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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1892

J. C. BANCROFT DAVIS

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
STEPHEN JOHNSON FIELD, Associate Justice.
JOHN MARSHALL HARLAN, Associate Justice.[1]
HORACE GRAY, Associate Justice.
SAMUEL BLATCHFORD, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.
HENRY BILLINGS BROWN, Associate Justice.
GEORGE SHIRAS, Jr., Associate Justice.
HOWELL EDMONDS JACKSON, Associate Justice.

RICHARD OLNEY, Attorney General.
CHARLES HENRY ALDRICH, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

[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.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1892.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY *v.* HOYT.

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

No. 180. Argued March 30, 1893. — Decided April 17, 1893.

When the record contains special findings of fact, but no bill of exceptions, the errors of law relied upon by a plaintiff in error must be considered and determined upon the findings.

If a contracting party absolutely binds himself to perform things which subsequently become impossible of performance, or to pay damages for the nonperformance thereof, and the thing which causes the impossibility might have been foreseen and guarded against in the contract, or arose from the act or default of the promisor, he will be held to the strict performance of his contract; but if the cause of the impossibility be of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, he will not be held bound by general words, which, though large enough to include it, were not used with reference to the possibility of the particular contingency which afterwards happened.

A railway company and several individuals entered into a contract for the construction of a grain-elevator by the latter, wherein the company agreed "that the total amount of grain received at said elevators shall be at least five million bushels on an average for each year during the term of this lease; and in case it shall fall short of that amount the said party

of the first part agrees to pay to the said party of the second part one cent per bushel on the amount of such deficiency, settlements to be made at the close of each year; and whenever it shall appear at the close of any year that the total of grain received during so much of the term of this lease as shall then have elapsed does not amount to an average of five million bushels for each year, the party of the first part shall pay to the parties of the second part one cent per bushel for the amount of such deficiency; but, in case it shall afterwards appear that the total amount received up to that time equals or exceeds the average amount of five million bushels per annum, the amount so paid to the party of the second part shall be refunded or so much thereof as the receipts of the year shall have exceeded five million bushels, so that the whole amount paid on account of deficiency shall be refunded, should the total receipts for the entire term equal or exceed fifty million bushels in all, or an average of five million bushels for each year." *Held*, that the railway company only agreed that the quantity of grain which it would deliver at the elevators or tracks connected therewith, in the usual way in cars, for storage and handling, should amount on an average to at least 5,000,000 bushels per annum for a period of ten years, and that, in case the grain so delivered, or brought to the elevators for delivery, fell short of that quantity, it would pay one cent per bushel on the amount of such deficiency.

THE case is stated in the opinion.

Mr. Edwin Walker, (with whom was *Mr. John W. Cary* on the brief,) for plaintiff in error.

Mr. John N. Jewett for defendants in error.

MR. JUSTICE JACKSON delivered the opinion of the court.

This action was brought by defendants in error against the plaintiff in error to recover a designated sum of money alleged to be due under the terms of a covenant contained in a certain indenture of lease made and entered into between the parties. The cause was tried by the court below under a written stipulation of the parties waiving a jury, and resulted in a judgment for the plaintiffs below for the sum of $33,783.83, to reverse which, for errors of law claimed to have been committed by the court in its construction of the covenant and in the legal conclusions it reached from the facts specially found, this writ of error is prosecuted.

Opinion of the Court.

On February 18, 1880, the Chicago, Milwaukee and St. Paul Railway Company, (hereafter called the railway company,) being the owner thereof, leased and demised to the defendants in error lots 3, 4 and 5, of block K, of the original town of Chicago, for a term of ten years from the first day of January, 1881, at an annual rental of $3850, to be paid quarterly by the lessees, who were also to pay all taxes and assessments that might be levied upon the premises during the term. At the date of the lease the lessees were the owners of the adjoining lots 1 and 2 of the same block, upon which was located an elevator or warehouse, used for receiving, storing and handling grain, and having a capacity for about 350,000 bushels. The lease was executed under seal of the respective parties thereto, and the material provisions thereof, so far as they relate to the present controversy, are as follows:

By the second article, Hoyt and his associates agreed to erect on said lots 3, 4 and 5 a grain elevator "of a storage capacity of 700,000 bushels or more during the year 1880." The article provided that the elevator should have all modern improvements and should be constructed to the satisfaction of the railway company. No question is raised upon this article. The case admits that it was fully executed.

By the third article, the railway company "agrees to lay all necessary tracks adjacent to said elevator, to connect its railway therewith for the purpose of delivering grain in cars thereto, and keep the same in repair during the time of this lease, and agrees to deliver on said tracks in cars, at said elevator, to the parties of the second part, all the grain that may be brought by its railway consigned to parties in the city of Chicago, so far as the party of the first part can legally control the same, for handling and storage in said elevator." The case involves no breach of this article.

By the fourth article it is provided as follows: "The said parties of the second part [Hoyt and his associates] agree to receive, handle and store said grain as delivered in the usual manner of handling grain in the city of Chicago to the extent and capacity of said elevator to be constructed, and in addition agree that they will use for the same purpose, so far as their

other engagements will allow, the elevator now standing on lots 1 and 2 of said block, and the said party of the first part shall at all times be entitled to storage for its grain to the extent of at least 1,000,000 bushels. The parties of the second part, with the consent of the party of the first part, may receive grain for storage from other parties and from river and canal craft, but in case such grain is so received so as to reduce the capacity of the parties of the second part to accommodate the party of the first part to the extent of 1,000,000 bushels in said elevators, the said parties of the second part agree to furnish storage in other elevators to the party of the first part to the extent that their capacity is so reduced, without expense to the said party of the first part for switching or otherwise." The case involves no violation of this article by either of the parties.

The fifth, sixth and seventh articles, taking them in their order, relate, 1st, to the charges to be made for the storage and handling of grain — certain elevators accommodating the grain business of competing railways being referred to as a standard; 2d, to the rebuilding of the elevator in case of its destruction by fire or other casualty, and that the "parties of the second part will save the said party of the first part free and harmless from all loss or damage by fire to said elevator or contents during the continuance of this lease"; and, 3d, to the weighing of the grain received into the elevator, and the appointment of weighers. In all these respects the case presents no question of controversy.

The last clause of the seventh article reads as follows: "It is further agreed that the parties of the second part will, at all times, keep a force at said elevators sufficient to transact all business that may be offered by said party of the first part, and that cars of grain will be received and unloaded, when the business of the party of the first part requires it, in the night time or on Sundays, and that said business shall be dispatched with equal and as great facility in that respect as at any of the elevators in the city of Chicago above mentioned, so as not to delay the cars of the party of the first part unreasonably or unnecessarily."

It is upon the alleged breach of the eighth article of the contract that this suit is brought. That article reads as follows:

"In consideration of the agreement aforesaid the said party of the first part agrees that the total amount of grain received at said elevator shall be at least five million bushels on an average for each year during the term of this lease; and in case it shall fall short of that amount the said party of the first part agrees to pay to the said parties of the second part one cent per bushel on the amount of such deficiency, settlements to be made at the close of each year; and whenever it shall appear at the close of any year that the total grain received during so much of this lease as shall then have elapsed does not amount to an average of five million bushels for each year, the party of the first part shall pay to the parties of the second part one cent per bushel for the amount of such deficiency; but in case it shall afterwards appear that the total amount received up to that time equals or exceeds the average amount of five million bushels per annum, the amount so paid to the parties of the second part shall be refunded or so much thereof as the receipts of the year shall have exceeded five million bushels, so that the whole amount paid on account of deficiency shall be refunded should the total receipts for the entire term equal or exceed fifty million bushels in all on an average of five million bushels for each year."

The remaining articles of the contract, including the supplement thereto, are comparatively unimportant.

In May, 1888, the defendants in error brought their action of covenant against the railway company in the Superior Court of Cook County, Illinois, for the alleged breach of the contract and agreement embodied in said article 8 of the lease. The railway company, being a citizen of Wisconsin, removed the cause to the United States Circuit Court for the Northern District of Illinois. The declaration contained two special counts, and the same breaches are assigned in each count. In the first count the contract is set out *in hæc verba;* the second, according to its tenor and effect.

The first breach assigned was that the grain received for

storage from the railway company during the year 1886 was less by 1,740,194 bushels than the 5,000,000 bushels covenanted to be received, and, therefore, the railway company became bound at the close of the year 1886 to pay the plaintiffs, (defendants in error,) on account of the deficiency, the sum of $17,401.94.

The second breach averred that the grain received for storage from the railway company during the year 1887 was less by 2,042,408 bushels than the 5,000,000 bushels covenanted to be received, and, therefore, the railway company became liable at the close of the year 1887 to pay to the plaintiffs, (defendants in error,) on account of the deficiency, the sum of $20,424.08.

The main breach specially set up and relied on is the third, which comprehends the other two, and is thus stated in the declaration:

"The said plaintiffs further aver that the total amount of grain received in the elevators mentioned in said indenture during the years 1886 and 1887 did not equal the ten million bushels or five million bushels upon an average for each of said years covenanted by the defendant in said indenture to be therein received during those years, but, on the contrary, the said plaintiffs aver that the total amount of grain received in said elevators during said two years, allowing to the defendants the full storage capacity in said elevators of one million bushels stipulated for in said indenture, was less than the ten million bushels promised to be therein received by the defendant as aforesaid during said years 1886 and 1887 by three million seven hundred and eighty-two thousand six hundred and two (3,782,602) bushels, and the plaintiffs aver that on account of said deficiency between the amount of grain promised by the defendant to be received in said elevators and the amount actually received therein during said years the said defendant became and was liable to pay to the plaintiffs, according to the terms and provisions of said indenture of lease and agreement and its further covenant in such case therein provided, the sum of one cent per bushel upon the total number of bushels constituting the deficiency of said years 1886 and 1887, whereby and by reason whereof the said defendant,

by virtue of its covenant aforesaid, became liable to pay to said plaintiffs thirty-seven thousand eight hundred and twenty-six dollars and two cents ($37,826.02) at the times and in the manner in said indenture provided."

On demurrer of the defendant to the declaration being overruled by the court, 39 Fed. Rep. 416, so far as it related to the breaches thus charged, the defendant interposed a plea of general performance, and by stipulation of the parties it was agreed that "said cause shall stand for trial upon the single plea of general performance, first pleaded by said defendant, and the issue made thereon, with the right reserved to either party to introduce on the trial of said cause under said issue all evidence which could be properly introduced under any issue legitimately framed under special pleas applicable to the case, and that upon the filing of this stipulation all other pleas filed herein by the said defendant shall be considered as withdrawn."

The cause was thereupon submitted and heard upon its merits by the court below, which made the following special findings of fact:

"First. It found the contract as already recited, duly made and entered into between the parties.

"Second. That said elevator was constructed upon the lots named in said agreement and was completed within the time and in accordance with the terms and conditions of said agreement, on or about the 24th day of December, A.D. 1880, with a working capacity of 750,000 bushels; that the storage or working capacity of the elevator known as the Fulton elevator was 350,000 bushels, both elevators affording storage and working capacity of about 1,100,000 bushels of grain, and that the cost of constructing said new elevator was about the sum of $200,000.

"Third. That the said Munger, Wheeler & Company, as assignees of Jesse Hoyt and his associates, built said new elevator and have controlled and operated both elevators since December, 1880, and are now operating the same, and that said firm during said time also owned and controlled six other elevators, all located in the city of Chicago, upon other

railroads entering into said city, and that at the present time said firm controls and operates in all eight grain elevators in said city, with an aggregate storage or working capacity of about 6,000,000 bushels of grain.

"Fourth. That in the year 1886 the plaintiffs received from the defendant, for store in the St. Paul or new elevator, 1,923,339 bushels of grain, and in the Fulton elevator 903,482 bushels, and also that the plaintiffs received from the defendant for storage 432,985 bushels of grain in the Union elevator, located on the Chicago and Alton Railroad, in the city of Chicago, making a total for the year 1886 of grain received by the plaintiffs from the defendant of 3,259,806 bushels, all of which is credited to the defendant in its account for that year.

"That in the year 1887 the plaintiffs received from the defendant in the new or St. Paul elevator 2,300,292 bushels of grain, and in the Fulton elevator 657,300 bushels of grain, making a total of 2,957,592 bushels of grain received by the plaintiffs from the defendant during the year 1887.

"That all the grain received and handled by the plaintiffs in the Fulton and St. Paul elevators during said years was received from the Chicago, Milwaukee and St. Paul Railway Company.

"Fifth. The court further finds that the plaintiffs admitted in open court that during the years 1886 and 1887 grain was tendered by the defendant to the plaintiffs for storage, and that it could not be received for the reason that the plaintiffs' warehouses were filled; that the grain so tendered amounted to 8,685,269 bushels, and that the plaintiffs never declined to receive shipments of grain from the defendant when such elevators had capacity to receive it within 1,000,000 bushels, and that when the plaintiffs refused to receive further grain for storage the defendant was notified that it occupied the entire capacity stipulated for in the contract at the time plaintiffs declined to receive the grain so tendered, to wit, 1,000,000 bushels.

"Sixth. That for the year 1886 the defendant paid for switching grain to other elevators when the plaintiffs were

unable, and, therefore, refused to accept the same, the sum of $2871.00, and in the year 1887 the sum of $9962.35, and that the cost of train service for the defendant in delivering such grain to other elevators amounted to about the same sum.

"That the defendant also, during said year, contracted with parties having grain stored in said elevators to remove the same in order to furnish more room for the defendant; that for the removal of 100,000 bushels the defendant paid the owners thereof $15,000.00, and that after such removal the plaintiffs refused to receive from the defendant for storage more than 40,000 bushels in place of the grain that had been so removed for the reason that that amount of additional grain exhausted the storage and hauling capacity of said two elevators; that it was to the interest of the defendant to deliver all the grain to the plaintiffs at said St. Paul and Fulton elevators during said years.

"That during the two years in controversy the entire storage capacity of said elevators was constantly occupied by grain received from the defendant's cars, and, although the plaintiffs refused to receive additional grain tendered by the defendant during the same period, their refusal was always based upon the ground that their elevators were full and contained more than 1,000,000 bushels of grain received from the defendant.

"That at no time during the said years 1886 and 1887 did the plaintiffs refuse to receive grain from the defendant for storage in said elevators when there was any unoccupied storage space in the same, and that some of the grain so delivered and stored during said years remained in said elevators so long that the plaintiffs were not able to receive or handle for defendant during said years the amount of grain contemplated by the contract or the full amount actually tendered by the defendant, and that but for this unusual condition the plaintiffs would have received and stored all the grain tendered by the defendant.

"Seventh. The court further finds that the plaintiffs' regular charges for storage of grain in said elevators during the years 1886 and 1887 were one and three-quarters of a cent

per bushel for the first ten days and one and one-half of a cent per bushel for the subsequent ten days, and for every thirty days the storage charges were one cent and three-quarters per bushel; that for 1,000,000 bushels stored in such elevators and continued therein for one year, the regular storage charges for the same during the years 1886 and 1887 would be at the rate of $150,000 for each 1,000,000 bushels for the term of one year; that if said elevators could be kept employed with first storage, that is, if 1,000,000 bushels could pass through said elevators each ten days, the charges for a year would amount to about $270,000.

"That the length of time that said grain remained in store was not regulated or controlled by either the plaintiffs or defendant, but by the shippers or owners of such grain.

"Eighth. That the plaintiffs have kept the account of all their elevators together, and, therefore, could not state the earnings of the elevators in question for the years 1886 and 1887.

"Ninth. There is no evidence of the amount of earnings of said St. Paul and Fulton elevators during the years 1886 and 1887, or of the income of the plaintiffs derived from the storage of grain or charges thereon in said elevators during said period of time, nor is there any evidence of any actual damages sustained by the plaintiffs by reason of their not handling in said elevators during said years the full amount of 10,000,000 bushels of grain, or by reason of the alleged breach of covenant by the defendant other than the one cent per bushel for the years 1886 and 1887, as prescribed by article 8 of the contract."

As the result of these findings, the amount of the deficiencies for the years 1886 and 1887, with interest from the end of each year to September 25, 1889, was ascertained to be $42,806.13, from which was deducted the rental and interest thereon, for the years 1886 and 1887, set up as a counterclaim, amounting to the sum of $9022.30, which left a balance due from the defendant to the plaintiffs of $33,783.83, for which judgment was rendered.

The defendant moved for judgment on various grounds,

which were denied by the court, and which need not be specially noticed, as they are covered by the assignments of error.

In the view we take of the case it is not necessary to consider several questions presented by the plaintiff in error, such as want of mutuality in the covenant in question, or the impossibility of the performance thereof, or that it was a wagering contract, and *ultra vires* on the part of the railway company. The material questions of the case are covered by the two assignments that the judgment is not sustained by the special findings of fact, and that the court erred in its construction of the contract between the parties. There is no bill of exceptions in the record, and the errors of law relied upon by the plaintiff in error must therefore be considered and determined upon the special findings of fact.

The action of the lower court in overruling the demurrer to the declaration proceeded in part, if not entirely, upon the ground that the undertaking entered into by the railway company in and by the eighth article of the lease amounted to a guaranty that the business of the elevators during each year of the term should amount to a certain sum. As we understand their position, counsel for the defendants in error do not, however, insist upon this construction of the covenant, but rely upon the interpretation given it by the Circuit Judge at the hearing on the merits, which was "that if, with a storage capacity of 1,000,000 bushels, the plaintiffs should not be able to receive and handle 5,000,000 bushels annually, and earn commissions on that basis, the defendant would pay to the plaintiffs one cent per bushel on the deficiency."

If the true meaning and intent of the covenant, read, as it should be, in connection with the other provisions of the contract, and in the light of the surrounding circumstances, the situation of the parties, and the objects they respectively had in view, was to guarantee to the lessees that they would actually receive, store and handle at the designated elevators, on an average each year of the lease, as much as 5,000,000 bushels of grain, and that if in the course of the grain business they could not, in fact, receive, store and handle more than

1,000,000 bushels during the year, still the railway company would be liable to them for one cent on 4,000,000 bushels not so received and stored, although tendered and offered to them in the manner and at the place provided for in the contract, then there is no error in the judgment of the Circuit Court.

If, however, the language of the stipulation means, as counsel for plaintiff in error contend, that the railway company only agreed that the quantity of grain which it would deliver at the elevators or tracks connected therewith, in the usual way in cars, for storage and handling, should amount on an average to at least 5,000,000 bushels per annum for a period of ten years, and that in case the grain so delivered, or brought to the elevators for delivery, fell short of that quantity, it would pay one cent per bushel on the amount of such deficiency, then the judgment is erroneous, and should be reversed. We are of opinion that the latter construction is the proper one, and meets the real object and purpose which the parties had in view in entering into the contract.

To meet a natural and reasonable solicitude of the lessees that the full supply of grain should be brought to their elevators, the railway company agreed "to deliver on said tracks in cars, at said elevators, to the parties of the second part (the lessees) all the grain that may be brought by its railway consigned to parties in the city of Chicago, so far as the party of the first part (the railway company) could legally control the same, for handling and storing in said elevator." If the railway company had failed to deliver at the elevators for storage and handling all grain, consigned or unconsigned, which it brought to Chicago, and could legally control, it might perhaps have been liable to the lessees for the damage thence resulting, and could not have set up, by way of excuse or defence, that the elevators were continuously filled with other grain previously received from the railway company. The fact that the lessees had furnished storage for a million bushels received from the railway company, and thereby exhausted the capacity of their elevators to take any more grain on storage so long as the million bushels remained on hand, would not have exempted the railway company from the obli-

gation of delivering at the elevators all grain brought by it to the city, so far as it could control the same. Under this provision of the contract if the quantity brought, and subject to its control, was four or five million bushels in addition to the million previously delivered and in store, the railway company would still be bound to tender such additional grain to the lessees, who, under the construction placed upon the eighth article of the lease by the court below, could not only decline to accept the same, but actually make their inability to receive and store the grain tendered the basis of a valid claim for one cent per bushel on the amount so tendered and declined. A result so unreasonable as this is hardly to be supposed to have been contemplated and intended by the parties. It is found as a fact that the length of time grain could or would remain in store was not, and could not, be legally controlled by either the lessor or the lessees, but was subject to the exclusive control, in that regard, of the shippers and owners of the grain. The construction which was placed upon the contract, and which is necessary to support the judgment below, would place the railway company in the position of undertaking to guarantee that shippers and owners having grain on storage in the elevators would so deal with, or remove and dispose of the same as to enable the lessees to store and handle more grain than the elevators had capacity for. It is not to be supposed that the railway company was undertaking to make a guaranty as to how grain, owned and stored by others, would be dealt with or controlled in respect to its remaining or being removed from the elevators, and the language of the covenant does not require a construction which would place the railway company in that position.

The court below attached importance to the use of the word "received," as employed in the eighth article. The words "total amount of grain received *at* said elevator" would, however, be pressed beyond their legitimate and proper meaning if construed to mean that the elevator should actually store and handle 5,000,000 bushels during each year without regard to its capacity, or without reference to the ability of the lessees to accept and store that quantity. The language of

the covenant is that the "total amount of grain received at said elevators shall be at least 5,000,000 bushels on an average for each year during the term of this lease, and in case it shall fall short of that amount, the said party of the first part agrees to pay to the said party of the second part one cent per bushel on the amount of such deficiency."

The agreement or stipulation that the amount of grain "received *at* said elevator" should reach the designated quantity, falls short of an undertaking or guaranty by the railway company, that the elevator should, in fact, store and handle that quantity each year of the term. The amount of grain "received at" an elevator during a given period should not be construed as meaning that such amount would or should be actually taken into the same for storage and handling, unless there is something in the context clearly indicative of an intention to use the words in the latter sense. No such intent appears in the present case.

The manifest object and purpose of the covenant was to assure the lessees that there would be delivered at or brought to said elevators by the railway company and others a total amount of at least 5,000,000 bushels of grain per annum for storage and handling, and not that the railway company would guarantee that the lessees could or would actually receive, store and handle that quantity at the elevators. When, therefore, the railway company, and others, offered at the elevators the stipulated quantity or amount of grain, it performed the condition of its guaranty, and the inability of the lessees to accept the grain so tendered, on account of the storage capacity of the elevators being fully occupied by third parties, whose action in respect to allowing the grain to remain, or to be removed, was beyond the control of either the lessor or the lessees, cannot operate to defeat such performance or constitute any ground for thereafter holding the railway company liable on its guaranty.

There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an

unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.

This principle is directly applicable here, for the covenant sued on cannot be construed to mean that the railway company contemplated by the terms of its agreement that it was to be held responsible for the course of business of the lessees, or that it was undertaking to guarantee that shippers and owners, having grain in store at the elevators, would remove the same with sufficient dispatch to enable the elevators to store and handle as much as 5,000,000 bushels annually. This would be a most unusual and unreasonable undertaking, wholly beyond the control and ability of the railway company to perform, and while the words "receive at the elevators" might in and of themselves be broad enough to include such an undertaking, if the context clearly showed that such was the intention of the contracting parties, we are of opinion that they were not so understood and used by the parties in this case, and should not be so extended as to cover the contingency or possibility of such a course of dealing as would prevent the acceptance of grain if the agreed quantity was tendered. There is no allegation in the declaration that grain to the amount specified was not, during the years 1886 and 1887, received at or tendered in cars on the tracks at said elevators for delivery, to the amount of or in excess of 5,000,000 bushels of grain. On the contrary, the court below finds, as a matter of fact, that the defendant in 1886 and 1887 so delivered 6,210,398 bushels, which was received by the defendant into said elevator, and further finds as follows: "Fifth. The court further finds that the plaintiffs admitted in open court that during the years 1886 and 1887

grain was tendered by the defendant to the plaintiffs for storage, and that it could not be received for the reason that the plaintiffs' warehouses were filled; that the grain so tendered amounted to 8,685,269 bushels, and that the plaintiffs never declined to receive shipments of grain from the defendant when such elevators had the capacity to receive it within a million bushels, and that when the plaintiffs refused to receive further grain for storage the defendant was notified that it occupied the entire capacity stipulated for it in the contract at the time plaintiffs declined to receive the grain so tendered, to wit, one million bushels."

It is urged in behalf of the defendants in error that this amount of 8,685,269 bushels so tendered by the railway company includes the 6,210,398 bushels which the court finds was actually received into the said elevators during said years. We do not so construe this finding. Its language relates clearly and distinctly to an amount of grain that was tendered by the railway company, and which could not be received by the lessees, for the reason that the warehouses were filled. It is thus shown that, in addition to what was actually received, there was tendered by the railway company, at the place and in the manner provided for in the contract, 8,685,269 bushels, which the elevators could not accept and did not receive and store. The amount so tendered, with that actually received, exceeded the total amount which the railway company agreed that the lessees should have the opportunity to accept and store, and this we hold to be a full and complete compliance by the railway company with the terms and true meaning of its covenant. To hold otherwise would render the railway company liable for the inability of the lessees to accept the performance that was offered by it. It would require the clearest and most unqualified understanding on the part of the railway company to subject it to such a liability.

The plaintiff in error interposed a counter-claim for the rent due it for the years 1886 and 1887, which, as found by the court below, amounted to $9022.30, which was deducted from the amount which the court below adjudged to be due the lessees.

Syllabus.

The conclusion of this court is that the judgment awarded the lessees is erroneous, and must be reversed with costs, and that the cause should be remanded with directions to the court below to enter judgment in favor of the plaintiff in error for the above amount of rent due to it, with interest thereon from October 1, 1889, the date of judgment below, and it is accordingly so ordered.

The CHIEF JUSTICE having been of counsel, and MR. JUSTICE FIELD not having heard the argument, took no part in the consideration or decision of this case.

BOGK *v.* GASSERT.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

No. 179. Argued and submitted March 27, 1893. — Decided April 17, 1893.

Under the practice in Montana a defendant may move for a nonsuit upon the ground that the plaintiff has failed to prove a sufficient case for the jury; but, if he proceed to put in testimony, he waives this right.

When one party has been permitted to state his understanding of the contracts which form the subject of the litigation, there is no error in giving a like license to the other party.

An exception cannot be taken to "a theory announced throughout" an instruction of the court.

A general exception to a refusal of a series of instructions taken together and constituting a single request is improper, and will not be considered if any one of the propositions be unsound.

When a grantor makes an absolute deed of real estate, for a money consideration paid by the grantee to the grantor, and the grantee at the same time executes and delivers to the grantor an agreement under seal, conditioned to reconvey the same on the payment of a certain sum at a time stated, and there is no preëxisting debt due from the grantor to the grantee, and no testimony is offered explanatory of the transaction, it is for the jury to determine whether the parties intended the transaction to be an absolute deed with an agreement to reconvey, or a mortgage.

Teal v. *Walker*, 111 U. S. 242, distinguished from this case.

Wallace v. *Johnstone*, 129 U. S. 58, held to decide that, in the absence of proof, in such case, "of a debt or of other explanatory testimony, the parties will be held to have intended exactly what they have said upon the face of the instruments."

Statement of the Case.

THIS was an action at law instituted by Henry Gassert, Jacob Reding and James H. Steele, as plaintiffs, against Gustavus Bogk, as defendant, upon a lease of certain premises in the city of Butte, and also certain mining claims in Silver Bow County, wherein plaintiffs prayed judgment against defendant for the restitution of the premises, and for damages for the detention thereof at the rate of $500 per month.

The facts of the case were substantially as follows:

Gustavus Bogk, the defendant below, was the owner of a lot of ground in Butte City, Montana, upon which stood a public house known as the Virginia Chop House. He was also the owner of some mining claims, five in number, located in Summit Valley, Silver Bow County, Montana. Having become involved in debt and unable to hold the property, on May 19, 1885, he sold and conveyed by deed in fee, duly executed, an undivided half interest in the property to James H. Steele, one of the plaintiffs, for the sum of $7500; and, upon the same day, by another similar deed, he sold and conveyed the other half interest to Gassert and Reding, the other plaintiffs, for a like sum. These two amounts were paid to Bogk, and disbursed under his direction. By a separate and independent instrument in writing of the same day, the plaintiffs Gassert, Reding and Steele agreed to reconvey the property to Bogk, if, on or before the end of one year thereafter, he would pay to Steele the sum of $8967.50, and to Gassert and Reding a like sum. This sum of $17,935, in the aggregate, was the purchase price of the property, $15,000, with interest compounded thereon monthly for one year. The agreement of reconveyance recited the previous sale of the property, but made no mention whatever of any loan of money.

Two days afterwards, namely, on May 21, 1885, Bogk took a lease of the property from Gassert, Reding and Steele for the term of one year, at a nominal rent of $450, payable on or before December 1, 1885, with a privilege of working the mines for his own use and benefit. Bogk never offered to repurchase the property, or tendered to the plaintiffs the sum of $17,935, or any other sum.

Statement of the Case.

Under this condition of things, the lease having expired, plaintiffs demanded possession of the property, and, upon the refusal of Bogk to comply with the demand, brought action before a justice of the peace, under a statute of Montana providing for summary proceedings against tenants holding over. Upon a plea of title interposed by Bogk, the suit was transferred to the district court of the proper judicial district, in accordance with the requirements of the statute, and was there tried before a jury. Plaintiffs proved the deeds of conveyance, the agreement to reconvey, the lease by them to Bogk, the rental value of the property, and then rested. Notice to quit and failure to surrender the premises had been averred in the complaint, and not being denied by the answer, under the provisions of the code of procedure in Montana, were taken as admitted. Thereupon counsel for defendant moved for a nonsuit upon the ground that the plaintiffs had not shown that they were ever entitled to the possession of the premises, or that the defendant had entered into possession under the lease, or that notice to quit or demand for the surrender of the premises had ever been given to defendant. The court overruled the motion for a nonsuit, and defendant excepted. The trial thereupon proceeded, and defendant introduced witnesses showing the value of the city property to be from $18,000 to $25,000, and the other property to be from $22,000 to $25,000, making in all, the lowest estimate at $40,000, and the highest at $50,000; that the negotiations commenced for a loan; that the object was to raise money to pay off mortgages, judgments, liens, etc., upon the property; that plaintiffs never had possession of any of it; that interest was computed upon the amount advanced; that the lease was given to secure the representation of the mining property and pay the taxes, and that the transaction was intended as a mortgage.

Plaintiffs thereupon introduced certain evidence in rebuttal, and the jury returned a verdict for the plaintiffs, awarding them restitution of the property and $2175 as rent of the premises from May 21, 1886. Upon this verdict judgment was entered, the case appealed to the Supreme Court of the

Argument for Plaintiff in Error.

Territory, and the judgment affirmed. Defendant thereupon appealed to this court.

Mr. Edwin W. Toole and *Mr. William Wallace, Jr.*, for plaintiff in error, submitted on their brief, in which they contended as follows concerning the overruling of the motion for a nonsuit, and touching the effect of the conveyances:

The section of the statute of the Territory of Montana under which the motion for a nonsuit was made, is identical with the present Compiled Statutes of the State, and reads as follows: "Sec. 242. An action may be dismissed or a judgment of nonsuit entered in the following cases: . . . Fifth, By the court upon motion of the defendant, when upon the trial, the plaintiff fails to prove a sufficient case for the jury." The exception to the ruling of the court was taken by bill of exceptions in this case, embodying the evidence. In *Kleinschmidt* v. *McAndrews*, the Supreme Court of Montana held that this was improper under the practice of the Territory and that the question could only be reviewed on a statement on appeal. That case was brought to this court on writ of error, and as a court of appeals for the Territories, it reversed this decision of the territorial Supreme Court, and held that the exception was properly preserved under the practice act of the Territory. *Kleinschmidt* v. *McAndrews*, 117 U. S. 282. So that, notwithstanding the ruling of the Supreme Court upon this question of practice, this court has overruled the same, and we shall assume that the question is properly presented by the bill of exceptions referred to in the record.

Did, then, the deed and defeasance, or agreement to convey, *per se* constitute a mortgage? If they did, the lease could amount to no more than a security, as a mortgagee is never entitled to the rents and profits until he acquires actual possession. *Teal* v. *Walker*, 111 U. S. 242. That is a well-considered case, in which this court reviews the authorities at length and reaches the conclusion that the deed and agreement to reconvey constitute a mortgage, and that until foreclosure and sale the mortgagee would not be entitled to possession or the rents, issues and profits of the mortgaged premises.

Argument for Plaintiff in Error.

The court in its opinion cites with approbation: *Nugent* v. *Riley*, 1 Met. 117; *S. C.* 35 Am. Dec. 355; *Wilson* v. *Shoenberger*, 31 Penn. St. 295; *Dow* v. *Chamberlin*, 5 McLean, 281; *Bayley* v. *Bailey*, 5 Gray, 505; *Lane* v. *Shears*, 1 Wend. 433; *Freidley* v. *Hamilton*, 17 S. & R. 70; *Shaw* v. *Erskine*, 42 Maine, 371. If this court stands upon the principles announced by Chief Justice Shaw in *Nugent* v. *Riley* and the other cases cited in support of it, the court erred in not granting the motion for a nonsuit.

That a deed and agreement to reconvey for a certain sum at a specified time, constituting one transaction, are *per se* a mortgage, we cite: *Teal* v. *Walker*, *supra*; *Nugent* v. *Riley*, 1 Met. 117; *Wilson* v. *Shoenberger*, 31 Penn. St. 295; *Preschbaker* v. *Feaman*, 32 Illinois, 580; *Harbison* v. *Lemon*, 3 Blackford, (Ind.,) 51; *S. C.* 23 Am. Dec. 376; *Colwell* v. *Woods*, 3 Watts, 188; *S. C.* 27 Am. Dec. 345; *Edrington* v. *Harper*, 3 J. J. Marshall, 353; *S. C.* 20 Am. Dec. 145; *Dow* v. *Chamberlin*, 5 McLean, 281; *Bayley* v. *Bailey*, 5 Gray, 505; *Lane* v. *Shears*, 1 Wend. 433; *Freidley* v. *Hamilton*, 17 S. & R. 70; *Shaw* v. *Erskine*, 43 Maine, 371; *Jeffery* v. *Hursh*, 58 Michigan, 246; *Voss* v. *Eller*, 109 Indiana, 260; *Bunker* v. *Barron*, 79 Maine, 62; *Butman* v. *James*, 34 Minnesota, 547.

Since the decision of this court in *Teal* v. *Walker*, and subsequent to the transaction now under consideration, the question again came up, in which other elements entered into the transaction, and this court reached a somewhat different conclusion. *Wallace* v. *Johnstone*, 129 U. S. 58. But the deed before the court in *Wallace* v. *Johnstone*, containing covenants of warranty, was made to one person, while the agreement for an option was to a third person, thereby in no way suggesting a right to redeem by the vendor. We do not claim that this transaction would *per se* constitute a mortgage. It does not present the principles, or call for a determination of the doctrines announced by the various decisions and law writers, where the conveyance was to a certain person, who, as a part of the same transaction, agreed to reconvey to his grantor upon the payment of a certain sum at a certain time. The distinction is too apparent to require further comment.

If this court had intended to announce a different doctrine from that established by the authorities quoted with approbation in *Teal* v. *Walker*, it would in some way have referred to the fact. Nor do the decisions cited by the court which we have above quoted conflict with the case of *Teal* v. *Walker*, in so far as it is based upon the cases therein cited with approbation.

Mr. W. W. Dixon, (with whom was *Mr. Martin F. Morris* on the brief,) for defendants in error.

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

The action in this case was upon the lease of a city lot and certain mining claims, and a judgment was demanded for the restitution of the premises, and for damages for detention. The answer set forth in substance that the lease was one of a series of contemporaneous agreements, consisting of two deeds, an agreement to reconvey and a lease; that the deeds were intended as a mortgage; and that the rental of $450 named in the lease was the amount which it was understood would be necessary to pay the taxes upon the property, and the annual assessment work upon the mining claims, and that upon payment thereof by defendant Bogk the object of the lease should be fully satisfied and discharged; that the defendant paid this sum; and that the said lease became void and of no binding force.

The trial took place before a jury, and the assignment of error relates to the rulings of the court made in the course of such trial. We proceed to consider them in their order.

1. That the court erred in overruling defendant's motion for a nonsuit. In this connection, the bill of exceptions shows that the plaintiffs put in evidence the deeds from Bogk and wife to the plaintiffs, the agreement to reconvey, the lease with oral testimony of the rental value, and then rested. Defendant thereupon moved for a nonsuit upon the ground that plaintiffs had failed to prove that they were ever at any time in or entitled to the possession of the premises; that

defendant ever entered into possession under or by virtue of said lease; and that plaintiffs totally failed to prove a demand to have been made for the possession of the premises, or ever served or gave notice to quit upon the defendant. This motion was overruled. Defendant excepted, and proceeded to introduce testimony in defence.

The practice in Montana (Comp. Stat. sec. 242) permits a judgment of nonsuit to be entered "by the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury." Without going into the question whether the motion was properly made in this case, it is sufficient to say that defendant waived it by putting in his testimony. A defendant has an undoubted right to stand upon his motion for a nonsuit, and have his writ of error if it be refused; but he has no right to insist upon his exception, after having subsequently put in his testimony and made his case upon the merits, since the court and jury have the right to consider the whole case as made by the testimony. It not infrequently happens that the defendant himself, by his own evidence, supplies the missing link, and, if not, he may move to take the case from the jury upon the conclusion of the entire testimony. *Grand Trunk Railway* v. *Cummings*, 106 U. S. 700; *Accident Insurance Co.* v. *Crandal*, 120 U. S. 527; *Northern Pacific Railroad* v. *Mares*, 123 U. S. 710; *Union Insurance Co.* v. *Smith*, 124 U. S. 405, 425; *Bradley* v. *Poole*, 98 Mass. 169; *Columbia & Puget Sound Railroad* v. *Hawthorne*, 144 U. S. 202.

2. The second error assigned is to the admission of the conversation of the parties at the time of the execution of the instruments. Exception was duly taken upon the trial to the admission of this testimony. This exception does not seem to have been incorporated in either of the bills of exceptions, but in a "Statement on Appeal," which appears to have been settled and signed by the judge in the same manner as a bill of exceptions, and to have been treated as such by the Supreme Court of the Territory. The Code of Civil Procedure of Montana provides (sec. 432) for a statement of the case to be used on appeal, which shall state specifically the particular errors

or grounds upon which the appellant intends to rely, and which seems to take the place of an ordinary bill of exceptions. Under this code, (sec. 628,) "when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and, therefore, there can be between the parties and their representatives or successors in interest no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: First, where a mistake or imperfection of the writing is put in issue by the pleadings; second, where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 632, or to explain an extrinsic ambiguity, or establish illegality or fraud. The term, agreement, includes deed and wills, as well as contracts between the parties."

In this case Bogk had been called upon as a witness for himself, and testified that he had applied to these parties for a loan, not a sale; that he wanted money to pay off parties whom he owed; that he first spoke to Gassert or to Steele, but there was a dispute whether he should pay one per cent or one and a half per cent, "but it should have been made in a deed with a bond to me for a deed back again to me. I wanted it for a year, to pay off these parties and give them a mortgage for it; that was the first agreement." But the plaintiffs demanded a deed with an offer to give a bond for a deed back again, "so you can release it — pay it off at any time"; "Steele and Harry Gassert said this to me; said 'we want a deed, but will give you a bond to convey back at any time.' . . . At the time of the negotiation of this loan I promised to repay the $15,000 to the plaintiffs just as soon as I made a sale of my mines. I had these mines so that I thought I could make a sale of them, and calculated to pay it that way; I promised to pay it inside of a year. The interest was put all together for a year, but I agreed to pay this interest every month, but through my sickness and the bad luck I had, I could not succeed, and could not pay it. The agreement was this way: If I should pay the interest they should give me a

written paper and credit for the amount, if it was paid in instalments as agreed between us. This lease, which was read in evidence, was made to secure the representation of two of my mining claims, the Eva and Leaf, which were then unpatented, and to secure the payment of the taxes on my property, which would probably be $250 and $200 for representing, making in all $450, which this lease was given to secure and nothing else; which representation work I did for that year, 1885, and I have paid the taxes. . . . There was nothing at all said in these interviews between me and plaintiffs or their agents or attorneys, as to the sale of my property. They said, give them a deed and they would give me a bond for a deed back again. The negotiation between us was to loan me money. There was no price set to any piece or pieces of this property. It was a loan on all the property together. They made me no proposition pending these negotiations to purchase my property, to buy it of me."

In rebuttal, Steele and Gassert were put upon the stand and asked as to the conversation which took place at the attorney's office at the time the deeds and contract to reconvey were made. This conversation was admitted, and defendant excepted. Now, while this might have been improper as original testimony, it would have been manifestly unfair to permit Bogk to give his version of the transaction gathered from conversation between the parties, and to deny the plaintiffs the privilege of giving their version of it. The defendant himself, having thrown the bars down, has evidently no right to object to the plaintiffs having taken advantage of the license thereby given to submit to the jury their understanding of the agreement. The code is merely in affirmance of the common law rule, and was evidently not intended to apply to a case of this kind.

3. Error is also imputed to the court "in adopting the theory announced throughout the instruction given on the part of the defendants" (in error) "that the transaction could not amount to a mortgage unless there was a personal liability on the part of the plaintiff," (in error, defendant below,) "upon which a recovery could be had, and error in giving conflicting

instructions upon said matter." This assignment is obviously too general. No exception was taken to any "theory" announced by the court; but if there were, it would not be valid, since the theory of the court must be expressed in particular language, and the exception should be taken to such language. Different persons may derive different theories from the same language, and in this very assignment error is charged in giving conflicting instructions upon the same matter.

4. Error is also assigned in not giving either of the instructions 2, 6 and 7, as requested by defendant. Upon the trial, the court was requested by the plaintiffs to give and did give seven instructions, to which defendant excepted; but as no error is assigned here upon such refusal, we are not at liberty to consider them. Defendant also requested twelve instructions, all of which were given, except the second, sixth and seventh, "to which action of the court," says the bill of exceptions, "the defendant then and there objected, for the reason that said instructions numbered two, six and seven correctly state the law as applicable to the facts in evidence, and are necessary in order that the jury may arrive at a correct conclusion; but, notwithstanding said objection, the court refused to give said instructions two, six and seven, to which action the defendant, by his counsel, excepted," etc.

This exception, as well as the one taken to the granting of the plaintiff's requests, is open to the objection so often made that a general exception taken to a refusal of a series of instructions taken together, and constituting a single request, is improper, and will not be considered if any one of the propositions be unsound. *Johnston* v. *Jones*, 1 Black, 209, 220; *Rogers* v. *The Marshal*, 1 Wall. 644; *Harvey* v. *Tyler*, 2 Wall. 328; *Beaver* v. *Taylor*, 93 U. S. 46; *Worthington* v. *Mason*, 101 U. S. 149; *Moulor* v. *American Life Insurance Co.*, 111 U. S. 335. This is not only the rule in this court but also in the courts of Montana. *Woods* v. *Berry*, 7 Montana, 195. Although since this case was decided, and at a session of the legislature in 1887, the law was changed so that the giving or refusal to give instructions are deemed excepted to, and no exception need be taken.

The *first* of these instructions, (No. 2,) stripped of its verbiage, assumes that an absolute deed and a separate written contract to reconvey, both under seal, bearing even date, executed and delivered at the same time, between the same parties, and relating to the same land, the agreement to reconvey being conditioned upon the payment by the grantor to the grantee of a certain sum of money within a certain period, constitute in law and fact a mortgage, and will not convey any interest in the premises, or entitle the grantee to the possession of the land described.

There is undoubtedly a great conflict of authority upon this point. The case of *Teal* v. *Walker*, 111 U. S. 242, is relied upon as sustaining this position. In that case one Goldsmith borrowed of Walker $100,000, and gave his note therefor. At this time Goldsmith was the owner of certain lands in Oregon, and he and Teal were the joint owners of certain other lands. These parties executed three several deeds of these lands, absolute on their face, but intended as a security for the note, as appeared by a defeasance in writing executed upon the same day as the note. This instrument, after reciting the execution of the note, declared the legal title of the lands conveyed to be in trust; that Teal and Goldsmith should retain possession of the lands until said note should become due and remain unpaid thirty days, and upon default being made in the payment of such note, they would surrender the lands to Hewitt, the trustee in the deed, who should take possession of them, and, upon thirty days' notice in writing, should sell the same at public auction. These instruments were construed to constitute a mortgage. In delivering the opinion of the court, Mr. Justice Woods said (p. 247): "The execution of all the deeds and the execution of the defeasance, which applied to all the deeds, occurred on the same day, and was clearly one transaction, the object of which was to secure the note for $100,000 made and delivered by Goldsmith to Walker." Here it will be observed that there was a debt, a note, a deed absolute on its face, and a defeasance conditioned upon the prompt payment of the debt.

The case of *Wallace* v. *Johnstone*, 129 U. S. 58, 61, 64, is

more nearly in point. The petition in this case alleged that defendant Wallace, by deed of warranty, conveyed certain lands to plaintiffs and one Leighton; that on the same day the grantees delivered to defendant Ford a contract in writing, giving him the option for sixty days of purchasing the land in question, upon payment of the sum of $5876, which contract on the same day was assigned to Wallace. Neither of the defendants ever paid anything on the lands, and neither exercised the option of repurchasing, and their rights had thus become forfeited. Defendant answered, admitting the deed and contract, but alleging that, taken together, they were understood by the parties as constituting a mortgage for the security of the money received by him at that time, which was in reality a loan; and that the transaction was to avoid the effect of the usury laws of Iowa. He, therefore, prayed for a right to redeem. In delivering the opinion of the court, Mr. Justice Lamar said: "If this question could be determined by an inspection of the written papers alone, the transaction was clearly not a mortgage, but an absolute sale and deed, accompanied by an independent contract between the vendee and a third person, not a party to the sale, to convey the lands to him upon his payment of a fixed sum within a certain time. Upon their face there are none of the *indicia* by which courts are led to construe such instruments to be intended as a mortgage or security for a loan; nothing from which there can be inferred the existence of a debt, or the relation of borrower and lender between the parties to the deeds or between the parties to the contract. . . . A deed of lands, absolute in form with general warranty of title, and an agreement by the vendee to reconvey the property to the vendor or a third person, upon his payment of a fixed sum within a specified time, do not of themselves constitute a mortgage; nor will they be held to operate as a mortgage, unless it is clearly shown, either by parol evidence or by the attendant circumstances, such as the condition and relation of the parties, or gross inadequacy of price, to have been intended by the parties as a security for a loan or an existing debt." The purport of this case is that, in the absence of proof of a debt

or of other explanatory testimony, the parties will be held to have intended exactly what they have said upon the face of the instruments.

