr. Justice Lamar.

THE CHIEF JUSTICE responded:

The court receives with appreciation the tribute of the bar through the Attorney General to the memory of the eminent man who so recently passed from its membership.

Although he was not spared to give many years to its labors, Mr. Justice Lamar was long enough upon this bench to exhibit on a comparatively new field his undoubted intellectual power, and to demonstrate the possession of marked judicial qualities. The remarkable career which preceded his appointment, crowded with varied incident and filled with distinguished service in public station, while it withdrew him from that active participation in professional practice which assures the habit of prompt decision in ordinary litigation, nevertheless well prepared him for the consideration of those grave public questions that so often press for solution before this tribunal. Experience in affairs had made him sage, and the wisdom thus acquired was aided by that "desire to seek, patience to doubt, fondness to meditate, slowness to assert, readiness to reconsider," which the great philosopher declared fitted him for nothing so well as for the study of truth. Such was indeed his nature, and leadership came to him not merely by reason of his courage, his eloquence, his statesmanlike views and general ability,

but largely, perhaps chiefly, because of his simplicity and single-mindedness, his integrity of thought as well as honesty in action, and that unobtrusive and unselfish devotion to duty which gives entrance to the kingdom that "cometh without observation."

There can be no better qualification for a great magistrate than, in addition to sufficient learning, to possess keen love of justice, earnest desire for truth, absolute sincerity and the highest conception of the responsibilities of public office, coupled with an intimate knowledge of the workings of government obtained through practical experience.

Mr. Justice Lamar always underrated himself. This tendency plainly sprang from a vivid imagination. With him the splendid visions attendant upon youth never faded into the light of common day, but they kept before him an ideal, the impossibility of whose realization, as borne in upon him from time to time, oppressed him with a sense of failure. Yet the conscientiousness of his work was not lessened, nor was the acuteness of his intellect obscured, by these natural causes of his discontent; nor did a certain Oriental dreaminess of temperament ever lure him to abandon the effort to accomplish something that would last after his lips were dumb.

We fully recognize the fitness of the reference to the loving disposition of our departed colleague. This especially endeared him to us, and it was this which enabled him to bear with cheerfulness the trials of a long illness and to find in the consolations of religion the peace that passeth all understanding.

Sincere in his support of a cause to which his early education and the training of opening manhood, his surroundings and personal attachments, committed him, his acceptance of the result of the arbitrament of arms was genuine and unqualified; and the singular felicity was his, here having returned to die at home at last, to appreciably contribute to the restoration of the ties of common interest and affection of a united people; of pride in common institutions and love for a common country; and to pass his closing days in assisting in the authoritative exposition of the wonderful instrument which binds together "the great contexture of this mysterious whole."

The resolutions and accompanying remarks will be spread upon our records, and the commemorative expressions of the bars of the State of Georgia, of the State of Mississippi and of the State of Illinois, and such other similar testimonials as may be transmitted to us, will be placed on file.

INDEX.

BANK.

A bank in Ohio contracted with a bank in Pennsylvania, to collect for it at par at all points west of Pennsylvania, and to remit the 1st, 11th and 21st of each month. In executing this agreement the Pennsylvania Bank stamped upon the paper forwarded for collection, with a stamp prepared for it by the Ohio Bank, an endorsement "pay to" the Ohio Bank "or order for collection for" the Pennsylvania Bank. The Ohio Bank failed, having in its hands, or in the hands of other banks to which it had been sent for collection, proceeds of paper sent it by the Pennsylvania Bank for collection. A receiver being appointed, the Pennsylvania Bank brought this action to recover such proceeds. *Held*,

(1) That the relation between the banks as to uncollected paper was that of principal and agent, and that the mere fact that a sub-agent of the Ohio Bank had collected the money due on such paper was not a commingling of those collections with the general funds of the Ohio Bank, and did not operate to relieve them from the trust obligation created by the agency, or create any difficulty in specially tracing them;

(2) That if the Ohio Bank was indebted to its sub-agent, and the collections, when made, were entered in their books as a credit to such indebtedness, they were thereby reduced to possession, and passed into the general funds of the Ohio Bank;

(3) That by the terms of the arrangement the relation of debtor and creditor was created when the collections were fully made, the funds being on general deposit with the Ohio Bank, with the right in that bank to their use until the time of remittance should arrive. *Commercial Bank* v. *Armstrong*, 50.

See INTERNAL REVENUE, 1.

BONA FIDE PURCHASER.

See DEED, 1, 2;
EQUITY, 3.

BOUNDARY.

1. The boundary line between the States of Virginia and Tennessee, which was ascertained and adjusted by commissioners appointed by and on behalf of each State, and marked upon the surface of the ground between the summit of White Top Mountain and the top of the Cumberland Mountains, having been established and confirmed by the State of Virginia in January, 1803, and by the State of Tennessee in November, 1803, and having been recognized and acquiesced in by both parties for a long course of years, and having been treated by Congress as the true boundary between the two States, in its district-

CERTIORARI.