In the case under consideration there is no mention made, in either of the three instruments, of a debt, a loan, a note, or anything from which the relation of borrower and lender can be inferred; and the case, in this particular, is distinguishable from that of *Teal* v. *Walker*, and is more nearly analogous to that of *Wallace* v. *Johnstone*. It is true that in *Wallace* v. *Johnstone* there was a deed with the usual covenants of warranty, and that the contract to reconvey was made with a third person; but as the contract was immediately assigned by such third person to the grantor in the deed, it is not perceived that the case is affected by either of these circumstances. The inadequacy of price was undoubtedly great, but this would not, of itself, authorize the court to take the question from the jury. In this connection it might be reasonably urged that defendant, having not only made an absolute deed of the premises, but having, two days thereafter, taken a lease of the same from his grantees, was thereby estopped to deny their title, but we do not find it necessary to express an opinion upon that point. The case was evidently a proper one to go to the jury, who were left to determine the question whether the instruments were intended as a mortgage, and were instructed that, if they found them to be such, the plaintiffs could not recover. The case seems to have been fairly tried, and the defendant has no just cause for complaint.

In the *second* of these instructions (No. 6) the defendant requested the court to charge, "That if the jury believes from the evidence that the defendant was induced to sign and execute the alleged lease in evidence herein by the deceit, misrepresentation, trick or fraud of the plaintiffs, or that the defendant executed the same by and under an innocent mistake or misapprehension as to the facts, then said lease is invalid and void, and you will find for the defendant." As there was no evidence in the case of deceit or misrepresentation or fraud, or even of the fact that the defendant executed the instruments under a mistake of fact, the request was prop-

erly refused. All his evidence amounts to is that he wanted a loan of money, and that the plaintiffs insisted upon a deed and an agreement to reconvey, instead of a mortgage. But defendant did not claim to have been imposed upon, deceived or defrauded, and he had no right to a request based upon this hypothesis.

The disposition we have made of these requests renders it unnecessary to consider the other, and the judgment of the court below is, therefore,

Affirmed.

PAULSEN *v.* PORTLAND.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 183. Argued and submitted March 28, 1893. — Decided April 17, 1893.

In view of the notice actually given of the meetings of the freeholders appointed to estimate the proportionate cost of a sewer in Portland, Oregon, and to assess the proportionate share of the cost thereof upon the several owners of property benefited thereby, and in view of the construction placed upon the ordinance by the City Council, and in view of the approval of the proceedings by the Supreme Court of the State as being in conformity with the laws thereof, *Held*, that, notwithstanding the doubt arising from the lack of express provision for notice, the requirements of the Constitution as to due process of law had not been violated.

On March 5, 1887, the common council of the city of Portland passed an ordinance, No. 5068, providing for the construction of a sewer in the north part of the city, and known as Tanner Creek sewer. In pursuance of that and subsequent ordinances the sewer was constructed, and the cost thereof cast by a special assessment upon the lots and blocks within a prescribed district. The validity of this assessment was challenged by this suit, the plaintiffs being lot owners in the sewer district. The suit was commenced in the Circuit Court of the State of Oregon for the county of Multnomah. That court sustained a demurrer to an amended complaint, and dismissed it, and this decree of dismissal was affirmed by the Supreme Court of the State. 16 Oregon, 450.

Statement of the Case.

The burden of the complaint rested upon these allegations:

"Said ordinance numbered 5068, approved March 5, 1887, is unconstitutional and void, in this:

"§ 121 of chapter 10 of the charter of the said city of Portland, providing for the construction of sewers, under and by virtue of which said ordinance numbered 5068 was passed, is in violation of the Fourteenth Amendment to the Constitution of the United States, as it provides for taking private property for public use without due process of law; and said ordinance numbered 5068 is also unconstitutional and void, as it determines arbitrarily and absolutely that the property therein described is benefited by said Tanner Creek sewer without giving to the owners of said property any notice or opportunity to be heard upon that question. Said ordinance numbered 5162, approved August 19, 1887, is unconstitutional and void upon the same grounds as those upon which said ordinance numbered 5068 is unconstitutional and void as aforesaid, and also because said ordinance numbered 5162 provides for an assessment of the property therein named for the construction of said Tanner Creek sewer without providing for any notice to the owners whose property is therein and thereby assessed.

"Said ordinances and each of them and said assessment were and are unconstitutional, illegal and void because — and these plaintiffs aver the fact to be as now stated — plaintiffs had not nor had any of them any notice of the said proceedings of the said common council or any opportunity to be heard as to whether or not their property or the property of any of them was or could be benefited by said sewer, or as to the amount that was or should be assessed upon the several parcels of property named in said ordinance numbered 5162.

"Said ordinances and each of them and said assessment were and are illegal and void for the reason — and these plaintiffs aver the fact to be — that said common council and the said viewers and each of them knew that a large proportion of the property described in said ordinances, including the property of these plaintiffs, was and is a long distance away from said Tanner Creek sewer, and never would or could

be benefited by said sewer, and that a considerable portion of said property was lower in elevation than the bottom of said sewer, and that it was physically impossible for said property to be drained into said sewer or to be benefited by it in any way.

"And said ordinances and assessment and each of them were and are a gross abuse of power by said common council and in fraud of the rights of these plaintiffs.

"Said assessment is illegal and void and in violation of § 121 of chapter 10 of the charter of the said city of Portland, because — and these plaintiffs aver the fact to be — that said assessment was not made upon the property directly benefited by said sewer, but was made indiscriminately upon a large section of the city of Portland and without reference to the benefits to the property therein contained."

Section 121 of the city charter is as follows:

"The council shall have the power to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly benefited by such drain or sewer, but the mode of apportioning estimated costs of improvement of streets, prescribed in sections 112 and 113 of chapter 10 of this act, shall not apply to the construction of such sewers and drains; and when the council shall direct the same to be assessed on the property directly benefited, such expense shall in every other respect be assessed and collected in the same manner as is provided in the case of street improvements: *Provided*, That the council may, at its discretion, appoint three disinterested persons to estimate the proportionate share of the cost of such sewer or drain to be assessed to the several owners of the property benefited thereby, and in the construction of any sewer or drain in the city shall have the right to use and divert from their natural course any and all creeks or streams running through the city into such sewer or drain." Oregon Session Laws, 1882, page 171.

Section 5 of ordinance 5068 commences: "Sec. 5. The streets and property within the district bounded and described as follows shall be sewered and drained into the Willamette River through the sewer in this ordinance provided

and ordered to be constructed along Tanner Creek and North Eighth street, from B street, near the intersection of North Fourteenth street to the Willamette River, to wit: Beginning," and then, after defining the boundary of the sewer district, declares: "And as the lots and blocks, and parts of lots and blocks, included within said district as above defined will be drained and sewered both by surface drainage and underground sewerage, by and through the sewer in this ordinance ordered to be located, constructed and put down, the said lots and blocks, and parts of lots and blocks aforesaid, are hereby declared to be directly benefited by such sewer and subject to assessment therefor, in proportion to the benefits received thereby, as provided in section 121 of the city charter of the said city."

Section 12 is as follows:

"Sec. 12. That R. L. Durham, Charles G. Schramm and H. W. Monastes, disinterested persons, be and they are hereby appointed viewers to estimate the proportionate share of the cost of said sewer to be assessed to the several owners of property benefited thereby in accordance with the provisions of section 121 of the charter of said city and report the same to the common council within sixty (60) days from the date of the approval of this ordinance by the mayor. Said viewers shall hold stated meetings in the office of the auditor and clerk of said city, and all persons interested may appear before said viewers and be heard in the matter of making said estimate."

Ordinance 5162 contains these provisions:

"The city of Portland does ordain as follows:

"Sec. 1. The common council of the city of Portland having by ordinance No. 5068 provided for the construction of a sewer, together with the necessary catch-basins, man-holes, lamp-holes and branches along Tanner Creek from North Fourteenth and B streets to North Tenth and H streets, thence along North Tenth street to I street, thence along I street to North Eighth street, and thence along North Eighth street to North Front street, and thence northeasterly to low water in the Willamette River:

"And having therein and thereby appointed three disinterested freeholders, viz., R. L. Durham, H. W. Monastes and

Charles G. Schramm to estimate the proportionate share of the cost of such sewer, to be assessed to the several owners of the property benefited thereby, and said assessors having made their report to the common council, which report being satisfactory is hereby adopted, said report being in words and figure as follows, to wit:

"To the hon. the common council of the city of Portland.

"GENTLEMEN: The undersigned appointed by your honorable body to assess the cost of constructing a brick sewer along Tanner Creek from North Fourteenth and B streets to North Tenth and H streets, thence along North Tenth street to I street, thence along I street to North Eighth street, thence along North Eighth street to North Front street, thence northeasterly to low water in the Willamette River, as provided by ordinance No. 5068, would respectfully beg leave to submit this our report.

"We met at the office of the auditor and clerk and were furnished with the plans, specifications and contract, from which we have ascertained the probable costs to be $35,652.20, thirty-five thousand six hundred and fifty-two & $\frac{20}{100}$ dollars.

"In accordance with the requirements of said ordinance No. 5068 we gave notice of our first stated meeting June 25, 1887, at 6.30 o'clock P.M., (by publication of such notice in the Daily News, the official paper of the city,) at which time we met and proceeded with our work, adjourning from day to day until the final completion of our labors. We have assessed the cost of constructing said sewer to the several lots, parts of lots and tracts of land included within the boundaries defined by you in your ordinance No. 5068, in the several amounts as shown by the following tabulated statement. [Omitted, per stipulation.]

"SEC. 2. The auditor and clerk is hereby directed to enter a statement of the assessment hereby made in the docket of city liens, and cause notice thereof to be published in the manner provided by the city charter.

"Passed the common council, August 17, 1887.

"W. H. WOOD, *Auditor and Clerk.*

"Approved August 19, 1887."

Argument for Plaintiffs in Error.

Mr. George H. Williams for plaintiffs in error, submitted on his brief.

We contend that section 121 of the city charter makes no provision for notice of any kind to the property holders whose property is to be assessed to pay for the construction of sewers and drains, and is void, because it violates that clause of the fourteenth amendment to the Constitution of the United States which declares that no State shall deprive any person of life, liberty or property without due process of law. *Stuart* v. *Palmer*, 74 N. Y. 183.

Several cases involving the constitutional validity of assessments have been before this court; and in every case, it is believed, the court has affirmed or recognized the doctrine that an act of the legislature providing for an assessment upon real property must also, to be valid, provide for some kind of notice to the property holder, or an opportunity for him to be heard as to said assessment before it reaches the conclusiveness of a judgment. *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Spencer* v. *Merchant*, 125 U. S. 345; *Lent* v. *Tillson*, 140 U. S. 316; *Palmer* v. *McMahon*, 133 U. S. 660.

See also the following, bearing upon these issues: *Jordan* v. *Hyatt*, 3 Barb. 275; *Wheeler* v. *Mills*, 40 Barb. 644; *Ireland* v. *Rochester*, 51 Barb. 414; *Griffin* v. *Mixon*, 38 Mississippi, 424; *Mulligan* v. *Smith*, 59 California, 206; *Thomas* v. *Gain*, 35 Michigan, 155; *Darling* v. *Gunn*, 50 Illinois, 424; *Patten* v. *Green*, 13 California, 325; *The State* v. *Newark*, 25 N. J. Law, (1 Dutcher,) 399; *Same* v. *Same*, 31 N. J. Law, (3 Vroom,) 360; *State* v. *Plainfield*, 38 N. J. Law, (9 Vroom,) 95; *State* v. *Elizabeth*, 37 N. J. Law, (8 Vroom,) 353.

Our understanding is that in the construction of the city charter of Portland, this court will be governed by the decisions of the Supreme Court of Oregon. *Chicago, Milwaukee &c. Railway* v. *Minnesota*, 134 U. S. 418. That court holds, in the case of *Strowbridge* v. *Portland*, 8 Oregon, 67, approved in this case, that no notice is provided for and none is necessary to persons whose property is to be assessed for the construction of sewers.

This construction, then, is to be taken by this court as a part of the city charter; and, therefore, the plain question here presented is: Can the real property of a citizen of Portland, Oregon, be constitutionally assessed one hundred or five hundred or a thousand dollars, or any other sum, for the construction of a sewer in that city, and such property, if necessary, be seized and sold to pay such assessment, without any notice to the owner at any stage of the proceedings, or any opportunity given him to be heard before any tribunal or court upon the subject?

Moreover, the question here is whether or not the Supreme Court of the State of Oregon made a correct decision in this case. That court decided that the charter did not make any provision for notice to persons who are to be charged for the expense of constructing a sewer, and that in such case no notice is necessary; and this decision has not been overruled by any argument or illustration in the case of *The King Real Estate Association* v. *City of Portland*, but will stand as the law of the State of Oregon unless it is reversed by this court. There is no alternative. This court must either affirm that decision, and hold that no notice is required and none is necessary to persons whose property is to be charged for the construction of a sewer in the city of Portland, or it must, by a reversal of that decision, decide that notice of some kind is necessary under such circumstances.

We respectfully submit that this question ought to be put at rest in an emphatic decision by this court. It is a vital and far-reaching question, and seems not to be so fully settled as it should be. Municipal corporations are multiplying indefinitely in all parts of the United States. Towns of only a few hundred inhabitants are everywhere being incorporated as cities. City governments are proverbial for their reckless extravagance in the expenditure of money. They are more or less influenced, and sometimes controlled, by selfish partisans and unscrupulous jobbers. City taxation and assessments in some cases approach the confiscation of private property. Under these circumstances, the citizen cannot be too carefully protected. The spirit of the Constitution and the claims of justice

will never be fully recognized till the citizen has personal notice served upon him, or public notice equivalent thereto, of every proceeding in which he may be divested of life, liberty or property.

Mr. William T. Muir for defendants in error.

Mr. Justice Brewer delivered the opinion of the court.

The question is that of notice to the taxpayer. It is insisted that the Supreme Court held that section 121 did not provide for notice; that such construction of the State statute is binding upon this court; and that we must consider the case as though no notice was provided for. It is not entirely clear what construction has been placed upon section 121 by the Supreme Court of Oregon. In the case of *Strowbridge* v. *Portland*, decided in 1879, 8 Oregon, 67, 83, the provisions of the city charter in these respects being then substantially like those in the act of 1882, it was said by Judge Boise, delivering the opinion of the court:

"The elaborate manner pointed out in the charter for acquiring the authority to construct street improvements does not apply to the construction of sewers. The latter may be laid when, in the judgment of the city council, the same shall be necessary. They may be made without previous notice, the council alone being the judge of their necessity."

This language is quoted with approval by Chief Justice Thayer, in delivering the opinion of the court in this case. *Paulsen* v. *Portland*, 16 Oregon, 450, 464. But on the petition for a rehearing, which was denied by two judges to one, each of the judges in favor of denying gave a brief opinion, and Judge Strahan in his says:

"But it is objected that neither the charter nor ordinance expressly provides for notice, and that, therefore, though notice may have been in fact given, the constitutional objection of want of notice is not met.

"Sections 95, 96, 97, 98 and 99 of the charter all provide for and regulate notice in case of improvement of streets; and

§ 121, which authorizes sewers, provides, among other things, 'and when the council shall direct the same (costs) to be assessed on the property directly benefited, such expense shall in every other respect be assessed and collected in the same manner as is provided in the case of street assessments.' The charter expressly provides for notice in case of street assessments, and § 121 makes the provisions applicable in case of sewers where the expense is ordered by the council to be made a charge on the property directly benefited."

In the subsequent case in the same court of *King Real Estate Association* v. *Portland*, decided in 1892, and reported in 31 Pac. Rep. 482, it was held that: "The provision that such expense shall be assessed in the same manner as is provided in the case of street improvements, necessarily makes such sections, in regard to street improvements, with the exceptions noted, a part of section 121, for that purpose." It would seem from this that the final construction placed by the Supreme Court was to the effect that the charter requires notice as much in the matter of sewers as of street improvements.

But were it otherwise, while not questioning that notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property, we do not think it essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice. The city is a miniature State, the council is its legislature, the charter is its constitution; and it is enough if, in that, the power is granted in general terms, for when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions, and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council. Thus, in the case of *Gilmore* v. *Hentig*, 33 Kansas, 156, it was held thus: "Where a statute authorizes a city to provide for the construction of sewers and drains, and to tax the costs thereof upon the adjacent property owners, but does not require that any notice shall be given to the property owners,

held, that such failure to require notice does not render the statute unconstitutional or void, but notice must nevertheless be given, and the city would have a broad discretion with reference to the kind of notice and the manner of giving the same." See also *Cleveland* v. *Tripp*, 13 R. I. 50; *Davis* v. *Lynchburg*, 84 Virginia, 861; *Williams* v. *Detroit*, 2 Michigan, 560; *Gatch* v. *Des Moines*, 63 Iowa, 718; *Baltimore & Ohio Railroad* v. *Pittsburgh, Wheeling &c. Railroad*, 17 W. Va. 812, 835.

But it is further insisted that, even if the general grant of power in a charter to do a work of this kind is sufficient without an express provision in it as to notice to the taxpayers, the city in the execution of that power must by ordinance provide for notice and prescribe its terms, and that these ordinances contained no such provision. Here again we are met with an apparent difference in opinion of the two judges of the Supreme Court of Oregon, concurring in the judgment in favor of the city. The Chief Justice seems to consider the matter of notice immaterial, relying upon the doctrine of *stare decisis*, that the right of the city to carry through such a work without any notice had been settled years ago in the *Strowbridge Case;* while Judge Strahan makes these observations:

"In addition to this, § 12 of ordinance No. 5068 provides that the viewers shall hold stated meetings at the office of the auditor and clerk of said city, and all persons interested may appear before said viewers and be heard in the matter of making said estimates.

"I think it would be a reasonable construction of this ordinance to hold that the right to be heard implies that notice shall be given, and, if this be so, the ordinance does provide for notice by necessary implication.

"That which is implied in a statute is as much a part of it as what is expressed. *Minard* v. *Douglas County*, 9 Oregon, 206."

But what was in fact done by the city? By ordinance 5068 it ordered the construction of a sewer, and directed what area should be drained into that sewer, and created a taxing

district out of that area. For these, no notice or assent by the taxpayer was necessary. A sewer is constructed in the exercise of the police power for the health and cleanliness of the city, and the police power is exercised solely at the legislative will. So also the determination of a territorial district to be taxed for a local improvement is within the province of legislative discretion. *Willard* v. *Presbury*, 14 Wall. 676; *Spencer* v. *Merchant*, 125 U. S. 345, 355. By the same ordinance the city also provided that the cost of the sewer should be distributed upon the property within the sewer district, and appointed viewers to estimate the proportionate share which each piece of property should bear. Here, for the first time in proceedings of this nature, where an attempt is made to cast upon his particular property a certain proportion of the burden of the cost, the taxpayer has a right to be heard. The ordinance named a place at which the viewers should meet, directed that they should hold stated meetings at that place, and that all persons interested might appear and be heard by them in the matter of making the estimate. The viewers, upon their appointment, gave notice by publication in the official paper of the city of the time of their first meeting. Notice by publication is a sufficient notice in proceedings of this nature. *Lent* v. *Tillson*, 140 U. S. 316, 328. As the form of the notice and the time of its publication are not affirmatively disclosed in the complaint, it must be assumed that there was no defect in respect to these matters. The precise objection is, that although proper and sufficient notice may have been given, it was not in terms prescribed by the ordinance appointing the viewers. But, as held by the Supreme Court of Oregon in the case referred to, *Minard* v. *Douglas Co.*, 9 Oregon, 206, that which is implied in a statute is as much a part of it as that which is expressed; and where a statute or an ordinance provides for stated meetings of a board, designates the place at which the meetings are to be held, and directs that all persons interested in the matter may be heard before it, it is, as said by Judge Strahan, not a strained interpretation that it is implied thereby that some suitable notice shall be given to the parties interested.

But, further, the viewers made formal report to the council of what they had done, stating that they had, in accordance with the requirements of ordinance 5068, given notice by publication, and the council, in the subsequent ordinance 5162, recites that their report is satisfactory and adopted. In other words, the council by this latter ordinance approved the construction placed by the viewers upon the first, to the effect that it required notice. It would seem that when notice was in fact given, notice whose sufficiency is not challenged, a construction put by the council upon the scope and effect of its own ordinance should be entitled to respect in any challenge of the regularity of the proceedings had under that ordinance. It is settled that, if provision is made "for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." *McMillen* v. *Anderson*, 95 U. S. 37; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Spencer* v. *Merchant*, 125 U. S. 345. If, before the viewers had in fact met, yet after they had published notice, the council had passed an ordinance reciting an approval of that act of notice, it could hardly be doubted that the full requirements of law as to notice were satisfied. Because this approval was not made until after the hearing before the viewers, is it thereby worthless, of no validity? And can this court say, when those proceedings have been sustained by the Supreme Court of the State, that rights guaranteed by the federal Constitution have been stricken down, and that these individuals have been deprived of their property without due process of law?

Another matter may be mentioned: The second section of ordinance 5162 directed the ordinary publication of notice of the assessment. The charter, section 102, required a "docket of city liens," in which was entered, first, the description of each piece of property assessed; second, the name of the owner, or that the owner is unknown; and, third, the sum assessed upon such piece of property, and the date of the entry; and by section 104 it was provided that "a sum of

money assessed for the improvement of a street cannot be collected until, by order of the council, ten days' notice thereof is given by the auditor, by publication in a daily newspaper published in the city of Portland. Such notice must substantially contain the matters required to be entered in the docket of city liens concerning such assessment."

Now, without deciding that this notice is sufficient notice to bring the proceedings within "due process of law," it is worthy of remark that during the ten days of publication, made as required by said section 104 and section 2 of ordinance 5162, the plaintiffs did not challenge the regularity of the proceedings or apply to the council for an inquiry into the justness of the apportionment, nor did they commence any suit until a month after the time when warrants for the collection of delinquent assessments had been ordered by the council. In other words, only after payment had been made by a portion of the taxpayers did these plaintiffs ask any relief.

Without continuing this inquiry any further, we are of the opinion that, notwithstanding the doubt arising from the lack of express provision for notice in ordinance 5068, it cannot be held, in view of the notice which was given, of the construction placed upon this ordinance by the council thereafter, and of the approval by the Supreme Court of the proceedings as in conformity to the laws of the State, that the provisions of the federal Constitution, requiring due process of law, have been violated.

The judgment is, therefore, *Affirmed.*

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

RICHMOND AND DANVILLE RAILROAD COMPANY *v.* POWERS.

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

No. 200. Argued April 6, 1893. — Decided April 17, 1893.

Where, in an action against a common carrier to recover damages for injuries to a passenger, there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them.

On April 11, 1886, W. D. Powers was run over by a train belonging to the Richmond and Danville Railroad Company, at a station known as "Lula," and so injured that he died in a few hours. This action was brought to recover damages therefor. The plaintiffs are his children, and the proper parties under the Georgia statutes to maintain the action. It was commenced in the city court of Atlanta, Georgia, and thence removed by the defendant to the Circuit Court of the United States for the Northern District of Georgia. A trial was had in November, 1888, which resulted in a verdict and judgment in favor of the plaintiffs for $9800. On the trial the defendant asked the following instruction:

"The undisputed fact exists in this case that the deceased man, Powers, being at the time about forty-five years of age, and, so far as the evidence discloses, in full possession of all his faculties, deliberately stepped upon the railroad track immediately in front of an engine which was running towards him at the rate of five or six miles an hour, and not more than ten feet off, and was almost instantly run over and killed.

"To say that this was an ordinarily careful act or that this conduct was not negligence on his part would do violence to a plain and well-settled principle of law. Admitting that he

was a passenger, and, therefore, not bound, as a traveller on the highway approaching a crossing would be bound, to listen and to look both ways before attempting to cross the track, still the immediate presence, within a few feet, of a moving locomotive would, it seems to me, have awakened all the senses of an ordinarily careful man, and would have warned him in more ways than one that he ought not to put himself on the track right in front of it.

"It cannot be doubted that this was a careless and dangerous step. If he had been ordinarily careful he would not have been killed or injured, even if the defendant was negligent. There is nothing in the other testimony in the case which relieves him from the consequences of this act of negligence. If he had not died and had brought suit he could not have recovered, nor can these plaintiffs recover under these facts, and it is, therefore, your duty under the law to find a verdict for the defendant."

This instruction was refused, and exception duly taken.

Mr. Pope Barrow for plaintiff in error.

I respectfully submit that the unfortunate man was not ordinarily careful and there was nothing in the case for a jury. *Bancroft* v. *Boston & Worcester Railroad*, 97 Mass. 275; *Schofield* v. *Chicago, Milwaukee & St. Paul Railway*, 114 U. S. 615; *Central Railroad* v. *Harris*, 76 Georgia, 501; *Atlanta Railroad* v. *Loftin*, 86 Georgia, 43; *Americus, Preston &c. Railroad* v. *Luckie*, 87 Georgia, 6.

Mr. Henry Jackson and *Mr. T. J. Leftwich* filed a brief for plaintiff in error.

Mr. Hoke Smith for defendant in error.

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

The only error assigned is in the refusal of the court to instruct the jury as requested, substantially that the deceased

was guilty of such contributory negligence as to prevent a recovery. It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fairminded men will honestly draw different conclusions from them. *Railroad Co.* v. *Stout*, 17 Wall. 657; *Washington & Georgetown Railroad* v. *McDade*, 135 U. S. 554; *Delaware & Lackawanna Railroad* v. *Converse*, 139 U. S. 469.

No objection is made to the instructions which were given, no suggestion that the law as to negligence and contributory negligence was not properly stated to the jury; so we have the question whether the facts as developed by the testimony were such as to compel a declaration, as a matter of law, by the court that there was contributory negligence on the part of the deceased, such as to prevent a recovery. What are the facts as disclosed by the testimony? Lula is a station in Hall County, Georgia, at which at that time both the north and southbound trains of the defendant's road stopped for supper. Deceased was a passenger on the northbound train. There were two tracks in front of the station and eating-house. The southbound train arrived first and ran along the inner track, the one nearest to the station. After its passengers had all gone in to supper, it moved back towards the north, and left the space in front of the station and eating-house open. Soon afterwards the northbound train came in and passed up on the outer track. This was about eight o'clock in the evening. The deceased did not intend to go any further than Lula, and expected to spend the night there. The two tracks were from eight to ten feet apart; the earth between the rails on the inner track had been levelled up, covering the ties, so as to make a smooth place for walking upon. There was no light other than the head-lights of the locomotives, and from a bonfire of pine knots near the eating-house. After the northbound train had stopped and other passengers had left the train for the purpose of going in to supper, deceased started

with two satchels, one in each hand, across the track to go to the eating-house or hotel, and just at that time the southbound train moved up, and ran upon and injured him. In reference to the foregoing facts there was no dispute.

Further than that, there was testimony tending to show that, as deceased was leaving the train, a man with his wife and two children, five and seven years of age, started to get off the car; that deceased, putting down his satchels, stopped to help them off; that there was no conductor, brakeman or other officer of the company present to render any assistance; that, after they were safely off the car, deceased took up his satchels, and they all started nearly together in the direction of the eating-house, at an angle across the inner track; that while thus walking the southbound train came along, without ringing a bell, at a rapid speed; that the engineer, being on the right hand of the engine, could not see any one on the left side of the track for quite a distance in front of the engine, and the fireman was so occupied that he could not see the track at all; that, just as the engine neared the party, somebody called out, and the man who had been helped off the train by the deceased jumped, with his wife, pushing the children over, and barely landing on the platform as the engine passed by, while deceased, who was at the side but a trifle in the rear of the others, was caught by it and run over. It did not appear that any of the party had ever been at Lula before, or knew of the existence of an inner track or the situation or surroundings, although, it did appear that the deceased had been travelling on the railroad. The man and his wife who thus narrowly escaped testified that they did not know there was a track upon which they were walking; that no bell was rung; and that they had no thought of an approaching train until the outcry, upon which they jumped and barely saved themselves. What the deceased heard and saw and knew is not affirmatively shown, but the entire circumstances of the injury tend to show that he was as ignorant as they in respect to these matters. They had moved but a few steps from the car towards the eating-house before the deceased was struck. Upon such facts as these, is it not a question, upon which minds might differ,

as to whether the deceased was guilty of contributory negligence? Do not these facts tend, at least, to show that he was exercising due care? His tarrying behind the other passengers was owing simply to his effort to help those who needed help, and in discharging a duty resting upon the officers of the company, and neglected by them. After they had all alighted from the car, they started together in the direction of the eating-house, as disclosed by the bonfire, without knowledge of an intervening track, or without thought of an approaching train. No bell was rung, no warning given until the moment of the accident, and then too late for all of the party to save themselves.

It seems as though there could be but one answer to these questions. If these facts do not establish due care on his part, they at least tend very strongly to prove it. It is true that there was testimony tending to show a different state of facts; that the bell of the engine was rung as it moved down the track in front of the station-house; that it was moving at a very slow rate of speed — not faster than a man would walk; that the deceased on alighting put down his satchels, waiting for some one from the hotel to come and help him carry them; and that he was there some minutes before he started for the hotel. And, indeed, there was some testimony tending to show that there were no such persons present as the family who claimed that they were helped off the train by deceased. But, of course, all conflict in the testimony was settled by the jury, and could not be determined by the court, and unless it were affirmatively shown that the deceased when he left the car and started towards the eating-house knew that he was walking along a track, and that there was danger from another train, and with such knowledge neither looked nor took precautions to satisfy himself whether there was present danger therefrom, it surely cannot be held that there was, as a matter of law, contributory negligence on his part.

There was no error in refusing the instruction, and the judgment is

Affirmed.

NATIONAL METER COMPANY *v.* YONKERS WATER COMMISSIONERS.

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

No. 192. Argued March 29, 1893. — Decided April 17, 1893.

Claims 3, 4, 5 and 6 of reissued letters patent No. 10,806, granted February 8, 1887, to the National Meter Company, as assignee of Lewis Hallock Nash, for improvements in water-meters, on the surrender of original letters patent No. 211,582, granted to said Nash, January 21, 1879, are not infringed by water-meters constructed according to letters patent reissued to the Hersey Meter Company, No. 10,778, November 2, 1886, as assignees of James A. Tilden, and to letters patent No. 357,159, granted to James A. Tilden, February 1, 1887, and to letters patent granted to said company, as assignee of said Tilden, No. 385,970, July 10, 1888.

The Nash piston has a side-rocking movement across the centre of the cylinder, upon successive bearing points made by the contact of a projection on the piston with the recess in the cylinder, or conversely, and the piston rotates upon its own axis, so that each projection comes successively into each recess of the cylinder. But in the defendant's structure, there is no side-rocking, nor any rotary motion, and each projection in the piston always operates in connection with one particular corresponding recess in the cylinder, and never leaves that recess.

IN EQUITY. The case is stated in the opinion.

Mr. J. Edgar Bull and *Mr. Edmund Wetmore* for appellant.

Mr. Frederick P. Fish and *Mr. Frederick H. Betts*, (with whom was *Mr. George L. Roberts* on the brief,) for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of New York, by the National Meter Company, a New York corporation, against the Board of Water Commissioners of the city of Yonkers, another New York corporation, founded on reissued letters

patent of the United States No. 10,806, granted February 8, 1887, to the plaintiff as assignee of Lewis Hallock Nash, for improvements in water-meters. The application for the reissue was filed December 18, 1886, on the surrender of original letters patent No. 211,582, granted to said Nash, January 21, 1879, for improvements in water-meters, the application therefor having been filed September 4, 1878. The claims of the reissue alleged to have been infringed are claims 3, 4, 5 and 6, which are as follows:

"3. A piston for water-meters, pumps, and motors provided with internal water passages, and having alternate bearing points or projections and recesses adapted, by means of a cylinder-chamber having alternate bearing points or projections and recesses, to have an eccentric or side-rocking movement within and upon continually-changing lines across the centre of said chamber to effect its division at two or more points on its sides into receiving and discharging spaces *cc*, which communicate with the inlet and outlet.

"4. A piston for water-meters, pumps, and motors having alternate bearing points or projections and recesses adapted, by means of a cylinder-chamber having alternate bearing points or projections and recesses, to have an eccentric or side-rocking movement within and upon continually-changing lines across the centre of said chamber to effect its division at two or more points on its sides into receiving and discharging spaces *cc*, which communicate with the inlet aud outlet, said piston having a free movement within said cylinder, controlled only by the shape of the cylinder, the shape of the piston and the flow of water through the meter.

"5. A piston for water-meters, pumps, and motors having alternate bearing points or projections and recesses adapted, by means of a cylinder-chamber having alternate bearing points or projections and recesses, to have an eccentric or side-rocking motion within and upon continually-changing lines across the centre of said chamber to effect its division at two or more points on its sides into receiving and discharging spaces *cc*, which communicate with the inlet and outlet, said piston being formed of hard rubber and having a free move-

ment within said cylinder controlled by the shape of the piston, the shape of the cylinder, and the flow of the water through the meter.

"6. A piston for water-meters, pumps, and motors having alternate bearing points or projections and recesses adapted, by means of a cylinder-chamber having alternate bearing points or projections and recesses, to have an eccentric or side-rocking movement within and upon continually changing lines across the centre of said chamber to effect its division at two or more points on its sides into receiving and discharging spaces *cc*, which communicate with the inlet and outlet, combined with ports controlled by said piston itself in its motion within said chamber."

The defences set up in the answer are (1) that the reissue is invalid as to the said four claims, because it was applied for and secured eight years after the grant of the original patent, not for the purpose contemplated by the statute, of correcting any error that arose from inadvertence, accident or mistake, but for the purpose of changing the patent so that it would claim combinations of devices which were not the subject of the claims of the original patent, nor described therein as being the inventions of Nash for which he obtained said original patent, in order that, by means of the reissue, the plaintiff might prevent the Hersey Meter Company, which manufactured the meters used by the defendant, and had assumed the defence of the suit, from carrying on its business; and, further, on the ground that Nash and the plaintiff unreasonably and fraudulently delayed undertaking to correct the alleged defects by a reissue, and did not make application for the reissue until the Hersey company had made and sold large numbers of meters of the type in question; and that the reissue was applied for and obtained for the sole purpose of procuring a new patent for other and different inventions from those forming the subject-matter of the claims of the original patent; and, further, that the reissue was procured by deceiving the Patent Office, and by fraudulent and untrue representations to that office, and that any right to the reissue was forfeited by the plaintiff's delay and laches, in not apply-

ing for it until long after the plaintiff had full knowledge of all the facts upon which such application purported to be based, and long after the Hersey company had made, sold and introduced into use meters identical with those used by the defendant; (2) that Nash did not particularly point out and distinctly claim the part, improvement or combination which he claimed as his invention or discovery, but, on the contrary, wilfully and fraudulently made his claims, in the original patent and the reissue in ambiguous language, intended to mislead the public, with the view of making it difficult to determine the real scope of his claims, and of reserving the right to contend for such interpretation thereof as the exigencies of any particular case might, in his judgment or that of his assignee, require; (3) non-infringement, and that the meter used by the defendant is substantially different, in construction and mode of operation, from the meter of the reissue; and that no invention is shown or described in the reissue upon which is, or could have been based any claim which would be infringed by the defendant's meter.

Proofs were taken, and the case was heard before Judge Wallace, who delivered an opinion, (38 Fed. Rep. 588,) holding that the defendant's meter did not infringe any of the claims in question, and entered a decree dismissing the bill, with costs. From that decree the plaintiff appealed to this court.

We do not find it necessary to consider the question of the validity of the reissue, because we are of opinion that the decree of the Circuit Court must be affirmed on the ground that the defendant has not infringed.

The original patent had eight claims, as follows:

"1. A piston for water-meters, pumps, and motors having alternate bearing points or projections and recesses adapted, by means of a cylinder-chamber having alternate bearing points or projections and recesses, to have an eccentric or side-rocking movement within and upon continually-changing lines across the centre of said chamber to effect its division at two or more points on its sides into receiving and discharging spaces *cc*, which communicate with the inlet and outlet.

"2. The piston of a water-meter, pump, or motor constructed with alternate recesses and bearing points or projections *a* and *b*, and a cylinder-chamber having alternate wall-recesses and bearing points or projections *a'* and *b'*, adapted to intermatch with each other at one or more bearing points at one side of the cylinder and allow the projections of each part to bear upon and to pass each other at two or more points at a different side of the chamber, to allow the piston to revolve while it also rocks in constantly-changing lines across the centre of the cylinder-chamber, for the purpose stated.

"3. The piston of a water-meter adapted to have an eccentric or side-rocking movement across the centre of the cylinder-chamber and a revolving motion, combined with a registering mechanism by means of a free or shifting connection acting with the continually-changing side-rocking movements of the piston while maintaining a driving relation with the dial mechanism.

"4. The combination, with a piston having an eccentric or side-rocking motion across the centre of the cylinder-chamber and a revolving motion around its own centre to divide the cylinder at two or more bearing points on its sides, of a valve controlled by the movements of said piston and adapted to open and to close receiving and discharging ports in succession, to effect the purpose stated.

"5. A rotary piston having a valve formed therein by opposite end ports or depressions, and adapted to act, in connection with receiving and discharging ports or passages in the cylinder-chamber, to form a valve and piston, into and through which the water entering at the inlet-cylinder end ports passes through one end of the valve into the cylinder on one side thereof, and, reëntering the valve from the other side of said cylinder, passes out at the opposite end ports of said valve, to effect the purpose stated.

"6. A rotary valve-piston having opposite end ports *dd'* communicating with the piston sides by diagonal passages *ee'*, in combination with a cylinder having receiving and discharging ports, communicating with said opposite valve end ports

and with the receiving and discharging spaces of said cylinder, whereby said valve opens some and closes others of its ports in succession, and to effect the equalization of the pressure of the water at right angles to the direction of the side-rocking and rotary movements of the said valve-piston, as stated.

"7. The inlet device L, having side walls, a perforated end, and an open-end bearing rim, seated adjustably in and forming the inlet-port J of the cylinder-chamber, in combination with the rotary piston, against one end of which the said device bears, for the purpose stated.

"8. The spaces or recesses c' in the walls of the cylinder, between the bearing points b' and the recesses a', in combination with the piston having alternate bearing points and recesses, whereby to prevent the choking of the flow and insure a uniform action of a piston adapted for operation with a side-rocking motion across the centre of the cylinder and a rotary motion around its own centre."

The meters alleged to infringe were constructed under patents granted to Hersey Brothers, as assignees of James A. Tilden. The first one was No. 324,503, dated August 18, 1885, on an application filed December 22, 1884, for a rotary fluid-meter. It was reissued to the Hersey Meter Company, November 2, 1886, as reissue No. 10,778, on an application for reissue filed September 30, 1886. Another patent was granted to James A. Tilden, February 1, 1887, No. 357,159, on an application filed August 15, 1885, for a water-meter with a revolving, non-rotating piston. A third patent was granted to the Hersey Meter Company, as assignee of James A. Tilden, No. 385,970, for a rotary fluid-meter, July 10, 1888, on an application filed January 25, 1887. The manufacture of the alleged infringing meters was begun, a large number of them were put upon the market, and they were extensively advertised, prior to the filing of the application for reissue No. 10,806.

Nash took one form of the Galloway rotary engine, that described in Reuleaux's "Kinematics of Machinery," translated by Kennedy and published in London, England, in 1876, and made improvements upon it which were necessary and valu-

able to adapt it for practical use as a water-meter. The Galloway engine was a steam engine. At that time, it was well known that steam and water engines, whether rotary or reciprocating, could be used as meters to measure the flow of fluids passed through them; and various forms of both kinds had been used as meters. The original patent of Nash states that it is contemplated to use the apparatus as a motor or as a pump; and so does the reissue.

Galloway had patented another form of engine in England, by English patent No. 11,485, sealed December 14, 1846, and specification enrolled June 14, 1847. Tilden, the inventor of the defendant's water-meter, took the form of this latter Galloway engine, and made such improvements upon it as were necessary to adapt it to practical use as a water-meter. Both Nash and Tilden supplied the arrangements of ports and discharging spaces necessary for the special form of piston and cylinder-chamber in the respective Galloway engines, adding also a registering device, to operate by attachment to the piston. In the Galloway engine described in the "Kinematics," there is a piston having projections and a cylinder having recesses, but the recesses are more in number than the projections on the piston. In the engine of Galloway's patent of 1846, the piston has the same number of projections that the cylinder has of recesses. In the engine in the "Kinematics," and in the plaintiff's apparatus, the piston has a side rocking movement across the centre of the cylinder, upon successive bearing points made by the contact of a projection on the piston with the recess in the cylinder, or conversely; and the piston rotates upon its own axis, so that each projection comes successively into each recess of the cylinder. But in the piston of Galloway's patent, and in the defendant's structure, there is no side rocking, nor any rotary motion, and each projection on the piston always operates in connection with one particular corresponding recess in the cylinder, and never leaves that recess.

The descriptions of the apparatus in the original and reissued patents of Nash are the same; but in reissue No. 10,806 there is a disclaimer in these words, which was not in the original

specification: "I do not claim, broadly, a piston for water-meters, pumps, and motors having alternate bearing points or projections and recesses adapted, by means of a cylinder-chamber having alternate bearing points or projections and recesses, to have an eccentric or side-rocking movement within and upon continually-changing lines across the centre of said chamber to effect its division at two or more points on its sides into receiving and discharging spaces *cc*, which communicate with the inlet and outlet; as a motor having a piston of substantially such construction and movement within a cylinder-chamber having such construction is shown and described in the English patent of Elijah Galloway, December 14, 1846, No. 11,485; but what I do claim are said elements in combination with additional elements, as hereinafter specified, thereby limiting my claims to the novel features embraced in my meter."

In all of the eight claims of the original patent, except claim 1, a piston revolving about its centre was an element in the combination claimed, and it is a feature in each one of claims 3, 4, 5 and 6 of the reissue. The theory upon which the disclaimer was inserted appears to have been that claim 1 of the original patent did not specify a piston revolving about its centre, and therefore was sufficiently broad to include the arrangement in the Galloway patented engine of 1846. But it does not seem doubtful that such a piston was a necessary element of claim 1 of the original patent, and that it forms an element of every new claim of the reissue. The only piston described in the specification of the original patent, and, therefore, the only one which could have been referred to in claim 1 of the original patent, is one having the side rocking and rotating movement which constitutes the compound motion described in the original specification, which motion is due to the fact that the piston has one or several less projections than the cylinder has recesses. The defendant's meter does not have such a piston, and, therefore, does not infringe any of the claims of the reissue.

The forms of the two Galloway engines are essentially different, and necessitate a different construction and arrange-

ment of the coöperating devices, to adapt them to efficient service as water-meters. As said by the Circuit Court in its opinion: "The inventions of Nash and Tilden commence upon different lines and result in a combination having a different mode of operation. The time and order of controlling the valves differ in each, and require a different arrangement of the valve ports, with reference to the valves which open and close them. In Nash's meter the ports for both entrance and discharge of water are in the ends or sides of the piston, while in Tilden's the ports are not in the piston, but in the ends or heads of the cylinder case, and are so located that the contact of the piston with the cylinder divides each recess into one filling and one discharging passage. In the former the ends of the cylinder act as the valves; in the latter the piston itself acts as the valves. In Nash's meter the rotary and side rocking or compound movement of the piston opens some and closes others of the ports in succession, in such a manner as to equalize the pressure of the water at right angles to the direction of the movements of the piston. In Tilden's meter it is an essential feature that there shall be not merely water pressure which moves the piston about the cylinder-chamber, but additional side pressure, which, in Nash's meter, must be avoided, and it is only because it has a pressure of water not found in Nash's meter that it is operative at all."

In the Nash reissue, it is required that the piston patented should have an "eccentric or side-rocking motion across the centre of a cylinder-chamber to effect its division at two or more points into receiving and discharging spaces." But the defendant's piston has no such motion, and the cylinder-chamber of its meter is not divided by the piston "at two or more points, into receiving and discharging spaces," in the sense of the Nash reissue.

In the Nash reissue, it is required that "with this eccentric or side-rocking action the piston also revolves round its own centre, . . . for as the piston rocks from one bearing point to another directly across the centre of the cylinder it is at the same time revolved." But the defendant's piston has no motion of revolution about its own centre.

Opinion of the Court.

In the Nash reissue, it is required that "in the rotation of the piston around its own centre one or more projecting bearing points of the piston will pass into corresponding recesses at one point of the cylinder, and in contact with and over one or more projecting bearing points of the cylinder at a different point, thereby always maintaining a direct contact of the piston and cylinder at two or more dividing points within the continually changing cylinder spaces." But in the defendant's meter, the bearing points of the piston are always in their own special recesses in the case, and are never in contact with, and never pass over, any of the projecting bearing points of the cylinder; and there never is a direct contact of the piston and cylinder at two or more dividing points, within the meaning of the Nash reissue.

In the Nash reissue, it is required that the valves should be "arranged so that the cylinder spaces on one side of the piston as it revolves have free inlet for the water through one set of the valve ports, while the spaces on the other side of the piston have free outlets for the water through the other ports of the valve." But in the defendant's meter, the division between the inlet and outlet ports is not made by the piston, and all the displacement of the water is effected in the individual chambers of the cylinder, and no two chambers are ever connected while measuring water.

In the Nash reissue, it is required that the valves should so open and close the ports in succession "as to keep the line of pressure of the water as nearly as possible at right angles to the direction of the eccentric or side-rocking and rotary movements of the piston, and thereby avoid any undue lateral pressure of the water upon the piston." But in the defendant's meter, the motion of the piston is of an entirely different character. The "lateral pressure of the water upon the piston," which the Nash structure is designed to avoid, is an essential feature of the operation, and without it, the piston of the defendant's meter would not be kept up against the side of the case, and no water could be measured.

In the Nash reissue, it is required that when a separate valve controlled by the piston is not employed, the valve is

"formed by inlet and outlet openings or ports in the ends of the piston communicating by means of passages in or through the piston with the spaces of the cylinder." But in the defendant's meter, no separate valve is employed, and there are no ports in the ends of the piston, and no passages in or through the piston, which communicate with the spaces of the cylinder; the single passage in the centre of the defendant's piston is a portion of the discharge-pipe; and it is required only in order to accommodate the water discharged at the bottom of the meter (a double discharge, namely, at the top and bottom of the meter, being used for the purpose of balancing the piston).

In the Nash reissue, it is required that the piston and cylinder should have "bearing or contacting surfaces . . . formed by alternate recesses *aa'* and projections *bb'* of such form or configuration as to allow of the rotation of the piston not only upon its own axis but around and across the centre of the cylinder, and the space within the cylinder must be of such form and sufficiently larger than the piston H to allow it to have this compound motion." But in the defendant's meter, the projections and recesses are of such form as to prevent the rotation of the piston upon its own axis, and also to prevent its motion around and across the centre of the cylinder; and the space within the cylinder is not of such form as, and not sufficiently larger than the piston, to allow the latter to have that compound motion.

In the Nash reissue, it is stated that "the object of this compound motion is to form bearing points or lines of contact of the piston with the cylinder-walls on opposite sides thereof, at the same time, as shown in Figs. 3 and 12, whereby to divide the cylinder into receiving and discharging spaces." But in the defendant's meter, no bearing points, or lines of contact of the piston with the cylinder-walls, on opposite sides thereof at the same time, are formed; and the receiving and discharging spaces are differently situated, and are divided in an entirely different way and on different lines.

In the Nash reissue, it is required that "of whatever form these alternate recesses and projections, they must be such

that while they are in contact upon one side of the cylinder they must also at the same time have a contact at the opposite or a different side of said cylinder, and in this way divide the cylinder into spaces." But in the defendant's meter, the projections and recesses are of such form that such required mode of dividing the cylinder into spaces by contacts on opposite or different sides of the cylinder is impossible.

In the Nash reissue it is stated that "in this contact it will be observed that upon one side of the cylinder and piston such contact takes place between a recess and projection, or intermediately between these points, while upon the opposite side such contact is made by corresponding projections, as shown in Figs. 3 and 12." But in the defendant's meter, no such contact ever takes place, and there is no contact upon opposite sides of the cylinder; and in each particular chamber, receiving and discharging spaces are formed by that projection of the piston which is in that chamber from the first and never leaves it.

In the Nash reissue, it is stated that "the compound motion of the piston and the contacting dividing points are due to the fact that the piston has one or more less points of projection than the cylinder." But in the defendant's meter there are the same number of projections on the piston and on the cylinder, and consequently no compound motion of the piston is possible.

In the Nash reissue, it is stated that the function of either form of valve described "is to regulate the flow of water in and out of the spaces of the cylinder in such manner as to produce the compound rotation and cross movement of the piston." But in the defendant's meter, the water is admitted and discharged in such a way as to prevent any motion of the piston except a sliding movement, which is neither a compound rotation nor a cross movement, within the meaning of the Nash reissue.

In the Nash reissue, it is required that the valve and piston should "coöperate to produce the results stated," viz., the compound motion of the piston and the proper control of the flow of the water in and out of the spaces of the cylinder. But in

the defendant's meter, the valves are adapted to the peculiar motion of the defendant's piston and the peculiar separation of discharging and receiving spaces, characteristic of that meter, and not at all to any such structure as is required by the Nash reissue.

In the Nash reissue, it is required that to get the best results "the valve should open and close its inlet and outlet ports in succession in such a manner as to keep the line of pressure as nearly as possible at right angles to the direction of the motion of the piston." And the specification explains: "By the 'line of pressure' I mean a line connecting the points of division which separate the inlet from the outlet spaces *c* of the cylinder, as shown by the line *z* in Fig. 12; and by a 'line of motion' I mean a line which is tangent to the path of the axis of the piston at any point of such path as shown by the arrow *y* in said figure." But such a requirement, interpreted by the definitions given, is meaningless when applied to the defendant's meter.

In the Nash reissue, it is stated that "in the use of the meter, the inlet may become the outlet, and *vice versa*." But in the defendant's meter, the inlet must always be the inlet, and by no possibility can it be made the outlet; and while the Nash meter may be run in either direction, the defendant's meter would be inoperative if the inlet became the outlet, and *vice versa*.

It is clear to us that there is no infringement, and that the decree of the Circuit Court must be

Affirmed.

WILSON *v.* UNITED STATES.

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

No. 1284. Argued April 7, 1893.— Decided April 17, 1893.

The act of March 16, 1878, 20 Stat. 30, c. 37, having provided that a person charged with the commission of crime may, at his own request, be a

Statement of the Case.

competent witness on the trial, but that "his failure to make such request shall not create any presumption against him," all comment upon such failure must be excluded from the jury.

A person indicted in a District Court of the United States for using the mails to give information where obscene and lewd publications could be obtained, offered evidence, through his counsel, of his previous good character, but did not offer himself as a witness. The district attorney, in summing up, said: "I want to say to you, gentlemen of the jury, that if I am ever charged with a crime I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven, and testify to my innocence of the crime." Defendant's counsel excepted to this, upon which the court said: "Yes, I suppose the counsel should not comment upon the defendant not taking the stand. While the United States court is not governed by the State's statutes, I do not know that it ought to be the subject of comments of counsel." Thereupon the assistant District Attorney said: "I did not mean to refer to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf." To which counsel for defendant again excepted. Judgment being given against the defendant, and the case being brought here by writ of error; *Held*,

(1) That the exceptions and the writ of error properly brought the matter before this court;

(2) That the judgment below should be reversed.

THE defendant below, George E. Wilson, the plaintiff in error here, is a bookseller and publisher, carrying on his business in Chicago, Illinois. He was indicted in the United States District Court for the Northern District of that State for a violation of section two of the act of Congress of September 26, 1888, 25 Stat. 496, c. 1039, amending section 3893 of the Revised Statutes, relating to the use of the mails to give information where and by what means obscene and lewd publications might be obtained, and was convicted and sentenced to imprisonment in the penitentiary of the State for two years. To reverse that judgment he brought this case to this court on writ of error.

The indictment charged, in different counts, that the defendant, by himself and another person, had deposited in the mail at Chicago, for delivery to John Hobart, at O'Fallon, Illinois, and Jack Horner, at Collinsville, Illinois, a letter and circular giving information where certain designated lewd and obscene books could be obtained. No attempt was made to show that

the letter and circular were mailed by the defendant in person, but an attempt was made to show that some other person had done the act at the instigation or request of the defendant, and that he was responsible for it. The defendant did not request to be a witness or offer himself as such, and the District Attorney of the United States, in summing up the case to the jury, commented upon the fact that he had not appeared on the stand, as follows:

"They say Wilson is a man of good character. It is a grand thing for a young man in Chicago to be the son of an honest man, because blood will tell. If the father is honest the chances are the son will be honest too. Men live all their lives to build up a good character, because it is a shield against the attack of infamy. They called two or three witnesses here who testified to this young man's character as being good, so far as they know, but I want to say to you, gentlemen of the jury, that if I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime."

To this language of the District Attorney the counsel for the defendant excepted, and called the court's attention to it, and the court said: "Yes, I suppose the counsel should not comment upon the defendant not taking the stand. While the United States court is not governed by the State's statutes, I do not know that it ought to be the subject of comments by counsel." To which the District Attorney replied as follows: "I did not mean to refer to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf." To which the counsel for the defendant thereupon excepted.

The act of Congress of March 16, 1878, 20 Stat. 30, c. 37, provides: "That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences and misdemeanors, in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own

request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

The objections of the defendant's counsel to the language of the District Attorney in his argument to the jury, in referring to the defendant's failure to appear on the stand as a witness and testify to his innocence of the charge against him, and to the neglect of the court to forbid and condemn such reference, were embodied in a bill of exceptions, and constitute one of the grounds urged for a reversal of the judgment and the award of a new trial.

Mr. C. Stuart Beattie, for plaintiff in error, cited: *Austin* v. *The People*, 102 Illinois, 261; *Baker* v. *The People*, 105 Illinois, 452; *Angelo* v. *The People*, 96 Illinois, 209; *Quinn* v. *The People*, 123 Illinois, 333; *Rolfe* v. *Rumford*, 66 Maine, 564; *Thompson* v. *State*, 43 Texas, 268; *State* v. *Smith*, 75 N. C. 306; *Hoxie* v. *Home Ins. Co.*, 33 Connecticut, 471; *Brown* v. *Swineford*, 44 Wisconsin, 282; *State* v. *Lee*, 66 Missouri, 165; *State* v. *Foley*, 12 Mo. App. 431; *People* v. *Mitchell*, 62 California, 411; *Ferguson* v. *State*, 49 Indiana, 33; *Cross* v. *State*, 68 Alabama, 476; *Flint* v. *Commonwealth*, 81 Kentucky, 186.

Mr. Assistant Attorney General Parker for defendant in error.

The court below committed no error in relation to the comments made by the District Attorney as to the examination of a defendant in a criminal case, and such comments do not require this court to grant a new trial.

The statute provides that in the trial of indictments in the United States courts, "the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

Two things appear: (1) If the defendant does not request to be made a witness he is not competent. In this case he did

not become competent. In such a case he remains as though the statute had never been enacted; and any comment of an attorney would have the same force as though made in a case before any legislation anywhere had given the person charged the privilege of testifying in his own behalf. (2) "His failure to make such request shall not create any presumption against him."

The general subject of the legislation permitting persons accused in criminal proceedings to testify in their own behalf is elaborately presented in the fifteenth edition of Greenleaf's Evidence (Vol. 1, pp. 467, 468, and Vol. 3, pp. 54 to 67).

It is there shown that in many States the enabling statutes provide that the circumstance of the failure of the person charged to request to be sworn shall not be commented upon by the prosecuting attorney. This is the case in Illinois, (3 Greenl. 56,) Indiana and Iowa, (Id. p. 57,) Kansas, (p. 58,) Nebraska, (p. 62,) New Hampshire and Ohio, (p. 63,) Pennsylvania (p. 65) and Virginia (p. 66). In Massachusetts the statute is substantially the same as that of the United States.

It is said (Id. p. 66) that even where the person charged is allowed to testify in his own behalf he is still carefully protected, and it is added: "And while his counsel may comment to the jury upon the fact that no inference may be drawn against him for not testifying, the prosecuting attorney may not, in rebuttal of these comments, suggest that the reason of his not testifying was his guilt; or comment in any way upon his nonappearance, but if he does, the defendant's counsel must seasonably object and ask the judge to instruct the jury to disregard the comment. He cannot require the judge to take the case from the jury." The cases of *Commonwealth* v. *Scott*, 123 Mass. 240, and *Commonwealth* v. *Worcester*, 141 Mass. 58, are referred to in this connection.

The cases cited in the brief of counsel for plaintiff in error relate to statutes differing essentially from the national enactment, and no case is found which would require a new trial in the case at bar.

The counsel for defendant below did not ask the court to give any directions or instructions to the jury in this connection, or to inform them that the omission of the defendant should not "create any presumption against him." They "notified the court" of the exception, and the court said: "Yes, I suppose the counsel should not comment upon the defendant not taking the stand. . . . I do not know that it ought to be the subject of comments of counsel."

There is no ground given for any inference that the failure of Wilson to the request to be made a witness in the case did create "any presumption against him." The remarks made by the District Attorney, which are complained of, are not of sufficient consequence to require this court to grant a new trial.

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

The act of Congress permitting the defendant in a criminal action to appear as a witness in his own behalf upon his request declares, as it will be seen, that his failure to request to be a witness in the case *shall not create any presumption against him.*

To prevent such presumption being created, comment, especially hostile comment, upon such failure must necessarily be excluded from the jury. The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it.

At common law no one accused of crime could be compelled to give evidence in a prosecution against himself, nor was he permitted to testify in his own behalf. The accused might rely upon the presumption of the law that he was innocent of the charge, and leave the government to establish his guilt in the best way it could.

This rule, while affording great protection to the accused against unfounded accusation, in many cases deprived him from explaining circumstances tending to create conclusions of his guilt which he could readily have removed if permitted

to testify. To relieve him from this embarrassment the law was passed. In mercy to him, he is by the act in question permitted upon his request to testify in his own behalf in the case. In a vast number of instances the innocence of the defendant of the charge with which he was confronted has been established.

But the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him.

In this case this provision of the statute was plainly disregarded. When the District Attorney, referring to the fact that the defendant did not ask to be a witness, said to the jury, "I want to say to you, that if I am ever charged with crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand and hold up my hand before high Heaven and testify to my innocence of the crime," he intimated to them as plainly as if he had said in so many words that it was a circumstance against the innocence of the defendant that he did not go on the stand and testify. Nothing could have been more effective with the jury to induce them to disregard entirely the presumption of innocence to which by the law he was entitled, and which by the statute he could not lose by a failure to offer himself as a

witness. And when counsel for defendant called the attention of the court to this language of the District Attorney it was not met by any direct prohibition or emphatic condemnation of the court, which only said : "I suppose the counsel should not comment upon the defendant not taking the stand." It should have said that the counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant from his failure to testify.

Instead of stating, after mentioning that the United States court is not governed by the State's statutes, "I do not know that it ought to be the subject of comment by counsel," the court should have said that any such comment would tend necessarily to defeat the very prohibition of the statute. And the reply of the District Attorney to the mild observation of the court only intensified the fact to which he had already called the attention of the jury: "I did not mean to refer to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf," which was equivalent to saying, "You gentlemen of the jury know full well that an innocent man would have gone on the stand and have testified to his innocence, but I do not mean to refer to the fact that he did not, for it is a circumstance which you will take into consideration without it." By this action of the court in refusing to condemn the language of the District Attorney, and to express to the jury in emphatic terms that they should not attach to the failure any importance whatever as a presumption against the defendant, the impression was left on the minds of the jury that if he were an innocent man he would have gone on the stand as the District Attorney stated he himself would have done.

This language of the District Attorney, and this action, or rather want of action, of the court, are set forth in the bill of exceptions, and although exceptions are generally taken to some ruling, or want of ruling, by the court in the progress of the trial in the admission or rejection of evidence or the interpretation of instruments, yet they can be taken to its action or want of proper action upon any proceeding in the progress of the trial from its commencement to its conclusion,

and when properly presented can be considered by the court on writ of error.

The refusal of the court to condemn the reference of the District Attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to his prejudice before the jury, and this effect should be corrected by setting the verdict aside and awarding a new trial.

Similar statutes to the one we have been considering have been passed by several States, and the rulings upon them have been substantially in accordance with our judgment in this case.

In 1866, the legislature of Massachusetts passed an act almost identical in terms with the act of Congress under consideration. It provided that "in the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant." The provision has been since reënacted in substantially the same terms. Mass. Stats. 1866, c. 260; 1870, c. 393, § 1, cl. 3; Pub. Stats. 1882, p. 987, c. 169, § 18, cl. 3. And in the case of *Commonwealth* v. *Scott*, 123 Mass. 239, 240, 241, where the indictment against the defendants was for breaking and entering a house in the night time with intent to commit larceny therein, none of the defendants testified at the trial, and the prosecuting attorney, in his closing argument, commented upon this fact, when the counsel for the defendants interrupted him and asked the judge to rule that the fact that the defendants did not testify could not be commented on by the government. But the judge, having first stated the law that the fact that they did not testify did not create any presumption against them, ruled that, inasmuch as the matter had been referred to by their counsel, the prosecuting attorney had a right to comment on the reasons given for their not going upon the stand and testifying in their behalf, and also to give the reasons which the government contended really existed for their not testifying; and permitted the prosecuting attorney

to proceed in his comments. The jury having rendered a verdict of guilty, the defendants alleged exceptions, and the case went to the Supreme Judicial Court of the Commonwealth. The Chief Justice, in delivering the opinion of the court, after referring to the fact that the government had no right to interrogate a person accused of crime, or to compel him to testify, but was bound to sustain its charge by independent evidence, observed that "the statutes allowing persons charged with the commission of crimes or offences to testify in their own behalf were passed for their benefit and protection, and clearly recognize their constitutional privilege, by providing that their neglect or refusal to testify shall not create any presumption against them."

And again: "The course of the closing argument for the prosecution tended to persuade the jury that the omission of the defendants to testify implied an admission or a consciousness of the crime charged; and the presiding judge in permitting such a course of argument, against the objection of the defendants, and in ruling that the prosecuting attorney had a right to comment on the reasons which the defendants' counsel gave for their not going upon the stand and testifying in their behalf, and also to give the reasons which the government contended really existed for their not testifying, committed an error which was manifestly prejudicial to the defendants, and which obliges this court to set aside the verdict and order a new trial."

The criminal code of Illinois, after providing that in criminal cases the accused may, on his own motion, testify in the case, declares, in a proviso, that "his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect."

In the case of *Austin* v. *The People*, 102 Illinois, 261, 264, a reference had been made to the neglect of the accused to testify, both in the opening and concluding argument for the prosecution, and the court, in setting aside the verdict of guilty which was rendered in that case, said: "When the statute says that *no presumption* against the accused shall be created

by his neglect to testify, it clearly meant that in cases where the defendant should not choose to avail himself of the privilege offered by the statute, the trial should be conducted in the same manner and upon the same presumptions as if the statute had not been passed." And again: "We do not see how this statute can be completely enforced, unless it be adopted as a rule of practice that such improper and forbidden reference by counsel for the prosecution shall be regarded good ground for a new trial in all cases where the proofs of guilt are not so clear and conclusive that the court can say affirmatively the accused could not have been harmed from that cause."

This view of the effect of the objections taken to the course of the district attorney, and to the failure of the court to properly condemn it, renders it unnecessary to consider any other alleged errors.

The judgment must be reversed and the cause remanded with directions to award a new trial, and it is so ordered.

In re FREDERICH, Petitioner.

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

No. 1305. Argued April 7, 10, 1893. — Decided April 24, 1893.

When a prisoner, convicted of crime in a state court and sentenced there to punishment, complains that his rights under the Constitution or laws of the United States have been thereby violated, he may seek relief in the federal courts by an application either to the proper Circuit Court for a writ of *habeas corpus*, or to a justice of this court for a writ of error to the state court.

The remedy by *habeas corpus* should be limited to cases in which the judgment or sentence attacked is clearly void by reason of its having been rendered without jurisdiction, or by reason of the court's having exceeded its jurisdiction in the premises; and the general rule and better practice, in the absence of special facts and circumstances, is to require the prisoner to seek a review by writ of error instead of resorting to the writ of *habeas corpus*.

THIS was an appeal from an order denying an application for a writ of *habeas corpus* addressed to the court below by

Statement of the Case.

Albert Frederich, a prisoner confined in the penitentiary of the State of Washington, at Walla Walla, in that State.

The case, as made by the petition and accompanying exhibits, was as follows: On the 17th of June, 1891, the prisoner was duly indicted by the grand jury of King County, Washington, for the murder of one Julius Scherbring, and upon said indictment he was subsequently arraigned, pleaded not guilty, was tried by a jury, and on the 26th of September, 1891, was found guilty of murder in the first degree. A motion for a new trial having been overruled, he was sentenced to be hung. From this judgment of death and the order overruling his motion for a new trial the accused appealed to the Supreme Court of the State, which reversed the judgment of the trial court and remanded the case, with a direction to set aside and vacate the judgment imposing the sentence of death, but to let the verdict stand and to enter a new judgment thereon for murder in the second degree, that being, in the opinion of the Supreme Court of the State, the proper degree of his crime, inasmuch as the evidence in the case did not show such deliberate and premeditated malice as would sustain a conviction of murder in the first degree. *Frederich* v. *State*, 4 Washington, 204.

This judgment of the Supreme Court was rendered under and in pursuance of the following provision of 2 Hill's Ann. Stats. and Code of Washington:

"Sec. 1429. The Supreme Court may affirm, reverse or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had."

Pursuant to this order of the Supreme Court, the prisoner, on the 16th of June, 1892, was again brought before the trial court and adjudged to be guilty of murder in the second degree, and he was thereupon sentenced to imprisonment in the state penitentiary for the term of twenty years. This sentence having been carried into execution and the prisoner incarcerated in the penitentiary, he, thereupon, on the 9th of August, 1892, made this application for a writ of *habeas corpus*, claiming that he was deprived of his liberty without due process of law, in violation of the provisions of the

Fourteenth Amendment to the Constitution of the United States.

The grounds upon which this application was based were, that the Supreme Court of the State was without jurisdiction and did not have any authority, under said section 1429 of the code, or under any other law, to render the judgment it did; that all that court could do was either to affirm the judgment of the trial court outright, or to reverse it outright, and, under proper instructions, remand the cause for a new trial by a jury; that, therefore, its judgment was absolutely void, and the judgment of the trial court in carrying out the directions of the Supreme Court was, of necessity, void; and that the prisoner ought, therefore, to be discharged.

The court below practically agreed with the petitioner that the Supreme Court of the State had misinterpreted said section 1429 of the code, and that what it had actually done, by its decision and judgment, was to modify the verdict of the jury, which, under legal and proper proceedings, it had no authority to do; that its judgment and the subsequent judgment of the trial court carrying it into effect were both void; and that, therefore, the petitioner's imprisonment was without due process of law and in violation of the Fourteenth Amendment to the Federal Constitution. The Circuit Court further ruled, however, that the petitioner's proper remedy was not by writ of *habeas corpus* in the federal courts, in the first instance, but that he should first raise the question of his illegal imprisonment in the state courts, and if it was finally decided against him by the state supreme court, he could then have it reviewed and corrected by the Supreme Court of the United States on a writ of error; and it accordingly denied the application. 51 Fed. Rep. 747.

Mr. Frederic D. McKenney, (with whom were *Mr. S. F. Phillips* and *Mr. W. B. Tyler* on the brief,) said, on the question of jurisdiction:

It being alleged under oath that Frederich is restrained of his liberty in violation of the Fourteenth Amendment, the

Circuit Court, by the express words of the statute in such case provided, had jurisdiction to inquire into the cause of the restraint and to deal with the prisoner "as law and justice require." Rev. Stat. §§ 751, 752, 753, 754, 755, 761.

That the imprisonment is the result of the exercise of state authority acting through its judicial agents does not affect the jurisdiction of the Circuit Court to make inquiry in the premises, nor does it lessen its power to discharge the prisoner upon a proper showing, and this, no matter whether the aid of the Circuit Court be invoked prior to the trial in the state court or subsequent to trial and conviction. *Ex parte Royall*, 117 U. S. 241. *In re Neagle*, 135 U. S. 1.

Although this court may put a party to his writ of error rather than interfere by *habeas corpus*, (*In re Wood, petitioner*, 140 U. S. 278,) nevertheless it has the power, if it see fit to do so, to proceed summarily by *habeas corpus* to determine whether the petitioner is illegally restrained. *Ex parte Royall*, *supra*. And if it appear that the process by which the prisoner is detained be not merely erroneous, but is absolutely void, a writ of *habeas corpus* should be issued instanter if the court to which the application is made is vested with jurisdiction. *Ex parte Lange*, 18 Wall. 163.

Upon writ of error to give this court jurisdiction, it must affirmatively appear on the face of the record not only that a federal question was raised in the state courts, but that it was decided or that its decision was necessary to the judgment or decree rendered. *Chouteau* v. *Gibson*, 111 U. S. 200. It will not do that such question was raised for the first time on motion for rehearing or review. *Texas & Pacific Railway* v. *Southern Pacific Railway*, 137 U. S. 48.

If it be true, as is stated in the opinion of the learned circuit judge, that no federal question has yet been passed upon in this case by the state supreme court, it would hardly be in keeping with the principles of good practice and procedure to insist that Frederich should hew out a new and circuitous pathway to this tribunal, when a direct and simple road is already open to him.

But it is not true that the validity of the judgment imposed

upon the appellant by the Superior Court of King County is open to further investigation upon appeal to the supreme court of the State. The action of the county court is in precise accord with the mandate of the state supreme court. Its judgment is in effect the judgment of the supreme court. The state supreme court must be presumed to have acted only after due consideration, and an appeal from a judgment entered pursuant to its mandate would be but an appeal from itself to itself. Such an appeal would be but a prayer in vain, and the doing of a vain thing is never insisted upon by the law. *Stewart* v. *Salamon*, 97 U. S. 361; *Humphrey* v. *Baker*, 103 U. S. 736; *Mackall* v. *Richards*, 116 U. S. 45. In the present state of the record in the state courts this is the sole method by which the prisoner may invoke the aid of the Federal Constitution in the maintenance of his fundamental rights.

Mr. W. C. Jones, Attorney General of the State of Washington, and *Mr. James A. Haight*, opposing, submitted on their brief.

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

At common law the general rule undoubtedly was that where an erroneous judgment was entered by a trial court, or an erroneous sentence imposed, on a valid indictment, the appellate court, on error, could not itself render such a judgment as the trial court should have rendered or remit the case to the trial court with directions for it to do so, but the only thing it could do was to reverse the judgment and discharge the defendant. This rule was recognized in England in the case of *The King* v. *Bourne*, 7 Ad. & El. 58, where the Court of King's Bench reversed the judgment of the Court of Quarter Sessions, and discharged the defendants because the sentence imposed upon them by that court was of a lower grade than that which the law provided for the crime of which they had been convicted.

Some of the States in which the common law prevails, or is

adhered to, have adopted the same rule, but in most of the States it is expressly provided by statute that when there is an error in the sentence which calls for a reversal, the appellate court is to render such judgment as the court below should have rendered, or to remand the record to the court below with directions for it to render the proper judgment. And this practice seems to prevail in the State of Washington. The whole subject is discussed in Wharton's Crim. Pl. & Pr., §§ 780, 927, where the authorities are collected and cited.

But whether this practice in the State of Washington is warranted, under a correct construction of said § 1429 of the code, or whether, if it is, that section violates the Fourteenth Amendment to the Federal Constitution, in that it operates to deprive a defendant whose case is governed by it of his liberty without due process of law, we do not feel called upon to determine in this case, because we are of opinion that, for other reasons, the writ of *habeas corpus* was properly refused.

While the writ of *habeas corpus* is one of the remedies for the enforcement of the right to personal freedom, it will not issue, as a matter of course, and it should be cautiously used by the federal courts in reference to state prisoners. Being a civil process it cannot be converted into a remedy for the correction of mere errors of judgment or of procedure in the court having cognizance of the criminal offence. Under the writ of *habeas corpus*, this court can exercise no appellate jurisdiction over the proceedings of the trial court or courts of the State, nor review their conclusions of law or fact, and pronounce them erroneous. The writ of *habeas corpus* is not a proceeding for the correction of errors. *Ex parte Lange*, 18 Wall. 163; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Curtis*, 106 U. S. 371; *Ex parte Carll*, 106 U. S. 521; *Ex parte Bigelow*, 113 U. S. 328; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Wilson*, 114 U. S. 417; *Ex parte Royall*, 117 U. S. 241; *In re Snow*, 120 U. S. 274; *In re Coy*, 127 U. S. 731; *In re Wight, petitioner*, 134 U. S. 136; *Stevens* v. *Fuller*, 136 U. S. 468.

As was said by this court, speaking by Mr. Justice Harlan, in *Ex parte Royall*, 117 U. S. 241, 252, 253, "where a person is in custody, under process from a state court of original

jurisdiction, for an alleged offence against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion whether it will discharge him, upon *habeas corpus*, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed by writ of *habeas corpus* summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States."

The office of a writ of *habeas corpus* and the cases in which it will generally be awarded was clearly stated by Mr. Justice Bradley speaking for the court in *Ex parte Siebold*, 100 U. S. 371, 375, as follows: "The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void. This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of *Ex parte Lange*, 18 Wall. 163, and *Ex parte Parks*, 93 U. S. 18. In the former case we held that the judgment was void, and released the prisoner accordingly; in the latter we held that the judgment, whether erroneous or not, was not void because the court had jurisdiction of the cause, and we refused to interfere." The reason of this rule lies in the fact that a *habeas corpus* proceeding is a collateral attack of a civil nature to impeach the validity of a judgment or sentence of another court in a criminal proceeding, and it should, therefore, be limited to cases in which the judgment or sentence attacked is clearly void by reason of its having been rendered without jurisdiction, or by reason of the court's having exceeded its jurisdiction in the premises.

It is said in *Ex parte Royall*, *supra*, that after a prisoner is convicted of a crime in the highest court of the State in which a conviction could be had, if such conviction was obtained in disregard or in violation of rights secured to him by the Constitution and laws of the United States, two remedies are open to him for relief in the federal courts — he may either take his writ of error from this court, under § 709 of the Revised Statutes, and have his case reëxamined in that way on the question of whether the state court has denied him any right, privilege or immunity guaranteed him by the Constitution and laws of the United States; or he may apply for a writ of *habeas corpus* to be discharged from custody under such conviction, on the ground that the state court had no jurisdiction of either his person or the offence charged against him, or had, for some reason, lost or exceeded its jurisdiction, so as to render its judgment a nullity; in which latter proceeding the federal courts could not review the action or rulings of the state court, which could be reveiwed by this court upon a writ of error. But, as already stated, the Circuit Court has a discretion as to which of these remedies it will require the petitioner to adopt. This was expressly ruled in *Ex parte Royall*, *supra*, and has been repeatedly followed since that case. In the recent case of *In re Wood*, 140 U. S. 278, 290, after reaffirming the rule laid down in *Ex parte Royall*, the court added: "After the final disposition of the case by the highest court of the State, the Circuit Court, in its discretion, may put the party who has been denied a right, privilege or immunity claimed under the Constitution or laws of the United States to his writ of error from this court, rather than interfere by writ of *habeas corpus*."

We adhere to the views expressed in that case. It is certainly the better practice, in cases of this kind, to put the prisoner to his remedy by writ of error from this court, under section 709 of the Revised Statutes, than to award him a writ of *habeas corpus*. For, under proceedings by writ of error, the validity of the judgment against him can be called in question, and the federal court left in a position to correct the

wrong, if any, done the petitioner, and at the same time leave the state authorities in a position to deal with him thereafter, within the limits of proper authority, instead of discharging him by *habeas corpus* proceedings, and thereby depriving the State of the opportunity of asserting further jurisdiction over his person in respect to the crime with which he is charged.

In some instances, as in *Medley, petitioner*, 134 U. S. 160, the proceeding by *habeas corpus* has been entertained, although a writ of error could be prosecuted; but the general rule and better practice, in the absence of special facts and circumstances, is to require a prisoner who claims that the judgment of a state court violates his rights under the Constitution or laws of the United States, to seek a review thereof by writ of error instead of resorting to the writ of *habeas corpus*.

In the present case we agree with the court below that the petitioner had open to him the remedy by writ of error from this court for the correction of whatever injury may have been done to him by the action of the state courts, and that he should have been put to that remedy, rather than given the remedy by writ of *habeas corpus*. The Circuit Court had authority to exercise its discretion in the premises, and we do not see that there was any improper exercise of that discretion, under the facts and circumstances.

Without passing, therefore, upon the merits of the question as to the constitutionality of the provision of the code under which the Supreme Court proceeded in disposing of the case, when it was before it, or upon the question of the validity of the judgments rendered by the state courts in the case, we are of opinion, for the reasons stated, that the order of the Circuit Court refusing the application for the writ of *habeas corpus* was correct, and it is accordingly

Affirmed.

CHANDLER *v.* CALUMET AND HECLA MINING COMPANY.

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

No. 202. Argued April 6, 7, 1893. — Decided April 24, 1893.

Swamp lands in Michigan which were not embraced in the list of such lands, made by the Surveyor General February 12, 1853, as coming within the provisions of the grant to the State of September 28, 1850, 9 Stat. 514, c. 84, which list was approved by the Secretary of the Interior January 11, 1854, and which lands were patented to the State March 3, 1856, as so listed and approved, were not included within the said grant of September 28, 1850.

These several official acts, by the proper officers, operated as an adjudication as to what were swamp lands within the grant of September 28, 1850, and to exclude contradictory parol evidence.

The grant by the State, May 25, 1855, of the land in controversy here, operated to convey it to the grantee, whether the State's title was acquired under the swamp land act, or under the grant of August 6, 1852, 10 Stat. 35, c. 92, for the purpose of building a ship canal.

Railroad Co. v. *Smith*, 9 Wall. 95, explained, qualified and distinguished from this case.

THIS was an action of ejectment brought by the plaintiff in error, a citizen of Illinois, against the defendant in error, a Michigan corporation, to recover a tract of forty acres of land in Houghton County, Michigan, particularly described as the southeast quarter of the northwest quarter of section 23, township 56 north, range 33 west.

Both parties to the controversy derive their title from the State of Michigan, the plaintiff under a patent of the State issued to him on November 3, 1887, and the defendant by various mesne conveyances, under a state patent issued to the St. Mary's Falls Ship Canal Company, a New York corporation, on May 25, 1855. The material and uncontroverted facts of the case, on which the questions involved depend, are the following. By the act of Congress, approved September 28, 1850, 9 Stat. 519, c. 84, known as the swamp land act, there

was granted to the State of Michigan the whole of the swamp and overflowed lands, made unfit thereby for cultivation, within the State, and it was made the duty of the Secretary of the Interior to make lists and plats of such lands, and transmit them to the governor of the State, and cause patents therefor to issue conveying such lands in fee simple. After the passage of this act the Commissioner of the General Land Office, by correspondence with the authorities of the State, suggested, through the surveyor general thereof, as a mode or method of selecting or segregating the swamp from the other public lands, that the field-notes of the United States surveys of lands should be accepted by the State as the basis of identification of the swamp lands which were intended to be granted by Congress. An act of the legislature of Michigan, passed June 28, 1851, No. 187 Sess. Laws, 1851, p. 322, accepted the grant, and adopted, as suggested by the Secretary of the Interior, or the Commissioner of the General Land Office, the field-notes of the United States surveys as a basis upon which the swamp lands should be identified and segregated. The surveyor general, on February 12, 1853, made lists of lands which he ascertained to be swamp and within the provisions of the grant, from the field-notes so agreed upon. Those lists were transmitted to the Secretary of the Interior, and by him approved January 11, 1854, and under date of February 24, 1854, a copy of said lists was certified by the Commissioner of the General Land Office to the governor of the State, and thereafter, on March 3, 1856, a patent was issued to the State for the lands described in said lists. The lists of the lands so selected and approved to the State were lodged in the Michigan land office. The lands thus selected and patented to the State, while embracing some portion of township 56 north, range 33 west, did not include the land in controversy.

By an act of Congress, approved August 26, 1852, 10 Stat. 35, c. 92, there was granted to the State of Michigan, for the purpose of building a ship canal around the Falls of St. Mary's, "seven hundred and fifty thousand acres of public lands, to be selected in subdivisions, agreeable to the United States surveys, by an agent or agents to be appointed by the governor

of said State, subject to the approval of the Secretary of the Interior, from any land within said State subject to private entry." The State accepted this grant by acts of its legislature approved respectively February 5 and February 12, 1853, Session Laws 1853, Nos. 38 and 61, pp. 48, 86, and authorized commissioners of the State to enter into a contract for the building of such canal. In pursuance of this authority a contract was entered into between the State and certain designated parties for the construction of the ship canal, by the terms of which the parties undertaking its construction, or their assignees, were to receive from the State of Michigan 750,000 acres of land at $1.25 per acre, to be located under the provisions of the act of August 26, 1852. The terms of this contract need not be specially set forth, as no question arises thereon.

The parties undertaking the construction of the canal subsequently assigned and transferred all their rights and privileges in the contract to the St. Mary's Falls Ship Canal Company. By the act of the legislature authorizing the contract for the construction of the canal, the State undertook the selection of the lands under said grant, and the contractors were to receive the lands so *selected* in payment for the work of building the canal. The fifth section of the act of the state legislature provided that " when and as fast as the lands shall have been selected and located, an accurate description thereof, certified by the persons appointed to select the same, shall be filed in the office of the commissioner of the state land office, whose duty it shall be to transmit to the Commissioner of the General Land Office a true copy of said list, and to designate and mark upon the books and plats in his office the said lands as St. Mary's Canal lands."

By section 6 it was provided that after the completion of the canal, within the time specified, to the satisfaction of, and the acceptance thereof by, the commissioners, the governor, and engineer, and a certificate of that fact filed in the office of the state land office, it was made the duty of said commissioner " forthwith to make certificates of purchase for so much of said lands as by the terms of the contract for the construc-

tion of said canal are to be conveyed for the purpose of defraying its costs and the expenses hereinbefore provided for, which certificates shall run to such persons and for such portions of said lands so selected and to be conveyed as the contractor may designate, and shall forthwith be delivered to the secretary of State, and patents shall immediately be issued thereon, as in other cases."

The St. Mary's Falls Ship Canal Company, as the assignee of the construction contract, completed the canal and became entitled to the consideration which the State was to pay therefor.

The agents appointed by the State to select and locate the lands granted for the purpose of building the canal made selections to the amount required, the list of which was filed in the general land office of the State, and was certified to the Secretary of the Interior, who, under date of January 24, 1855, duly approved the same to the State of Michigan, under the act of Congress of August 26, 1852. The list of selected lands under this grant, and so approved by the Department of the Interior, included the demanded premises, and on May 25, 1855, the governor of the State, in pursuance of the foregoing legislation and contract on the subject, issued a patent to the St. Mary's Falls Ship Canal Company for a large portion of these selected lands, including therein, by particular description, the premises in controversy, which by mesne conveyances passed to the defendant in error, which entered into possession of the same, and was in actual possession thereof at the commencement of the present suit. This conveyance was duly recorded, and after the expiration of five years from the date of the patent, during which they were exempt from taxation, the lands so patented to the canal company have been continually subject to taxes by the State.

It is shown from the foregoing statement of facts, and it is conceded, that the demanded premises had never been selected as a part of the swamp lands granted to the State, nor had the same ever been approved to the State as such, and that no list or plat of swamp lands in Michigan, made by, or by the authority of, the Secretary of the Interior, contained or

described the tract in question as swamp land, although a portion of the land in the vicinity thereof, and in the same township, was included in the lists of such lands which were selected and approved by the Secretary of the Interior.

It thus appears that the plaintiff and the defendant have each a conveyance from the State of Michigan for the particular tract of land in controversy, and that the conveyance to the defendant in error was prior in time to the conveyance to the plaintiff in error. The latter, however, claims that the demanded premises were a part of the swamp and overflowed lands granted to the State by the act of Congress of September 28, 1850, and as such were conveyed to him by the patent of the State issued on November 3, 1887, and that he thereby acquired a title to the same, superior to that which the defendant in error acquired under the prior patent to the canal company, through which the defendant in error derives its title. In support of this contention it is urged that the swamp land act was in effect a grant *in præsenti*, so that the title of the State to such lands dated from the date of that act, and consequently the State did not and could not acquire title to the tract in question under the act of August 26, 1852.

On the other hand, the defendant in error insists that the act of the State and of the Department of the Interior, in the selection of lands under the swamp land act, amounted to an adjudication or a determination on the part of the Department of the Interior, that the parcel of land in question was not embraced within the provisions of the act of 1850, and that the same, having been affirmatively and particularly selected and certified to the State, under the grant of August 26, 1852, was a direct adjudication, that it came properly within the canal grant; that the legal effect and operation of the two selections, considered together, made with the consent and concurrence of the State, was to exclude, by implication, the particular premises here involved from the operation of the former grant, and to expressly include the same within the latter grant; and that this adjudication or determination of the department cannot be collaterally attacked or called in question in an action at law. The defendant in error further

contends that, even conceding that the title of the State to the lands in question was derived under the act of 1850, it acquired the superior title thereto, under and by virtue of the conveyance made to the St. Mary's Falls Ship Canal Company by the State's patent of May 25, 1855, which operated to pass to said company whatever title the State had to the premises in question, independently of the source from which it had derived its title.

On the trial of the case by the court and jury the plaintiff, to maintain the issues on his part, introduced his patent from the State, and offered oral evidence to prove that the tract conveyed thereby, and involved in the suit, with the exception of about seven acres thereof, was in fact swamp and overflowed land, being wet and unfit for cultivation, within the meaning of the swamp land act of Congress, and was so at the time of the approval of the act. To this evidence the defendant objected, and the court, reserving its ruling thereon until after the defendant had introduced its proof, sustained the objection, and refused to allow the evidence to go to the jury, to which ruling the plaintiff excepted.

After all the evidence in the case had been introduced, the plaintiff, by his counsel, requested the court to direct the jury to return a verdict in his favor. This the court refused to do, and instructed the jury to bring in a verdict for the defendant, which was accordingly done, and judgment was entered thereon, to which the plaintiff excepted; and to reverse this judgment the present writ of error is prosecuted.

The opinion of the court below is reported in 36 Fed. Rep. 665; and its action in rejecting the oral testimony and in directing a verdict for the defendant was rested upon two grounds: First, that after the Secretary of the Interior had discharged his duty and approved the list of swamp lands, made, in accordance with his suggestion, from field-notes of government surveys with the consent of the State, which selection and identification did not include the parcel of land in question, although embracing other lands in the same township, there was in effect a determination that the land in controversy was not covered by or embraced within the swamp

Argument for Plaintiff in Error.

land grant; and, secondly, that the State, having accepted the parcel of land in question, under the grant of 1852, and having conveyed the same to the canal company, was estopped from thereafter asserting any title thereto.

Mr. James K. Redington and *Mr. J. M. Wilson*, (with whom was *Mr. Frank E. Robson* on the brief,) for plaintiff in error.

I. Upon the facts shown by the record the title of the plaintiff in error is good, and he was entitled to a verdict and judgment without oral proof of the actual character of the land.

That the swamp land act of 1850 operated as a grant *in præsenti* to the States then in existence, including the State of Michigan, and vested title as of the date of its passage, is settled by abundant and uninterrupted authority. *Railroad Co.* v. *Smith*, 9 Wall. 95; *French* v. *Fyan*, 93 U. S. 169; *Martin* v. *Marks*, 97 U. S. 345; *Rice* v. *Sioux City &c. Railroad*, 110 U. S. 695; *Wright* v. *Roseberry*, 121 U. S. 488.

Starting with this fundamental consideration, it is entirely clear that if the tract in controversy is shown by the record to have been swamp and overflowed at the date of the act of September 28, 1850, then the plaintiff has the paramount and conclusive legal title. In other words, if by any proper and legitimate means, identification of the tract in question as swamp and overflowed land appears in the record, then the charge of the court below was error, the jury should have been charged to find for the plaintiff and the judgment of this court should remand the case for new trial.

Such an identification, independently of any present investigation as to the fact, appears in the record. The Surveyor General, while the official plat of this land was still within his custody, placed thereon the usual official mark to show that the entire forty-acre tract was to be classed as swamp and so returned to the General Land Office. There can be no reasonable doubt that it was the intention of that officer at the time of making up his list to be reported to the Com-

missioner, to include this particular forty acres as swamp, and that its omission from his list and the consequent fact that no patent has ever issued thereon, were results of a mere clerical mistake. That plat and the papers on which it was based constitute the real adjudication.

It follows that the tract in controversy was fully identified and set apart as swamp by the rule of determination adopted by the government, and that this identification, according to this rule, was complete and perfect. This being so, the failure of the Surveyor General to list and of the Secretary of the Interior to patent the tract can have no effect upon the situation, for a patent was not necessary to pass the title. *Wilcox* v. *Jackson*, 13 Pet. 498; *Grignon's Lessee* v. *Astor*, 2 How. 319; *Reichart* v. *Felps*, 6 Wall. 160; *Langdeau* v. *Hanes*, 21 Wall. 521; *Ryan* v. *Carter*, 93 U. S. 78; *Morrow* v. *Whitney*, 95 U. S. 551; *Whitney* v. *Morrow*, 112 U. S. 693.

II. But the claim of the plaintiff rests upon even more certain foundation. It is submitted with the utmost confidence that independently of any question of prior identification, the plaintiff had the right, by parol testimony, to prove the character of the tract in question at the date of the swamp grant and thus identify it as a piece or parcel of land which passed to the State, under said grant, on the 28th day of September, 1850.

The field-notes of the survey and the annotation made upon the township plat in the Surveyor General's office were an adjudication as to the character of the land; or, upon the contrary, they were not. If they were such an adjudication, then the tract is already identified and title to it vested in 1850. If they are not such an adjudication, then, in respect of this tract, the Secretary of the Interior has utterly failed to make the identification required by the act, and it is competent for the State or her grantee to do so by parol testimony in any court and in any form of proceeding where it may be material.

This question is by no means a new one in this court. On the contrary, it has repeatedly arisen, and the court has uniformly recognized this right to resort to parol testimony,

under the circumstances stated. In at least three well-considered cases this doctrine has been positively and directly declared to be law. *Railroad Co.* v. *Smith*, 9 Wall. 95; *French* v. *Fyan*, 93 U. S. 169; *Wright* v. *Roseberry*, 121 U. S. 488. (See also *Martin* v. *Marks*, 97 U. S. 345.)

Here are three decisions of this court fully recognizing the proposition that parol evidence is admissible to identify lands falling within the swamp grant. In *Railroad Co.* v. *Smith* that was the sole and only question presented, and there is no distinction or difference whatever between that case and the case at bar, except that in the former the testimony was offered for the defendant instead of the plaintiff in ejectment. In *French* v. *Fyan* the general doctrine is again clearly announced, and in *Wright* v. *Roseberry* the principle is reiterated with emphasis after elaborate consideration and discussion of every authority bearing on the subject.

The doctrine thus announced and upon which we rely is that where the Secretary has neglected or failed, under the provisions of the second section of the act of 1850, by some legal or proper method to identify a tract of land which, as matter of fact, was swamp and overflowed in 1850, it is competent for the State or its grantee, in any forum and in any form of action where it may be material, to establish the real fact by parol testimony and thus identify land as inuring to the State under the grant. This, we submit, is the clear doctrine of the above authorities and conclusive of the question at bar.

We do not deny the general proposition that the Secretary of the Interior was created, by the act of 1850, a special tribunal with jurisdiction to determine the character of the lands to inure to the State under that grant, and that when he has once finally acted upon a particular case, duly and properly presented, his decision is conclusive as a finding of fact. This is undoubtedly the law, no matter whether the field-notes were accepted or not as a basis of adjudication, and no matter what character or class of evidence was submitted to and considered by him. But we do insist that when in respect to a particular tract the Secretary has never so acted; or where he

has refused or neglected to so act; or where, from circumstances other than those affecting the character of the land, he is deprived of the power to act, then the State, whether she has accepted the field-notes or otherwise, is entitled, in judicial proceedings, wherever material, to show the character of the land by parol evidence.

Mr. T. L. Chadbourne and *Mr. Ashley Pond* for defendant in error.