CHATTEL MORTGAGE.

CHEROKEE INDIANS.

CIRCUIT COURTS OF APPEALS.

CONTRACT.

COURT OF CLAIMS.

See CLAIMS AGAINST THE UNITED STATES;
JURISDICTION, A, 5; C.

COURT-MARTIAL.

1. The proceedings, findings and sentence of a military court-martial being transmitted to the Secretary of War, that officer wrote upon the record the following order, dating it from the "War Department," and signing it with his name as "Secretary of War": "In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President. The proceedings, findings and sentence are approved, and the sentence will be duly executed." *Held*, that this was a sufficient authentication of the judgment of the President, and that there was no ground for treating the order as null and void for want of the requisite approval. *United States* v. *Fletcher*, 84.
2. When a court-martial has jurisdiction, errors in its exercise cannot be reviewed in an action against the United States by the officer court-martialed to recover salary. *Ib.*
3. *Runkle* v. *United States*, 122 U. S. 543, questioned upon the ground that the report of that case shows that the circumstances were so exceptional as to render it hardly a safe precedent in any other. *Ib.*

CUSTOMS DUTIES.

1. Cigarette paper, of suitable size and quality to be used in making cigarettes, and pasteboard covers therefor, of corresponding size, imported separately and entered together with the intention to combine them with paste into cigarette books for the use of smokers, are subject to a duty of seventy per cent *ad valorem* as "smokers' articles" under schedule N, and not to a duty of fifteen per cent *ad valorem* as "manufactures of paper" under schedule M, of the Tariff Act of March 3, 1883, c. 121. *Isaacs* v. *Jonas*, 648.
2. Cigarette paper, made of a quality, and cut into a size, fit for wrapping cigarettes, and which, in the condition and form in which it is imported, can be used by smokers in making their own cigarettes, is subject to the duty of seventy per cent *ad valorem*, imposed on "smokers' articles" by schedule N of the Tariff Act of March 3, 1883, c. 121, and not to the duty of fifteen per cent *ad valorem* imposed on "manufactures of paper" by schedule M of the same act. *United States* v. *Isaacs*, 654.

See JURISDICTION, B, 1.

DEED.

1. The receipt of a quit claim deed does not of itself prevent a party from becoming a *bona fide* holder; and the doctrine expressed in many cases

EQUITY.

INDIAN.

INDIANA.

INDICTMENT.

INTEREST.

See INDIAN, 5.

INTERNAL REVENUE.

B. OF CIRCUIT COURTS OF THE UNITED STATES.

C. JURISDICTION OF THE COURT OF CLAIMS.

LACHES.

LANDLORD AND TENANT.

See CONTRACT, 6.

LETTER-CARRIER.

a letter-carrier whose salary is $1000 a year, and who is employed, in a period of a little more than two months, 165 hours and 9 minutes more than eight hours a day, is not required to deduct therefrom the deficit of less than eight hours a day worked by him on Sundays and holidays. *United States* v. *Gates*, 134.

LICENSE TAX.

See TELEGRAPH COMPANY, 1.

LOCAL LAW.

1. A chattel mortgage of the stock of goods in a store in Colorado, given to secure the mortgagees for their liability as endorsers of notes of the mortgagor, is held to be a chattel mortgage, and not a general assignment for the benefit of creditors. *May* v. *Tenney*, 60.
2. In Colorado, a general transfer of property by a debtor for the benefit of a preferred creditor, does not, if found to be in violation of the policy of the State as expressed in its legislation, become a general assignment for the benefit of all creditors, without preferences, but is entirely void. *Ib.*
3. In Missouri, in an action of unlawful detainer, the defendant put in evidence a lease of the property by the then owner, who had since died, which had been assigned to him. The plaintiff offered evidence of a judgment cancelling and setting aside that lease, which was admitted under objection, and the admission excepted to. *Held*, that the ruling was right. *Lehnen* v. *Dickson*, 71.
4. In Texas, a married woman, who owns land in her own right, cannot convey it to her husband, as her attorney, under a power of attorney from her to him, without herself signing and acknowledging privily the deed, although her husband joins in the deed individually. *Mexia* v. *Oliver*, 664.
5. Where a suit is brought in Texas by a married woman and her husband, to recover possession of land, her separate property, and the petition is endorsed with a notice that the action is brought as well to try title as for damages, it is error to admit in evidence against the plaintiffs such a power of attorney and deed, although there is an issue as to boundary and acquiescence and ratification. *Ib.*
6. It does not appear beyond a doubt that such error could not prejudice the rights of the plaintiffs. *Ib.*

District of Columbia. *See* JUDGMENT, 1.
Kansas. *See* MUNICIPAL BOND, 3, 4, 6, 9.
Mississippi. *See* MUNICIPAL BOND, 1.
Oregon. *See* TAX AND TAXATION, 4, 5.
Washington. *See* CONTRACT, 2.