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

The plaintiff has assigned for errors (1) that the trial court improperly excluded the oral evidence offered to show that the demanded premises were in fact swamp lands when the act of September 28, 1850, was passed; and (2) that the court should have directed a verdict for the plaintiff instead of for the defendant.

In support of the first proposition, the plaintiff in error relies upon the case of *Railroad Company* v. *Smith*, 9 Wall. 95, in which oral evidence was admitted to establish the fact that the parcel of land there in dispute was swamp and overflowed land at the date of the swamp land act. But in that case there was no selection or identification of the land under either the swamp land act, or under the subsequent grant for railroad purposes. The selection and identification under each of said acts was left open and undetermined when the respective titles, involved therein, were acquired. It also further appeared in that case that the State neither made any selection of the lands granted for railroad purposes, nor conveyed to the railroad company any particular lands, but simply assigned or transferred generally the lands granted to the State by Congress, which were at the time only a "float," requiring identification and selection to make the grant operative to pass title to any portion of the public domain.

The facts of the present case present the direct converse of the situation which existed in the case of *Railroad Company*

v. *Smith*. But aside from this, the rule as to oral evidence, recognized in that case, was afterwards explained, and limited in its operation to cases in which there had been non-action or refusal to act on the part of the Secretary of the Interior in selecting lands granted, as appears in the subsequent cases of *French* v. *Fyan*, 93 U. S. 169, 173, and *Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 69, where parol evidence was offered to show that patented lands were not of the character described.

In *French* v. *Fyan*, the court, speaking by Mr. Justice Miller, said in reference to such evidence: "The case of *Railroad Company* v. *Smith*, 9 Wall. 95, is relied on as justifying the offer of parol testimony in the one before us. In that case, it was held that parol evidence was competent to prove that a particular piece of land was swamp land, within the meaning of the act of Congress. But a careful examination will show that it was done with hesitation, and with some dissent in the court. The admission was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selection or lists whatever, and would issue no patents, although many years had elapsed since the passage of the act. The court said: 'The matter to be shown is one of observation and examination; and whether arising before the Secretary, whose duty it was primarily to decide it, or before *the court whose duty it became, because the Secretary had failed to do it*, this was clearly the best evidence to be had, and was sufficient for the purpose.' There was no means, as this court has decided, to compel him to act; and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the Secretary to perform his duty. There is in this no conflict with what we decide in the present case, but, on the contrary, the strongest implication, that if, in that case, the Secretary had made any decision, the evidence would have been excluded."

In the case of *French* v. *Fyan* it was held that, while the swamp land grant was a grant *in præsenti*, by which the title

to such lands passed at once to the State in which they lay, it was made the duty of the Secretary of the Interior to identify them, make lists thereof, and cause a patent to be issued therefor, and that the patent so issued could not be impeached in an action at law by showing that the land which it conveyed was not in fact swamp and overflowed land, as the plaintiff in that case sought to do.

In the subsequent case of *Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 68, 69, the plaintiff deraigned title through a patent of the United States for the demanded premises, bearing date June 10, 1875, which was given in evidence, while the defendant claimed that twenty acres thereof were swamp and overflowed lands which passed to the State of California under the act of Congress of September 28, 1850, and offered parol evidence to establish this fact, but the evidence was rejected. It did not appear in that case that the demanded premises formed a part of any land selected by the State or claimed by her as swamp and overflowed land. In that case this court held, speaking through Mr. Justice Field, that "a patent of the United States, regular on its face, cannot, in an action at law, be held inoperative as to any lands covered by it, upon parol testimony that they were swamp and overflowed, and, therefore, unfit for cultivation, and hence passed to the State under the grant of such land on her admission into the Union"; and after citing and approving the decision made in *French* v. *Fyan*, above cited, proceeded as follows: "In that case parol evidence to show that the land covered by a patent to Missouri under the act was not swamp and overflowed land, was held to be inadmissible. On the same principle, parol testimony to show that the land covered by a patent of the United States to a settler under the preëmption laws was such swamp and overflowed land must be held to be inadmissible to defeat the patent. It is the duty of the Land Department, of which the Secretary is the head, to determine whether land patented to a settler is of the class subject to settlement under the preëmption laws, and his judgment as to this fact is not open to contestation in an action at law by a mere intruder without title. As was said in the case cited of the patent to

the State, it may be said in this case of the patent to the pre-emptioner, it would be a departure from sound principle and contrary to well-considered judgments of this court to permit, in such action, the validity of the patent to be subjected to the test of the verdict of a jury on oral testimony."

Nothing that was said or involved in *Wright* v. *Roseberry*, 121 U. S. 488, where the subject of these grants was exhaustively considered by the court, is in conflict with the rulings announced in these cases. In *Wright* v. *Roseberry*, patents for lands had been issued to the defendants, or their grantors, by the United States, under the preëmption laws, upon claims initiated subsequently to the swamp land grant to the State, and it was held that such patents were not conclusive at law as against the parties claiming under the latter grant, and that in an action for their possession evidence was admissible to determine whether or not the lands were in fact swamp and overflowed at the date of the swamp land grant, and that if proved to have been such the rights of subsequent claimants, under other laws, would be subordinate thereto. In that case the lower court held that the title to the demanded premises never vested in the State for want of a certificate by the Department of the Interior that they were swamp and overflowed lands, and that the State could not make title to the plaintiff upon which he could maintain an action of ejectment against persons in possession under a patent of the United States. This principle was denied by this court in an elaborate opinion announced by Mr. Justice Field, fully reviewing all the decisions on the subject, who said, p. 509, that "the result of these decisions is, that the grant of 1850 is one *in præsenti*, passing title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the Secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted; but when that officer has neglected or failed to make the identification it is competent for the grantees of the State, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object. A resort to such

mode of identification would also seem to be permissible, where the Secretary declares his inability to certify the lands to the State for any cause other than a consideration of their character."

Under the principle announced in that case, and under the foregoing facts in the present case, it would seem that there had been such affirmative action on the part of the Secretary of the Interior in identifying the lands in this particular township, containing the lands in controversy, as would amount to an identification of the lands therein, which pass to the State by the swamp land grant, and that the selection by the State of the demanded premises under the canal grant of 1852, with the approval of the Secretary of the Interior, and the certification of the department to the State that they were covered by the latter grant, may well be considered such an adjudication of the question as should exclude the introduction of parol evidence to contradict it. The exclusion of the land in dispute from the swamp lands, selected and patented to the State, and its inclusion in the selection of the State as land coming within the grant of 1852, with the approval of such selection by the Interior Department and the certification thereof to the State, operated to pass the title thereto as completely as could have been done by formal patent, *Frasher* v. *O'Connor*, 115 U. S. 102; and being followed by the State's conveyance to the canal company, presented such official action and such documentary evidence of title as should not be open to question by parol testimony in an action at law. Under the facts of this case we are of opinion that the plaintiff in error could not properly establish by oral evidence that the land in dispute was in fact swamp land, for the purpose of contradicting and invalidating the department's certification thereof to the State and the latter's patent to the canal company.

But assuming that this parol testimony offered by the plaintiff in error was competent, and that it would have established that the land in controversy was swamp land that passed to the State by the act of 1850, what then would be the rights of the parties to this suit, under their respective

patents from the State? Can it be maintained that, because the State acquired title thereto under the act of 1850, its patent therefor to the canal company made in 1855 would be over-reached and superseded by its subsequent patent to the plaintiff in 1887? We are at a loss to understand upon what principle this can be asserted, for, even conceding that the State, in patenting the demanded premises to the canal company, acted under mistake or misapprehension as to the character of the land so conveyed, still so long as that patent remains uncancelled and unrevoked by the State, it must be held that its legal effect was and is to pass whatever title the State had to the tract in question, however that title may have been originally acquired by the State.

In the cases relied upon by the plaintiff in error there had been no particular lands conveyed by the State under grants subsequent to the act of 1850, and there was no presumption of law or fact that its patent was intended to convey lands which accrued to it under the swamp land grant. But in the case under consideration, even assuming that the State's title was acquired under the latter grant, it had a title for any and all purposes to which it might choose to apply or devote the property, and when it applied it to the purpose of constructing the canal, and actually conveyed it to the canal company, it was not in a position thereafter, so long as that conveyance remained in force, to transfer the same land to another purchaser.

It is well settled that the State could have impeached the title thus conveyed to the canal company only by a bill in chancery to cancel or annul it, either for fraud on the part of the grantee, or mistake or misconstruction of the law on the part of its officers in issuing the patent, and until so cancelled or annulled it could not issue to another party any valid patent for the same land. *United States* v. *Hughes*, 11 How. 552; *Hughes* v. *United States*, 4 Wall. 232; *Moore* v. *Robbins*, 96 U. S. 530. This is also the view taken of the question in *Michigan* v. *Flint and Père Marquette Railroad*, 89 Michigan, 481, 494. In that case the prior patent of the State was held to estop it from subsequently asserting title to

the parcel of land conveyed, while its patent for the same land was outstanding. But whether there is any technical estoppel in the ordinary sense or not, it cannot be maintained that the State can issue two patents, at different dates, to different parties for the same land, so as to convey by the second patent a title superior to that acquired under the first patent. Neither can the second patentee, under such circumstances, in an action at law be heard to impeach the prior patent for any fraud committed by the grantee against the State, or any mistake committed by its officers acting within the scope of their authority, and having jurisdiction to act and to execute the conveyance sought to be impeached.

The patent to the canal company is not shown to be void, because the State acquired title to the parcel in question, if it did so acquire it, under the swamp land grant, rather than under the act of 1852. Neither the State nor its subsequent patentee is in a position to cancel or annul the title which it had authority to make, and which it had previously conveyed to the canal company. The patent to the canal company did not on its face, or by its terms, purport to convey only such lands and such title as the State was entitled to under the grant of 1852. On the contrary, it conveyed by accurate description the particular tract or parcel of land in controversy. It is, therefore, wholly immaterial under which of the two Congressional grants the State acquired its title to said lands.

The canal grant of 1852 did not by its terms make the State a trustee, in any proper sense of the word, in reference to the lands granted by that act; but if it did, the State, as a trustee, made the selection of the lands covered by that grant, and in that selection included the particular parcel in question, and thereafter conveyed it to the canal company; and having full authority to so appropriate it, even if the title had previously accrued to it under the swamp land act of 1850, its conveyance of the same to the canal company for a full and adequate consideration cannot, upon any well-settled principle, be held void either as to the State or any subsequent grantee from the State. So that, independently of any question arising upon the action of the court in excluding the parol evi-

dence to show that the premises in controversy were, in fact, swamp land, it is clear, that under the facts in this case, the defendant has shown a superior title to such premises, and that the court below was correct in directing a verdict for it.

Our conclusion, therefore, upon the whole case is that the judgment below should be *Affirmed.*

MR. JUSTICE FIELD did not hear the argument in this case or take any part in its decision.

MR. JUSTICE BROWN, being interested in the result, did not sit in this case and took no part in its decision.

THOMAS *v.* WESTERN CAR COMPANY.

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

No. 196. Argued March 30, April 3, 1893. — Decided April 24, 1893.

A debt due from a railroad company to a car company for rental of cars prior to the commencement of a suit to foreclose a mortgage on the road and the appointment of a receiver, is held not to be a preferred debt, having priority over the mortgage debt.

A similar debt accrued during the receivership is examined, and is settled as to amount and allowed.

The car company in such case is not allowed interest.

After property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the fund.

THIS is an appeal from the decree of the Circuit Court of the United States for the Northern District of Illinois, in a proceeding to foreclose a mortgage executed by the Peoria and Rock Island Railway Company to secure its first mortgage bonds to the amount of $1,500,000.

The original bill was filed in October, 1874, by Veeder G. Thomas, Daniel R. Thomas and Thomas B. Simpson, citizens

of the State of New Jersey, as holders of certain mortgage bonds, and on behalf of all of the holders of such bonds. Among others it made the trustee in the mortgage given to secure the bonds, and William R. Hamilton, Benjamin E. Smith and William Dennison, defendants, and, beside setting forth the default in the covenants of the mortgage, charged, among other things, that these mortgage bonds were issued, as it was represented, for the purpose of constructing and equipping the said railroad, and that they were placed upon the market for general sale by the firm of Turner Bros., bankers, of the city of New York, who assumed and represented themselves to be the financial agents for the railway company, and, as such agents, represented by pamphlets, statements, and otherwise that the road of the said railway company was a completed road, built by subscriptions to its capital stock; that the capital stock, amounting to $2,000,000, had all been paid in; that the said road was open and being operated successfully; and, finally, that the said bonds were offered for sale by the said company for the purpose of placing upon the road the equipment necessary for the business offered, and to construct cars, engines, depots, and machine-houses, such as were required by the business of the company.

The bill charges that the complainants purchased and became the holders of their bonds in reliance upon these representations, and that the entire issue of bonds was sold by Turner Bros. under like representations; that these representations were in fact false and fraudulent; and that the officers of the railway company and the defendants, Smith, Dennison, and Hamilton, directed and authorized them to be made, knowing them to be false. It is charged that in June, 1870, while Hamilton was president of the railway company, a contract was made with Smith and his associates for the construction of the railroad, and that Dennison was one of the associates of Smith in this contract; that by the terms of the contract Smith and his associates agreed to iron, depot, and moderately equip with rolling stock the railway, and the railway company was to deliver to him, for himself and associates

$1,250,000 of the capital stock of the company, and the entire $1,500,000 of the first mortgage bonds; that the $1,250,000 of the capital stock was immediately upon the making of the contract issued and delivered to Smith for himself and his associates, being a large majority of all of the capital stock of the company, and that Smith and Dennison and their associates thereby obtained absolute control of the management of the railway company, and caused such officers and directors to be elected as were friendly to their schemes and in their control; that the road was insufficiently constructed and insufficiently equipped on the part of Smith and his associates; that, desiring to sell the bonds, and having control of the management of the company, Smith and his associates fraudulently caused the bonds to be offered for sale through Turner Bros. as the financial agents of the railway company, and as for its benefit upon the said representations, and that in fact the bonds were not put upon the market and sold for the benefit of the railway company, and it was not intended or expected to use the proceeds thereof for the purpose of placing the necessary equipment upon the road as was represented, but, on the contrary, the entire proceeds of the bonds were received by and divided among Smith and his associates, and that the railway company has never had any other or greater equipment of rolling stock than that furnished by Smith under his construction contract before the sale of the bonds.

The bill charges further that in 1871, owning and controlling the capital stock of the railway company, Smith and his associates caused Smith, Dennison, and Hamilton, and others in their interest, to be elected directors, Hamilton to be elected president, and Smith to be elected vice-president of the railway company, and that as such they continued to control the affairs of the railway company down to the time of the filing of the bill.

Among other charges of fraud in the bill it is charged that Smith, Dennison, and others of the directors of the railway company had caused the railway company to hire cars from the Western Car Company at an exorbitant rate, and that these contracts for the use of cars were made and continued

by reason of the control of Smith and his associates over the affairs of the railway company.

The bill sought a foreclosure of the mortgage and prayed for the appointment of a receiver.

On the 23d of January, 1875, an order was entered appointing John R. Hilliard receiver of the Peoria and Rock Island Railway Company and its property, and on the 1st of February, 1875, Hilliard, as receiver, went into the possession and into the operation of the said railway. Hilliard remained in control and operated the railroad until after its sale in 1877, and until possession was delivered by him, under the order of court, to the purchasers who had become organized as the Rock Island and Peoria Railroad Company, and who have ever since operated this railroad.

A decree of foreclosure was rendered on the 11th day of January, 1877. It directed a sale to be made by the master in chancery of the franchises and property of the railway company. It contained directions as to the application of the proceeds of the sale, ordering, among other things, that, after payment of specific sums provided for, the balance should be paid to the clerk of the court, who should apply the same, under the direction of the court, first, to the payment of all remaining claims of intervening creditors, as they should be allowed by the court, and next to the payment of the bonds and coupons secured by the mortgage, which should be outstanding and unpaid. It authorized the master to receive from the purchaser or purchasers, after payment of the sum of $100,000 of the amount of his bid, for the balance of the sum bid, in lieu of cash, outstanding and unpaid bonds and coupons at such percentage as the court should direct on the approval of the sale; and it authorized the purchaser or purchasers of the property and franchises of the railway company to reorganize under and by virtue of the provisions of the charter of the said railway company, and to be invested with all the rights, franchises, privileges, and powers of the said railway company.

On September 17, 1877, an order was entered approving the master's report of sale, and ordering that the sale made

to Ransom R. Cable for $550,000 be confirmed. The purchaser Cable was directed by this order to deposit all such bonds and coupons as he should desire to pay in on account of the purchase with the clerk of the court. The court also ordered that all petitioners for allowance of intervening claims complete their proofs of such claims by the 1st of October, 1877.

On the 14th of December, 1877, an order was entered by the court approving the report of the master, showing the execution of a deed by him of the property under the foreclosure decree to the Rock Island and Peoria Railway Company, in pursuance of an order entered on the 11th of December, 1877, and approving the deed, a copy of which is set forth in the order. This order also approved penal bonds in the sum of $100,000 each, payable to the clerk of the court, for the use of whomsoever should become interested, one of such bonds being expressly conditioned for the payment to the Western Car Company of any amount which should be found due to it, reciting the intervention of that company and the claims asserted by it against the proceeds of the sale of the property of the railway company.

The original intervening petition of the Western Car Company in this cause was filed on the 11th of December, 1876. It asserted that at the time of the appointment of the receiver the railway company was indebted to the car company in the sum of $35,106.49 and interest thereon, for car rentals under contracts made between the railway company and the car company. It also claimed the sum of $1500 under the terms of these car contracts for the value of 2 box cars destroyed by the railway company and not replaced. It claimed that the furnishing of cars to the railway company under these contracts was in the nature of supplies furnished to it by means whereof the company had been enabled to transact its business, and prayed that the receiver might be ordered to pay his indebtedness to the petitioner out of any moneys in his hands or income received from the business of the railway company.

To this original petition were attached statements of account,

as exhibits, showing the amount claimed by the car company against the railway company prior to the appointment of the receiver; and also copies of two contracts between the car company and the railway company, one bearing date March 5, 1872, for the leasing of 70 box cars and 20 stock cars, the other bearing date October 1, 1873, for the leasing of 150 box cars.

To this original petition answers were filed by both the complainants in the original cause and the receiver. The answer of the complainants in the original cause charged that these contracts were fraudulent and void, for the reason that at the time when they were made Benjamin E. Smith was the owner of a large amount of the stock of the car company, and its president and in control of its operations, and Hamilton was the owner of a considerable portion of its stock, and the remainder of its stock was owned and controlled by the associates of Smith and Hamilton; that at the same time Smith was the vice-president of the railway company and the owner and holder of a great portion of its stock, and controlling its operations through the officers and agents whom he named and appointed, and Hamilton was the president of the railway company; and that Smith, Hamilton, and their associates owned and controlled the majority of its capital stock, and with their associates combined to defraud the owners and holders of the first mortgage bonds, and made these contracts for leasing cars for that purpose. The answer further charges that the rental reserved by these contracts was exorbitant, and that the fair rental for the cars in question did not exceed the sum of $10 per month per car, whereas the contracts reserved a rental of $20 per month per car; and that the car company received from the railway company moneys to the amount of more than $76,000.

The answer of the receiver stated that the books of the railway company showed credits to the car company for rental of cars to the amount of $115,686.70, and payments made to the car company prior to his appointment, amounting to $76,031.70, and that since his appointment he had paid over to the car company, under the order of court, $6237.01. It alleged that

the two cars were destroyed in the possession of the railway company more than six months prior to his appointment, and charged that the rental reserved by the contracts was extortionate, and that the cars were not worth to the railway company and could not be made worth more than from $7 to $10 per month per car. The receiver also stated that he had not as receiver used these cars under the said contracts, or in anywise adopted, recognized or confirmed the contracts.

Both answers, that of the complainants to the original bill and of the receiver, denied that the rental of the cars was in the nature of supplies or that the car company should have precedence or priority awarded to it over the bondholders.

On March 14, 1877, the car company filed its amended petition. In this it represented that when Hilliard was appointed receiver the railway company was in possession of 240 cars belonging to the car company under the two contracts. That on June 11, 1875, the former contracts were modified and changed by another contract made between it and the receiver, by which it rented to the receiver 138 of these cars, and that an additional clause was appended to that contract renting to the receiver 56 other cars. The amended petition set out *verbatim* this contract with the receiver and the additional clause appended to it, and charged that the receiver continued in possession and use of the 138 cars and the 56 cars, and claimed that there was due from the receiver to the car company for the rental of these cars $15,281.34, with interest.

It is also claimed that the rental due for the use of its cars by the receiver was in the nature of a current operating expense, and a lien on the road and its property superior to that of the mortgage, and prayed that in case the fund in the hands of the receiver should not be sufficient to pay these claims, the payment thereof might be enforced as a first lien on the road and property of the railway company, and paid out of the proceeds of any sale thereof.

To this amended petition were attached statements of rentals charged to be due to the car company from the receiver.

On May 26, 1877, an order was entered, directing the amendment to the petition of the car company, filed March

14, 1877, to be stricken out as an amendment to the petition theretofore filed, and ordering that it stand as a petition against the receiver, and giving the car company leave to file a supplemental petition.

This supplemental petition was filed May 26, 1877. It averred, as supplementary matter, that the receiver had notified the car company that he would not keep the 138 cars in service after May 1, and that he had returned 88 of said cars, and proposed returning the remaining 50; that the receiver had neglected to keep the cars in repair, as provided in the contract, and had returned them in bad order and out of repair; and that the car company had been obliged to put them in the shops for repairs, and had thereby sustained large damages.

That as to the 56 cars, and to the rental due on them, the receiver had notified the car company that he did not, and would not, recognize any liability to it for the use or rental of the 56 cars.

On the 27th of June, 1877, the receiver filed his answer to the amended petition of the car company, in which he stated that when he took possession as receiver of the property of the railway company only 135 of the 138 cars came into his possession. That during the months of February and March, 1875, he used the 135 cars and paid the car company $12 per month per car; that about April, 1875, he obtained leave from the court to rent these cars at a rate not to exceed $10 per month per car, and executed the agreement dated June 11, 1875, a copy of which is set out in the amended petition of the car company.

That in April, 1877, he became satisfied that the cars so rented could not be used to advantage at the rental of $10 per month, and notified the car company that he should return them on May 1, 1877, and that he did return them from time to time, as collected.

That when he received these cars into his possession as receiver they were in poor condition and out of repair, and he was obliged to and did make large and extensive repairs on them, and that he kept them and returned them in better re-

pair than when he received them, and that they were in good repair for use on said road.

As to the 56 cars the receiver stated that he did not receive these cars from the car company, and did not agree with the car company to pay it any rental for them, and never executed and delivered to the car company the alleged writing in reference to the same; that Mr. Ingersoll, who was his attorney and the attorney of the car company, brought a replevin suit in the United States Circuit Court for the Northern District of Illinois against the Chicago and Northwestern Railway Company, and under the replevin writ in that suit caused the 56 cars to be seized, he and one Whiting giving the bond necessary for the obtaining of the writ, and, in order that the bondsmen might have security to indemnify themselves upon their bond, they kept these cars in their possession and obtained leave from the receiver to store them on the side tracks held by him as receiver; that it was afterwards agreed between Ingersoll and the receiver that when the receiver should have occasion to use more cars than he then had as receiver he might use these 56 cars, paying the usual mileage rate of one cent per mile run, when the replevin suit should be determined, but that the cars should only be used for the local business of the receiver's road, and should not be allowed to run or go off from that road. The answer further stated that he had used the cars to some extent under his agreement, and was ready to account for such use when the replevin suit should be determined, and to surrender the cars at that time.

The answer further stated that in 1875 the general agent of the car company was in Peoria, and that Ingersoll and this general agent then expected the replevin suit to be decided before the December following, and this agent desired, if this was done, to make some arrangement for renting these 56 cars without being required to return them again to Peoria, and the copy of the contract of June 11, 1875, belonging to the receiver, being then in the possession of Ingersoll, as the receiver's attorney, Ingersoll endorsed upon it the additional clause or memorandum, a copy of which the car company had set out in its amended petition, and the receiver signed this as a memo-

randum, but it was never given to or delivered to the car company or any one for it, and never passed out of the control of the receiver, and that the receiver had, and claimed to have, no power or authority or intention to make any contract for the rental of the said cars, and instructed his attorney not to allow this memorandum to go out of his possession or to make any contract in relation thereto, even if the replevin suit should be decided, unless the court should first authorize the making of such contract as to the said 56 cars. And the receiver averred that the replevin suit had never been decided; that he had never had the full use of the cars; and denied that he owed any rental thereon; and stated that he had never applied for leave of court to make any contract for the rental of the 56 cars, because the circumstances under which such contract was to be made had never arisen.

On July 3, 1877, the complainants in the original cause filed an amended answer to the petition of the car company, in which the car company asserted and asked for payment of the balance due for rentals prior to the appointment of the receiver. This amended answer sets out more strongly the alleged fraudulent character of these car contracts between the car company and the railway company.

It shows the construction contract on June 1, 1870, made by the railway company with Benjamin E. Smith and his associates; that Smith was the president of the car company, and Dennison and others were associates of Smith in the construction contract and in the car partnership and company; that Smith and his associates received from the railway company 12,000 shares of its stock, which constituted a large majority of the entire stock, and also received all of the first mortgage bonds of the company; that they caused these bonds to be advertised for sale and procured their sale by means of false representations, representing, among other things, that the bonds were sold by the railway company for the purpose of placing the necessary equipment upon its road, and that complainants purchased their bonds relying upon these false representations; and they charged that in fact the bonds were not held by the railway company nor were the proceeds thereof

used in furnishing the equipment for its road, but were used for the private benefit of Smith and his associates.

This amended answer further shows that about January 1, 1872, Smith and his associates united themselves together in a partnership known as the Western Car Company, and that Hamilton, who was then the president of the railway company, and Charles W. Smith, who had been appointed by Benjamin E. Smith the general manager of the railway company, also became partners in this car partnership, and that the partnership furnished the cars to the railway company and made these contracts with it under these circumstances; that afterwards Smith and his associates and other partners in the Western Car Company organized themselves into a corporation under the laws of Delaware, but that this corporation was but a continuation of the partnership bearing the same name, and was controlled, governed and directed by Smith and his associates.

That during 1872 and until the 1st of February, 1875, Smith and his associates controlled and dictated all the contracts and business operations of the railway company; that Hamilton, its president, Benjamin E. Smith, its vice-president, and all of its directors were chosen and appointed by Smith and his associates; that the contracts made and dictated by them were fraudulent and void in equity; and that the amount agreed by these contracts to be paid as rental was grossly excessive.

They claimed further that the railway company had paid to the car company for the use of its cars more than their use was worth; and that the car company should be precluded from claiming any sum whatsoever as due for rental, and was estopped from claiming to own the cars.

On October 16, 1877, which was after the time fixed by the court for closing proofs in all intervening claims, the car company filed a further amendment to each of its intervening petitions. Its original petition it amended by praying that whatsoever sum should be found due to it might be paid out of the proceeds of the sale of the road. It also alleged that the reasonable rental for all the cars named in each of its peti-

tions, irrespective of any contract price, was, up to the end of July, 1874, $20 per month per car, and from that time to the appointment of the receiver $15 per month per car, and from that time on at least such amount as is named in the contract between it and the receiver.

Its petition against the receiver it amended by charging that at the time of the appointment of the receiver and of his entry into the possession of the railway, he took possession of 100 cars which had been rented by it to the railway company, and which were known as White Line cars; that the receiver held these cars for some months and returned them some time in March or April, 1875, in bad condition and out of repair; and that the petitioner upon receiving them was obliged to expend moneys in their repair.

It also charged, as to the 56 cars, that the replevin suit concerning them had been decided by the court in favor of the car company; that since the receiver was appointed he had held and claimed the right to hold these cars, pending the replevin suit, and refused to pay rent for them; and it claimed rental due for their use, amounting to $13,000. It also claimed that these 56 cars were badly out of repair, and so damaged for want of ordinary necessary repairs that it would cost the car company $9500 to put them in good repair.

Afterwards, and on October 31, 1877, it filed a petition praying for an order directing the receiver to return the 56 cars, and on this petition the receiver was ordered to surrender and deliver these cars to the car company.

On these issues a large quantity of evidence was offered before the master by both parties.

The respondents claimed that the only amounts that were in equity due to the petitioner, and should be allowed to it from the fund in court, were the balance of rentals due from the receiver on the 134 cars, $8789.86; the mileage earned by the 56 cars, $3496.78; and the value of one car lost and not returned by the receiver, $450; making a total of $12,736.64.

The master's report in this intervening cause, filed June 22, 1885, found, as to the amount claimed as due from the railway company prior to the receivership, that the question as to

whether the contracts were fraudulent and void was "unimportant," in view of "the practice of the court in cases of this character to allow against the fund or the receiver claims of this kind established by the testimony as reasonable and just, which have accrued during the period of six months prior to the appointment of the receiver, and during the receivership, independent of any contracts which may have previously existed, unless such contracts have been recognized and adopted by the court"; and that for the period of six months prior to the receivership there was due the car company a balance of $2062.99. The master disallowed claims as to lost cars and repairs on White Line cars.

As to the claims against the receiver, the master found the car company entitled to the balance remaining unpaid of the rental of the 135 cars, at the rate which the receiver had agreed to pay, amounting to $8807.97. He also found under protest the car company entitled to the sum of $14,046.55 paid out for repairing these cars after their return by the receiver. As to this allowance for repairs, the report says: "I have found it difficult to deal with this branch of the case for the reason that while it appears that the bills which have been presented for these repairs were actually paid by the petitioner, it is also evident in many instances these repairs were extravagantly conducted, and that in many respects they were rendered necessary by their condition before they came into the hands of the receiver, and there is much testimony in the case showing this to have been the fact. It is also apparent from the testimony that in many cases cars were practically rebuilt and renewed. Upon a very careful examination of all the testimony bearing on this branch of the petitioner's claim, I find it impossible to separate items of this account in such a way as to equitably charge this respondent with such portion of the repairs as he should be called upon to pay upon the basis of the claim of the petitioner, although in my estimation the effect of the testimony is to show that a credit at least to some extent of the amount charged by the petitioner upon this item should be applied to the reduction of this claim."

The master allowed the petitioner mileage on the 56 cars up to December 1, 1875, and a rental of $10 per car per month from then until they were surrendered, although, as he says, "perhaps it (a contract as to these cars) was not finally consummated or delivered." He also allowed $5650, the full amount claimed as expended in repairing these latter cars, though he finds that they came into the receiver's possession in bad condition, for the same reason which he had given as to the claim for repairs to the 138 cars, that he was unable to make an equitable distribution of this. The master disallowed all claims for interest, and found the total amount of $43,816.69 due to the car company.

To this report exceptions were taken by the car company, the complainants in the original bill, and the receiver, which were argued before Mr. Justice Harlan in June, 1887, and on August 29, 1888, his opinion in this intervening cause was filed. 36 Fed. Rep. 808.

In this opinion the contracts between the car company and the railway company are held to be fraudulent and void as to the railway company. But the court holds that nevertheless the car company is entitled to be reasonably compensated for the use of its cars, without reference, however, to the contracts.

As to what would be a reasonable compensation, the court holds that "a fair compensation for the use of these . . . would be such amount as similar cars to be used in the same manner and upon similar roads would commonly rent for in the open market."

The court then states the general principles which have been established by the decisions of this court as to charging the income of the receivership with the payment of certain classes of liabilities of the railroad company incurred prior to the receivership, and their payment from the proceeds of the sale of the railroad prior to the mortgage indebtedness. It holds that the six months rule, which is the general rule in the Seventh Circuit, should govern, and finds the car company entitled to $8162.99, as the balance due to it for the use of the cars during the six months prior to the receivership, thus in-

Counsel for Appellants.

creasing by $6100 the allowance made by the master on this branch of the case.

As to the claims against the receivership, the court found that the receiver was chargeable with the rental of 138 cars, instead of 135, as found by the master, amounting to $9667, and with the $14,046.55 paid by the car company for repairs on these cars. The court also allowed the car company the rentals claimed for the 56 replevied cars, $12,857.32, though, as the opinion states, "with great difficulty." It also allowed the $5650.32 claimed for repairs of the replevied cars. The total amount found due to the car company was $50,775.52, and interest at six per cent was allowed on this sum from June 22, 1885, the date of the filing of the master's report.

On October 9, 1888, the final decree was entered, from which the complainants in the original foreclosure suit prayed and were allowed an appeal.

After the entry of the decree, Ransom R. Cable filed a petition, praying that the decree might be opened, and that he might be made a party defendant thereto and to the intervening cause, for the purpose of prosecuting an appeal therefrom, or be allowed to prosecute an appeal from said decree in the names of the complainants in the original cause. This petition represented that a decree directing the sale of the railroad property and franchises was rendered January 11, 1877, and that at this sale under this decree the petitioner had become the purchaser, and the sale to him had been confirmed, and he had been ordered to pay into court on his bid all of the first mortgage bonds held by him, and had deposited under this order 1395 of the entire 1500 first mortgage bonds of said company. On December 1, 1888, it was ordered that leave be granted Cable to prosecute the appeal in the name of the complainants to the original cause, and that this appeal should become a supersedeas on his filing an appeal bond in the sum of $80,000. The bond was therefore filed, and thereafter the record on this appeal was brought to this court.

Mr. Charles M. Osborn and *Mr. Samuel A. Lynde* for appellants.

Mr. H. B. Hopkins and *Mr. John M. Butler* for appellee.

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

The questions presented by this record for our determination arise out of objections by the appellants to allowances made by the court below in favor of the Western Car Company, the appellee, and which company was permitted to intervene in the foreclosure proceedings brought by the appellants against the Peoria and Rock Island Railway Company.

The first contested question is as to the propriety of the allowance of the sum of $8162.99 for the use of cars of the Western Car Company for a period of six months prior to the receivership.

It cannot be said that in no case can indebtedness for necessary supplies, which accrued before the appointment of a receiver, be allowed priority to the mortgage bonds. It was held in *Miltenberger* v. *Logansport Railway*, 106 U. S. 286, 311, that "many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay preëxisting debts of certain classes, out of the earnings of the receivership, or even the *corpus* of the property." It is, however, added that "the discretion to do so should be exercised with very great care. The payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, when a stoppage of the continuance of such

business relations would be a probable result, in case of non-payment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien."

This subject received further consideration by this court in the case of *Kneeland* v. *American Loan Company*, 136 U. S. 89, 97, and where it was said: "The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company, or to work for it, and whoever has dealings with a company when property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced." And, accord-

ingly, all claims for rental of cars prior to the appointment of the receiver were disallowed.

Tested by the principles asserted in these cases, the claim for car rental that had accrued prior to the receivership cannot be maintained, but should have been disallowed.

The case of a corporation for the manufacture and sale of cars, dealing with a railroad company, whose road is subject to a mortgage securing outstanding bonds, is very different from that of workmen and employés, or of those who furnish, from day to day, supplies necessary for the maintenance of the railroad. Such a company must be regarded as contracting upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity.

In the present case it appears, in the contract between the car company and the railroad company, that the former reserved the express right to terminate the contract and demand possession of the cars forthwith upon any failure by the railroad company to promptly pay the interest or the principal of any of its bonds or other liabilities. Such a provision shows that the car company was aware of the existence of the outstanding bonds, and protected itself by other methods than relying upon the possible order of a court which might appoint a receiver. Moreover, it appears in this case that the principal officers of the car company were in control of the railroad company and its operations, and must be treated as having full notice of the financial condition of the railroad company, and as having leased the cars to it in reliance upon its general credit, rather than in expectation of displacing the priority of the mortgage liens.

The item of $9667, allowed for a balance of rental of cars that accrued during the receivership from February 1, 1875, to the surrender of the cars, appears to us to come fairly within the doctrine of this court as a proper allowance.

The next contested claim is for $12,857.32, allowed by the court below for rental of the 56 cars which had been replevied by the Western Car Company from the Chicago and Northwestern Railroad Company, and placed in the control of the receiver of the Peoria and Rock Island Railway Company.

Opinion of the Court.

It is contended by the appellants that these cars were not necessary for the use of the receiver, and were put in his custody as a matter of convenience for the car company, and that, at any rate, the amount charged for their use, and allowed by the court below, was excessive. They claim that a mileage charge for the actual use of the cars would be an equitable allowance. The evidence upon this branch of the case is conflicting and confusing. The learned judge of the court below, in his opinion, says: "Looking at all the circumstances, I am of opinion that the endorsement by the receiver on the agreement of June 11, 1875, signed by him, that the 56 cars delivered to him, 'being the cars replevied from the Chicago and Northwestern Railroad Company,' shall be retained by him 'upon the same terms set forth' in the above agreement, 'commencing on the first day of December, 1875,' should turn the scale, and as the terms of the agreement of June 11, 1875, were not unreasonable, and as the endorsement was one which the receiver might reasonably have made in the interest of a fair administration of the property in his hands, I approve the finding of $12,857.32 as the rental of the replevied cars while they were under the control of the receiver."

Our conclusion, reached with some difficulty, and after a careful consideration of the evidence, is to accept the views of the court below, and to allow this claim.

The next matters of contention are the allowances made by the court below on account of repairs of the rented cars, being $14,046.55 for repairs on the 138 cars rented under the agreement of June 11, 1875, and $5650.32 for repairs on the 56 replevied cars.

It should be observed that the sums so allowed were not for repairs made by the receiver, but for moneys expended by the car company in rebuilding and repairing the cars after they were surrendered to the car company by the receiver. By the contract between the receiver and the car company it was provided that the former should keep the cars in good repair for use on the road. Hilliard, the receiver, testified that the condition of the cars, when he was appointed, was very poor, and in this he was corroborated by other witnesses. He also

states that when they were delivered up to the car company they were in as good condition as, and better than, when he received them. Mozier and Doyle, who were familiar with their condition when the receiver took possession of them, and who had made repairs on them while the receiver used them, testified that the condition of the cars was better when delivered up than when they came into the hands of the receiver.

There is, however, testimony on behalf of the car company to the contrary. Our consideration of the conflicting evidence brings us to the conclusion that the car company is entitled to an allowance on account of repairs, but not to the amount awarded by the court below. The master reported on this subject as follows: "I have found it difficult to deal with this branch of the case, for the reason that while it appears that the bills which have been presented for these repairs were actually paid by the petitioner, it is also evident that in many instances these repairs were extravagantly conducted, and that in many respects they were rendered necessary by their condition before they came into the hands of the receiver. It is also apparent from the testimony that in many cases cars were practically rebuilt and renewed." And in respect to the 56 replevied cars he says: "It is apparent from the testimony that these cars were received in bad condition, after having been used for two or three years by the railroad, from which they appear to have been taken by the receiver, partly, at least, upon the suggestion and for the accommodation of the petitioner."

He further reported that he found it impossible from the testimony to determine to what extent the respondent was liable for the payment of this charge, and that he was unable to make what might finally be regarded as an equitable distribution of this liability, and was, therefore, obliged to charge the respondent with the full amount of the payments shown to have been made on this account. If, indeed, it was impossible, under the evidence, for the master to discriminate between what was expended to put the cars into running order for use, as stipulated for in the contract, and the amount

expended in rebuilding the cars, it may be that the proper conclusion would have been to disallow the claims altogether. However, we are not disposed either to allow the claims for repairs in full, or to refuse wholly to regard them. We agree with the court below in thinking that the contract bound the receiver to keep the cars in good running order, and if he did not do so, to be charged with what was reasonably expended by the car company on that behalf after they were surrendered. Our examination of the evidence leads us to the conclusion that some allowance is properly chargeable against the receivership on this account.

In fixing the amount of such an allowance we do not find ourselves wholly left to conjecture. Theodore Mozier, the master mechanic of the Peoria and Rock Island Railroad Company, certified that he made an inspection of 138 of these cars at the time they were surrendered to the car company by the receiver, and he estimated that the sum of $994.20 would suffice to put them in fair running order. James Doyle, who was for some years in the employ of the Peoria and Rock Island Railway Company, and afterwards in that of the receiver, in the car shops, assisted Mozier in inspecting these cars. He states that, in his opinion, the cars were in poor condition when they came into the hands of the receiver and were in better condition when surrendered by him. He gave a detailed statement of repairs put upon these cars while in possession of the receiver, amounting to $1440. The testimony on the part of the car company consists chiefly of evidence of the amounts actually paid for repairs and reconstruction of the cars after they were surrendered. But it fails — indeed, does not pretend to try — to show how much of such payments was due to the original condition of the cars and how much to the wear and tear while in the hands of the receiver.

It is affirmatively found by the master that, in many instances, the repairs were extravagantly conducted; that in many cases the cars were practically rebuilt and renewed; and that in many respects the repairs were rendered necessary by their condition before they came into the hands of the receiver.

We think it is clear that the object and scope of the repairs put upon the cars was not merely to put them in running order, but to renew them, so as to put them in a condition acceptable to a new lessee. The expenditure for such repairs is shown to have been about $100 per car; and it was testified by General Huidekoper, a witness on behalf of the car company, and a person of large experience in such matters, that the cost of a general overhauling and rebuilding of cars is from $50 to $80; and that $36 a year for ordinary repairs and $80 every two years for general repairs would keep the cars in good order.

Assuming, then, that the proportion of the amount shown to have been expended in the renewal of these cars was $80 per car, and the rest in ordinary repairs of the kind contemplated by the contract, and deducting from the claims as made for the entire number of the cars, to wit, $19,695, the estimated cost of reconstruction, as certified to by Huidekoper, $13,920, there remains the sum of $5775, representing ordinary repairs, and to that extent we approve the decree of the court below in allowing for repairs.

The final matter of contention is the allowance of interest. We think the court below was plainly right in rejecting the car company's claim for interest based upon the statute of Illinois, prescribing interest at the rate of six per cent per annum for moneys after they become due on "any bond, bill, promissory note or other instrument of writing." But the learned judge was of opinion that some allowance of interest should be made, because of what he deems to have been a vexatious and unreasonable delay in the payment of what was justly due the car company. As against this view of the case it is urged that the delay was occasioned by resisting demands made by the car company, which the result of the litigation shows were excessive, if not extortionate.

We cannot agree that a penalty in the name of interest should be inflicted upon the owners of the mortgage lien for resisting claims which we have disallowed. As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on

the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate. *Williams* v. *American Bank*, 4 Met. 317, 323; *Thomas* v. *Minot*, 10 Gray, 263. We see no reason in departing from this rule in a case like the present, where such a claim would be paid out of moneys that fall far short of paying the mortgage debt.

We, therefore, reverse the decree of the court below in the particulars hereinbefore mentioned, and remand the record with directions to modify the decree in accordance with this opinion.

Reversed.

DOBSON *v.* CUBLEY.

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

No. 206. Argued April 10, 11, 1893. — Decided April 24, 1893.

The inventions protected by letters patent No. 203,604, granted to Charles E. Dobson, May 14, 1878, or by letters patent No. 249,321, granted to Henry C. Dobson, November 8, 1881, both for improvements in banjos, exhibit patentable novelty; but they are not infringed by instruments constructed according to the specification and claims in letters patent 253,849, granted to Edwin I. Cubley, February 21, 1882.

In equity to prevent the infringement of letters patent. The case is stated in the opinion.

Mr. Arthur S. Browne, (with whom was *Mr. Albert Comstock* on the brief,) for appellant.

Mr. Howard Henderson for appellee.

Mr. Justice Shiras delivered the opinion of the court.

This case comes here on appeal from the Circuit Court of the United States for the Southern District of New York, whose decree dismissed complainant's bill charging the defendants

with infringing letters patent of the United States, No. 203,604, granted to Charles E. Dobson, May 14, 1878, and letters patent No. 249,321, granted to Henry C. Dobson, November 8, 1881, both being for improvements in banjos.

The bill discloses that the several letters patent, so as aforesaid issued to Charles E. Dobson and to Henry C. Dobson, by certain assignments in writing, became vested in the complainant, Catharine L. Dobson, and avers an infringement by the defendants E. I. Cubley and George Van Zandt of her rights under said letters patent.

The defendants, by their answer, admit that letters patent were issued as alleged in the bill to Charles E. Dobson and Henry C. Dobson, but deny that said patentees were original inventors of the devices described therein, and allege that each of the combinations or devices claimed in said several letters patent was a mere aggregation of mechanical features well known in the art, and hence contend that the claims for said devices should be declared null and void.

The answer further sets up that the defendant Edwin I. Cubley was himself the original inventor of certain improvements in banjos and other musical instruments, for which letters patent No. 253,849 were, on the 21st of February, 1882, granted to him, under which the defendants were carrying on the manufacture and sale of banjos, and denies that such manufacture and sale were infringements of any supposed or alleged rights of complainant as assignee of the several letters patent described in the said bill.

Replication was duly filed, testimony taken, and, after hearing, the decree dismissing the bill of complaint was rendered.

The banjo is described as a musical instrument of the guitar class, having a neck with or without frets, and a circular body covered in front with tightly-stretched parchment. It has from five to nine strings, of which the melody string, the highest in pitch, but placed outside of the lowest of the others, is played by the thumb of the performer. As in the guitar, the pitch of the strings is fixed by stopping them with the left hand while the right hand produces the tone by plucking or striking. (The Century Dictionary, article, Banjo.)

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The banjo of the Charles E. Dobson patent contained a dome-shaped ring, composed of metal, interposed between the parchment and a wooden rim, and what is claimed as new is this dome-shaped ring, in combination with the wooden rim and parchment head. The advantages claimed are that the rounded shape of the ring causes less wear of the parchment head than the more angular corner or edge previously in use, and that such combination materially improves the tone or resonance.

The banjo of Henry C. Dobson has also a metal ring, but the ring is formed with two downwardly-projecting flanges, interposed between the parchment head and a rim composed of wood and metal. The outer flange passes down outside of the ring, and the inner one projects down inside the ring, and is free from contact with other parts of the instrument, so as to be capable of unrestrained vibration, and it is claimed that the effect is to give a clear, bell-like ringing tone to the instrument.

The ring is an element of both of the Dobson patents, and its peculiar form is essential in each invention in producing the bell-like notes which are characteristic of the instruments. These effects are varied in each by the dimensions and form of the ring, and in the Henry C. Dobson patent the flanges and the combination of wood and metal in the rim are distinctive features.

The Cubley banjo has no ring. The parchment rests directly on the rim, as was the case with the old form of banjo. The device claimed as new is in making the shell entirely of sheet metal, and the advantages claimed are, first, mechanical, in strengthening the shell by shaving it so that the strain of the parchment will come upon the metal in the line of its greatest resistance, and thus maintain the shape of a true circle; secondly, in beautifying the appearance of the shell by covering from view the internal attachments by which the straining device is fastened upon the outer side, and providing a continuous surface unbroken and with rounded corners, capable of being finely and easily polished; and thirdly, to strengthen and render more melodious the tone of the instrument.

Conceding that the Dobson devices involve a patentable novelty, we are of the opinion that the Cubley patent does not infringe either of these, as it has no ring upon which the parchment rests. In the Cubley banjo the parchment rests directly upon the rim, which consists of a metallic shell formed by turning over both edges of a piece of sheet metal and constituting a hollow rim or case, the effect of which is to impart a different musical quality to the instrument. This difference is doubtless accentuated by discarding altogether the wooden rim of the Dobson banjo. The devices are so dissimilar in their design and functions that we are of the opinion that the latter cannot be deemed an infringement of the former.

These differences in mechanical structure result in a noticeable difference in the tones of the instruments, so much so as to call for a different kind of trade.

Arthur C. Fraser, the complainant's expert, admits that in the Dobson patents the ring and rim are two distinct parts, while in the defendant's banjo they are actually integral. He claims that this feature of construction necessitates that the rim should be of metal, which, as compared with a wooden rim, gives the instrument what he calls "an inferior quality of tone." He says that, "assuming that both banjos were made of the same grade of excellence, so far as workmanship and finish are concerned, it seems to me that the Dobson banjo would be considerably superior to the defendant's banjo in the fact chiefly that it is constructed with a wooden rim, whereas defendant's banjo has a metal rim. The rim of a banjo is essentially its sounding box, and it is well known that wood is more resonant, and is in every way a better material for a sounding box than metal, giving a louder sound and a fuller, deeper and richer quality than is given out by metal. A metal sounding box gives out a light, thin, wiry or tinny sound as compared with the full, sonorous vibration resulting from a wooden sounding box." He further says: "A brass plate as thick as that in the ring in the Dobson banjo would give a much louder and clearer ringing tone than a similar plate made as thin as the flange of the ring in the defendant's banjo. . . . The sound produced by the Dobson banjo is

much louder, and the tone more full, clear, resonant and brilliant than that of defendant's banjo, which is comparatively weak, colorless, and sharp or tinny."

William Becker, an expert called by the defendant, testified that "I think the Dobson banjos are more adapted for large audiences, ball-rooms, theatres, etc., while the Cubley banjo would better meet the trade for home amusement and parlor use." And again: "It is well known that wood-rim banjos covered with metal have a sharp, shrill tone, where a hollow-shell rim will give a metal tone."

George Van Zandt, a witness for the defendant, testified that "the tone of a banjo is a very essential feature in reference to its value as a musical instrument, but there are various kinds of tones, and for some uses one kind may be preferred to another, and for other uses, *vice versa*. For a concert room a strong, loud tone is desirable, and for a smaller room a soft and mellow tone would be preferred. The tone of the Dobson banjo is a loud, strong one, especially in the high notes. The one of the Cubley banjo is softer and more enduring, especially in the lower notes. For accompaniment and for use in the parlor by amateurs, probably the Cubley banjo would be preferred. By professional players, for brilliant effects, perhaps the Dobson banjo would be the best."

Without expatiating on this "strange difference twixt tweedle-dum and tweedle-dee," we think we see in the testimony of the respective witnesses on the merits of their favorite instruments a recognition of an obvious difference in the quality and characteristics of their tones. Differing, then, as we have seen they do, in their mechanical devices and in the material of the sounding boxes, and in the quality and character of their musical effects, we conclude that the Cubley banjo cannot be deemed an infringement of either of the Dobson banjos.

The contention that the Dobson banjos exhibit no patentable novelty has not been much pressed. At all events, we think that their additional devices are obvious improvements, and justify the granting of letters patent.

As the court below reached the same conclusion, 39 Fed. Rep. 276, its decree is *Affirmed.*

Syllabus.

CAIRO *v.* ZANE.

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

No. 210. Argued April 13, 14, 1893. — Decided April 24, 1893.

In accordance with a previous resolution of the city council of Cairo, Illinois, an election was duly held there on the 28th of May, 1867, "for the purpose of voting upon the question of the city's issuing $100,000 in twenty-year bonds, drawing eight per cent interest, as a subscription to the capital stock of the Cairo and Vincennes Railroad"; and it was, by a vote of 695 to 1, "declared to be the wish of the people that the said sum of $100,000 be so subscribed." Such subscription was accordingly made. In November following the railroad company and the city further agreed that the railroad company should commence work within six months and push it with dispatch; that the city should issue its bonds to the amount of $50,000, when the road should be completed to the boundary line between Alexander and Pulaski Counties, and a like amount when it should be completed to the boundary line between Pulaski and Johnson Counties, and that each amount when issued should be delivered to the railroad company in exchange for a like amount of its stock; and that the city should, as each issue of stock was made, sell it to the railroad company for the sum of $2500 in bonds of the city. In July, 1871, an ordinance was passed authorizing this contract to be carried out; and in December, 1872, the city, by its trustee, delivered to the railroad company bonds to the amount of $100,000, the company delivered to the trustee for the city certificates of stock to the like amount and bonds of the city to the amount of $5000, and the trustee thereupon transferred the certificates of stock to the company. The mayor of the city then, on the 14th of December, 1872, reported to the auditor of the State of Illinois an issue of bonds of the city to the amount of $95,000 for subscriptions to the stock of the railroad company, and the bonds were certified by the auditor as registered pursuant to the laws of Illinois, "to fund and provide for paying the railroad debts of counties, townships, cities and towns." The bonds were sold by the company and passed into the hands of innocent holders for value. The city having failed to pay the coupons on said bonds as maturing, one of the holders brought suit to recover the same. *Held,*

(1) That the executed agreement on the part of the city to subscribe for stock, and on the part of the company to receive bonds in payment therefor, was not affected by the further act of the city in parting with its stock to the company in consideration of a return of a portion of the bonds; and that whatever wrong might have

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been committed by the city council in the latter transaction, did not vitiate the bonds issued under the former, after they had passed into the hands of a *bona fide* holder;

(2) That, as the statute of the State had provided for the registry of municipal bonds in such cases and a certificate thereof, such certificate should be held to be sufficient evidence to a purchaser of the existence of the facts, upon which alone the bonds could be registered;

(3) That the bonds were valid in the hands of a *bona fide* holder;

(4) That under the laws of Illinois, governing the issue, the city had the power to make the bonds payable in New York;

(5) That under the settled rule in Illinois the coupons drew interest after maturity.

On August 3, 1883, defendant in error commenced suit in the Circuit Court of the United States for the Southern District of Illinois, on certain coupons attached to bonds issued by the city of Cairo, plaintiff in error. After answer had been filed a trial was had, which resulted in a judgment in favor of plaintiff for $8556.36. This judgment was entered on February 27, 1888, and to reverse such judgment the city sued out a writ of error from this court.

The facts as developed in the case are these: On May 28, 1867, a resolution passed the city council of the city of Cairo, ordering a special election "for the purpose of voting upon the question of the city issuing $100,000 in twenty-year bonds, drawing eight per cent interest, as a subscription to the capital stock of the Cairo and Vincennes Railroad." An election was duly had, at which 695 votes were cast in favor of the subscription and one vote against. At a meeting of the council on July 1 the vote was canvassed, and a motion carried "that it be declared the wish of the people that the said sum of $100,000 be so subscribed." On November 5, 1867, the journal of the proceedings of the city council contains this record:

"A proposition was received from the Cairo and Vincennes Railroad Company proposing to purchase from the city of Cairo the $100,000 capital stock of said company subscribed by said city, accompanied by the following contract for consideration, viz.:

"This contract, made and entered into by and between the

city of Cairo, Illinois, party of the first part, and the Cairo and Vincennes Railroad Company, party of the second part, witnesseth:

"That whereas heretofore, to wit, on the first day of July, 1867, by a vote of the electors of the city of Cairo, Illinois, at an election held in said city, the mayor and city council of Cairo were authorized to make a subscription of one hundred thousand dollars to the capital stock of the Cairo and Vincennes Railroad Company, and to pay for said stock in bonds of the city of Cairo of the denomination of five hundred dollars, with the bonds to run for twenty years and to bear interest at the rate of eight per centum, payable half yearly, on the first days of January and July of each year, in the city of New York, said city of Cairo being required by the laws of this State to issue instalments of said bonds from time to time, as assessments may be made upon said stock by said railroad company;

"And whereas the said railroad company proposes to guarantee that work on said road shall be commenced at Cairo within six months from the date of this contract, and that the construction of the road-bed and laying the track from Cairo northward shall be pushed with reasonable dispatch, and also to release the city of Cairo from the obligation to issue any part of said bonds until said railroad shall be built from Cairo to the boundary line between Alexander and Pulaski Counties, and also to purchase of the city of Cairo the stock to be issued to said city upon the delivering of the city bonds aforesaid, it is therefore hereby stipulated and agreed by and between the parties aforesaid as follows:

"Article 1. The party of the second part agrees that work on said road shall be commenced at Cairo within six months of the date of this contract, and that the construction of the road-bed and laying of the track from Cairo northward shall be pushed with reasonable dispatch.

"Article 2. The party of the second part agrees that, instead of the city of Cairo issuing bonds in payment for stock upon assessments made from time to time by said railroad company, the city of Cairo shall issue fifty thousand dollars of bonds

and deliver the same to said company in payment for stock when the track of said road shall have been laid to the boundary line between the counties of Alexander and Pulaski and cars shall have run thereon, and the said city shall issue fifty thousand dollars of bonds as aforesaid and deliver the same to said company in payment for stock when the track of said company shall have been laid and cars shall have run thereon from the city of Cairo through Pulaski County to the boundary line between that county and Johnson County, Illinois.

"ARTICLE 3. The party of the first part hereby agrees to issue the fifty thousand dollars of bonds of the city of Cairo in payment for fifty thousand dollars of stock of said Cairo and Vincennes Railroad Company, and deliver said bonds to said company whenever the railroad track of said company shall be laid from Cairo to the boundary line between Alexander and Pulaski Counties and cars shall have run thereon; and also to issue fifty thousand dollars of said bonds in payment for stock as aforesaid, and deliver the same to said company whenever the railroad track of said company shall have been laid from the city of Cairo to the boundary line between Pulaski and Johnson Counties and cars shall have run thereon.

"ARTICLE 4. And whereas the early construction of said road is of vast importance to the city of Cairo, therefore, in consideration of the stipulations made by the party of the second part in articles first and second of this contract and in consideration of the sum of five thousand dollars to be paid by the said party of the second part as hereinafter stated, the party of the first part hereby agrees to sell and transfer to said party of the second part the one hundred thousand dollars stock of said railroad company to be issued to the city of Cairo, Illinois, in payment for one hundred thousand city bonds, at and for the sum of five thousand dollars, as follows: When fifty thousand dollars of the stock of said company shall be issued to the city of Cairo, the party of the first part agrees to transfer and assign the same to the party of the second part on payment of twenty-five hundred dollars in Cairo city bonds,

and when the fifty thousand dollars of the stock of said company shall be issued as aforesaid the party of the first part agrees to transfer and assign the same to the party of the second part on payment of twenty-five hundred dollars in Cairo city bonds.

"Alderman Baker then offered the following resolution, viz.:

"*Resolved*, That the contract between the city of Cairo and the Cairo and Vincennes Railroad Company this evening laid before the city council by the president of said company be, and the same is hereby, approved, ratified, and confirmed by the city council of the city of Cairo, and that the proper city officers be, and are hereby, authorized, empowered, and instructed to sign, seal, and execute said contract for and in behalf of the city.

"Alderman Vincent moved that said resolutions be adopted; which motion was carried by the following vote, viz.:

"Ayes — Baker, Halliday, Hamilton, Lansden, Redman, Rittenhouse, Vincent and Webb.

"Nays — None."

On July 22, 1871, this ordinance was passed:

"An ordinance to authorize the subscription of $100,000 to the Cairo and Vincennes Railroad Company, and for other purposes.

"Whereas by an agreement entered into between the Cairo and Vincennes Railroad Company and the city of Cairo, and approved by the city council November 25, 1867, it is provided that the stock, amounting to $100,000, to be issued by the Cairo and Vincennes Railroad Company to the city for the subscription of that amount should be sold by the city to the said company upon certain conditions as expressed in said contract; and whereas it is understood that said company are willing to extend the time for the issue of said bonds and the commencement of the payment of interest on the same: Therefore,

"Be it ordained by the city council of the city of Cairo —

"Sec. 1. That the mayor of the city be, and is hereby,

authorized and instructed to subscribe on behalf of the city of Cairo to the capital stock of the Cairo and Vincennes Railroad Company in the sum of one hundred thousand dollars, said subscription to be payable in bonds of the city, as hereinafter provided for; that the mayor, city clerk and city comptroller be, and they are hereby, authorized and instructed to have prepared and to sign and seal bonds of the city to the amount of one hundred thousand dollars, to be issued to said railroad company, said bonds to be in such sums as the said company may desire, to bear interest at the rate of 8 per cent per annum, and to be payable twenty years after the date thereof, with coupons attached for the payment of the interest semi-annually on the same; that the mayor is hereby authorized and instructed to take charge of said bonds when prepared and signed, sealed, and ready for delivery, and is authorized and instructed to deliver the same to some responsible banking, loan or trust company, trustee or trustees, located or residing in the city of New York or elsewhere, as may be agreed upon by him and said railroad company, said bonds to be held by said banking, loan or trust company, trustee or trustees, in escrow, and to deliver up to the said Cairo and Vincennes Railroad Company when the said Cairo and Vincennes railroad has been constructed, that is to say, has been put in good ordinary running order from the city of Cairo, Illinois, to the city of Vincennes, Indiana, and the cars shall have run thereon, and not before, provided work on said road shall be resumed by or before October 1st next, and said road shall be finished by or before the first day of August, 1873; and provided also that the interest accruing on said bonds previous to their delivery to said railroad company shall not enure to the benefit of said railroad company, but the coupons for all accrued interest shall be detached from said bonds previous to their delivery to said railroad company, and be returned to said city of Cairo, so that interest shall not be paid or accrued to said railroad company before the time when said company shall be entitled to receive said bonds according to the condition herein expressed.

"SEC. 2. It shall be and it is hereby made the duty of the

banking, loan or trust company, or trustees which shall be chosen or selected to hold such bonds, as hereinbefore provided, to deliver up the said bonds to said railroad company upon the said company's issuing to said city and delivering to said trustee one hundred thousand ($100,000) dollars of paid-up stock in said railroad company, which said stock the said trustee is hereby authorized and directed to sell to said railroad company for five thousand dollars ($5000) of Cairo city bonds, so as thereby to carry out the provisions of the agreement entered into November 25, 1867, by and between said city and railroad company.

"Approved July 22, 1871. JOHN M. LANSDEN, *Mayor.*

"Attest: M. J. HOWLEY, *Clerk.*"

On January 6, 1873, these proceedings were had:

"The finance committee also reported that they had received from A. B. Safford, trustee, five bonds, numbered from 96 to 100, inclusive, for $1000 each, issued in favor of Cairo and Vincennes Railroad Company, and also 100 coupons detached from said bonds before being transferred to said railroad company. The committee reported that they had destroyed said bonds by burning, and asked that their action be approved.

"Alderman Safford moved that said report be received and the action of the committee sanctioned. Carried.

"A communication was read from A. B. Safford, trustee, stating that he had, on the 4th day of December, delivered to the Cairo and Vincennes Railroad Company one hundred thousand dollars in bonds of the city of Cairo, from which he previously detached all the January, 1873, coupons, (subject to the order of the city;) that in return he received from said railroad company (a certificate) for one hundred thousand dollars paid-up stock of said company, and in accordance with the provisions of ordinance 119, approved July 22, 1871, he had transferred said stock to said railroad company and received from said company therefor five thousand dollars in said bonds. Said trustee further stated in his communication that as he had detached all the January 1, 1873, coupons, the

company is entitled to sixteen days' interest, amounting to $337.82.

"Accompanying said communication was a copy of a receipt of Councilman Wood, chairman of the finance committee, for said five thousand dollars in bonds and for said detached coupons, a copy of a receipt of the Cairo and Vincennes Railroad Company, by Edward F. Winslow, attorney-in-fact, for said one hundred thousand dollars in bonds, and also a copy of a sworn certificate of E. F. Winslow, of the firm of Winslow & Wilson, and Charles O. Wood to the effect that on the 13th day of December, 1872, a through train passed over the Cairo and Vincennes railroad from the city of Vincennes to the end of the track at Cairo."

On December 14, 1872, the mayor of the city furnished to the auditor of the State of Illinois the following certificate of registration:

"*Certificate of Registration.*

"STATE OF ILLINOIS, COUNTY OF ALEXANDER.

"CITY OF CAIRO, *December 14th*, 1872.

"*To the Auditor of Public Accounts of the State of Illinois.*

"SIR: I hereby certify that the following-described bonds are entitled to registration in your office under the provisions of the act entitled 'An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns,' in force April 16, 1869, the bonds being numbered from No. 1 to No. 95, inclusive, for $1000 each, dated July 1st, 1872, and payable July 1st, 1892, being in all 95 bonds and amounting to $95,000 and bearing interest at the rate of eight per cent per annum, payable semi-annually on the first days of January and July. These bonds are issued by the city of Cairo, in the county of Alexander and State of Illinois, to the Cairo and Vincennes Railroad Company, under and by authority of the provisions of 'An act to incorporate the Cairo and Vincennes Railroad Company,' approved March 6th, A. D. 1867, and the general act of the legislature of this State for subscriptions of stock, etc., in railroad companies, approved November 6th, 1849, and by a vote of the people of said city of Cairo at an election

held on the first day of July, A. D. 1867; and I, as the mayor of said city of Cairo, do hereby certify that all the preliminary conditions in the act 'in force April 16th, 1869,' required to be done to authorize the registration of these bonds and to entitle them to the benefits of said act last referred to have been fully complied with, to the best of my knowledge and belief.

"JOHN M. LANSDEN,

"*Mayor of the City of Cairo, Illinois.*

"Subscribed and sworn to by the said John M. Lansden, mayor, etc., before me this 14th day of December, A. D. 1872.

"[SEAL.] H. H. CANDEE, *Notary Public.*"

The bonds were, with the endorsements, in the following form:

"*Bond of City of Cairo.*

"(Number —.) UNITED STATES OF AMERICA. ($1000.)

"*Bond of the City of Cairo, State of Illinois, issued in Payment of Stock in the Cairo and Vincennes Railroad Company.*

"Know all men by these presents that the city of Cairo, in the county of Alexander and State of Illinois, acknowledges itself indebted and firmly bound to the Cairo and Vincennes Railroad Company in the sum of one thousand dollars, which sum the said city of Cairo promises to pay to the said Cairo and Vincennes Railroad Company or bearer, at the National Bank of Commerce, in the city of New York, on the first day of July, 1892, together with interest thereon from the first day of July, 1872, at the rate of eight per cent per annum, which interest shall be payable semi-annually on the first days of January and July in each year, on the presentation and delivery at said National Bank of Commerce, New York, of the coupons of interest hereto attached.

$1000

"This bond is issued in pursuance of an ordinance passed by the city council of said city of Cairo and authorized by a vote of the citizens of said city and in accordance with the laws of the State of Illinois.

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"In testimony whereof the said city of Cairo has executed this bond by the mayor, city clerk, and city comptroller thereof signing their names under the ordinance authorizing the same and affixing the seal of said city, at said city of Cairo, on the 1st day of July, A. D. 1872.

"J. M. LANSDEN, *Mayor.*

"E. A. BURNETT, *City Comptroller.*

"M. J. HOWLEY, *City Clerk.*

"[City of Cairo Seal.]

"(Endorsement on above bond:)

"AUDITOR'S OFFICE, ILLINOIS.

"I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled 'An act to fund and provide for paying the railroad debts of counties, townships, cities and towns,' in force April 16, 1869.

"In testimony whereof I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

"[SEAL.] C. E. LIPPINCOTT, *Auditor P. A.*"

The coupons attached were in the ordinary form of such instruments, being simply an acknowledgment of so much due at a given date, for interest on the bond.

The statutes and constitutional provisions bearing upon the question are the following: First. The act incorporating the Cairo and Vincennes Railroad Company, passed March 6, 1867, (Private Laws of Illinois, 1867, vol. 2, p. 558,) the 10th section of which authorized towns, cities, or counties, through or near which the railroad should pass, to subscribe for and take stock in the company, and issue bonds in payment for such stock of five hundred dollars each, and required, as a condition of such subscription, a majority of the legal votes cast at an election held upon the question. Second. The general railroad law of November 6, 1849, (Laws of Illinois, 1849, second session, p. 18,) authorizing cities and counties to subscribe for stock in

railroad companies, and to pay for such stock in bonds. Third. An act passed February 9, 1869, amending the act incorporating the Cairo and Vincennes Railroad Company, (vol. 3, Private Laws of Illinois, 1869, p. 259,) the third section of which is as follows:

"SEC. 3. *Be it further enacted*, That all contracts made by towns, cities, and counties, into, through, or near which the Cairo and Vincennes railroad shall run, whereby, as an inducement for the construction of said railroad, such towns, cities, and counties agreed, upon the completion of certain portions of said railroad, to sell to the said company, at a nominal price, the stock of said company which such towns, cities, or counties, by a vote of their electors, had theretofore subscribed and agreed to issue bonds in payment thereof, thereby in effect agreeing to make a donation to said company of certain amounts of the bonds of such towns, cities, or counties, as an inducement for the construction of said railroad, are hereby declared to be valid and binding upon such towns, cities, and counties, and shall be carried into effect, in good faith, by the same; and all orders and notices of elections and elections and returns of such elections in respect to such subscriptions of stock to said company, in any such towns, cities, and counties, are hereby declared to be valid and binding upon such towns, cities, and counties."

Fourth. An act approved April 6, 1869, to fund and provide for paying the railroad debts of counties, townships, cities, and towns. (Public Laws, Illinois, 1869, p. 316.) That act authorized the registering of bonds by the state auditor. Section 7 forbade the registry, unless the debt was authorized by a majority of the legal votes cast at an election duly held and until the railroad aided had been completed, and cars run thereon, and all conditions prescribed in the subscription had been fully complied with. It then continued as follows: "And the presiding judge of the county court, or the supervisor of the township, or the chief executive officer of the city or town, that shall have issued bonds to any railway or railways, immediately upon the completion of the same near to, into, or through such county, township, city, or town,

as may have been agreed upon, and the running of the cars thereon, shall certify under oath that all the preliminary conditions in this act required to be done to authorize the registration of such bonds, and to entitle them to the benefits of this act, have been complied with, and shall transmit the same to the state auditor, with a statement of the date, amount, number, maturity, and rate of interest of such bonds, and to what company and under what law issued, and thereupon the said bonds shall be subject to registration by the state auditor as is hereinbefore provided." Fifth. These sections of the constitution of 1870:

"No county, city or town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: *Provided, however*, That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." 1 Charters and Constitutions, 491; 1 Starr & Curtis's Stat. 167.

ARTICLE 9, SECTION 12.

"No county, city, township, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness. Any county, city, school district, or other municipal corporation incurring any indebtedness as aforesaid shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same. This section shall not be construed to prevent any county, city, township, school district, or other municipal corporation from issuing their bonds

in compliance with any vote of the people which may have been had prior to the adoption of this constitution in pursuance of any law providing therefor." 1 Charters and Constitutions, 486; 1 Starr & Curtis's Stat. 153.

SCHEDULE.

"That no inconvenience may arise from the alterations and amendments made in the constitution of this State, and to carry the same into complete effect, it is hereby ordained and declared:

"SECTION 1. That all laws in force at the adoption of this constitution, not inconsistent therewith, and all rights, actions, prosecutions, claims, and contracts of this State, individuals or bodies corporate, shall continue to be as valid as if this constitution had not been adopted." 1 Charters and Constitutions, 492; 1 Starr and Curtis's Stat. 168.

Mr. William B. Gilbert for plaintiff in error.

I. The Illinois Supreme Court and the United States Circuit Court of Appeals, Seventh Circuit, by recent decisions, since rendition of judgment below, have settled the questions involved in this case in favor of defendant in error. *Choisser* v. *The People*, 140 Illinois, 21; *Post* v. *Pulaski County*, 9 U. S. App. 1.

II. The contract of November 25, 1867, cannot be sustained as a valid existing contract, which the constitution of 1870 could not impair. *Spangler* v. *Jacoly*, 14 Illinois, 297; *S. C.* 58 Am. Dec. 571; *People* v. *Staine*, 35 Illinois, 121; *Ryan* v. *Lynch*, 68 Illinois, 160; *Macoupin County* v. *The People*, 58 Illinois, 191; *Madison County* v. *The People*, 58 Illinois, 456.

III. The void contract of November 25, 1867, could not be, and was not legalized by the amended charter. *Choisser* v. *The People* and *Post* v. *Pulaski County*, above cited; *Marshall* v. *Silliman*, 61 Illinois, 218; *Gaddis* v. *Richland County*, 92 Illinois, 119; *Williams* v. *The People*, 132 Illinois, 574; *Barnes* v. *Lacon*, 84 Illinois, 461; *Elmwood* v. *Marcy*, 97 U. S. 289; *People* v. *Chicago*, 51 Illinois, 17; *Lovingston* v. *Wider*, 53 Illinois, 302.

Argument for Plaintiff in Error.

IV. Neither the general law of 1849, nor the charter of the railroad company if at all material, authorized issuance of any bonds as a donation. The distinction between a subscription and a donation is well understood and recognized in both lexicography and public parlance, as well as law. *Concord* v. *Portsmouth Savings Bank*, 92 U. S. 625; *Schoeffer* v. *Bonham*, 95 Illinois, 368.

V. The bonds and coupons having been issued since the adoption of the constitution of 1870, as a mere donation and not as authorized under existing laws by any vote of the people, were absolutely void for want of power to issue same. *Choisser* v. *People* and *Post* v. *Pulaski County*, above cited. The authority to act at all depends upon the existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by *any one*, and in consequence, that all persons claiming under the exercise of such power might be put to such proof of the fact made a condition of its lawfulness, notwithstanding any recitals in the instrument. *Dixon County* v. *Field*, 111 U. S. 83; *Northern Bank of Toledo* v. *Porter Township*, 110 U. S. 608; *Hayes* v. *Holly Springs*, 114 U. S. 120; *Katzenberger* v. *Aberdeen*, 121 U. S. 172; *Concord* v. *Robinson*, 121 U. S. 165; *German Savings Bank* v. *Franklin County*, 128 U. S. 526.

The unbroken line of decisions, admitting recitals in bonds as estoppels, is based upon the principle that, "These recitals are municipal decisions made by the *appointed tribunal selected by the legislature* according to a true construction of the legislative enactment under which they acted, and are therefore *res judicata*." *Marcy* v. *Oswego*, 92 U. S. 637; *Commissioners* v. *January*, 94 U. S. 202; *Commissioners* v. *Bolles*, 94 U. S. 104; *Rock Creek* v. *Strong*, 96 U. S. 271; *Buchanan* v. *Litchfield*, 102 U. S. 278.

VI. The bonds not having been issued "in compliance with" any vote of the people, and no tax provided for their payment before or after their issuance, their issuance was in violation of art. 9, sec. 12, of constitution of 1870, and they are void. *Buchanan* v. *Litchfield*, 102 U. S. 278.

VII. The act approved April 16, 1869, does not aid the

plaintiff on the question of recitals or validity. *German Savings Bank* v. *Franklin County*, 128 U. S. 526; *Dixon County* v. *Field*, 111 U. S. 83; *Crow* v. *Oxford*, 119 U. S. 215.

VIII. The city is not chargeable with interest on the coupons after maturity in the absence of any agreement in the coupons to pay interest. The local laws of Illinois forbid such interest. *Madison County* v. *Bartlett*, 1 Scammon, 67; *Pike County* v. *Hosford*, 11 Illinois, 170; *Pekin* v. *Reynolds*, 31 Illinois, 529; *S. C.* 83 Am. Dec. 244; *Chicago* v. *People*, 56 Illinois, 334; *South Park Commissioners* v. *Dunlevy*, 91 Illinois, 49.

By the laws of Illinois, "cities and counties, unless specially authorized by legislative enactment, have no power to make their indebtedness payable at any other place than at their treasury"; and "the fact that a coupon is made payable in New York or elsewhere than at the treasury of the county issuing it, will not invalidate it; the objectionable words will be regarded as surplusage." *People* v. *Tazewell County*, 22 Illinois, 147; *Pekin* v. *Reynolds*, 31 Illinois, 529; *Sherlock* v. *Winnetka*, 68 Illinois, 530; *Enfield* v. *Jordan*, 119 U. S. 680.

Even if the bonds and coupons had been lawfully made payable in New York, such bonds and coupons must still be "deemed and considered as governed by the laws of the State of Illinois," and "not be affected by the laws of the State or country where the same shall be made payable," as specially provided by the laws of Illinois in force when said bonds were issued. Sess. Laws, 1857, p. 38.

By the "contract or loan" in this case, there was a contract concerning interest, viz.: 8 per cent on the amount of the bond and nothing on the interest coupons; and although the bond and interest coupons are made payable out of the State, yet the case is plainly within the said provision of the law of 1857, and must be "governed by the laws of the State of Illinois," and no interest allowed on coupons. To allow interest is to give bondholder something he knew the law did not give him when he purchased his bonds.

Mr. George A. Sanders for defendant in error.

Opinion of the Court.

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

It is insisted that these bonds were void because, issued after the restrictive provisions of the constitution of 1870 had come into effect, they were in fact a mere donation, and the only authority given by the people prior to the constitution of 1870 was to issue bonds in payment of a subscription. This contention cannot be sustained. There was a vote authorizing a subscription. The bonds were issued by the city, and received by the company in payment of a subscription, and stock for an equal amount was issued by the company to the city. It is true the stock thus received was immediately thereafter sold to the company for $5000 of the city bonds, a portion of the bonds thus issued, and that this sale was in pursuance of an agreement made by the city long prior to the execution of the bonds. And it is urged that the form of the transaction must be ignored; that the resultant fact is that the company has $95,000 of the city bonds, and the city nothing; and that thus substantially there was a donation of $95,000 of bonds. But the result does not determine the true nature of the transaction. The same result would have followed if the city had given away the stock to a third party. The fact is that the city issued its $100,000 of bonds, and received its $100,000 of stock; and the wrong, if any there were, on the part of the council, was not in carrying out the subscription as directed by the vote of the people, but in wrongfully disposing of the stock received. But surely a wrong in that matter does not affect the question of the validity of the bonds, nor can it be presented as a defence against one who has purchased in good faith the bonds thus issued. In the case of *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, it appeared that after bonds had been voted by the county, at an election held on September 13, 1869, the county board, on November 5, passed an order directing a subscription in accordance with the terms of the vote, and also "that the stock above subscribed for by this board in behalf of Anderson County is hereby sold and transferred, for and in

consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, to James F. Joy, president of said railroad company, and the chairman of this board is authorized to sign a transfer of said stock to said James F. Joy, and to assign the certificate for said stock issued to Anderson County by said railroad company, and to authorize in such assignment the necessary transfer of said stock on the books of said company." And it was averred that this transfer thus ordered was for the benefit of the railroad company. In reference to this, Mr. Justice Blatchford, speaking for the court, observed (p. 240): "When the bonds were delivered to the company the transaction was complete, and the bonds, as they afterwards passed to *bona fide* holders, passed free from any impairment by reason of any dealing by the board with the stock subscribed for to which the county became entitled by the issuing and delivery of the bonds. The board may have committed an improper act in parting with the stock, but that is no concern of a *bona fide* holder of the bonds or coupons." And in *Maxcy* v. *Williamson County*, 72 Illinois, 207, it appeared, as here, that after an election authorizing a subscription of $100,000 to the stock of a railroad company the county court entered into an agreement to sell the $100,000 of stock to the railroad company for $5000, a transaction, it will be perceived, precisely like the one before us. The validity of the bonds thus issued in payment of this subscription was thereafter challenged in a suit by taxpayers to restrain the collection of taxes levied to pay the interest thereon. Their validity was sustained, and in respect to this transfer of the stock the court, on p. 212, says: "We fail to perceive how the sale of the certificate of stock to the company for $5000 can in any manner affect the rights of the holders of the bonds of the county. It surely is not intended to be insisted that because the county has, by any means, lost the consideration it received for the bonds, innocent holders, who had nothing whatever to do with the sale of the certificate, must lose their bonds."

It is said that a different rule has since been established in Illinois, and the cases of *Choisser* v. *The People*, 140 Illinois, 21, and of *Post* v. *Pulaski County*, decided by the Circuit

Court of Appeals for the Seventh Circuit, 9 U. S. App. 1, are cited. But even if this were so, it was not established until long after the plaintiff had purchased these bonds, and he would doubtless be entitled to claim the benefit of the rule existing when he made his purchase; and the facts as they appear in these two cases are substantially unlike those in the case before us. Thus, in *Choisser* v. *The People*, the vote to subscribe $100,000 of stock was on October 5, 1867, and on November 28 following, an agreement was entered into between the company and the county court, acting on behalf of the county, that $100,000 in stock should be issued, but that the stock should be returned back to the company for the sum of $5000, payable on the redelivery to the city of that amount of county bonds. When the bonds came to be issued, the record made by the county court recited that the $100,000 of the capital stock should be sold back to the company for $5000 of county bonds, "thereby making a payment of $95,000 of Saline County bonds to said company as a donation." And no stock was in fact issued by the company, or received by the county, and only $95,000 of bonds were issued by the county, or delivered to the company. In short, the parties to the transaction treated it as though it was a donation of $95,000 of bonds, and it was this transaction which was condemned as unauthorized by a vote prior to the constitution. Yet, even in that case, the court was careful to limit its decision to a case in which only the rights of the railroad company, the party receiving this $95,000 of bonds, were concerned, for it says: "The only presumption arising from these facts is that said bonds are still in the hands of the railroad company, and no question, therefore, is presented as to how far the alleged invalidity of said bonds would be affected by those conclusive presumptions which the law raises for the protection of *bona fide* holders of commercial paper. . . . Nothing is before us except the mere question of the legality of these bonds, as between the county and the railroad company, the original parties thereto." And the case in the Circuit Court of Appeals is simply a counterpart of the case in the Supreme Court.

But the case before us is entirely different. The parties did not treat it as a donation. The city issued the full amount of $100,000 in bonds, and the company issued a certificate for $100,000 of stock, and until the receipt of this certificate, no sale had been made of it. All that the record shows was an agreement on the part of the city to sell at a named price. Nowhere is it shown that the company agreed absolutely to purchase. It was, until after the receipt of the stock, an unaccepted offer on the part of the city. No contract was signed by the company. All we have are the recitals of the record of the city. Of course, such recitals do not bind the company. Thus, on November 5, 1867, it is said that a proposition was received from the company to purchase the stock. What that proposition was is not disclosed. It is stated that it is accompanied by a contract, tendered to the city for consideration, which contract also recites that the company proposes to purchase. That contract nowhere binds the company to purchase, but does bind the city to sell on payment of $5000 in Cairo city bonds. So in the proceedings of July 21, 1871, while there is a recital of the making of an agreement for the sale of the stock, yet such recital did not bind the company; and if the contract referred to was that copied into the record of November, 1867, it contained nothing binding the company. And the second section of the ordinance then passed (the first section having provided for placing the bonds in escrow) made it the duty of the trustee holding these bonds in escrow to deliver them to the company upon its issuing to the city, and delivering to him, $100,000 of its paid-up stock, and then authorized and directed him to sell such stock to the company for $5000 of Cairo city bonds. But nowhere in this or any other of the ordinances or agreements in evidence is there any promise on the part of the company to take $95,000 in city bonds, and release the city from all obligations growing out of the subscription. On the contrary, so far as is disclosed, when the trustee delivered the $100,000 in bonds and received the $100,000 in stock, there was nothing casting any obligation on the company to repurchase its stock, or to return to the city any portion of

the bonds. The city had offered to sell, but it had not agreed to buy. It could have stopped with the receipt of the $100,000 of bonds, and left the city to do what it pleased with the stock.

There is, therefore, not presented the case of an ignoring of the fact or terms of a subscription. Everything authorized by the vote of the people was done, and fully done, and whatever wrong may have been committed by the city council in its proffer of sale and subsequent sale of the stock could not vitiate the bonds after they had passed into the hands of a *bona fide* holder.

But, further: The bonds on their face show that they were issued in payment of stock in the railroad company, and recite that they were issued in pursuance of an ordinance of the city council, and authorized by a vote of the citizens, and in accordance with the laws of the State; and they were duly registered by the auditor of the State, and his certificate of registry was endorsed on the back. It is true that the recitals do not show when the ordinance was passed, or the election held, and do not refer by title or otherwise to the particular statute granting the authority, and the bonds were dated and issued after the constitution of 1870 had come into force. It is also true that the certificate of registry is not conclusive that the bonds were issued in full compliance with the terms and conditions of a subscription. *German Savings Bank* v. *Franklin County*, 128 U. S. 526, 540.

But surely these recitals and this certificate have significance. It is unnecessary to affirm that the certificates are so "clear and unambiguous," *School District* v. *Stone*, 106 U. S. 183, 187, as to estop the city from showing that the bonds were issued in violation or without authority of law, or that they, in conjunction with the certificate, foreclose all possible defences. But when the law of the State provides for registry of municipal bonds and a certificate thereof, such certificate should be held as sufficient evidence to a purchaser of the existence of those facts upon which alone bonds can be registered. If the plaintiff in this case, not resting upon the mere terms of the certificate, had examined the records of the

auditor's office, he would have found there the certificate, under oath, of the mayor of the city, of the election, its date, and facts necessary to warrant the issue of the bonds, such officer being the one named in the statute as the one to furnish to the auditor the evidence necessary to justify the registry. Can it be that a purchaser, with this evidence before him, is not protected by the statement upon the face of the bonds that they were issued in payment of a subscription? Is it his duty to examine all the proceedings, to see whether that which was a subscription in the first instance, was called a subscription all the way through, and was named as a subscription in the bonds, had not been transformed by some action of the city council into a donation? It will be borne in mind that it is not a matter of law, but of fact, in respect to which an estoppel is urged against the city by virtue of the recitals and the fact of registry. But it is unnecessary to pursue this line of thought further. We are of opinion that the bonds were properly held valid in the hands of a *bona fide* holder.

It is finally objected that the court erred in allowing interest on the coupons. They were made payable in New York, and as such drew interest according to the laws of New York. *Pana* v. *Bowler*, 107 U. S. 529, 546; *Walnut* v. *Wade*, 103 U. S. 683, 696. Counsel, not questioning the fact that such have been the frequent rulings, insists that in this case, as found by the court, the bonds were issued under the law of 1849; that that does not authorize specifically the issue of bonds payable outside of the State; that in *People* v. *Tazewell County*, 22 Illinois, 147, it was decided that "counties and municipal corporations, unless specially authorized by legislative enactment, have no power to make their indebtedness payable at any other place than at their treasury," a decision reaffirmed in *Johnson* v. *County of Stark*, 24 Illinois, 75, 91, and adhered to in *Sherlock* v. *Winnetka*, 68 Illinois, 530.

We do not understand the findings of the court in the manner claimed. The finding is simply that the bonds are of the denomination of $1000 each, as authorized under and by the law of 1849, and not of the denomination of $500 each, as required by the charter of the railroad company. But there

is nothing in the nature of things preventing the city from exercising all the powers conferred by two or more acts, where the acts do not involve in and of themselves substantial contradictions. It is not a vital matter whether the bonds should be of $500 or $1000 each; and as the charter of the railroad company expressly authorized the issue of bonds payable in the city of New York, we see no reason why such stipulation could not be incorporated into a bond of the denomination of $1000, and the certificate of the mayor to the auditor is that the bonds were issued under the authority of both acts. *Knox County* v. *Ninth National Bank*, 147 U. S. 91. Indeed, counsel refers to the law of 1857, (Public Laws of Illinois, 1857, p. 38,) which provides that "where any contract or loan shall be made in this State . . . it shall and may be lawful to make the amount of principal and interest of such contract or loan payable in any other State or Territory of the United States." If that statute is applicable, then of course it is immaterial whether the bonds were issued under the general railroad law, or the act incorporating the railroad company. But it is unnecessary to consider this question at length. The settled rule in Illinois is, that coupons draw interest after maturity. *Harper* v. *Ely*, 70 Illinois, 581, 586; *Humphreys* v. *Morton*, 100 Illinois, 592; *Drury* v. *Wolfe*, 134 Illinois, 294, 297; *United States Mortgage Co.* v. *Sperry*, 138 U. S. 313, 340.

These are the only matters that we deem essential to consider. We see no error in the conclusions reached, and the judgment is, therefore, *Affirmed.*

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

Names of Counsel.

THE SERVIA.[1]

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

No. 207. Argued April 12, 13, 1893. — Decided April 24, 1893.

A steam vessel, the N., backed out from her slip in Jersey City, towards the middle of the Hudson River between Jersey City and New York, preparatory to turning down to go to sea. Another steam vessel, the S., was going down, above the N., and nearer the New York shore, on her way to sea. It was customary and necessary for the N. to back out of her slip to about the middle of the river. The S. knew of such practice of the N. When the N. had reached the middle of the river she stopped her engines and the S. assumed she would go ahead, and herself proceeded without any material change of course, under slow speed, until she got near enough to observe that the N. was continuing to make sternway at considerable speed, and might bring herself in the path of the S. Then the S. stopped her engines, being about 1000 feet away from the N., and one minute after, upon observing that the N. still continued to make sternway at a speed which indicated danger of collision, put her engines at full speed astern and ported. The N., after stopping her engines, waited two minutes before putting her engines at half speed ahead, and two minutes more before putting her engines at full speed ahead. The vessels collided, the N. and the S. both of them making sternway at the time; *held*, that the N. was in fault and the S. not in fault.

The S. was justified in assuming that the N. would pursue her customary course and took timely measures to avert a collision.

The statutory steering and sailing rules had little application in the case and it was rather one of "special circumstances."

In admiralty. The case is stated in the opinion.

Mr. John E. Parsons, (with whom was *Mr. Henry Galbraith Ward* on the brief,) for appellant.

Mr. Frank D. Sturges, (with whom was *Mr. Edward L. Owen* on the brief,) for appellee.

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[1] The docket title of this case is "Harlich Nichels, Master of the Belgian Steamship 'Noordland,' Appellant, *vs.* The British Steamship 'Servia,' her engines, etc., the Cunard Steamship Company, Limited, Claimant."

Opinion of the Court.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in admiralty, *in rem*, brought in February, 1886, in the District Court of the United States for the Southern District of New York, by Harlich Nichels, master of the Belgian steamship Noordland, of Antwerp, against the British steamship Servia, to recover damages resulting from a collision which took place January 30, 1886, between those two vessels, in the harbor of New York, in the Hudson River, between New York and Jersey City. Both were damaged and a cross-libel was filed by the Servia against the Noordland. The Noordland was backing out, stern foremost, from her berth in a slip in Jersey City, and the Servia had backed out from her slip in the city of New York, and was heading down the Hudson River above the Noordland. Both vessels were going to sea, and had lain in their slips bow in. The libel of the master of the Noordland charges fault in the Servia in that (1) she was not stopped when the Noordland could be easily seen from her; (2) she kept on until she was brought into dangerous proximity to the Noordland; (3) instead of then keeping out of the way of the Noordland, she threw her head to starboard, and thus struck the Noordland on the starboard quarter.

The answer of the Servia charges negligence and fault on the part of the Noordland, in that (1) she did not have competent and vigilant lookouts properly stationed and faithfully attending to their duties; (2) her officers and crew were inattentive; (3) she continued under sternway, thus bringing her down to and upon the Servia, which was as close into the New York shore as it was prudent for her to go; (4) she did not stop her sternway, or start her engines ahead, until immediately before the collision, when it was too late to avoid it; (5) after she had stopped her engines, she wrongfully and improperly started them astern again, thus crowding down to and upon the Servia's rightful course, notwithstanding she had plenty of room between her and New Jersey to have gone ahead, which she was bound to have done, and so have avoided the Servia.

The case was heard by Judge Brown in the District Court, and a decree was entered by that court dismissing the libel of the Noordland, with costs. The opinion of Judge Brown is reported in 30 Fed. Rep. 502. He held that the Servia did all that the law required of her, and was without fault, and that the collision occurred through the unjustifiable delay of the Noordland in starting her engines ahead. The master of the Noordland appealed to the Circuit Court, and that court, held by Judge Wallace, in March, 1889, affirmed the decree of the District Court, and dismissed the libel of the Noordland, with costs of both courts. The libellant has appealed to this court.

The Circuit Court made the following findings of fact:

"1. At about 2.45 P.M., January 30, 1886, a collision took place between the steamships Servia and Noordland, in the Hudson River, at a point 800 to 1000 feet off the New York side, about opposite Cortlandt street. The river at that place is about 4400 feet wide between the lines of the piers.

"2. Both steamships had just left their respective slips, intending to put to sea, the slip of the Servia being above Houston Street, New York city, and the slip of the Noordland being at Jersey City, about opposite the place of collision. It was customary and necessary for the steamers to back out of their respective slips to about the middle of the river, for the purpose of straightening on the courses down the river, and it was frequently the practice of the Noordland to back still nearer to the New York side. Both vessels knew the practice customary with the other when starting for sea. The Servia started from her slip at about 2.15 and the Noordland from hers about 2.30.

"3. The Servia had got turned about and straightened on her course down the river, and was proceeding within a distance of 800 to 1000 feet from the New York shore, and nearer to the New York shore than was customary, and as near as she prudently could, having reference to her own size and the proximity of other vessels, while the Noordland was backing over towards the New York shore, assisted by a tug at her port quarter, preparatory to straightening on her course.