LONGEVITY PAY.

See OFFICERS OF THE NAVY, 2.

MANDAMUS.

1. Mandamus lies in behalf of a State to compel the remanding to one of its courts of a criminal prosecution there commenced, and of which the Circuit Court of the United States has assumed jurisdiction, at the defendant's suggestion, without due proceedings for removal. *Virginia* v. *Paul*, 107.
2. Mandamus does not lie to review an order on a writ of *habeas corpus*, under sections 751–753 of the Revised Statutes, discharging a prisoner from commitment under authority of a State, on the ground of his being in custody for an act done in pursuance of a law of the United States. *Ib.*
3. This court, in *Goode* v. *Gaines*, (145 U. S. 141,) on an appeal by the defendant in a suit in equity, from a decree of the Circuit Court of the United States for the Eastern District of Arkansas, reversed the decree, and ordered that each party pay one-half of the costs in this court, and the mandate recited the decree of this court, and remanded the cause "for further proceedings to be had therein in conformity with the opinion of this court," and commanded that such further proceedings be had in the cause, "in conformity with the opinion and decree of this court, as, according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding." The Circuit Court had decreed that the title of the defendant to a lot of land be divested out of him, and be vested in the plaintiffs, and that a master take an account of rents on the lot, taxes paid and improvements placed on it. This court held that no error was committed in any matter relating to the title or possession of the land, but that error was committed, in acting on the report of the master, in allowing the plaintiffs for rents which accrued before the filing of the bill. On the presentation of the mandate to the Circuit Court, with a proposed decree thereon, the defendant filed exceptions, and the Circuit Court entered an order allowing the defendant to take further testimony in support of his exceptions, "by way of defence to the title to the land in controversy," and set the cause down upon the issues formed by the pleadings and exceptions as to the title to the land, and sustained the exceptions, and overruled a petition of the plaintiffs for a writ of possession. This court awarded a mandamus for the entry of the proposed decree, and for a writ of possession. *Gaines* v. *Rugg*, 228.
4. This court had not disturbed the findings and decree of the Circuit Court in regard to the title and possession, but only its disposition of the matter of accounting. *Ib.*
5. The mandate and the opinion, taken together, although they used the word "reversed," amounted to a reversal only in respect to the accounting, and to a modification of the decree in respect of the accounting, and to an affirmance of it in all other respects. *Ib.*

MUNICIPAL CORPORATION.

See TELEGRAPH COMPANY, 1, 2, 3.

NATIONAL BANK.

See INTERNAL REVENUE, 1.

NAVY.

See OFFICERS OF THE NAVY.

NEGLIGENCE.

A contractor agreed with a railroad company to construct piers for a bridge over the Ohio River of sizes and forms, in places, and of materials, in accordance with plans and specifications furnished by the company, and to furnish the materials and perform the work of preparing and keeping in place, buoys and lights to warn against danger. By reason of a flood one of these piers was submerged, and the buoy and light placed to give warning of it were carried away. The contractors failed to place a new buoy and light. One of the barges in a tow struck on the pier and was lost. In an action against the contractor to recover damages therefor: *Held*,

(1) That the defendants were independent contractors, and not em-

PRINCIPAL AND AGENT.

PUBLIC LAND.

STATUTE.

A. CONSTRUCTION OF STATUTES.

SUBROGATION.

The plaintiffs, having been held liable to the owners of bonds improperly cancelled as parties to the transaction, are not entitled to be subrogated to the heirs of the estate in the suit against the United States; since a person who invokes the doctrine of subrogation must come into court with clean hands. *German Bank* v. *United States*, 573.

TAX AND TAXATION.

1. To make a tax sale valid, observance of every safeguard to the owner created by statute is imperatively necessary. *Marx* v. *Hanthorn*, 172.
2. When not modified by statute, the burden of proof is on the holder of a tax deed to maintain his title, when questioned, by showing that the provisions of the statute have been complied with. *Ib.*
3. It is competent for a legislature to declare that a tax deed shall be *prima facie* evidence, not only of the regularity of the sale, but also of all prior proceedings, and of title in the purchaser; but as the legislature cannot deprive one of his property by making his adversary's claim to it conclusive of its own validity, it cannot make a tax deed conclusive evidence of the holder's title to the land. *Ib.*
4. The reasonable meaning of the Oregon statutes regulating notices and sales of property for taxes, (Gen. Laws, ed. 1874, 767, §§ 90, 93; Hill's Ann. Laws, 1309,) is that such notice and advertisement should give the correct names of those whose property is to be sold. *Ib.*