"4. When the Noordland reached about mid-river she stopped her engines and signalled the Servia that she intended to starboard her helm and go ahead. The Servia did not hear the signal, but observed the movements of the Noordland and assumed that she would go ahead in time to leave the Servia an unobstructed course. The Servia proceeded without any material change of course, headed about south by west one-half west, under slow speed, until she got near enough to observe that the Noordland was continuing to make sternway at considerable speed and might bring herself in the path of the Servia; whereupon the Servia stopped her engines, being then about 1000 feet away from the Noordland, and one minute after, upon observing that the Noordland still continued to make sternway at a speed which indicated danger of collision, put her engines at full speed astern and ported her helm.

"5. When the Noordland reached mid-river and stopped her engines she had been backing at a speed of five or six knots an hour, and, after stopping her engines and giving the signal to indicate that she would go ahead she did not go ahead, but waited two minutes longer before putting her engines at half speed ahead, and two minutes more, and when it was too late to avoid collision, before putting her engines at full speed ahead, and in the meantime she had continued to encroach upon the Servia's course and was making sternway at the time the vessels collided.

"6. When the vessels came together the bow of the Servia canted a little to starboard, while her engines were reversed, and her starboard bow came into contact with the starboard quarter of the Noordland at the extreme stern. Both vessels were injured and the Servia sustained damages in the sum found by the commissioner of the District Court.

"7. Both steamships were properly officered, manned, and equipped. Those in charge of the Servia exercised proper vigilance in observing the Noordland, but those in charge of the Noordland were inattentive in observing the Servia and in observing the speed at which their own vessel was nearing the New York shore after she had reached mid-river, and were

negligent in permitting her to back so near to the New York side.

"8. There were no vessels or obstructions in the river at the time to complicate the movements of the Noordland, and it was entirely unnecessary for her to back much, if any, beyond the middle of the river in order to straighten upon her course, but she nevertheless did back at a speed gradually decreasing from five to six knots an hour until she came within 1000 feet or nearer of the New York side and struck the Servia."

There is a bill of exceptions, which, after setting forth the findings of fact by the court, states as follows:

"Whereupon the libellant offered to the said court the following additional findings of fact:

"'First. The course of the Servia was ahead down stream on the New York side from Houston Street, and of the Noordland astern across stream from Jersey City about opposite the place of collision.'

"Which the said court refused, except as already found, and the libellant duly excepted to such refusal.

"'Second. The vessels were on crossing courses, the Servia having the Noordland on her starboard hand.'

"Which said court refused, except as already found, and the libellant duly excepted to such refusal.

"'Third. Just before the collision, but too late to overcome her headway or prevent the vessels coming together, the Servia reversed full speed astern, causing her bow (her propeller being right-handed and her helm being aport) to cant over to starboard towards the Noordland.'

"Which said court refused to find, and the libellant duly excepted to such refusal.

"'Fourth. The Servia struck the Noordland at the port side of her fantail, at the extreme stern, doing considerable damage.'

"Which the said court refused, except as already found, and the libellant duly excepted to such refusal.

"'Fifth. If the Servia had reversed her engines a minute sooner, as she might perfectly well have done, there would have been no collision.'

"Which the said court refused to find, and the libellant duly excepted to such refusal.

"'Sixth. If the Servia had continued her course without stopping, she would have gone clear.'

"Which said court refused to find, and the libellant duly excepted to such refusal.

"'Seventh. The master of the Servia proceeded upon the opinion that his vessel had right of way; that the Noordland was required to keep out of her way. This led to the Servia coming into dangerous proximity to the Noordland. Instead of then keeping on, according to this view of her captain, the Servia by reversing and canting her head towards the Noordland brought about the collision.'

"As to the seventh request, the court found that the master of the Servia supposed and claimed that his vessel had the right of way. In other respects this finding was refused, and the libellant duly excepted to such refusal.

"'Eighth. To the southward and westward of the course of the Noordland as she backed towards New York were flats and shoals, to avoid which, when she straightened on her course, made it desirable for her to reach across as far as was safe towards the New York side of the river.'

"Which said court refused to find, and the libellant duly excepted to such refusal.

"'Ninth. The opinion and observation of the master of the Servia were that it is usual for steamers going to sea from the Jersey side of the river to back over to from eight hundred to a thousand feet of the New York piers — just to clear them. This is usual where vessels are not in the way at the end of the New York piers, and suitable.'

"Which said court refused to find, and the libellant duly excepted to such refusal.

"'Tenth. The Noordland, as she was going astern, did not have the same command of her movements as was the case with the Servia.'

"Which the said court did find.

"And thereupon the said court found the following conclusions of law:

"'1. Each steamship was bound to conform to her own customary course and manœuvres under similar circumstances and take notice of the customary course and manœuvres and observe the movements of the other, and each had the right to assume that the other would do so.'

"To which conclusion the libellant duly excepted as being against the evidence and against the law.

"'2. The Servia was justified in assuming that she could safely proceed at moderate speed upon the course she had taken after she had straightened down the river, without being obstructed by the Noordland, and it was not until such time as she ought to have discovered that the Noordland was backing so near her path as to probably impede her movements that she was under any obligation to apprehend danger and take additional measures to avoid collision.'

"To which conclusion the libellant duly excepted as being against the evidence and against the law.

"'3. The Servia was not guilty of fault or negligence contributing to the collision.'

"To which conclusion the libellant duly excepted as being against the evidence and against the law.

"'4. The Noordland was in fault for backing nearer to the New York side than was necessary or was prudent, in view of the course and movements of the Servia; for not taking timely measures to stop her sternway after she had reached mid-river; and for failing to observe the movements of the Servia with due attention.'

"To which conclusion the libellant duly excepted as being against the evidence and against the law.

"'5. The decree of the District Court is right, and should be affirmed with costs, and it is accordingly so ordered.'

"To which conclusion the libellant excepted as being against the evidence and against the law.

"And the libellant thereupon offered to and requested the court to find the following additional conclusions of law:

"'First. The Noordland had the right of way, and the Servia was at fault for not keeping out of her way.

"'Second. The Servia should have stopped before she came into dangerous proximity to the Noordland.

"'Third. The Noordland was not compelled to go ahead before she had run out her sternway, nor was she required to stop her engine nearer the Jersey side of the river.

"'Fourth. The Servia had no right to require or expect the Noordland to run out her sternway at a greater distance from the ends of the New York piers than she did.

"'Fifth. The Servia, having elected to go on, was at fault for reversing full speed astern and putting her helm aport when so near the Noordland that before her headway was stopped her bow would be carried into that vessel.

"'Sixth. The decree of the District Court should be reversed and a decree should be entered holding the Servia in fault for the collision, with costs to the appellants of the District and Circuit Courts and a reference to ascertain the damages of the Noordland.'

"And the court declined to find any further conclusions of law than already found; to which refusal of the court to find the said six additional conclusions of law, and each of them, the libellant duly excepted as being against the evidence and against the law."

It is stated in the bill of exceptions that it contains all the evidence material to any of the exceptions.

It is alleged by the appellant as error (1) that the Circuit Court should have made the eighth and ninth findings of fact requested on behalf of the Noordland; (2) that it should have made so much of the seventh finding of fact requested on behalf of the Noordland as found that the master of the Servia proceeded upon the opinion that his vessel had the right of way; (3) that the Circuit Court erroneously found the first, second, third, and fourth conclusions of law made by it; (4) that it erroneously refused to find, as requested for the Noordland, that she had the right of way and that the Servia was at fault for not keeping out of the way; (5) that it erroneously refused to find, as requested for the Noordland, that the Servia should have stopped before she came into dangerous proximity to the Noordland; (6) that it erroneously re-

fused to find, as requested for the Noordland, that she was not compelled to go ahead before she had run out her sternway, nor was she required to stop her engines nearer the New Jersey side of the river; (7) that it erroneously refused to find, as requested for the Noordland, that the Servia had no right to require or expect the Noordland to run out her sternway at a greater distance from the ends of the New York piers than she did; (8) that it erroneously decided that the Noordland was in fault; and (9) that it erroneously decided that the Servia was free from blame.

It is contended here on behalf of the Noordland (1) that the vessels were on crossing courses, and that the Servia, having the Noordland on her starboard side, was required by rule 19 of the steering and sailing rules set forth in § 4233 of the Revised Statutes of the United States, and by article 16 of the act of March 3, 1885, c. 354, (23 Stat. 438, 441,) to keep out of the way of the Noordland; (2) that the collision occurred because the Servia claimed the right of way and acted accordingly, and that the Circuit Court not only refused to find that the Noordland was entitled to the right of way, but approved the action of the master of the Servia in appropriating the right of way to that vessel; (3) that, if the Noordland was entitled to the right of way, it was error for the Circuit Court to refuse to find that the Servia should have stopped before she came into dangerous proximity to the Noordland; (4) that there were no special circumstances to deprive the Noordland of her right of way, nor was she unreasonable in insisting upon her right; (5) that the Servia could not be excused for her failure to keep out of the way of the Noordland on the ground that she had the right to assume that the Noordland would not obstruct her course, or would yield to the Servia the right of way to which the Noordland was entitled; (6) that the assumption upon which the Servia is supposed to have acted is pure assumption, those in charge of the navigation of the Servia not having acted upon such an assumption; (7) that it was error in the Circuit Court not to find the eighth and ninth additional findings of fact proposed on behalf of the Noordland; (8) that the collision

was due solely to the fact that those in charge of the Servia erroneously supposed that they had the right of way; (9) that the undisputed facts show that the Servia was guilty of inattention; (10) that if the Noordland was at fault for allowing an interval to elapse between stopping her engines and going ahead, then the Servia was also at fault for allowing an interval to elapse between stopping her engines and going astern; and (11) that the decree of the Circuit Court should be reversed, and a decree made in favor of the Noordland for her damages, with costs.

But we are of opinion that the decree of the Circuit Court was correct and must be affirmed.

The first conclusion of law of the Circuit Court, that "each steamship was bound to conform to her own customary course and manœuvres under similar circumstances, and take notice of the customary course and manœuvres and observe the movements of the other, and each had the right to assume that the other would do so," was correct. The known usage as to the movements of each vessel preparatory to getting upon her course to sea was established as a custom, and each vessel was justified in assuming that the other would perform her duty in that respect. *Williamson* v. *Barrett*, 13 How. 101, 110; *The Vanderbilt*, 6 Wall. 225; *The Free State*, 91 U. S. 200; *The John L. Hasbrouck*, 93 U. S. 405, 408; *The Esk and The Niord*, L. R. 3 P. C. 436. It was the duty of each vessel to observe the movements of the other.

The Circuit Court was correct also in finding as a conclusion of law that "the Servia was justified in assuming that she could safely proceed at moderate speed upon the course she had taken after she had straightened down the river, without being obstructed by the Noordland, and it was not until such time as she ought to have discovered that the Noordland was backing so near her path as to probably impede her movements that she was under any obligation to apprehend danger and take additional measures to avoid collision." The court had found as facts that the Servia was proceeding under slow headway down the river, at a distance of from 800 to 1000 feet from the New York shore, and heading about south by

west one-half west, thus having from 1200 to 1400 feet between her starboard side and the middle of the river (the river being about 4400 feet wide) toward which the Noordland was backing. The Servia was, therefore, heading well under the Noordland's stern, the latter having abundance of the width of the river for her manœuvre, and knew the usage of the Noordland to back to about the middle of the river, and saw that the engines of the Noordland were stopped when she had reached about the middle of the river, indicating that the Noordland intended to follow her usage. The Servia, therefore, had a right to assume that the Noordland would head down the river and proceed to sea. It became the duty of the Servia only to proceed carefully on her course, keeping watch of the Noordland. No danger was apparent. The Servia's course was well clear of the Noordland, and of the course which the Servia had the right to believe the Noordland would promptly take. Marsden on Collisions, Ed. 1880, 233; *The Ulster*, 1 Mar. L. C. 234; *The Scotia*, 14 Wall. 170; *The Free State*, 91 U. S. 200; *The Rhondda*, 8 App. Cas. 549; *The Jesmond and the Earl of Elgin*, L. R. 4 P. C. 1.

The Servia stopped her engines when she had got near enough to see that the Noordland continued to make sternway, and when about 1000 feet away from her, and immediately afterwards the Servia put her engines at full speed astern and ported her helm. It then appeared to the Servia that the Noordland, in violation of the usage and of her duty, was proposing to maintain her sternway so as to bring her across the path of the Servia, and that there was danger of collision. Then it became the duty of the Servia to take measures to avert a collision, which she did, as above stated.

The Circuit Court held that the Servia was not guilty of fault or negligence contributing to the collision. This is a proper conclusion from the findings of fact that she was properly officered, manned, and equipped; that those in charge of her exercised proper vigilance in observing the Noordland; that the Servia was well over toward the New York shore, leaving ample room for the movements of the Noordland;

that the Servia was under slow speed; that she stopped her engines as soon as she saw that the Noordland was under sternway, although her engines had been stopped; and that the Servia put her engines at full speed astern as soon as she saw that such sternway of the Noordland was continuing so as to indicate danger of collision. The Servia, therefore, complied with all the requirements of the law.

The Circuit Court held, also, that the Noordland was in fault for backing nearer to the New York side of the river than was necessary or was prudent in view of the course and movements of the Servia; for not taking timely measures to stop her sternway after she had reached mid-river; and for failing to observe the movements of the Servia with due attention. This was a proper conclusion of law from the findings of fact, that it was the custom of the Noordland to back to mid-river in her manœuvre of turning; that there were no vessels or obstructions in the river at the time to complicate her movements; that it was entirely unnecessary for her to back much, if any, beyond the middle of the river, in order to straighten upon her course; that when she reached mid-river, she stopped her engines and signalled that she intended to starboard her helm and go ahead; that she then waited two minutes longer before putting her engines at half speed ahead, and waited two minutes more before putting her engines at full speed ahead; that her speed astern, prior to the stopping of her engines, had been five or six knots an hour; that the two vessels struck when the Servia was 1000 feet or less from the New York shore and was making sternway; and that those in charge of the Noordland were inattentive in observing the Servia and in observing the speed at which the Noordland was nearing the New York shore after she had reached mid-river, and were negligent in permitting the Noordland to back so near to the New York side.

This negligence on the part of the Noordland in observing the Servia, and in observing how the Noordland was encroaching on the course of the Servia, is a sufficient explanation of the collision which ensued. *The Genesee Chief*, 12 How. 443, 463; *The Pennsylvania*, 19 Wall. 125, 136; *The*

Sunnyside, 91 U. S. 208, 214; *The Illinois*, 103 U. S. 298, 299; *The Nevada*, 106 U. S. 154, 159.

The Noordland was in fault for not starting her engines ahead at once after stopping in mid-river. There was no necessity for her to back further across the river. It is found as a fact that, after stopping her engines and signalling that she would go ahead, she did not go ahead, but waited two minutes longer before putting her engines at half speed ahead, and two minutes more, and until after she had continued to encroach upon the Servia's course before putting her engines at full speed ahead. That negligence was assigned by the District Court as the cause of the collision; and the Circuit Court finds that the Noordland was in fault for not taking timely measures to stop her sternway after she had reached mid-river.

The exceptions on the part of the Noordland to the refusal of the Circuit Court to find the proposed conclusions of law are untenable, because those conclusions of law were based on the findings of fact proposed on the part of the Noordland, which the Circuit Court correctly refused to adopt. The court substantially found as requested by the first and second additional findings of fact proposed on the part of the Noordland. The Noordland was at no time before the collision on a definite course, as contemplated by the statute and rules of navigation; and on the facts found she cannot claim that she had the right of way as against the Servia. The statutory steering and sailing rules before referred to have little application to a vessel backing out of a slip before taking her course, but the case is rather one of "special circumstances," under Rule or Article 24, requiring each vessel to watch, and be guided by, the movements of the other. A finding that the Servia had the Noordland on the starboard side, and that, therefore, the Noordland had the right of way, and the Servia was in fault for not keeping out of the way, would be immaterial, in view of the other facts affirmatively found. The Noordland was bound to conform to her usage in the river; she knew that usage, and the Servia also knew it. Only the inexcusable delay of the Noordland in observing her own

practice, which she indicated she intended to follow, brought about the collision.

The Servia maintained her position close to the New York shore; she proceeded slowly; she observed the Noordland closely; she stopped her engines when at a safe distance to enable the Noordland to check her own sternway; and she reversed her engines when the sternway of the Noordland indicated risk of collision. She was thwarted in her manœuvres by the faults committed by the Noordland. It was not incumbent upon the Servia to take any other precautions than she did; and she did nothing to bring on the risk of collision.

The other exceptions taken on the part of the Noordland are either immaterial or have been sufficiently remarked upon.

Decree affirmed.

NORTHERN PACIFIC RAILROAD COMPANY *v.* WHALEN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

No. 156. Submitted March 22, 1893. — Decided April 24, 1893.

A railroad corporation cannot, by the general principles of equity jurisprudence, or by the provisions of the Code of Washington Territory, maintain a suit for an injunction, as for a nuisance, against the keepers of saloons near the line of its road, at which its workmen buy intoxicating liquors and get so drunk as to be unfit for work.

THIS was an action, in the nature of a bill in equity to restrain a nuisance, commenced December 17, 1887, in a court of Kittitass County in the Territory of Washington, by the Northern Pacific Railroad Company against the three county commissioners of that county, twenty-one persons constituting ten partnerships, and twenty-eight other persons, by a complaint alleging as follows:

That the plaintiff was a corporation created by an act of Congress of July 2, 1864, to construct a railroad from Lake Superior to Puget Sound, and was constructing its railroad and a tunnel through and over the Cascade Mountains and at the village of Tunnel City, and had there four thousand employés engaged in constructing its road; and such construction made it necessary to use high explosives, such as dynamite, and machinery run by electricity, steam and compressed air, which required sober, skilled labor.

That the defendants, except the county commissioners, at and near Tunnel City, and along the line of the railroad so being constructed by the plaintiff, "for several months last past, have been running retail drinking and lager-beer saloons, and selling spirituous, malt and fermented liquors to the said employés of said plaintiff; and that the said sales of said liquors to said employés have frequently and continuously caused drunkenness of said employés; and that the said drunkenness incapacitated the said employés, so that they were not able to perform the labor assigned to them, and the labor they were expected to do and for which they were employed; and that the said drunkenness increased the risk and danger incident to the necessary use of the said explosives and machinery, and increased the danger to the employés employed in constructing the road as aforesaid, and to the officers and agents of said plaintiff, and has caused and is causing many of said employés to quit their said employment on account thereof."

That "during the four months last past the said railroad company has employed and transported, in and upon said work at and near Tunnel City, in Kittitass County, about eight thousand men, at an average expense of ten dollars for each man; that about four thousand of said men so employed, for the reason aforesaid, quit and left the work of said plaintiff"; and that the plaintiff, by reason of such sales of liquors to its employés, had been prevented from obtaining and retaining enough employés to complete its road as far as Tacoma during the present year, and would be obliged to continue the work during the coming winter, and at an increased expense of more than $100,000.

Statement of the Case.

That "said saloons have been so conducted, and drunkenness and gambling permitted and carried on to such an extent, that they, the said saloons, have been for months and are now public nuisances, and also a private nuisance in so far as the said plaintiff is concerned; that the superintendents, officers and families thereof are seriously discommoded, discomfited, injured and annoyed by said nuisance; and that said lives of the officers, agents and employés have been endangered, and the said property of the said plaintiff has been diminished and injured in value, in consequence of said sales of liquors and drunkenness caused thereby; and that the said plaintiff, by said saloons and the sale of intoxicating liquors therein to said employés, and said drunkenness and said gambling, has sustained great and irreparable injury."

That "said saloons and the said beer halls have been and are now running, and selling at retail said intoxicating liquors as aforesaid to employés of the plaintiff and others, without a license, and without any right or authority so to do."

That "said saloons during the past have, and will in the future, unless enjoined, continuously and constantly continue to sell said intoxicating liquors to said employés, and constantly and continually permit said drunkenness, and maintain said gambling houses and said public and said private nuisances, to the great injury, danger, discomfiture and annoyance of the said plaintiff and the said plaintiff's employés and the said property of plaintiff."

That the saloons aforesaid were on unsurveyed lands, owned one half by the plaintiff and the other half by the United States, and were run and maintained under licenses issued by the county commissioners without right or authority; that the other defendants intended to apply, and were now fraudulently applying, to the county commissioners for licenses to sell intoxicating liquors at retail, without filing the consent of the owners of the lands, as required by law; that the county commissioners, knowing this, intended to grant such licenses; and that "the granting of said licenses will greatly complicate said matters, and injure and damage said plaintiff, and will deprive plaintiff to a great extent, if not absolutely, of any

remedy against said defendants, and cause the plaintiff great and irreparable damage."

That the defendants were insolvent and unable to respond in damages; that the plaintiff had no adequate remedy at law; and that the granting of an injunction would avoid a great multiplicity of suits.

Wherefore the plaintiff prayed for an injunction to restrain the county commissioners from granting to the other defendants licenses to retail spirituous, malt and fermented liquors, and to restrain the other defendants from selling such liquors at retail, and from running and maintaining the saloons and nuisances aforesaid, and for general relief.

The defendants demurred to the complaint, as not stating facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment rendered for the defendant. The plaintiff appealed to the Supreme Court of the Territory, which affirmed the judgment. 3 Wash. Ter. 452. The plaintiff thereupon, on March 7, 1889, appealed to this court.

Mr. James McNaught, *Mr. A. H. Garland* and *Mr. H. J. May* for appellant.

The allegations in the bill bring the cause within the definition of nuisance, both at common law and under the Code of Washington Territory. These nuisances are shown to be continuous. It is admitted that the appellees are insolvent. All this affords good reason for an appeal to a court of equity.

These nuisances were both public and private in their character, inasmuch as they were an annoyance to, and an interference with, both private and public rights and interests. Code Wash. Ter., §§ 1235, 1243, 1247; *Meyer* v. *State*, 12 Vroom, (41 N. J. Law,) 6. See also c. 50 of this Code, which regulates the proceedings in civil actions for damages, and other remedies. From these provisions it will be seen that it recognizes nuisances both as defined by the common law and by the statute. The statutory remedies were cumulative, but were like those given by the common law and in equity.

The particular nuisances complained of were the result of

the sale of intoxicating liquors, and of the maintenance of gambling houses. A right of action is given by the Code to any one who may be injured by the sale of intoxicating liquors. §§ 2059–2061. These sections may fairly be regarded as *in pari materia* with the other sections already referred to. By fair construction of § 2059 of the Code, the remedy here sought is given; but §§ 605, 606, providing for an action for damages and for other and further relief, and for a writ of injunction when an action at law is inadequate, when considered in connection with § 2059, place this beyond controversy.

And further, it is well settled in general equity jurisprudence, that such jurisdiction exists to prevent a multiplicity of suits; to prevent the continuance of a wrong which cannot be remedied at law; and where the defendants are insolvent and unable to respond in compensation for damages. Story Eq. Jur. §§ 920, 923, 925, 927.

No appearance for appellees.

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

The Northern Pacific Railroad Company asks for an injunction against the county commissioners and the other defendants, because the latter, under pretended licenses from the former, keep and maintain gambling and drinking saloons at the village of Tunnel City and along the line of the plaintiff's railroad, and there sell intoxicating liquors at retail to the plaintiff's employés, and thereby make them drunk and unfit to work under their several contracts with the plaintiff, and thus increase the danger to its agents and employés from the use of the machinery and explosives required in constructing its railroad, cause many of the employés to quit its employment, delay and increase the expense of constructing its railroad, seriously annoy its agents and their families, and consequently diminish the value of the plaintiff's property.

It is not alleged that the defendants have conspired or intend to injure the plaintiff's property or business, or to

prevent the plaintiff's workmen from performing their contracts of service. Nor is it alleged that any one of the saloons kept by the several defendants is a disorderly house, which, by reason of noises in or about it, or otherwise, is a nuisance to property in the neighborhood. The whole complaint is based upon the theory that by the general principles of equity jurisprudence, and by the provisions of the Code of Washington Territory, the saloons kept by the defendants severally are, by reason of the sales of intoxicating liquors therein to the plaintiff's workmen, and their consequent drunkenness and incapacity to work, public nuisances, and cause special damage to the plaintiff, to prevent the repetition and continuance of which it is entitled to an injunction.

But the usual, and at the suit of a corporation the only, ground on which, independently of express statute, a court of equity will grant an injunction in a private action for a nuisance is special injury to the plaintiff's property. 3 Bl. Com. 216; *Robinson* v. *Kilvert*, 41 Ch. D. 88; *Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91, 99. No employer has such a property in his workmen, or in their services, that he can, under the ordinary jurisdiction of a court of chancery, maintain a suit, as for a nuisance, against the keeper of a house at which they voluntarily buy intoxicating liquors, and thereby get so drunk as to be unfit for work.

Nor is there anything in the provisions of the Code of the Territory, cited in behalf of the plaintiff, which enlarges the equitable jurisdiction in this respect.

By that code, a nuisance, other than the obstruction of a highway, or of navigable or running waters, is defined to be "whatever is injurious to health, or indecent or offensive to the senses, or an obstacle to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property"; and again, "unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or in any way renders other persons insecure in life, or in the use of property"; "the remedies against a public nuisance are indictment or civil action

or abatement"; and an action for damages may be brought, and an injunction or abatement obtained, "by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance." Secs. 605, 606, 1235, 1242. As a corporation cannot be said to have life or health or senses, the only ground on which it can obtain either damages or an injunction, under these provisions, is injury to its property.

The code further provides, in section 1247, that all houses of ill fame; "all public houses or places of resort where gambling is carried on or permitted; all houses or places within any city, town or village, or upon any public road or highway, where drinking, gambling, fighting or breaches of the peace are carried on or permitted"; and all opium dens; are nuisances, and may be abated, and the owners or keepers thereof punished. This section is aimed at nuisances which affect the public morals or the public peace, and affords no countenance for a private action, unless by an owner of property, the use or enjoyment of which is specially affected by the existence of such a nuisance in its immediate neighborhood. *United States* v. *Columbus*, 5 Cranch C. C. 304; *Meyer* v. *State*, 12 Vroom, (41 N. J. Law,) 6; *Hamilton* v. *Whitridge*, 11 Maryland, 128; *Inchbald* v. *Robinson*, L. R. 4 Ch. 388.

The Code of Washington Territory contains no enactment, such as exists in some States, declaring all houses or tenements kept for the unlawful sale of intoxicating liquors to be common nuisances, and conferring jurisdiction in equity to restrain them by injunction, at the suit of the district attorney or of a private citizen.

The plaintiff relies on section 2059, which provides that "any husband, wife, child, parent, guardian, employe[r?], or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication in whole, or in part, of such person," as well as against the owner

of the building or premises in which the liquors are sold, if he has leased it with knowledge that such liquors are to be there sold, or has knowingly permitted their sale therein. But this section, creating a new liability, unknown to the common law, is to be strictly construed, and is not to be extended beyond the clear import of its terms; and, as the only remedy which it gives is an action against the seller of the liquor, or against the owner of the place where it is sold, to recover damages suffered by reason of sales to particular persons, it cannot be construed as authorizing an injunction to prevent the use of the building for future sales.

The complaint in this case has no foundation, in common law or statute, in principle or precedent.

Judgment affirmed.

In re TYLER, Petitioner.

ORIGINAL.

No. 17. Original. Argued April 4, 1893. — Decided April 24, 1893.

Property within a State, which is in the possession of a receiver by virtue of his appointment as such by a Circuit Court of the United States, is not subject to seizure and levy under process issuing from a court of the State to enforce the collection of a tax assessed upon its owner under the laws of the State.

The exclusive remedy of the State tax collector in such case is in the Circuit Court which appointed the receiver, where the question of the validity of the tax may be heard and determined, and where the priority of payment of such amount as may be found to be due which is granted by the laws of the State will be recognized and enforced.

The writ of *habeas corpus* is not to be used to perform the office of a writ of error, or of an appeal.

When no writ of error or appeal will lie, if a petitioner for a writ of *habeas corpus* be imprisoned under a judgment of a Circuit Court which had no jurisdiction of the person or of the subject matter, or authority to render the judgment complained of, then relief may be accorded by writ of *habeas corpus*.

THIS was a petition for a writ of *habeas corpus* filed by leave of court March 7, 1893, by M. V. Tyler, sheriff of the county

of Aiken, South Carolina, representing that he is unjustly detained by G. I. Cunningham, United States marshal for the District of South Carolina, to which the marshal made return upon a rule laid upon him to do so. The facts appearing from the petition, return, and accompanying documents are as follows:

On December 5, 1889, in the case of *Bound* v. *The South Carolina Railway Company*, Daniel H. Chamberlain was appointed receiver of the railway company by an order of the Circuit Court of the United States for the District of South Carolina, with the usual powers of receivers in such cases, and all of the property of the company was placed under his care and management and protected by injunction. On March 7, 1892, the receiver filed a bill in equity in that court against the treasurers and sheriffs, eighteen in number, in the counties through which the railroads in his possession passed, alleging that the treasurers were about to issue tax executions and the sheriffs about to levy and seize thereunder property of the railroad company for the taxes for the fiscal year beginning November 1, 1890. The bill alleged that the taxes for that fiscal year were unconstitutional and illegal in part, upon various grounds set forth therein in detail, and involving an alleged wrongful and illegal raising of the valuation of the state board of equalization; that the levy and sale of the road would cause irreparable injury, preventing the receiver from carrying on the business of the railroad as a common carrier; that there was no adequate remedy at law; that a multiplicity of suits would be necessary to protect his rights if he sued at law; and that the levy would cast a cloud upon the property; and prayed for an injunction against the issue and levy of the tax warrants in question. The bill further set forth that the receiver had tendered without condition the taxes admitted to be due and that the same had been refused by the county treasurers, but pending the motion for preliminary injunction the defendants were permitted to waive this refusal and receive the amounts tendered, which was accordingly done. On April 8, 1892, the court, after full hearing, issued the injunction prayed for, and the defendants having answered, it was provided by order of

court that the testimony should be taken in due course in time for final hearing at the November term, 1893.

For the fiscal year beginning November 1, 1891, the receiver made a return of the property for taxes as provided by law, similar to the return he had made the year previous, and the state board of equalization having again proceeded in the matter of the assessment and valuation as before, the receiver again tendered the taxes calculated on the valuation as returned, and not upon the valuation as assessed. The amounts so tendered were received, but tax executions or warrants were issued by the county treasurers, for the difference between the return and the assessment, and on February 4, 1893, levy was made by Tyler, sheriff of Aiken County, upon property in the hands of the receiver at Aiken. There were apparently two warrants, one for $1215.14 and the other for $466.40, and the value of the property levied on was $9500. That property consisted of fourteen freight cars, five belonging to the South Carolina Railway, one to another South Carolina company, and eight to various railroad companies of other States. All of the cars were marked with the initials of the corporations to which they belonged, and most of them with the names of the owners in full. Eight of the cars were loaded with merchandise belonging to shippers. The cars were chained to the track of the South Carolina Railway Company alongside of the only freight depot of the company in Aiken, and effectively stopped traffic through that depot for a period of twelve days. On Monday, February 6, 1893, the receiver filed his petition in the Circuit Court of the United States, alleging the illegality of the taxes for which the warrants were issued, in substantially the same terms as in the bill of the year before, and setting forth that he had paid the taxes admitted to be due; that the court in the previous case had decided a tax in all respects similar to be illegal; and, after disclaiming any intention to delay or escape the payment of the taxes due, and alleging that he was only doing his duty as an officer of the court, prayed that the treasurer and sheriff be enjoined from interfering with the property in the receiver's charge, and be committed for contempt for levying upon property in the

custody of the court. The court issued a restraining order and a rule to show cause, returnable at Charleston on February 20, 1893, as follows:

"Ordered, that an order do forthwith issue and be served upon said MacMitchell and M. V. Tyler, requiring them to show cause before me on the 20th day of February, 1893, at 10 o'clock A.M., at the United States court-house, Charleston, S. C., why they should not be attached and punished as prayed for.

"2. That the said MacMitchell and M. V. Tyler do likewise show cause before me at the same time and place why they should not be enjoined and restrained from interfering with any or all of the property of the said South Carolina Railway Company or other property in the possession and control of the said D. H. Chamberlain as receiver and officer of this court, or from interfering in any manner whatsoever with the officers and agents of the said receiver, and also from levying upon, advertising or selling or in any manner whatsoever attempting to dispose of the said property. That the said MacMitchell and M. V. Tyler do likewise in due course file an answer, if any, why such further relief as may be necessary should not be granted in the premises.

"4. In the meantime it is ordered that the said MacMitchell and M. V. Tyler be, and they are hereby, restrained and enjoined from levying upon, seizing, advertising or selling or in any manner whatsoever endeavoring to interfere with or to dispose of the said property in the possession of the said D. H. Chamberlain, as receiver of this court, until the hearing of the rule and the order of this court thereon.

"5. That a copy of the petition and order herein be forthwith served upon the said MacMitchell and M. V. Tyler."

On February 8 a supplemental petition was filed by the receiver, reciting the filing of the original petition, the order thereon, and the service of copies of said petition and order, and stating that the sheriff refused to comply with a written demand, on February 7, for the release of the property from his custody.

Accompanying this supplemental petition were affidavits

stating the facts in detail, whereupon the order of February 6 was so modified as to require the respondents to show cause on February 11, 1893, instead of February 20.

The respondents answered the petitions on February 12, denying any unlawfulness in the assessment and admitting that the property was in the possession of the court, but denied that such possession exempted the same from process of law for the collection of taxes by the State. They admitted the levy upon the cars, but denied any knowledge or information sufficient to form a belief that any of them belonged to corporations other than the South Carolina Railway, and denied that the levy seriously interfered with the receiver or the public in doing business over said road. They further denied that the facts stated in the original and supplemental petitions, if true, were sufficient to constitute a contempt of court, and insisted upon various matters, afterwards again set forth in the application for *habeas corpus*.

They asserted the legality and regularity of the warrants for the collection of the taxes, and that the levy was made in obedience thereto, and submitted that they were acting under the laws of South Carolina as the officers and agents of the State, "and as such engaged in the performance of their duties in issuing the said execution, in making the said levies and in retaining possession of the property so levied upon, under the valid constitutional laws of the said State, and that if said petitioners have any controversy with any one in regard thereto, it is a controversy with the State of South Carolina, which is no way a party to these proceedings, and that there can be no controversy with the respondents in this regard unless they were acting without the commission and warrant of the State of South Carolina and were trespassers, which they deny." And, finally, they disclaimed "any intention to treat this court or its orders with disrespect, and state that they have been actuated alone with a desire to discharge their official duties as officers of the State of South Carolina."

This return was accompanied by a large number of affidavits tending to show the legality of the tax complained of.

A hearing having been had, the Circuit Court delivered its

opinion, stating the facts briefly, and holding that the interference by the court by injunction was justified on the ground of excessive levy and on the ground of the taking of property other than the property of the alleged taxpayer; but further, that while property in the hands of a receiver of any court, either state or national, was bound for the payment of taxes, state, county, or municipal, yet that a receiver is not bound to pay taxes in his judgment unlawful, unless by the order of the court whose officer he is; and that in the present proceeding it was not competent for the court to go into the question of whether the tax was or was not illegal. The Circuit Court thereupon entered severally the following orders:

"This cause came on to be heard on petition, rules to show cause, return thereto and affidavits. And on hearing the same, and upon due consideration thereof, it is

"Ordered, adjudged and decreed, that an injunction do issue to M. V. Tyler, sheriff of Aiken County, his deputies and agents, enjoining and restraining them from further intermeddling, interfering with, keeping and holding the personal property distrained upon by him, belonging to the petitioner, as receiver of the South Carolina Railway Company, or in his care and custody as receiver and common carrier, and that this injunction remain of force until the further order of this court.

"It is further ordered, that the said property be restored to the custody of the receiver of this court, and that the marshal put him in possession thereof."

"M. V. Tyler, sheriff of Aiken County, having been served with two rules to show cause why he be not attached for contempt, for the matters set forth in copy of petition to each rule attached, and sufficient cause not having been shown, and it further appearing that he, notwithstanding, continues to hold and detain said property, we adopt the precedent set in *In re Childs*, 22 Wallace, 157, by the Supreme Court of the United States.

"It is ordered, adjudged and decreed, that he is in contempt of this court and of its orders and process.

"It is further ordered that he do pay a fine of five hundred

dollars, and that the clerk of this court shall enter judgment thereon and issue execution therefor. And that he also stand committed to the custody of the marshal of this court until he has paid said fine, or purged himself of his contempt herein."

Among other averments in the petition for the writ of *habeas corpus*, it was alleged that by an act of the general assembly of South Carolina, (No. 631,) approved March 19, 1874, 15 S. C. Stat. 789, it is provided that in all cases where it is claimed that taxes have been erroneously or illegally charged upon taxable property within the State, the person so claiming may, by petition, submit a full statement of the facts in the case, and the comptroller-general may make such abatement thereof as, in his judgment, the same may demand, and that such relief so granted in cases for erroneous charges as aforesaid has not been sought by the receiver or the railroad company. That by the statutes of the State it is also provided that the collection of taxes shall not be stayed or prevented by any injunction, writ or order issued by any court or judge thereof, Gen. Stats. S. C. sec. 171, and that in all cases where taxes are charged against any person, which he may conceive to be unjust or illegal for any cause, he shall pay the taxes notwithstanding, under protest, and upon such payment being made the person so paying may, within a time limited, by action against the county treasurer, recover such taxes as may, in such suit, be adjudged to have been wrongfully or illegally collected. It was further averred that by the act of Congress approved March 3, 1887, and amended by the act of August 1, 1888, the receiver appointed in this case was required to manage and operate the property situated in South Carolina according to the requirements of the valid laws of that State in the same manner as if in possession of the owner thereof; and petitioner insisted that the action of the Circuit Court in appointing a receiver did not change the title or possession of the property or its relation to the sovereign power of the State to tax it, and was subject in like manner as the property would have been subject had it remained in the hands of its owners. Petitioner also referred to an act of the

Statement of the Case.

legislature of South Carolina, approved December 24, 1892, Acts S. C. 1892, p. 81, which provided that the assessment of property for taxation should be deemed and held to be a step in the collection of taxes; that certain enumerated sections of the general statutes, thereby declared to be in full force and effect, should be construed to mean as giving full and complete power to the county auditor independent of any rights conferred on county boards of assessors, or other officers, in the matter of securing a full and complete return of property for taxation in all cases, and that the action of the auditor under those sections should not be interfered with by any court of this State by mandamus, summary process, or any other proceeding, but that the taxpayer should have the right to pay his tax on such return under protest, as now provided by law. Petitioner, therefore, insisted that an adequate remedy at law was given the taxpayer for unjust and excessive taxation, and that it was not competent for a court of the United States to grant the injunction in this case, any more than it would have been for a court of the State; that the receiver's possession is that of the court, only for the parties litigant in the suit, and to the extent only of the power to subject the property to the rights of suitors, subject to the paramount right of the State to tax the property according to its own laws; that the railway company was a citizen of South Carolina, and hence that the receiver, as plaintiff in his petition, represented a citizen of South Carolina, and proceeded against the petitioner Tyler, who was also a citizen of that State; that the amount involved was less than gives jurisdiction to the Circuit Courts of the United States; that, on the grounds indicated, the court had no jurisdiction, and its order was void; and that, therefore, the order of commitment and fine was void. In conclusion petitioner insisted:

"1st. That the injunction proceeding by the receiver is a suit against the State of South Carolina; that to enjoin the functionary is to forbid the function of the State to tax by its own laws and fix and assess its amount by its own procedure; and that your petitioner, as the officer charged with this state function, is sued by the receiver, which is in fact a suit against

the State, and contrary to the Eleventh Amendment of the Constitution of the United States.

"2d. That under the laws of the United States and of the State the remedy of the owner or taxpayer is ample by proceeding at law, and he can have none in equity, which is denied by the statute of the State and on general principles of equity practice, and that the exigency which induced the appointment of a receiver does not in any respect change the legal aspect of the case, but makes the order of the court of the United States illegal, void and without jurisdiction.

"3d. That to fine and imprison your petitioner for action as a legal officer, under and according to the valid laws of South Carolina, is to deny the authority of the State itself, by making it impossible for the State to execute its laws by agents, except under penalties which the United States courts cannot impose as an obstruction to the functions of the State itself.

"Wherefore your petitioner insists that he is held in custody against law, and contrary to the Constitution of the United States, the supreme law of the land."

This case was argued with Nos. 16, 18 and 19 original, *post*, page 191.

Mr. Ira B. Jones, (with whom was *Mr. Samuel Lord* on the brief,) for the petitioners in all the cases.

I. While a proceeding by *habeas corpus* is a civil proceeding, *Ex parte Tom Tong*, 108 U. S. 556; *Robb* v. *Connolly*, 111 U. S. 624, contempt of court is a specific criminal offence, and the imposition of the fine is a judgment in a criminal case. *New Orleans* v. *Steamship Co.*, 20 Wall. 387; *Ex parte Kearney*, 7 Wheat. 38. Ever since the case of *Bollman* v. *Swartwout*, 4 Cranch, 75, it has not been doubted that the Supreme Court has authority to issue *habeas corpus* where a person is in custody under the warrant or order of any court of the United States. The struggle since has been as to the extent of the inquiry the court could make into the causes of the commitment.

Mr. Jones's Argument for Petitioners.

Previous to the act of March 31, 1891, establishing the Circuit Court of Appeals, and defining the jurisdiction of the United States courts, it was settled that the Supreme Court, having no jurisdiction of criminal cases by writ of error or appeal, could not, on *habeas corpus*, examine into the sufficiency of the evidence on which the judgment and sentence of the court was founded, but could, and it was its duty to do so, discharge by means of *habeas corpus* any person imprisoned under sentence of any court of the United States, in a criminal case, where there was a want of jurisdiction or an excess of the jurisdiction, power or authority of the committing court in the judgment and sentence imposed. *Ex parte Hamilton*, 3 Dall. 17; *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Watkins*, 3 Pet. 193, 7 Pet. 568; *Ex parte McCardle*, 6 Wall. 318, 7 Wall. 506; *Ex parte Metzger*, 5 How. 176; *Ex parte Kaine*, 14 How. 103; *Ex parte Wells*, 18 How. 307; *Ex parte Milligan*, 4 Wall. 2; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Yerger*, 8 Wall. 85; *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Mason*, 105 U. S. 696; *Ex parte Curtis*, 106 U. S. 371; *Ex parte Carll*, 106 U. S. 521; *Keyes* v. *United States*, 109 U. S. 336; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Crouch*, 112 U. S. 178; *Ex parte Bigelow*, 113 U. S. 328; *Ex parte Wilson*, 114 U. S. 417; *Ex parte Fisk*, 113 U. S. 713; *In re Ayers*, 123 U. S. 443.

If, therefore, the act establishing Circuit Courts of Appeals, approved March 3, 1891, authorizes the Supreme Court to review on appeal by defendants in criminal cases, the judgment of the court below on such questions as are raised in the application for *habeas corpus* in these cases, there seems to be no obstacle in the way now of this court in proper cases extending the uses of *habeas corpus* to an inquiry into the sufficiency of the evidence on which the judgment was founded and into errors of law beyond jurisdictional errors.

This sweeping change in the appellate jurisdiction of this court seems clearly to allow defendants in criminal cases a right to appeal direct to this court in such cases above provided.

II. If, however, we are mistaken in this respect, and the inquiry is limited to jurisdictional errors, then we submit that the Circuit Court "has acted without jurisdiction, or has exceeded its powers to the prejudice of the party seeking relief," *In re Lane*, 135 U. S. 443; because the sheriffs in making the levy for taxes were acting as the duly authorized law officers and representatives of the State of South Carolina, acting in obedience to the requirements of the valid laws of the State and the commands of a superior officer; and that since the State cannot be made a party to these proceedings without her consent, neither can her representatives. The test whether an officer of the State can be sued, is whether the officer is a trespasser. If the officer can justify his act under a valid constitutional law of the State, he is not a trespasser and is the representative of the State which cannot be sued without its consent. *Virginia Coupon Cases*, 114 U. S. 269; *Hagood* v. *Southern*, 117 U. S. 52. See also *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446; *Poindexter* v. *Greenhow*, 114 U. S. 270, 288; *Osborn* v. *United States Bank*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *United States* v. *Lee*, 106 U. S. 196.

III. We concede, in its fullest scope, the doctrine that property in the hands of a receiver appointed by a court is in the custody of the law and cannot be interfered with by a trespasser or to enforce a private claim, and that any such interference with the receiver's possession may be punished as a contempt of the court. Our contention is that receiver's possession is subordinate to the right of the State in the exercise of its sovereign power, in its own authorized way, to collect its taxes which are essential to its existence against all property within its jurisdiction.

This question came up before Mr. Justice Brewer in the case of *Central Trust Co.* v. *Wabash, St. Louis &c. Railroad*, 26 Fed. Rep. 11, in which a receiver prayed protection from the payment of a tax. Injunction to restrain tax collector was refused. The same question was presented to Mr. Justice Blatchford in *Stevens* v. *Midland Railroad*, 13 Blatchford, 104. The court denied the application of a receiver for

injunction against a tax officer. To exempt property in the hands of a receiver from summary seizures for taxes is: (1) Inconsistent with the power of taxation; (2) inconsistent with the revenue laws of the State in which it is situated; (3) contrary to the settled policy of the United States, which is, not to interfere with the revenue laws of the State; and (4) contrary to the spirit, if not to the letter, of Amendment XI to the Constitution.

The orderly administration of justice requires non-interference with property in the hands of the court, without the court's permission. This is a settled principle of law. On the other hand, it is just as clearly settled that the State is sovereign in the matter of her revenue laws which do not trench upon the federal Constitution, and that a summary collection of revenues, essential to the existence of the State, is necessary. When these principles conflict, which must yield? There can be no orderly administration of justice without government, and there can be no government without revenue. The power to tax, and the right to speedy process for its collection, must stand as the first cause, the bed-rock of the government, and any other power of government which conflicts with this must yield.

Mr. Hugh L. Bond, Jr., (with whom were *Mr. Henry Crawford* and *Mr. J. S. Cothran* on the brief,) for the respondents in the cases of Tyler, Gaines and Ryser, petitioners in Nos. 16, 17 and 18.

Mr. D. A. Townsend, Attorney General of the State of South Carolina, filed a brief for all the petitioners.

Mr. Joseph W. Barnwell for the respondent in No. 17, Tyler, petitioner.

Mr. John Randolph Tucker closed for all the petitioners.

In concluding the argument, I propose to insist, without waiving the other points on my brief, only on the point that the suit was in fact a suit against the State.

Referring for the history of the Eleventh Amendment to the opinion in *In re Ayers*, 123 U. S. 443, Judge Campbell's brief in *New Hampshire* v. *Louisiana*, 108 U. S. 76, *Hans* v. *Louisiana*, 134 U. S. 22, *McGahey* v. *Virginia*, 135 U. S. 662, 684, and *Pennoyer* v. *McConnaghy*, 140 U. S. 1, I remark that the mandatory language of that amendment is emphatic. "The judicial power shall *not* be construed," etc. It is a constitutional rule of construction, to prevent by direct or indirect methods a suit against a State in a court of the United States.

Nor need the State be sued by name, to bring the case within the mandate of the amendment. Cases *supra*, and the overruling of the *dictum* in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, in *Georgia* v. *Madrazo*, 1 Pet. 110, 7 Pet. 627, *sub nom. Madrazzo*, commented on by the court in *In re Ayers*, *supra*.

In *In re Ayers*, *supra*, and cases cited therein, it is settled that if the act of a state officer is contrary to the Constitution of the United States, he cannot protect himself against suit, by a claim that he represents the State. But where an officer of the law does an act under valid and constitutional authority of the government of his State, in obedience to its order and in pursuance of his sworn duty as its officer, the act is not his own, it is the *act of the State by its own will and mind and hand*, the hand and will and mind of its own officer. If those by whom *alone* the State can act may be punished or prevented, it is folly to say the State is not punished and prevented. To enjoin the officers through whom only it can act is to enjoin the State; to sue these is to sue the State. If these are deterred by such proceedings from acting, it is deterred from action; is a State maimed and helpless; a State only in name; a sovereign without will or capacity to act at all.

If Congress (*Collector* v. *Day*, 11 Wall. 113) cannot tax the salary of a state officer, because thus impairing state autonomy, how can a federal court fine him for doing his duty, or imprison him to prevent his doing it? He is vicariously a victim for the State. If property he holds only for it is taken

from him, or if he be compelled to surrender it, *he* is deprived of nothing, but the State is. If so, is not the State sued contrary to the Eleventh Amendment, or decreed against without a hearing? without due process of law secured by the Fifth Amendment?

That the law under which this tax is claimed is not against the federal Constitution is clear. *Murray* v. *Hoboken Co.*, 18 How. 272; *Cheatham* v. *United States*, 92 U. S. 85; *Stanley* v. *Albany Supervisors*, 121 U. S. 535; *Tennessee* v. *Sneed*, 96 U. S. 69; *Shelton* v. *Platt*, 139 U. S. 591, citing *Synder* v. *Marks*, 109 U. S. 189. Nor is it against the state constitution. *Charlotte, Columbia &c. Railroad* v. *Gibbes*, 142 U. S. 386; *Whaley* v. *Gaillard*, 21 S. C. 510.

The case stands then free of the only objection to the officer's claim of immunity from suit, because he represents the State. He has no interest in the *lis contestata*, except as her representative. The assessor and sheriff exercised official *discretion*, and therefore represented the State, as has been often held, and how can judicial action be substituted for legislative or executive discretion? *State Railroad Tax Cases*, 92 U. S. 575; *Stanley* v. *Albany Supervisors*, and other cases, *supra*.

In all such cases, as the right or interest involved is that of the State, and none other, the State is a *necessary party* to any suit, where the judgment affects it, and unless made a party, *no judgment is lawful;* and it cannot be made a party because of the Eleventh Amendment. This is strongly stated by this court in *Hagood* v. *Southern*, 117 U. S. 52, 71. The court says that no decree can be made, because the State is no party; and the State may refuse to be a party.

In *Georgia* v. *Madrazo*, 1 Pet. 110, *Cunningham* v. *Macon &c. Railroad*, 109 U. S. 446, and *Louisiana* v. *Jumel*, 107 U. S. 711, property held by state officers without right, and against the provisions of the Constitution of the United States, was held to be beyond the reach of a federal court, because the officers held for the State, and to oust their possession would be to oust the possession of the State. This cannot be done but by making the State a party, which the Eleventh Amendment forbids. See in accord with this, the

case of *Queen* v. *Lords Commissioners of the Treasury*, L. R. 7 Q. B. 387, 400.

With these settled principles, let us see now what was done in these cases.

In three of them, the lien for taxes attached in November, 1891, and the receiver was not appointed in these cases until May and August, 1892. The receivers took subject to the legal lien, the lien of the *State*. That lien was made effectual by levy under which the sheriff held possession. This lien was paramount to all, protected by receivers. Mere levy did not disturb the receiver's possession. *Albany Bank* v. *Schermerhorn*, 9 Paige, 372; *S. C.* 38 Am. Dec. 551; *Hewitt* v. *Midland Railroad*, 12 Blatchford, 452, 13 Ibid. 104; *Georgia* v. *Atlantic & Gulf Railroad*, 3 Woods, 437; *Central Trust Co.* v. *Wabash &c. Railway*, 26 Fed. Rep. 11.

But the court, by its order, set at naught the lien of the State, and its levy, without making the State a party. This could not be done. That lien and levy were adjudged null without a hearing. The State was a necessary party, and the decree made in its absence was void.

By a mandatory injunction upon its officers, the court divested the State of its possession, and as it was a necessary party, before this could be done the order was absolutely void.

Finally the marshal seized the property in the hands of the State and returned it to the receiver. Can there be doubt that this was *ultra vires*, when the State was not, and could not be made a party? *Hagood* v. *Southern; Cunningham* v. *Macon; Louisiana* v. *Jumel*, *supra*.

The court did all this on a claim to decide on the amount of tax due, in disregard of the *quasi* judicial action of the Boards of the State, action which this court has held conclusive on the taxpayer, except by payment and suit to recover back. *Hagar* v. *Reclamation District*, 111 U. S. 701, 710; *Stanley* v. *Albany Supervisors*, 121 U. S. 535.

For refusal to obey the order of the court and to surrender the possession held by his officers for the State, they were imprisoned to compel obedience. The officer in prison was thus disabled from holding and protecting the State's rights of

property. Sustain this order, and the tax due the State may be enjoined perpetually, and its power to collect or adjudicate it will be destroyed. Its tax law will be nullified, and the court will, by its receiver, sit in the seat of its sovereignty.

Every injunction is based on an *equity* of plaintiff against some *legal* right of defendant, and the court is bound to adjust the conflict. But how can it do this without deciding how much tax is due to State? and how do that unless the State be a party? and how can it make the State a party?

From doing both of these the court is excluded; from the one by fundamental principles of right, from the other by the Constitution of the United States. In this dilemma, only one course is left: dismiss the bill, as without jurisdiction, and discharge the prisoners.

But it is insisted, that this property was in *custodia legis*, and that this makes a difference.

All the cases cited are cases of corporations, municipal or private. None touch the case of a State. In cases of corporations the court of the receiver may compel the party to submit to its intervention. But this cannot apply to a State.

It is said, the receiver's court will by its action decree what is *rightly* due the State. But the answer is conclusive, that such decision cannot be made against the claim of the State, unless the State be made a party. But it is not a party, and cannot be made one. How, then, can the court decide? The real issue is, not whether the federal court will or not decide justly, but where is the *jus decidendi*. The Eleventh Amendment declares it is not with the federal court unless the State waives its immunity; and *Hagood* v. *Southern*, *supra*, decides that the State cannot be compelled to be a party; and no decision can be made against its right where it is not a party. Can the receiver's court by *sequestration* of the property within the reach of the state process, by so holding it, through fine and imprisonment, as to prevent remedy, drive the State to this dilemma? "Take nothing for your claim, or what that court will decide you entitled to." This would be a judicial strategy in fraud of the Eleventh Amendment. It would be equivalent to saying: The receiver's court will

decide against you without a hearing, contrary to fundamental principles, or will compel you to be a party to this suit, contrary to your immunity under Eleventh Amendment. With the *jus decidendi* denied to the federal court by that amendment, it would usurp it by duress on the officers of the State, and by a forceful withdrawal of all property from state process.

It may be plausibly argued, that for wrongful levy on property not subject to levy, or for excessive levy, or for obstruction of the railway, the court could enjoin the officer. But, as in *Rowland's Case*, 104 U. S. 604, the court has in excess of jurisdiction taken all out of the sheriff's hands, and imprisoned them for holding any of it, until all should be given up. This excess makes the order wholly void.

The court could not rightfully decide the fundamental question of *quantum* of tax. That was *coram non judice*. It should have sent the receiver to the state tribunals, where the State consented to the adjudication of its right, and should not have assumed or enforced a jurisdiction to try a tax right of the State without its consent, and in defiance of its constitutional immunity.

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

Unless the order of commitment was utterly void for want of power, this application must be denied. The writ of *habeas corpus* is not to be used to perform the office of a writ of error or appeal; but when no writ of error or appeal will lie, if a petitioner is imprisoned under a judgment of the Circuit Court, which had no jurisdiction of the person or of the subject matter, or authority to render the judgment complained of, then relief may be accorded. *Ex parte Parks*, 93 U. S. 18; *Ex parte Terry*, 128 U. S. 289; *Neilsen, Petitioner*, 131 U. S. 176. And even if the contention were well founded, which is not at all to be conceded, that under the fifth section of the Judiciary Act of March 3, 1891, a writ of error might be brought to review such a judgment as that before us, and

that thereby our appellate jurisdiction was enlarged, we should still decline to consider the whole record for error merely, but only to ascertain whether the judgment was absolutely void.

The property in question was in the custody of the Circuit Court, in a cause within its jurisdiction, and protected by injunction. The power exercised was the power to protect the property in the custody of the court from invasion, and in order to sustain the receiver's application the ordinary grounds of equity interposition were not required to be set forth. Whether inadequacy of remedy at law in respect of the disputed taxes, or the requisite jurisdictional amount, or diverse citizenship, were shown to exist, was not and could not be matter of inquiry. But it may be observed that diverse citizenship is not material in ancillary and dependent proceedings, where jurisdiction exists over the subject of the litigation; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Morgan's Co.* v. *Texas Central Railroad*, 137 U. S. 171, 201; that the objection of adequacy of legal remedy as here presented goes to the want of equity and not to want of power; *Reynes* v. *Dumont*, 130 U. S. 354; and that an apparent defect of jurisdiction for lack of a matter in controversy of sufficient pecuniary value can be availed of only by appeal or writ of error. *In re Sawyer*, 124 U. S. 200, 221. In the latter case, the distinction between an absolute want of power and its defective exercise, between cases where the subject matter falls within a class over which equity has jurisdiction and those where it does not, is clearly pointed out and the authorities cited.

No rule is better settled than that when a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned, and cannot be disturbed without the leave of the court; and that if any person, without leave, intentionally interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor. *Wiswall* v. *Sampson*, 14 How. 52; *Taylor* v. *Carryl*, 20 How. 583; *Davis* v. *Gray*, 16 Wall. 203; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Barton*

v. *Barbour*, 104 U. S. 126; *Gumbel* v. *Pitkin*, 124 U. S. 131.

Ordinarily the court will not allow its receiver to be sued touching the property in his charge, nor for any malfeasance of the parties, or others, without its consent; and while the third section of the act of Congress of March 3, 1887, 24 Stat. 552, c. 373, now permits a receiver to be sued without leave, it also provides that "such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." Neither that, nor the second section, which provides that the receiver shall manage the property "according to the valid laws of the State in which such property shall be situated," restricts the power of the Circuit Courts to preserve property in the custody of the law from external attack.

In this case, instead of issuing an attachment against the petitioner at once for forcibly seizing the rolling stock of this railroad under the circumstances appearing upon the face of the record, the court adopted the course of serving him with a rule to show cause, and with an order restraining him, in the meantime, from interference with the property. The petitioner refused to release the property upon request of the receiver, and persisted in his attempt to hold possession thereof by force in disregard of the order of the court.

The general doctrine that property in the possession of a receiver appointed by a court is *in custodia legis*, and that unauthorized interference with such possession is punishable as a contempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, but this does not justify a physical invasion of such custody and a wanton disregard of the orders of the court in respect of it. The maintenance of the system of checks and

balances characteristic of republican institutions requires the coördinate departments of government, whether federal or state, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle.

The levy of a tax warrant, like the levy of an ordinary *fieri facias*, sequestrates the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face.

The acceptance of the rule has been general, and but few decisions were cited on the argument in illustration of its application.

The Court of Appeals of Maryland, in *Prince George's County Commissioners* v. *Clarke*, 36 Maryland, 206, 218, stated the question presented to be "whether, after a decree has been passed by a court of equity for the sale of real estate and trustees have been appointed to make such sale, a collector of taxes has the power to seize and sell the same, or any part thereof, for taxes due." And the court thus proceeded: "The decree was passed the 9th of November, 1865. The taxes for which the land was sold were assessed for the years 1866 and 1867, and the collector's sale took place the 29th of September, 1870. The land in the meantime had been sold by the trustees, under the decree in the equity case, but exceptions having been filed to the sale, the question of its ratification was still pending. So that both at the time of the imposition of the taxes and at the time of the collector's sale, the land in question was under the control and jurisdiction of a court of equity. Under these circumstances it was not admissible for a collector to step in, and by a summary distress and sale divest the court

of its jurisdiction, and transfer the question of title to another tribunal. His plain and obvious duty was to apply to the court for the payment of the taxes due, and as they had full power, the presumption is, that they would have directed their payment through their agents, the trustees, in a manner that would have occasioned no unnecessary delay, while at the same time the rights of all interested would have been properly protected."

In *Greeley* v. *Provident Savings Bank*, 98 Missouri, 458, 460, payment of taxes upon intervention of the tax collector in a case wherein a receiver had been appointed, was resisted upon the ground of lapse of time, and the court said: "The amount of the taxes was undisputed, and the receiver had in his hands funds sufficient to pay them, and we think the order should have been made. It may be conceded that the State did not have an express lien upon the assets that went into the hands of the receiver, but it had a right paramount to other creditors to be paid out of those assets, . . . a right which it could have enforced through its revenue officers by the summary process of distress, . . . but for the fact that the property and assets of its debtor had passed into the custody of its courts; whose duty it was in the administration and distribution of those assets to respect that paramount right, upon the untrammelled exercise of which depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it; and to make no order for the distribution of assets *in custodia legis* except in subordination to that right. The ordinary revenue officers of the State being deprived of the ordinary means of securing the State's revenue from the fund in the custody of the court, the duty devolved upon the court to be satisfied, and upon the receiver to see, that the taxes due the State were paid before the estate was distributed to other creditors; and we can conceive of no scheme of administration that the court could properly adopt by which the State's demand could be reduced to the level of an ordinary debt, and be cut off unless presented to the court for allowance within a given time." And see *Central Trust Co.* v. *N. Y. & Northern Railroad*, 110 N. Y. 250.

County of Yuba v. *Adams*, 7 California, 35, 37, was also a case of intervention, and the view of the court was thus expressed: "The levy of the tax gave to the intervenor a judgment and lien on the property assessed, having the force and effect of an execution, which might be enforced in the same manner as other executions. . . . This lien was not divested by the subsequent proceedings taken by Brumagim and others; but the fund, being in the custody of the law, was not liable to seizure, and the proper remedy was by direct application to the court having the fund in possession."

We do not understand any other or different rule to have obtained in the courts of South Carolina. Indeed, in *Hand* v. *Savannah & Charleston Railroad*, 17 S. C. 219, the court, without objection, passed upon a claim for taxes by the State against the property of the railroad company in the hands of the court, and held that it could not be maintained.

If such be the ordinary rule in the state courts, it is quite apparent that it is the only one that can be properly applied where property is in the custody of the courts of the United States. Their officers are the agents of the United States, and, without an order of the court appointing them, they are in duty bound to hold the property and refer those who would interfere with it to the court.

In *Georgia* v. *Atlantic & Gulf Railroad*, 3 Woods, 434, an application was made to the Circuit Court of the United States for the Southern District of Georgia on behalf of the State of Georgia for leave to sell the depots, freight houses, passenger houses, and offices of the railroad company, by virtue of a writ of *fieri facias* which had been levied on the property to enforce the collection of taxes due the State, and the levy suspended by affidavit of illegality filed by the railroad company under a provision of the Code of Georgia to that effect. A receiver had been appointed by the Circuit Court after the levy, and had possession subject to the prior lien of the execution which was being contested. Mr. Justice Bradley, for reasons given, held that the levy was void, and denied the application for leave to proceed with the execution, while he declared that the court would take care that the full

right of the State should be preserved so far as it should be brought judicially to the notice of the court.

In *Western Union Tel. Co.* v. *Atl. & Pac. Tel. Co.*, 7 Bissell, 367, Judge Drummond decided that proceedings in the state court on the part of one of the parties to condemn a right of way of the other, in the exercise of the power of eminent domain, was invalid, because the property was in the possession of the Circuit Court of the United States, through receivers, "and that, being so, no action could take place in the state court affecting it without the consent first obtained of this court."

In *Covell* v. *Heyman*, 111 U. S. 176, 182, where the question arose as to the replevin by process from a state court of property held by a United States marshal, which this court held could not be permitted, Mr. Justice Matthews, delivering the opinion, said: "The forbearance which courts of coördinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and, therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coëxist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void."

This principle is applicable here, for whether the sheriff were armed with a writ from a state court or with a distress warrant from a county treasurer, this property was as much withdrawn from his reach as if it were beyond the territorial limits of the State.

The inevitable conclusion that this must be so, if constitu-

tional principles are to be respected in governmental administration, does not involve interruption in the payment of taxes or the displacement or impairment of the lien therefor, but, on the contrary, it makes it the imperative duty of the court to recognize as paramount, and enforce with promptness and vigor, the just claims of the authorities for the prescribed contributions to state and municipal revenue. And when controversy arises as to the legality of the tax claimed there ought to be no serious difficulty in adjusting such controversy upon proper suggestion. The usual course pursued in such cases is by intervention *pro interesse suo*, as in the instance of sequestration. 2 Dan. Ch. Pl. & Pr. 4th ed. 1057, 1744; *Savannah* v. *Jesup*, 106 U. S. 563, 564. The tax collector is a ministerial officer, *Erskine* v. *Hohnbach*, 14 Wall. 613; *Stutsman County* v. *Wallace*, 142 U. S. 293; and no reason is perceived why he should not bring his claim to the attention of the court, while, on the other hand, it is clearly the duty of the receiver to do so, if he contends that the taxes are illegal. If found valid, they must be paid; if invalid, the court will so declare, subject to the review of the appellate tribunals.

The courts of the United States have always recognized the importance of leaving the powers of the State in respect to taxation unimpaired. Where the questions involved arise under the state constitution and laws, the decisions of its highest tribunal are accepted as controlling. Where the Constitution and laws of the United States are drawn in question, the courts of the United States must determine the controversy for themselves.

Such was the aspect of this case. The receiver had denied the validity of a distinctive portion of the annual taxes, and under the direction of the court had proceeded by bill to test the question in reference to the levy for the previous fiscal year. Injunction had been granted, issues made up, and the case stood for final hearing. The alleged illegality existed in the levy for the current year. The receiver paid the undisputed taxes, and, upon the forcible intervention of the collectors to compel payment of the balance, brought the controverted point again to the attention of the court in his

application for the protection of the property. So far as the order before us is concerned, we are not called upon to review the grounds upon which the assertion of illegality is rested. It has been repeatedly and uniformly held by this court that in a proper case for equity interposition an injunction will lie to restrain the seizure of property in the collection of taxes imposed in contravention of the Constitution of the United States. *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Dodge* v. *Woolsey*, 18 How. 331; *Allen* v. *Baltimore & Ohio Railroad*, 114 U. S. 311; *In re Ayers*, 123 U. S. 443; *Shelton* v. *Platt*, 139 U. S. 591. Whether or not the particular case is one calling for that measure of relief, it is for the Circuit Court to determine in the first instance, and its action cannot be treated as a nullity.

It is said that any restraint upon or correction of unjust and illegal assessment and taxation by judicial interposition is inconsistent with the revenue laws of South Carolina, which only permit payment under protest and recovery back at law, and our attention is called to statutory provisions forbidding the courts to interfere with the collection of taxes by any writ, process or order, and to various decisions thereunder. In *State* v. *County Treasurer*, 4 S. C. 520, the subject was considered whether the legislature was precluded by the state constitution, prescribing the jurisdiction of the Circuit Courts, from taking away the remedy by prohibition commonly resorted to in the case of illegal taxation, and it was held that it was not, a vigorous dissenting opinion being delivered by Chief Justice Moses, who said (p. 539): "The power to tax is the most extensive and unlimited of all the powers which a legislative body can exert. It is without restraint, except by constitutional limitations. To tie up the hand that can alone resist its unlawful encroachments would not only render uncertain the tenure by which the citizen holds his property, but would make it tributary to the unrestrained demands of the legislature."

In *State* v. *Gaillard*, 11 S. C. 309, application was made to the court for a writ of mandamus, directed to the county treasurer, commanding him to receive bills of the Bank of

South Carolina for taxes, and the writ was refused. Mr. Justice McIver concurred on the ground that the constitutionality of the prohibitory act had been settled in the case of *State* v. *County Treasurer*, just cited.

In *Chamblee* v. *Tribble*, 23 S. C. 70, the action was brought to enjoin the county treasurer from collecting certain taxes for railroad purposes. The constitutionality of these provisions was again adjudged, Mr. Justice McIver concurring as before, solely on the ground of *stare decisis*, while Mr. Justice McGowan dissented.

In *Bank* v. *Cromer*, 35 S. C. 213, the court granted a mandamus to correct an assessment, and held that the statute did not prohibit the courts from exercising proper control over officers charged with the listing and assessment of property for the purpose of taxation when proceeding contrary to law.

This was followed by the passage of the act of December 24, 1892, providing that the assessment of property for taxation should be deemed and held to be a step in the collection of taxes, and inhibiting interference by mandamus, summary process or any other proceeding, with official action in respect of assessments.

Manifestly the object of this legislation was to confine the remedy of the taxpayer for illegal assessment and taxation, to the payment of taxes under protest, and bringing suit against the county treasurer for recovery back, but all this is nothing to the purpose. The legislature of a State cannot determine the jurisdiction of the courts of the United States, and the action of such courts in according a remedy denied to the courts of a State does not involve a question of power.

The reasonableness of the contention that it would have been wiser, in this instance, for the Circuit Court to have directed the receiver to pay these taxes and bring suits at law in nine different courts against the county treasurers of as many counties, to recover them back, need not be passed upon.

The jurisdiction exercised by the Circuit Court had relation to the property in its custody, and the proceeding before us relates only to its exercise of power in the protection of that property from unauthorized seizure.

The stress of the argument, however, on behalf of the petitioner is placed upon the proposition that this proceeding is void, because it is in fact a suit against the State, and forbidden by the Eleventh Amendment. But this begs the question under consideration. The petitioner was either in contempt or he was not. This property was in the custody of the Circuit Court under possession taken in a cause confessedly within its jurisdiction, and if such possession could not be lawfully interfered with, the petitioner was in contempt. And, apart from the question of the validity of such legislation, we know of no statute of South Carolina that attempts to empower its officers to seize property in the possession of the judicial department of the State, much less in that of the United States.

The object of this petition was, we repeat, to protect the property, but even if it were regarded as a plenary bill in equity properly brought for the purpose of testing the legality of the tax, we ought to add that in our judgment it would not be obnoxious to the objection of being a suit against the State. It is unnecessary to retravel the ground so often traversed by this court in exposition and application of the Eleventh Amendment. The subject was but recently considered in *Pennoyer* v. *McConnaughy*, 140 U. S. 1, in which Mr. Justice Lamar, delivering the opinion of the court, cites and reviews a large number of cases. The result was correctly stated to be that where a suit is brought against defendants who claim to act as officers of a State and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State; or, for compensation for damages; or, in a proper case, for an injunction to prevent such wrong and injury; or, for a mandamus in a like case to enforce the performance of a plain legal duty, purely ministerial; such suit is not, within the meaning of the amendment, an action against the State.

And while it was conceded that the principle stated by Chief Justice Marshall in the leading case of *Osborn* v. *Bank of the United States*, 9 Wheat. 738, that "in all cases where

jurisdiction depends on the party, it is the party named in the record," and that "the Eleventh Amendment is limited to those suits in which a State is a party to the record," had been qualified to a certain degree in some of the subsequent decisions of this court; yet it was also rightly declared that the general doctrine there announced, that the Circuit Courts of the United States will restrain a state officer from executing an unconstitutional statute of the State, when to execute it would be to violate rights and privileges of the complainant that had been guaranteed by the Constitution and would do irreparable damage and injury to him, has never been departed from.

The views expressed in *United States* v. *Lee*, 106 U. S. 196; *New Hampshire* v. *Louisiana*, 108 U. S. 76; *In re Ayers*, 123 U. S. 443; *Hans* v. *Louisiana*, 134 U. S. 1; *McGahey* v. *Virginia*, 135 U. S. 662, and numerous other cases, render further discussion unnecessary.

The levies here were excessive, were made in a large part on property other than that of the defendants in the warrants, and in such a way and on such property as to obstruct the operation of the railroad. No leave of court was sought, and it was known that the legality of the amount unpaid was disputed by the receiver, and that identical taxation had been previously held by the court to be illegal. The sheriff declined upon request to release the property from seizure, or to yield to the order of the court.

Such conduct was not to be tolerated, and the court was possessed of full power to vindicate its dignity and to compel respect to its mandates. Its action to that end is not subject to review upon this application.

The petition for the writ of *habeas corpus* is *Denied.*

MR. JUSTICE FIELD did not hear the argument and took no part in the consideration of this and the following cases.

In re RISER, *Petitioner*, No. 16, Original: *In re* TYLER, *Petitioner*, No. 18, Original: *In re* GAINES, *Petitioner*, No. 19, Original.

These cases were all argued with *In re Tyler*. See *ante*, pages 172 to 180.

Opinion of the Court.

MR. CHIEF JUSTICE FULLER: The differences between the general facts in these cases and in that just considered are not controlling as to the result, and, for the reasons given in the opinion in that case, the applications for the writ of *habeas corpus* are severally

Denied.

In re HUMES, Petitioner.

ORIGINAL.

No. 20. Original. Argued April 17, 1893. — Decided April 24, 1893.

A judgment of a Circuit Court to which a writ of error had been sued out, with a supersedeas bond given, being affirmed here and remanded to the trial court in the usual way, that court, on motion, summoned in the sureties, and, although they proposed to interpose a plea of partial payment, proceeded to render judgment against them and the principal for the full amount of the original judgment with interest and costs. An appeal to the Circuit Court of Appeals having been dismissed for nonjoinder of the original defendant, they applied to this court for a writ of mandamus, commanding the court below to vacate its judgment in so far as it was rendered against the sureties, and to execute the mandate by entering judgment and ordering execution against the principal only. *Held*, that that judgment was rendered in the exercise of judicial determination, and not in the discharge of a ministerial duty, and that the petitioners' remedy, if they deemed themselves aggrieved, was by writ of error.

THE case is stated in the opinion.

Mr. W. Hallett Phillips for petitioners.

Mr. George T. White, opposing. *Mr. William Richardson* and *Mr. Francis Martin* were with him on the brief.

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

The Third National Bank of Chattanooga recovered a money judgment in the Circuit Court of the United States for the Northern District of Alabama against Eugene C.

Gordon, April 14, 1888, to reverse which Gordon sued out a writ of error from this court, giving a supersedeas bond in the usual form with Milton Humes and C. C. Harris as sureties thereon. March 21, 1892, the judgment of the Circuit Court was affirmed by this court, and the mandate was thereafterwards issued in the usual form. On the 12th of October, 1892, at a regular term of the Circuit Court, the bank made a motion upon notice for judgment against the defendant Gordon and his sureties. To this motion Humes and Harris appeared and filled a demurrer, which was overruled, and they then proposed to interpose a plea of partial payment, which the court refused to permit to be filed or to hear any evidence upon that subject, whereupon, without any other evidence than the supersedeas bond and the mandate of this court, the Circuit Court rendered judgment against Gordon, Humes, and Harris for the principal, interest, and costs as shown in the original judgment. To this judgment Humes and Harris prosecuted a writ of error from the Circuit Court of Appeals, which dismissed the writ because Gordon did not join in it, and there was no summons and severance or equivalent proceeding. *Hardee* v. *Wilson*, 146 U. S. 179; *Mason* v. *United States*, 136 U. S. 581.

Thereupon Humes and Harris applied to this court for leave to file a petition for a writ of mandamus and for a rule requiring the judge of the Circuit Court to show cause why he should not be commanded to execute the mandate of this court by vacating the judgment in so far as it was rendered and directed execution against petitioners, and to enter judgment and direct execution against the defendant Gordon without more. Leave was granted to file the petition and a rule was entered thereon accordingly, to which return has been duly made. The judgment rendered by the Circuit Court recites that it appears to the satisfaction of the court that judgment was recovered against Gordon, a writ of error sued out and a supersedeas bond given; and further, from an inspection of the mandate of this court, that that judgment was affirmed, "and the said cause remanded with directions to this court to take such further proceedings in said case as right

and justice and the laws of the United States direct, in accordance with the opinion of the said Supreme Court." And judgment was then given, as before stated, against Gordon, Humes, and Harris.

We are of opinion that this application must be denied. The argument for petitioners is that the Circuit Court was proceeding wholly in execution of our mandate; that in doing so the judgment rendered went beyond its requirements; and that, therefore, petitioners are entitled to the remedy by mandamus to correct action in excess of the jurisdiction of the court below. *In re Washington & Georgetown Railroad*, 140 U. S. 91; *Gaines* v. *Rugg*, 148 U. S. 228. But, without considering or determining any other question, it is sufficient to observe that these petitioners were not parties to the original judgment, or to the writ of error, and were not so concerned in the execution of the mandate as to be entitled to ask for a review of the action of the Circuit Court in that regard by mandamus. The judgment against them was rendered in the exercise of judicial determination, and not in the discharge of a ministerial duty, and their remedy, if they deem themselves aggrieved, lies in a writ of error. *Ex parte Flippin*, 94 U. S. 348.

Writ denied.

MEXICAN CENTRAL RAILWAY COMPANY *v.* PINKNEY.

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

No. 1199. Submitted April 17, 1893. — Decided May 1, 1893.

To give a Circuit Court of the United States jurisdiction on the ground of diverse citizenship, the facts showing the requisite diverse citizenship must appear in such papers as properly constitute the record of the case.

The refusal by the trial court, during the progress of the trial, of leave to file a plea on the question of the plaintiff's citizenship and to permit issue

to be joined thereon is within the discretion of that court and is not reviewable here.

A person in charge of a joint railroad warehouse in a railroad centre in Texas, the property of one of several companies which unite in bearing the expense of maintaining it and in selecting its employés and in controlling its expenses, who makes no contracts and handles no moneys on behalf of another railroad centering there, but not participating in the selection of the employés and in controlling expenses, and who is not on the pay-roll of the latter company, is not its "local agent" upon whom process may be served under the provisions of the statutes of that State (Sayles Revised Civ. Stats. Art. 1223*a*).

The provisions of the Texas statutes which give to a special appearance, made to challenge the court's jurisdiction, the force and effect of a general appearance, so as to confer jurisdiction over the person of the defendant, are not binding upon Federal courts sitting in that State, under the rule of procedure prescribed by the fifth section of the act of June 1, 1872, as reproduced in Rev. Stat. § 914.

THE case is stated in the opinion.

Mr. A. T. Britton, *Mr. A. B. Browne* and *Mr. J. Lewis Stackpole* for plaintiff in error.

Mr. S. F. Phillips and *Mr. Frederic D. McKenney* for defendant in error.

MR. JUSTICE JACKSON delivered the opinion of the court.

This writ of error brings up for our consideration the general question whether the Circuit Court of the United States for the Western Dictrict of Texas acquired or rightfully exercised jurisdiction in the present case. This jurisdictional question arises as follows: The defendant in error, Alexander Pinkney, brought an action in that court against the plaintiff in error, the Mexican Central Railway Company, Limited, to recover damages for personal injuries alleged to have been sustained while in the performance of his duties as a brakeman in the employ of the company.

In his original petition the plaintiff alleged that he was a resident, citizen, and inhabitant of the county of El Paso, in the Western District of Texas; that the defendant was a citi-

zen of Massachusetts, being a corporation organized under the laws of that State, and having its principal office and place of business in Boston; and that it was owning, operating, and maintaining, or operating and maintaining, a line of railroad running from El Paso, in Texas, southwardly through the Republic of Mexico to the city of Mexico, and had an office in El Paso, and a local agent there named Harry Lawton.

Upon the filing of this petition a citation or summons was issued, and was served upon Lawton by the marshal of the district, who made return thereon as follows: "Executed on the 23d day of September, 1891, by delivering to H. Lawton, local agent of the Mexican Central Railway Company, at El Paso, Texas, in person, a true copy of this writ."

On the 30th of September, 1891, the defendant entered a special appearance for the purpose of excepting to the service of the citation, and filed a plea in abatement thereto, as follows:

"Now comes the defendant in the above-styled and numbered cause and, appearing only for the purpose of excepting to the service of the citation herein, and not appearing generally or for any other purpose, says:

"1st. That Harry Lawton, upon whom the citation herein was served as the local agent of this defendant, is not the president, vice-president, secretary, treasurer, general manager or any officer of this defendant, and, neither said Lawton nor any 'joint agent,' or agent at 'the joint warehouse' in the city of El Paso, Texas, has ever been designated by this defendant as its officer or agent upon whom citation might be served in this State and county, and is not authorized by this defendant to receive or accept citation on its behalf.

"2d. That before the establishment of what is known as the 'joint warehouse,' in the city of El Paso, Texas, over which said Lawton has control and management, importers of goods, their brokers and agents, were put to great trouble and inconvenience on account of the lack of the proper and necessary facilities for handling, examining, weighing and classifying goods billed to and from points in the Republic of Mexico upon their arrival at said city of El Paso over the various

roads hereinafter mentioned, and on account of said deficiencies owners of goods destined to points in the Republic of Mexico were frequently subjected to fines and penalties under the custom laws of Mexico on account of inaccuracies in the importation papers required therefor by said Mexican government; that in the interest and convenience of importers of American as well as of Mexican goods and merchandise, and in order thereby to increase the traffic of this defendant, and the other railroads hereinafter mentioned, there was established and since maintained said 'joint warehouse,' where goods, wares, and merchandise destined to points in said republic upon their arrival at said El Paso are transferred, deposited and held by the agent in charge thereof for examination, weighing and classification as aforesaid, prior to their entry into said republic, and where the import duties on goods coming from said republic over defendant's line may be conveniently paid and such goods transferred and turned over to the proper roads by the agent in charge of said 'joint warehouse.'

"3d. That at the solicitation of the railroads then jointly interested therein said warehouse was constructed and established in or about the year A. D. 1887, by the Atchison, Topeka and Santa Fé Railroad Company, on property owned by it then and since, until the same was duly passed by transfer to the Rio Grande and El Paso Railroad Company, which now and ever since said transfer has owned said warehouse and the property upon which the same is located.

"4th. That this defendant pays one-half of all the expense incurred in the maintenance and operation of said 'joint warehouse,' while said Rio Grande and El Paso Railroad Company, the Texas and Pacific Railroad Company, the Galveston, Harrisburg and San Antonio Railroad Company, and the Southern Pacific Railroad Company bear the balance thereof upon a tonnage basis.

"5th. That said Lawton and all 'joint agents' are selected by said Rio Grande and El Paso Railroad Company, and, with the approval of the other companies last aforesaid and this defendant, are appointed by said R. G. & E. P. R. R. Co.,

upon whose pay-rolls the names of such 'joint agents' and the members of their force appear as employés of said last-mentioned company, which pays the salaries and wages thereof.

"6th. That said Lawton, as 'joint agent,' and his force are under bond to said Rio Grande and El Paso Railroad Company, Texas and Pacific Railroad Company, Galveston, Harrisburg and San Antonio Railroad Company, and Southern Pacific Railroad Company, conditioned for the faithful performance of the duties required of them by said last-mentioned companies, to which reports are made, and of and for which money is collected and received by said Lawton.

"7th. That said Lawton, being unauthorized so to do, makes no contracts, and collects and handles no money for or on behalf of this defendant; is under no bond to it; keeps no accounts of or for it; is not on its pay-rolls; was not selected or appointed by it, and this defendant is without power to discharge him; all of which defendant is ready to verify. Wherefore defendant says that said Lawton is not its local agent or other employé or agent, that the service of the citation herein is insufficient, and prays that the return thereon be quashed."

On the 6th of April, 1892, by leave of the court, the plaintiff filed an amended petition setting out with considerable detail the facts upon which he based his claim that Lawton was an agent of the defendant upon whom service could be made, (which facts were not materially different from those set out in the plea and motion to quash the return to the citation,) and making substantially the same allegations as respects the personal injuries sustained by him as were contained in the original petition.

The plaintiff afterwards demurred to the plea in abatement and motion to quash the return to the citation, and the demurrer having been sustained and the service held to have been good, the defendant excepted. Thereafter the defendant filed an answer setting up (1) a general demurrer, (2) a general denial, and (3) a plea of contributory negligence; and the cause thereupon went to trial before the court and

a jury, resulting in a verdict and judgment in favor of the plaintiff for the sum of $3000.

On the trial of the case evidence was brought out on cross-examination of the plaintiff, who testified in his own behalf, which counsel for the defendant claimed tended to show that the plaintiff was not a citizen of the district in which the action was brought, and they thereupon moved the court to permit defendant to file a plea to the effect that plaintiff was not a resident or citizen of the State of Texas when the action was brought, and had never been a resident of that State, but was a deserter from the army of the United States and was a resident and citizen of Arizona Territory, where he had enlisted and where his troop was stationed, so as to raise and present an issue as to the jurisdiction of the court on the ground of citizenship of the plaintiff. But the court ruled that no amendment to the pleadings would be permitted, and that the issue could not then be raised, but that defendant might ask plaintiff as to his residence and citizenship. To which ruling the defendant excepted.

The assignments of error are as follows:

"First. The court erred in assuming jurisdiction over this cause, for the reason that the record herein fails to show the residence and citizenship of the parties to this suit at the time of the institution of the same.

"Second. The court erred in sustaining plaintiff's demurrer to defendant's exception to the service of the citation and motion to quash the return thereof, and in holding that the service on one Harry Lawton, as defendant's agent, was good — 1st, for the reason that plaintiff's demurrer was insufficient in law; 2nd, for the reason that the return of said citation was defective and insufficient; and, 3rd, for the reason that defendant's said exception and motion showed that said Lawton was not the local agent of defendant.

"Third. The court erred in refusing to permit issue to be joined and tried as to its jurisdiction, and in refusing to permit defendant to file its plea to the effect that plaintiff was not a resident and citizen of the State of Texas, as in his complaint averred, at the time his suit was filed, for the reason

that it was the right of the defendant to show, and it was the duty of the court to hear, at any stage of the trial, that plaintiff had wrongfully misstated his residence and citizenship in the attempt to fraudulently confer jurisdiction upon the court, which had in fact no jurisdiction, plaintiff being a resident and citizen of the Territory of Arizona and the defendant, as shown by the record herein, being a corporation created and existing under the laws of the State of Massachusetts, and therefore a resident and citizen of that State."

With respect to the first assignment of error, the point is made that the averment of citizenship of the plaintiff was not sufficiently set out in the amended petition, it being simply alleged therein that the "plaintiff is a resident, citizen, and inhabitant of El Paso County, Texas," which averment referred to the date of the filing of that petition, and not to the date of the commencement of the action. But the original petition, which was the first pleading filed in the case, made the proper averments, as respects the citizenship of the parties, to bring the case within the jurisdiction of the Circuit Court, and in our opinion that was sufficient. The rule is that, to give the Circuit Courts of the United States jurisdiction on the ground of the diverse citizenship of the parties, the facts showing the requisite diverse citizenship must appear in such papers as properly constitute the record of the case. The original petition is properly a part of the record; and, as that made the proper averments as to the citizenship of the parties, the point raised by the first assignment of error is not well taken.

The third assignment of error relates to matters purely within the discretion of the trial court, and is, therefore, of no avail. The proposition is not controverted that if it appears in the course of the trial that the controversy is not one of which the court could take cognizance, by reason of the citizenship of the parties to it, the Circuit Court has the right, and it is its duty, to dismiss the cause for the want of jurisdiction. But that is not this case. The question presented by this assignment of error is, that the court erred in refusing leave to file a plea, during the progress of the trial,

on the question of the plaintiff's citizenship, and in refusing to permit issue to be joined thereon. It is well settled that mere matters of procedure, such as the granting or refusing of motions for new trials, and questions respecting amendments to the pleadings, are purely discretionary matters for the consideration of the trial court, and, unless there has been gross abuse of that discretion, they are not reviewable in this court on writ of error. And even if such questions were reviewable here generally, on writ of error, they are not reviewable in this proceeding, because they do not go to the question of jurisdiction in the court below, which is the only question we can consider upon the present writ of error.

This brings us to the consideration of the questions presented by the second assignment of error, which are (1) as to whether, upon the record, as made by the plea in abatement and motion to quash the return to the citation, and the demurrer thereto, Lawton was a local agent of the defendant upon whom service could be made, within the general meaning of that term, and under the statutes of Texas relating to the method of obtaining service upon foreign corporations doing business in that State; and (2) as to whether, even if the service was bad, the special appearance of the defendant for the sole purpose of excepting to it, and, after its plea and motion were overruled, its filing a general answer, can be deemed in any sense a general appearance within the meaning of the statutes of Texas relating to such matters of practice, such as operated to confer jurisdiction on the Circuit Court of the United States.

The statute of Texas relating to service of process on foreign corporations is as follows:

"In any suit against a foreign, private, or public corporation, joint stock company or association, or acting corporation or association, citation or other process may be served on the president, vice-president, secretary, or treasurer, or general manager, or upon any local agent within this State, of such corporation, joint stock company, or association, or acting corporation or association." 1 Sayles' Rev. Civ. Stat. Texas, 417, Art. 1223*a*.

Under the allegations of the plea in abatement or motion to quash the return to the citation, and admitted by the demurrer, was Lawton a "local agent" of the defendant company, within the meaning of this statute? We think not. The joint warehouse in which Lawton was employed, and the ground on which it is located, was the property of the Rio Grande and El Paso Railroad Company. The whole force of employés and agents in that warehouse were selected by that railroad company, with the approval of certain other named companies, not including the defendant; they were on the pay-rolls of that company, and were bonded to it and the other companies; and Lawton made his reports of the moneys collected and received by him to those companies. The seventh paragraph of the plea in abatement makes this terse and comprehensive statement: "Lawton, being unauthorized so to do, makes no contracts and collects and handles no money for or on behalf of this defendant; is under no bond to it; keeps no accounts of or for it; is not on its pay-rolls; was not selected or appointed by it, and this defendant is without power to discharge him." The only ground upon which it could possibly be contended that Lawton was a local agent of the defendant company, within the meaning of this statute, is that the company paid one-half of the expense incurred in the maintenance and operation of the joint warehouse. But surely this fact alone would not create the relation of principal and agent between Lawton and the defendant. While it may be somewhat difficult to define the line between those who represent a foreign corporation and those who do not, within the meaning of the Texas statute quoted, it is perfectly clear to our minds that the relation between Lawton and the defendant was not such as to render him a "local agent" upon whom process against the company could be served; for in no proper sense was he the direct representative of the company, any more than a general ticket agent, employed by one of the great trunk lines running out of New York to the West, who sells a through ticket to the city of Mexico, which would entitle the holder of it to transportation to the city of Mexico over the road of the plaintiff in error, would be its

agent, although it might bear some proportion of the expense of the general office in New York.

The contention on the part of the defendant in error, however, is, that even admitting that the service in this case was not sufficient to bring the railway company into court, still, under the laws of Texas, as construed by the highest court of the State, the special appearance of the company for the purpose of objecting to the jurisdiction of the court in the premises, and its subsequent answer on the merits, after its motion to quash the return to the citation had been overruled, amounted to, or was in effect, a general appearance in the case, and gave the Circuit Court jurisdiction. In other words, the point is made that, as the state laws regulating the procedure and practice of the state courts in actions at law furnish the rules for procedure in like cases in the Circuit Courts of the United States, under section 914 of the Revised Statutes, and as, under the statutes of Texas, a special appearance of a defendant to question or object to the jurisdiction of the court for want of personal or proper service of process, even if his objection is sustained, becomes a general appearance to the next term of the court, therefore the court below in this case, by reason of the special appearance of the defendant, acquired jurisdiction of its person, notwithstanding the fact that the original service may have been insufficient and bad.

These statutes regulating the procedure in the state courts of Texas have been before this court for consideration in several recent cases. In *York* v. *Texas*, 137 U. S. 15, the question was whether this state legislation (Arts. 1242 to 1245, Rev. Stats. Texas) providing that a defendant who appears only to obtain the judgment of the court upon the sufficiency of the service of the process upon him is thereafter subject to the jurisdiction of the court, although the process against him is adjudged to have been insufficient to bring him into court for any purpose, was "due process of law," within the meaning of the Fourteenth Amendment to the Federal Constitution, and this court held that it was. A like decision was rendered in the subsequent case of *Kauffman* v. *Wootters*, 138 U. S. 285, and

the ruling in *York* v. *Texas* was reaffirmed. Those were cases arising in the state courts, and were brought here on writs of error to the Supreme Court of the State, and it was, therefore, properly said in the opinion in *York* v. *Texas*, p. 20, that "the State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants," citing *Antoni* v. *Greenhow*, 107 U. S. 769.

In the case of *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, decided at this term of the court, questions somewhat similar to those in this case were brought before us. In that case an action had been brought in the Circuit Court of the United States for the Western District of Texas by a citizen of the Eastern District of that State against a corporation organized under the laws of Kentucky, and therefore a citizen of that State, and which was doing business in said Western District. The defendant demurred to the action on the ground that, under the first section of the act of Congress, approved March 3, 1887, c. 373, § 1, 24 Stat. 552, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 434, it could not be sued in the Western District of Texas, but if suable at all in the federal courts of that State it must be sued in the Eastern District of the State, of which district the plaintiff was a citizen. The demurrer was overruled and exceptions saved by the defendant, after which it filed an answer and went to trial upon the merits of the case, the trial resulting in a verdict and judgment in favor of the plaintiff for the sum of $4515. The defendant thereupon sued out a writ of error from this court, on the question of jurisdiction, under the act of Congress approved February 25, 1889, (25 Stat. 693,) and the case was decided here on a motion to dismiss that writ of error. The motion was overruled and the judgment of the Circuit Court reversed, and the cause remanded with directions to render judgment for the defendant upon its demurrer.

It was held by the court that, under the act of Congress approved March 3, 1887, as corrected by the act of August 13, 1888, above referred to, the defendant was not suable in the

Western District of Texas, because neither it nor the plaintiff was a citizen of that district. In that case the appearance of the defendant to question the jurisdiction of the Circuit Court was relied on, under the Texas statutes, and the authority of the Texas decisions and the decisions of this court in *York* v. *Texas* and *Kauffman* v. *Wootters*, above cited, to save the jurisdiction; but this court, speaking by Mr. Justice Gray, in reply to this contention, said (p. 208):

"It is further contended, on behalf of the defendant in error, that the case is controlled by those provisions of the statutes of Texas, which make an appearance in behalf of a defendant, although in terms limited to the purpose of objecting to the jurisdiction of the court, a waiver of immunity from the jurisdiction by reason of non-residence; and which have been held by this court not to violate the Fourteenth Amendment of the Constitution of the United States, forbidding any State to deprive any person of life, liberty, or property without due process of law. Rev. Stats. of Texas of 1879, Arts. 1241–1244; *York* v. *State*, 73 Texas, 651; *S. C. nom. York* v. *Texas*, 137 U. S. 15; *Kauffman* v. *Wootters*, 138 U. S. 285; *St. Louis &c. Railway* v. *Whitley*, 77 Texas, 126; *Ætna Ins. Co.* v. *Hanna*, 81 Texas, 487.

"But the question in this case is not of the validity of those provisions as applied to actions in the courts of the State, but whether they can be held applicable to actions in the courts of the United States. This depends on the true construction of the act of Congress, by which 'the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding, existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held.' Rev. Stat. § 914; Act of June 1, 1872, c. 255, § 5; 17 Stat. 197.

"In one of the earliest cases that arose under this act, this court said: 'The conformity is required to be "as near as may be" — not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested

by a purpose: it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely encumber the administration of the law or tend to defeat the ends of justice in their tribunals.' *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291, 300, 301.

"Under this act, the Circuit Courts of the United States follow the practice of the courts of the State in regard to the form and order of pleading, including the manner in which objections may be taken to the jurisdiction, and the question whether objections to the jurisdiction and defences on the merits shall be pleaded successively or together. *Delaware County* v. *Diebold Safe Co.*, 133 U. S. 473, 488; *Roberts* v. *Lewis*, 144 U. S. 653. But the jurisdiction of the Circuit Courts of the United States has been defined and limited by the acts of Congress, and can be neither restricted nor enlarged by the statutes of a State. *Toland* v. *Sprague*, 12 Pet. 300, 328; *Cowles* v. *Mercer County*, 7 Wall. 118; *Railway Co.* v. *Whitton*, 13 Wall. 270, 286; *Phelps* v. *Oaks*, 117 U. S. 236, 239. And whenever Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the State upon the same matter. *Ex parte Fisk*, 113 U. S. 713, 721; *Whitford* v. *Clark County*, 119 U. S. 522.

"The acts of Congress, prescribing in what districts suits between citizens or corporations of different States shall be brought, manifest the intention of Congress that such suits shall be brought and tried in such a district only, and that no person or corporation shall be compelled to answer to such a suit in any other district. Congress cannot have intended that it should be within the power of a State by its statutes to prevent a defendant, sued in a Circuit Court of the United States in a district in which Congress has said that he shall not be compelled to answer, from obtaining a determination of that matter by that court in the first instance, and by this court on writ of error. To conform to such statutes of a State would 'unwisely encumber the administration of the law' as

well as 'tend to defeat the ends of justice' in the national tribunals. The necessary conclusion is that the provisions referred to, in the practice act of the State of Texas, have no application to actions in the courts of the United States."

While the decision in the *Denton case* does not fully cover the case at bar, still the reasoning on which the court reached its conclusion therein has a bearing upon the question under consideration, which occupies rather a middle ground between the question presented in *York* v. *Texas*, above cited, and that presented in the *Denton case*, and is not directly or authoritatively controlled by either of those decisions. In the present case, the precise question is whether the provisions of the Texas statutes which give to a special appearance, made to challenge the court's jurisdiction, the force and effect of a general appearance, so as to confer jurisdiction over the person of a defendant, are binding upon the Federal courts sitting in that State, under the rule of procedure prescribed by the 5th section of the act of June 1, 1872, as reproduced in § 914 of the Revised Statutes.

The words of this section, "as near as may be," were intended to qualify what would otherwise have been a mandatory provision, and have the effect to leave the Federal courts some degree of discretion in conforming entirely to the state procedure. These words imply that, in certain cases, it would not be practicable, without injustice or inconvenience, to conform literally to the entire practice prescribed for its own courts by a State in which Federal courts might be sitting. This qualification is indicated in *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291, 300, 301.

But aside from this view, there are other provisions of the statutes which clearly manifest an intention on the part of Congress not to leave the jurisdiction of the inferior Federal courts to the regulation and control of state legislation. Thus by section 1011, Revised Statutes, as corrected by the act of February 18, 1875, c. 80, it is provided that "there shall be no reversal in the Supreme Court, or in a Circuit Court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court." 18 Stat. 318.

This entirely preserves to this court the right and duty to pass upon the jurisdiction of the lower court.

So, too, by the act of February 25, 1889, 25 Stat. 693, c. 236, it is provided that "in all cases where a final judgment or decree shall be rendered in a Circuit Court of the United States in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to review such judgment or decree, without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of five thousand dollars, the Supreme Court shall not review any question raised upon the record except such question of jurisdiction;" and it is further provided that "such writ of error or appeal shall be taken and allowed under the same provisions of law as apply to other writs of error or appeals."

By the first clause of section 5 of the act of March 3, 1891, 26 Stat. 826, 827, c. 517, it is provided that "appeals or writs of error may be taken from the District Courts, or from the existing Circuit Courts, direct to the Supreme Court . . . in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

These provisions of the Federal statutes which confer upon litigants in the Federal courts the right to have the jurisdiction of such courts reviewed by this court by appeal or writ of error would be practically destroyed or rendered inoperative and of no effect if state statutes, such as those of Texas, could make an appearance to question the jurisdiction of a Federal court a general appearance, so as to bind the person of the defendant. It would be an idle ceremony to bring to this court for review the question of the Circuit Court's jurisdiction, arising out of a failure to serve the defendant with process, if the defendant's special appearance before the lower court to challenge its jurisdiction should, under state laws, amount to a general appearance which conferred such juris-

diction. The effect of the statutes of a State giving such an operation to an appearance for the sole purpose of objecting to the jurisdiction of the court, would be practically to defeat the provisions of the Federal statutes which entitle a party to the right to have this court review the question of the jurisdiction of the Circuit Court. Under well settled principles this could not and should not be permitted, for wherever Congress has legislated on, or in reference to, a particular subject involving practice or procedure, the state statutes are never held to be controlling. In *Harkness* v. *Hyde*, 98 U. S. 476, it was held by this court that illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied by his answering to the merits. Such illegality is considered as waived only when he, without having insisted upon it, pleads in the first instance to the merits. We are of opinion that under the statutes of the United States the jurisdiction of the Federal courts, sitting in Texas, is not to be controlled by the statutes of that State above referred to. Jurisdiction is acquired as against the person by service of process; but as against property within the jurisdiction of the court, personal service is not required. *Boswell* v. *Otis*, 9 How. 336; *Pennoyer* v. *Neff*, 95 U. S. 714. But it is well settled that no court can exercise, at common law, jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears. *Kendall* v. *United States*, 12 Pet. 524; *Harris* v. *Hardeman*, 14 How. 334.

In the present case, when it was established by the facts stated in the plea in abatement, and admitted by the demurrer thereto, that the plaintiff in error was never brought before the court by any proper or legal process, the Circuit Court was without jurisdiction to proceed in the case; and in so doing, and in assuming jurisdiction and proceeding to trial on the merits, its action was erroneous.

Our conclusion, therefore, is that the judgment of the lower court must be reversed; that the cause be remanded to the

Circuit Court for the Western District of Texas, with directions to set aside the verdict and judgment, and to overrule the demurrer to the plea in abatement; and it is accordingly so ordered.

UNITED STATES *v.* SNYDER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 229. Submitted April 20, 1893. — Decided May 1, 1893.

The lien imposed upon the real estate of a manufacturer of tobacco, snuff or cigars, by Rev. Stat. § 3207, to secure the payment of internal revenue taxes, is not subject to the laws of the State in which the real estate is situated respecting recording or registering mortgages or liens.

THE case is stated in the opinion.

Mr. Assistant Attorney General Maury for appellants.

Mr. B. F. Jonas for appellee.

MR. JUSTICE SHIRAS delivered the opinion of the court.

The facts of this case, as appearing by the record, are undisputed, and are as follows: Charles A. Snyder was, during the year 1878, engaged in the business of the manufacture of tobacco in the city of New Orleans, and, while so engaged, became indebted to the United States for internal revenue taxes in the sum of several thousand dollars; and these taxes were duly assessed and certified to the collector of internal revenue, who made demand for payment.

On the 20th day of November, 1879, at the time of such indebtedness and demand for payment, and for more than a year prior and subsequent to said date, the said Charles A. Snyder was the owner of certain pieces and parcels of real

estate situated in the city of New Orleans, to wit, nine several lots designated as Nos. 4, 5, 6, 9, 10, 11, 12, 13, and 14, with the buildings and improvements thereon, in the square bounded by Peters, Erato, Gaiennie, and Tchoupitoulas Streets; and by act of sale passed before Theodore Guyol, notary, on February 5, 1881, Charles A. Snyder sold, conveyed and delivered, for a valuable consideration, the said lots of ground to the International Cotton Press Company, which has been ever since in the continuous use and occupation of the same.

On April 15, 1885, a bill of complaint was filed in the Circuit Court of the United States for the Eastern District of Louisiana against Charles A. Snyder for the collection of said taxes. Nannie Mary Torian, wife of said Snyder, and the International Cotton Press Company were named as codefendants with him, it being alleged in said bill that they claimed to have liens and interests in the said pieces or lots of ground.

Mrs. Snyder was not served with process, nor was any appearance entered for her. The cause was put at issue, and so proceeded in that a personal judgment was entered against Charles A. Snyder and in favor of the United States in the sum of $3643.29, but the bill was dismissed as to the International Cotton Press Company, and from this decree an appeal was taken to this court.

The assessment on which the lien for taxes was claimed in behalf of the United States was never filed or inscribed in the mortgage office of the parish of New Orleans, as required by the laws of the State of Louisiana, in order to affect third persons; and the International Cotton Press Company purchased the property on which said tax lien was claimed to exist for full value, in good faith, and in ignorance of the said alleged assessment.

Section 3371 of the Revised Statutes, as amended by section 14 of the act of March 1, 1879, under which the taxes in question were assessed, is in the following terms:

"Whenever any manufacturer of tobacco, snuff, or cigars sells, or removes for sale or consumption, any tobacco, snuff, or cigars upon which a tax is required to be paid by stamps,

without the use of the proper stamps, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid, and to make an assessment therefor, and certify the same to the collector. The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal: *Provided, however*, That no such assessment shall be made until and after notice to the manufacturer of the alleged sale and removal to show cause against said assessment; and the Commissioner of Internal Revenue shall, upon a full hearing of all the evidence, determine what assessment, if any, should be made."

Section 3186 of the Revised Statutes, as amended by section 3 of the act of March 1, 1879, is as follows:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person."

The method of remedy is provided by section 3207, Revised Statutes, as follows:

"In any case where there has been a refusal or neglect to pay any tax, and it has become necessary to seize and sell real estate to satisfy the same, the Commissioner of Internal Revenue may direct a bill in chancery to be filed in a District or Circuit Court of the United States, to enforce the lien of the United States for tax upon any real estate, or to subject any real estate owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax. All persons having liens upon or claiming any interest in the real estate sought to be subjected as aforesaid shall be made parties to such proceedings, and be brought into court as provided in other suits in chancery therein. And the said court shall . . . proceed to adjudicate all matters involved therein, and finally determine the merits of all claims to and

liens upon the real estate in question, and, in all cases where a claim or interest of the United States therein shall be established, shall decree a sale of such real estate by the proper officer of the court, and a distribution of the proceeds of such sale, according to the findings of the court in respect to the interest of the parties and of the United States."

The record discloses in the present case that the Commissioner of Internal Revenue did, within two years after sale and removal by Snyder of tobacco without the proper stamps, in the mode authorized and directed by law, estimate the amount of the tax omitted to be paid, make an assessment thereof, and certify the same to the collector.

The bill of complaint was in the form prescribed by law, and, upon the facts admitted, the government was entitled to a decree for a sale of Snyder's real estate in satisfaction of the sum found due by him, unless, indeed, the defence set up on behalf of the International Cotton Press Company was valid.

That defence was founded in the provisions of Article 176 of the Louisiana Constitution of 1879, in these terms: "No mortgage or privilege on immovable property shall affect third persons, unless recorded or registered in the parish where the property is situated, in the manner and within the time as is now or may be prescribed by law, except privileges for expenses of last illness, and privileges for taxes, state, parish, or municipal: *Provided*, Such privileges shall lapse in three years."

That the lien or assessment of the taxes in question was not recorded or filed in the mortgage office of the parish of New Orleans, within which Snyder's real estate was situated, and that no proceedings to enforce the lien were brought within three years, are admitted facts.

The single question thus presented for our consideration is whether the tax system of the United States is subject to the recording laws of the States.

The court below answered this question in the affirmative, but filed no opinion. Nor have the counsel of the appellees sustained the proposition on which they rely by the citation

of any authorities. It is true that, on the other hand, the attorney of the government has not referred us to any decision of this court which can be said to be directly in point. This absence of authority is doubtless attributable to the fact that the subject of Federal taxation, dealt with by Federal statutes, creating liens for taxes, and providing remedies for their collection, has always been conceded to be independent of the legislative action of the States.

The power of taxation has always been regarded as a necessary and indispensable incident of sovereignty. A government that cannot, by self-administered methods, collect from its subjects the means necessary to support and maintain itself in the execution of its functions is a government merely in name. If the United States, proceeding in one of their own courts, in the collection of a tax admitted to be legitimate, can be thwarted by the plea of a state statute prescribing that such a tax must be assessed and recorded under state regulation, and limiting the time within which such tax shall be a lien, it would follow that the potential existence of the government of the United States is at the mercy of state legislation.

Moreover, it scarcely seems necessary to look beyond the Constitution itself for a decisive reply to the question we are now considering. The 8th section of the 1st article declares that "the Congress shall have power to lay and collect taxes, duties, imposts and excises, . . . but all duties, imposts and excises shall be uniform throughout the United States." The power to impose and collect the public burthens is here given in terms as absolute as the language affords. The provision exacting uniformity throughout the United States itself imports a system of assessment and collection under the exclusive control of the general government. And both the grant of the power and its limitation are wholly inconsistent with the proposition that the States can by legislation interfere with the assessment of Federal taxes, or set up a limitation of time within which they must be collected.

Although decisions of this court upon the precise question before us cannot be cited, there are some on analogous sub-

jects which lead clearly to the conclusion that the tax system of the United States is regulated by the Federal statutes and practice, and are not controlled by state enactments.

In *Dollar Savings Bank* v. *United States*, 19 Wall. 227, it was held that the United States could maintain an action of debt for taxes due by a state bank in a Circuit Court of the United States, in disregard of a state statute prescribing a special form of remedy for the assessment and collection of taxes due by banks.

In *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272, 281, it was said: "Among the legislative powers of Congress are the powers 'to lay and collect taxes, duties, imposts and excises, . . . and to make all laws which may be necessary and proper for carrying into execution these powers.' . . . The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution."

Arnson v. *Murphy*, 109 U. S. 238, was a suit under the revenue laws of the United States, wherein the plaintiffs sought to recover moneys alleged to have been illegally exacted by the collector for custom duties. The Circuit Court applied the state statute of limitations, and directed a verdict in favor of the defendant. This court held that the limitation laws of the State in which the cause of action arose, or in which the suit was brought, did not furnish the rule of decision, and that it was error in the Circuit Court to apply, as a bar to the action, the limitation prescribed by the state statute.

The conclusion reached is that that part of the decree of the court below which dismissed the bill as to the International Cotton Press Company must be reversed, and that the cause be remanded with directions to the court below to proceed therein in conformity with this opinion.

Reversed.

Statement of the Case.

DUER *v.* CORBIN CABINET LOCK COMPANY.

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

No. 191. Submitted March 28, 1893. — Decided May 1, 1893.

The invention claimed in letters patent No. 262,977, issued August 22, 1882, to Morris L. Orum for an improvement in locks for furniture, in view of the previous state of the art had no patentable novelty.

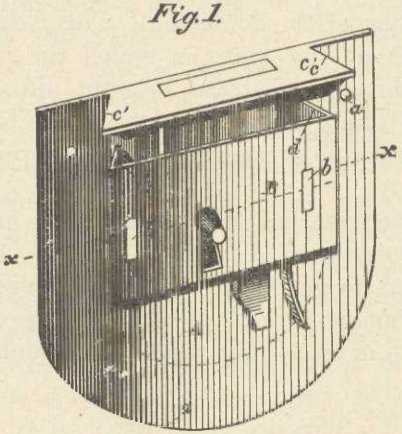
The mere fact that a patented article is popular and meets with large and increasing sales is unimportant when the alleged invention is clearly without patentable novelty.

THIS was a bill in equity for the infringement of letters patent No. 262,977, issued August 22, 1882, to Morris L. Orum, for an improvement in locks for furniture, such as are used on bureau or desk drawers, or the doors of wardrobes, wash-stands, &c., and as stated by the patentee in his specification:

"It has for its object to provide a lock of such shape as to adapt it for insertion in a mortise of peculiar form, whereby a pair of the securing screws or nails is dispensed with, and the case of the lock is held laterally in the mortise by reason of its conformity thereto in shape."

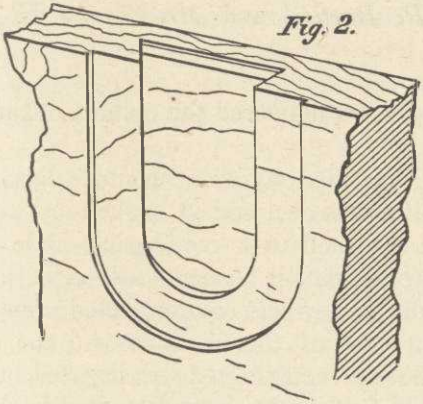
The following drawings illustrate the lock and mortise in which it is held.

Fig. 1.



Counsel for Appellant.

Fig. 2.



The patentee further said in his specification:

"The lock costs no more than an ordinary one of equal quality, and to attach it one tack is used, instead of four screws, as usual; but the main advantage is due to the saving of time and labor in making the mortise, and to the superiority of the finished job by reason of the fact that the lock-plate is countersunk in the wood, instead of lying upon its surface. This result has never heretofore been attained, except by hand chiselling, which is a slow and tedious process.

"I am aware that locks arranged to dovetail into their mortises are not broadly new, and such I do not claim."

His claim, and there was but a single one, was as follows:

"The lock herein described, having a dovetail cap and top plate, and a front plate projecting laterally and below the cap and rounded at the bottom, whereby the lock is adapted for insertion in a mortise formed by a laterally-cutting bit, and when in place is sustained by a countersunk front plate, as set forth."

The answer set up certain anticipating devices owned by the defendant, and the case was heard in the court below upon the pleadings and proofs, and the bill dismissed. 37 Fed. Rep. 338. Plaintiff thereupon appealed to this court.

Mr. Benjamin Price and *Mr. Wilmarth H. Thurston* for appellant.

Mr. John P. Bartlett and *Mr. Charles E. Mitchell* for appellee.

Mr. Justice Brown delivered the opinion of the court.

The old and familiar style of furniture lock in use from time out of mind was enclosed in a shell or case, square or nearly so, and attached to a rectangular plate turned over at the top to form what is termed a selvedge, through which the bolt passed. A key-post also projected some distance beyond the back plate of the shell toward the front of the drawer. The lock so constructed was inserted in a rectangular mortise cut out to receive it, and secured to the drawer by four screws through the four corners of the broad front plate.

The peculiar shape of the cavity required the mortising to be done by hand, which took considerable time, and added largely to the expense of the furniture. Indeed, the lock itself in some instances cost less than the expense of mortising the recess to receive it. The need had been felt for a long time of a lock of such shape that it could be received into a rounded cavity, which was capable of being excavated by machinery.

This want was first met by a lock invented by one Gory, for which a patent was issued to him April 22, 1873, numbered 138,148. This patent consisted of "such a construction of the shell or frame of the lock that it is adapted to fasten itself within a routed cavity in the wood, and thus dispense with mortising and fastening screws." "The shell, A," said the patentee, "is so constructed that upon each side of the rear face (and by the rear face is understood the face nearest the front of the drawer) an extension projection or wing, *a*, is formed, which, when snugly fitted into a corresponding depression, *b*, at each side of the routed cavity, B, serves to retain the lock securely in the routed cavity. In this way the recess for the reception of the lock for drawers or similar uses, instead of being a mortise necessarily cut by a slowly operating mortising machine, is an open sided recess made

almost instantly by the rapidly-revolving tool of a routing-machine or groover. . . . This improved form of lock, when driven snugly into a routed cavity such as is described, requires no fastening screws to hold it in place, and consequently reduces the expense of the lock and fastening in addition to the reduced cost of producing the cavity to receive it." This was the underlying patent of all similar devices, and while it never seems to have come into general use, subsequent patents have been merely improvements upon it.

The peculiar feature of his patent was not only in rounding the bottom of the lock so that it could be admitted into a cavity cut out by a revolving tool known as a router, but in making the cavity larger in the rear than in the front, so that a lock correspondingly shaped might be slipped into the cavity from above, and held there without the aid of screws.

While the single claim of this patent was confined to a lock whose frame is made with side extensions at the rear face, to enable the lock to be firmly secured in the routed cavity, several different forms of cavity are shown in the drawings, nearly all of which are dovetailed in such manner that the lock is received and held in position without the aid of other fastenings. This lock was a most ingenious device, and no doubt involved patentable novelty. Three-fourths of this patent now belong to the defendant. There was a difficulty with it, however, in the fact that the patentee took off all the projections from the old style of lock, including those of the broad front plate, through which the screws were inserted, which was cut off so as to be flush with the side of the shell, the projecting key-post which was cut flush with the face of the cap, and the top plate or selvedge through which the bolt is passed. It consisted merely of a shell fitted snugly upon all sides into a cavity routed out of the exact size to receive it. For these or other reasons, the lock never seems to have gone into general use. Indeed, the evidence is that it was never used at all.

Next in order of time is patent numbered 241,828, issued May 24, 1881, to Henry L. Spiegel. In this device "the back plate of the lock" (that is, the plate nearest the front of the

drawer) "is made to project on each side of the lock, and adapted to fit a groove or dovetail formed in the inner surface of the drawer front," the object of the improvement being to provide a lock which may be secured in its receptacle without the aid of screws. The lock shown was of the ordinary pattern, except that its back plate was provided with projecting edges, designed to fit in a groove and hold the lock fast. "It is obvious," said the patentee, "that the groove B may be made dovetailed, and the edges G of the back plate bent to a corresponding angle to fit therein, if desired." His claim was for a cabinet lock with its rear plate projecting beyond each side of the lock-case, and having the upper part of each projection bent toward the front plate, which front plate had a slit and strip, which, when the lock is forced home, was set into the wood by a hammer, and thus the lock was held from working out of its receptacle. This patent is also owned by the defendant.

His idea was in substance that of so constructing the lock that there should be a space between the front and rear plates to receive the walls of a routed mortise. Both the front and back plate, however, as well as the selvedge, were made rectangular, and hence the lock was no better adapted for insertion in a routed cavity than was the old-style lock. This lock also seems to have been a failure in practical use, and so far as the record shows none were ever constructed under the patent.

On April 23, 1883, Spiegel filed an application for another patent, which was issued to him April 21, 1885, two and one-half years after the Orum patent in suit; but as the lock was invented before that of Orum, and as Orum had full knowledge of it before he made his alleged invention, it should be considered as part of the art as it existed at the date of the Orum patent.

In his specification, speaking of prior devices, and apparently of the Gory patent, the patentee states: "In view of the fact that locks constructed with projecting key-posts possessed certain advantages that met the demand of the trade, the peculiar construction of lock above described, with its flush key-post and adapted to be driven into a routed cavity, failed

of introduction, preference being given to the old form of lock-case, with its projecting key-post, though it necessitated the hand-chiselled mortise and fastening-screws for its attachment." Speaking of his own prior patent of May 24, 1881, he says: "The lock-case being thus secured at its sides, allowed of a space or recess being formed in the rear wall of the mortise and in rear of the cap-plate for the reception of the projecting key-posts, which space was covered and concealed from view by the projecting top plate for selvedge. While this latter construction of lock possessed valuable features of improvement not disclosed by the prior art, yet the form of lock shown and described in the patent is such as to preclude its adoption for use in routed cavities, because this front plate is not of the proper form to fit within and cover a cavity made by a routing tool. The object of this invention is to obviate the objectionable features and defects hereinbefore set forth, and provide a lock-case of such form and construction that it may have a projecting key-post, if so desired, and be secured within a routed cavity, and snugly retained therein, so as to conceal the cavity from view, and form a neat and finished appearance when in place. With these ends in view my invention consists in a lock-case having its edges constructed to engage or interlock with the side walls of a routed cavity, and provided with a front plate having a rounded bottom adapted to fit within a countersunk recess around the routed cavity, and constitute a support for the lock-case and conceal the cavity from view." This lock differs from the prior Spiegel patent principally in being rounded at the bottom so as to be fitted to a routed cavity, and prevent the displacement of the lock either in a forward or backward direction, and also in having a space in the rear wall of the cavity for a projecting key-post.

This was practically the state of the art when Orum's patent was granted. In this patent the shell or case of the lock is dovetailed to fit a corresponding dovetailed cavity, and the selvedge is also made of similar dovetail shape. The front plate projects upon each side of the case and is rounded at the bottom, so that it may be fitted to a routed cavity. The

lock is held in position by two tacks through the upper corners of the front plate, or by a single tack driven through a hole at the base of the plate. To insert the lock, it is simply slipped down into place in the mortise and secured against lifting by one or more tacks which are used merely to prevent the lock from slipping out of the mortise, and are not called upon to resist a strain. His claim is for "the lock herein described, having a dovetail cap and top plate, and a front plate projecting laterally and below the cap and rounded at the bottom, whereby the lock is adapted for insertion in a mortise formed by a laterally-cutting bit, and when in position is sustained by a countersunk front plate, as set forth." There is no mention made, in the specification or claim, of a projecting key-post or of any space for its reception, although such a key-post is shown in the drawing, and it was evidently intended that the mortise should be made deep enough to receive it, or that a special channel should be cut out for that purpose. The selvedge was made wide enough to cover a cavity corresponding in depth to the projection of such key-post.

In view of the advance that had been made by prior inventors, it is difficult to see wherein Orum displayed anything more than the usual skill of a mechanic in the execution of his device.

All that he claims as invention is found in one or more of the prior patents. The dovetailed cavity and the correspondingly shaped case or shell is only a copy of a cavity shown in Fig. 8 of the Gory patent, and it certainly required no invention to make the top plate or selvedge of the same shape so as to completely cover the cavity. The projecting front plate rounded at the bottom is shown in the second Spiegel patent, both of these patents also exhibiting a projecting back and front plate, and a projection or groove in the mortise between them. Neither is the countersunk recess for the reception of the front plate novel, since it is also found in the second patent to Spiegel, and expressly set forth as an element of his first two claims. In each case it is used for the purpose of supporting the lock vertically, and also of

preventing it falling backward against the inner wall of the mortise.

In view of the fact that Mr. Orum had no actual knowledge of the Gory patent, he may rightfully claim the quality of invention in the conception of his own device, but as he is deemed in a legal point of view to have had this and all other prior patents before him, his title to invention rests upon modifications of these, too trivial to be the subject of serious consideration. His "radically new idea of making the mortise as deep as the width of the projecting selvedge and of cutting out the selvedge at its ends," as claimed by his counsel, was such as would have occurred at once to an ordinarily intelligent mechanic who had the previous devices before him. To speak of these trifling variations as involving months of labor, thought, and experiment is a misuse of words. In his own testimony, Mr. Orum, who was called as a witness by the defendant, says that if he had been acquainted with the Gory patent he would have had no difficulty in making the top plate of the Spiegel lock conform to a dovetailed cavity, or any other routed cavity. While the testimony of a patentee in derogation of his own patent is usually open to some suspicion, this opinion is so obviously correct that it needs only a comparison of his device with those of Gory and Spiegel to confirm it.

It is true the Orum lock seems to have gained an immediate popularity, to have met with large and increasing sales, and to have had the usual effect of successful patents in stimulating the activity of business competitors to produce an equally useful and popular device. Were the question of patentability one of doubt this might suffice to turn the scale in favor of the patentee. But there are so many other considerations than that of novelty entering into a question of this kind that the popularity of the article becomes an unsafe criterion. For instance, a man may, by the aid of an alluring trade-mark, succeed in catching the eye of the people, and palming off upon them wares of no greater intrinsic value than those of his rivals; but such trade-mark may be, and usually is, wholly destitute of originality, often taken from some prior publica-

tion, and appropriated to the specific purpose of the owner. The same result may follow from the more attractive appearance or the more perfect finish of the article, from more extensive advertising, larger discounts in price, or greater energy in pushing sales. While the popularity of the Orum lock may be due to its greater usefulness, or to the fact that it was put upon the market just at the time when cabinet-makers were looking for a lock of this description, it is certainly not due to any patentable feature in its construction.

The decree of the court below dismissing the bill is, therefore,

Affirmed.

UNDERWOOD *v.* GERBER.

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

No. 217. Argued April 19, 1893. — Decided May 1, 1893.

In a suit in equity brought on letters patent No. 348,073, granted August 24, 1886, on an application filed March 22, 1886, to John T. Underwood and Frederick W. Underwood, for a "reproducing surface for type-writing and manifolding," the claim being for "A sheet of material or fabric coated with a composition composed of a precipitate of dye-matter, obtained as described, in combination with oil, wax, or oleaginous matter, substantially as and for the purposes set forth," it appeared that letters patent No. 348,072, had been granted to the plaintiffs August 24, 1886, on an application filed March 22, 1886, the claim of which was for "The coloring composition herein described for the manufacture of a substitute for carbon-paper, composed of a precipitate of dye-matter, in combination with oil, wax, or oleaginous matter, substantially as set forth." The suit was not brought on No. 348,072. The only difference in the two patents was that No. 348,073 was for spreading upon paper the composition described in No. 348,072: *Held* that, in view of earlier patents and publications, there was no novelty in taking a coloring substance already known and applying it to paper; that the omission to claim in No. 348,073, the composition of matter described in it was a disclaimer of it, as being public property; and that there was no invention in applying it to paper, as claimed in No. 348,073.

THE case is stated in the opinion.

Mr. Livingston Gifford for appellants. *Mr. James A. Hudson* filed a brief for same.

Mr. Arthur v. Briesen for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Eastern District of New York, by John T. Underwood and Frederick W. Underwood against Henry Gerber and Anton Andreas, founded on the alleged infringement of letters patent No. 348,073, granted to the plaintiffs August 24, 1886, on an application filed March 22, 1886, for a "reproducing surface for type-writing and manifolding."

The specification reads as follows:

"Our invention relates to an improved reproducing-surface adapted to be employed for obtaining copies of type-writing or other printed or written impressions by means of a type-writer or other printing device, or by the employment of a stylus or other writing means.

"Our improved transfer-surface is spread upon a sheet or vehicle, and when so applied is adapted to be employed in place of the articles of trade commonly known and designated as 'carbon paper' or 'semi-carbon paper,' which are employed by type-writers and others to produce copies of impressions either obtained by a machine or by a stylus or other writing means.

"[In carrying out our invention we employ in the manufacture of our improved transfer-surface dye-wood solutions or their active principles, which we filter and precipitate with alkalies and mineral salts, or with alkalies, acids, and mineral salts, or with acids or alkalies alone. After the solution has been filtered the precipitate is removed from the filtering device and dried. The precipitate is then mixed with lard-oil and wax or their equivalents, and the mixture is then ground together in a warm state.

"The dye solutions we prefer to employ are obtained from logwood or hæmatoxylin, the active principle of logwood, Brazil wood, sapan wood, peach wood, madder, or its active principle — alizarine.

"The proportions we find to answer well in producing our improved surface are as follows: Take one pound of extract of logwood and dissolve the same in one gallon of water, then add to the solution one pound of soda and one pound of mineral salt, using one of the salts of iron or copper, preferably sulphate of copper. The mixture thus obtained is then placed in a filter. After the solution has been filtered the precipitate is removed from the device employed *for filtering* and *then* dried, *after which the precipitate is ready for use.* To every two pounds of precipitate thus obtained we add one pound of oil and one pound of wax, and then grind the mixture in a warm state in what is commonly known as a 'paint' or other suitable grinding mill. The heated mixture thus obtained is *then* applied to tissue-paper or other suitable paper or fabric by means of a sponge or other suitable transferring device.

"The paper or fabric to which our improved surface is to be applied is placed upon a heated table, by preference formed of iron, and heated by steam; but this may be varied.

"In place of employing oil or wax, or both combined, we can employ any other suitable oleaginous matter or combination of oleaginous matter having equivalent or approximately equivalent properties.]"

The claim is as follows:

"A sheet of material or fabric coated with a composition composed of a precipitate of dye-matter, obtained as described, in combination with oil, wax, or oleaginous matter, substantially as and for the purposes set forth."

The answer sets up as defences want of novelty and non-infringement. There was a replication, proofs were taken, and the case was brought to a hearing before Judge Lacombe, who entered a decree dismissing the bill. His opinion is reported in 37 Fed. Rep. 682. The plaintiffs have appealed to this court. Since the appeal was taken, Frederick W. Under-

wood has died, and John T. Underwood and Hannah E. Underwood, as his executors, have been substituted as co-appellants, with the surviving appellant, John T. Underwood.

Among the proofs introduced by the defendants was a patent, No. 348,072, granted by the United States to the same persons to whom No. 348,073 was granted, dated August 24, 1886, on an application filed March 22, 1886, the specification of which states as follows: "Our invention relates to the process of producing a transfer-surface adapted to be employed upon a sheet or vehicle to take the place of the articles of trade commonly known and designated as 'carbon papers' or 'semi-carbon papers,' which are employed by type-writers or others to produce copies of impressions either obtained by a machine or by a stylus or other writing means." Then the specification proceeds in the same words that are contained in brackets in the foregoing specification of No. 348,073, leaving out the words that are in italics, and changing the word "paint" to "paint-mill."

The claim of No. 348,072 is as follows:

"The coloring composition herein described for the manufacture of a substitute for carbon paper, composed of a precipitate of dye-matter, in combination with oil, wax, or oleaginous matter, substantially as set forth."

This suit was not brought on No. 348,072. The defendants have made the composition of matter described in both of the patents, and have combined paper with it as indicated in No. 348,073. The only difference in the two patents is that No. 348,073 is for spreading upon paper the composition described in No. 348,072.

The opinion of the Circuit Court says that in view of the earlier patents and publications put in evidence, it was difficult to see what novelty or invention there was in taking a coloring substance already known and applying it to paper; that, if No. 348,072 had been granted to some person the day before the plaintiffs applied for No. 348,073, the latter would clearly be void for want of novelty or invention; that, if No. 348,072 were held by an assignee of the plaintiffs, near or remote, he could not be held as an infringer of No. 348,073;

that an assignee of No. 348,072 could not be so held except for the combination of paper with the coloring substance for the purpose named; that such a combination was old; that the plaintiffs insisted that their position was the same as if they held a patent with two claims, one for the composition of matter producing the coloring substance, and the other for the combination of that substance with paper; that this might be so, if they could be considered as holding both of the patents, but in the suit they had abstained from declaring on No. 348,072, or even referring to it; that its issue was known to the court only through the defendants, who set it up in defence; that the plaintiffs based their claim to a monopoly solely upon No. 348,073; that, as that patent might stand or fall, so the case which they made out upon their bill must also stand or fall; that the holders of No. 348,073 must submit it to a comparison with No. 348,072 as if the latter patent were outstanding; that thus, at the time when No. 348,073 was issued, the composition of matter which enters into the combination with paper was known, and the right to exclude all persons from making such composition was conferred upon the holder of No. 348,072; that the right to exclude all persons from combining paper with that composition was conferred upon the holders of No. 348,073, but, in view of the state of the art, such a grant was void; that the combination which No. 348,073 sought to cover was not patentable; that this suit, being based upon that patent alone, must, therefore, fail; and that, to the holder of No. 348,072, whoever he might be, belonged the right to exclude all others from making the new composition of matter, the only invention which (if the other issues in the case were decided against the defendants) was sufficiently novel to warrant the granting of letters patent.

This opinion was filed February 13, 1889; and on March 20, 1889, the plaintiffs moved the court for leave to amend their bill and to take further proofs. The court made an order on that day, that, on the payment of the defendants' costs on the final hearing, the plaintiffs should have leave to amend their bill by the insertion of apt words, whereby they

should allege their ownership, and the infringement by the defendants, of letters patent No. 348,072; that, on the service of the amended bill, the defendants should answer, plead, or demur, and after replication proofs should be taken, strictly limited to the questions arising on No. 348,072, and the case should stand for final hearing on all the issues; but that, if the plaintiffs failed to pay such costs within ten days after taxation, or failed to file their amended bill within ten days after paying such costs, the bill should be dismissed. The plaintiffs did not pay such costs or amend their bill, and the decree of dismissal was entered on April 26, 1889.

We are of opinion that the decree of the Circuit Court must be affirmed. There was no patentable novelty or invention, in view of the earlier patents and publications put in evidence, in applying an existing coloring substance to paper.

In the English patent granted to Ralph Wedgwood in 1806, there is described a carbonated paper, as follows: "I make use of a prepared paper, which I call duplicate paper. This is made by thinly smearing over any kind of thin paper with any kind of oil, preferring those kinds of oil which are least liable to oxygenizement, or to be evaporated by heat;" and it is said: "The ink made use of in this mode of writing consists of carbon, or any other coloring substance, and finely levigated in any kind of oil. . . . Or coloring matter of any kind and in any other medium or vehicle may be used, provided that medium be such as will admit of the coloring matter being transferred to the duplicate and writing paper; some coloring substances may likewise be used without any medium or vehicle."

In the English patent granted to Charles Swan and George Frederick Swan, in February, 1856, a black coloring matter is described, applicable to the purposes of writing, dyeing, or staining; and it is said that the inventors employ an extract of logwood, treated with bichromate of potash, or with perchloride of mercury, subcarbonate of potash, chlorate of potash, and spirit of ammonia; and, also, "the said coloring matter may be obtained in a liquid form by introducing the salts above mentioned into a liquid extract of logwood, and

straining or otherwise purifying, the fluid in any suitable manner; or the said coloring matter may be obtained in a solid form by combining the aforesaid salts with a solid preparation of extract of logwood, or by evaporation or distillation from the liquid coloring matter above described, and the solid coloring matter may be kept on hand till required, and reduced to a liquid form by dilution with any suitable proportion of water. And the coloring fluid obtained in any of the modes hereinbefore set forth, in the form of an ink, may be converted into a copying fluid by the addition of any saccharine or other thickening ingredients hitherto employed, or which may be found applicable; it may also be obtained from the solid coloring matter by any suitable process."

The United States patent granted to Charles Cowan, May 4, 1869, for an improvement in the preparation of copying-paper, says: "I first prepare a mixture of the following ingredients: Boiled linseed-oil, two parts; spirits of turpentine, one part; copal varnish, one part. With this compound I smear the paper thinly and evenly on one side, and allow it to soak and dry for about half an hour; then I apply the coloring matter, which I prepare as follows: For black, I take ivory-black, four parts; pure black lead, four parts; Prussian blue, one part." He then gives sundry recipes for different colors, and says: "My copying-paper is applicable to making copies of letters, designs, or characters of any desired description."

In *Miller* v. *Brass Co.*, 104 U. S. 350, 352, it is said: "The claim of a specific device or combination, and an omission to claim other devices or combinations apparent on the face of the patent, are, in law, a dedication to the public of that which is not claimed. It is a declaration that that which is not claimed is either not the patentee's invention, or, if his, he dedicates it to the public."

In *Mahn* v. *Harwood*, 112 U. S. 354, 360, 361, it is said: "The taking out of a patent which has (as the law requires it to have) a specific claim, is notice to all the world, of the most public and solemn kind, that all those parts of the art, machine, or manufacture set out and described in the specifi-

cation, and not embraced in such specific claim, are not claimed by the patentee — at least, not claimed in and by that patent. . . . So far as that patent is concerned, the claim actually made operates in law as a disclaimer of what is not claimed."

As No. 348,073 does not claim the composition of matter, although it describes it, that composition must be regarded as disclaimed, and as being public property, and there was no invention in applying it to paper, as claimed in the patent sued on.

Decree affirmed.

PEARSALL *v.* SMITH.

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

No. 198. Argued and submitted April 18, 1893. — Decided May 1, 1893.

An assignee in bankruptcy brought a suit in equity, in September, 1886, to set aside transfers of property made by the bankrupt in 1874, in fraud of creditors, and recorded prior to June, 1875. He had been declared a bankrupt in August, 1878, and the assignment in bankruptcy had been made in February, 1879. The answers set up the statute of limitations of the State of six years, and the bankruptcy statute limitation of two years. Judgment creditors of the bankrupt, included in his schedules in bankruptcy, brought a suit in the Supreme Court of the State in July, 1875, against the present defendants to set aside as fraudulent the conveyances in question, and duly filed a *lis pendens*, in which suit the same charges were made as in the present suit. The bill alleged that a decree was made in that suit, in favor of the plaintiffs, in November, 1885, and that it was not until the assignee in bankruptcy was informed of that decree, in July, 1886, that he received knowledge or information of the transfers of the property, or of any facts or circumstances relating thereto, or tending to show, or to lead to inquiry to, any fraudulent transfer. The bill did not set forth what were the impediments to an earlier prosecution of the claim, how the plaintiff came to be so long ignorant of his rights, the means, if any, used by the defendants fraudulently to keep him in ignorance, or how and when he first obtained knowledge of the matters alleged in the bill: *Held*, that the case was a clear one in favor of the bar of limitation, both by the state statute and by the bankruptcy statute.

THE case is stated in the opinion. After hearing counsel for appellant the court declined to hear further argument.

Mr. Benjamin G. Hitchings, (with whom was *Mr. B. F. Tracy* on the brief,) for appellant.

Mr. Matthew Daly, (with whom was *Mr. Frederic R. Coudert* on the brief,) and *Mr. Paul Fuller* for Slauson and Moses, appellees.

Mr. James R. Angel for Smith and Willetts, appellees; and *Mr. James R. Angel* and *Mr. Elmer A. Allen* for Jones, appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a bill in equity, filed in the Circuit Court of the United States for the Eastern District of New York, by Charles Jones, as assignee in bankruptcy of David M. Smith, against David M. Smith, Ella F. Willetts, Richard S. Jones, and Albert Slauson, and is a creditors' bill to set aside several distinct transfers of property to several of the defendants, alleged to have been made by Smith in the year 1874, in fraud of the rights of creditors. The bill was filed September 11, 1886. The answers set up the statute of limitations of the State of New York of six years, and the bankruptcy statute limitation of two years. Albert Slauson, Austin M. Slauson, and Robert H. Moses, composing the firm of A. Slauson & Co., were added as defendants to the bill. They demurred to it, and the demurrer was overruled. The opinion of the court overruling the demurrer is reported in 33 Fed. Rep. 632.

Replications to the answers were filed, proofs were taken, and the court, held by Judge Lacombe, dismissed the bill. His opinion is reported in 38 Fed. Rep. 380. The assignee, Charles Jones, appealed to this court. Thomas E. Pearsall has been appointed his successor, and has taken his place as appellant in this suit. Pending the appeal, Richard S. Jones, one of the appellees, has died, and Frances A. Jones, as his sole executrix, has been admitted as appellee in his place.

The conveyances sought to be set aside are those of three separate parcels of real estate to the several defendants.

David M. Smith was adjudged a bankrupt in 1878, and was discharged from his debts in June, 1879. The conveyances complained of were all made and recorded prior to June 1, 1875. Smith's petition in voluntary bankruptcy was filed August 31, 1878. The assignment in bankruptcy to Charles Jones was made February 10, 1879.

The opinion of the Circuit Court dismissing the bill considered, first, the New York state statute of limitations, § 382 of the Code of Civil Procedure, subdivision 5, which provides that there must be commenced within six years after the cause of action has accrued "an action to procure a judgment other than for a sum of money, on the ground of fraud, in a case which, on the thirty-first day of December, 1846, was cognizable by the court of chancery," and that "the cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud." The Circuit Court held that this suit was one of the class provided for by the terms of § 382, subdivision 5, and that, if the plaintiff would be barred of his relief in the state court by lapse of time, he would be barred in the federal court also, citing *Burke* v. *Smith*, 16 Wall. 390, 401; *Clarke* v. *Boorman's Executors*, 18 Wall. 493, 509; *Wood* v. *Carpenter*, 101 U. S. 135, 138; *Kirby* v. *Railroad Co.*, 120 U. S. 130, 138. The Circuit Court further said, that the assignee in bankruptcy takes from the bankrupt all the rights of property and of action previously held by him, but that the right to maintain an action such as the present one does not come to the assignee from that source; that a transfer made to defraud creditors is valid between the parties to it; that the debtor has no right of action to set it aside; and that, therefore, no such right passes to the assignee as part of the debtor's estate.

Section 5046 of the Revised Statutes of the United States, which is an embodiment of § 14 of the act of March 2, 1867, ch. 176, (14 Stat. 522,) provides as follows: "All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent rights, and copyrights; all debts due him, or any person for his use, and all liens and

securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract, or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section," which are exemptions, "be at once vested in such assignee."

Section 5057 of the Revised Statutes, which is an embodiment of § 2 of the act of March 2, 1867, ch. 176, (14 Stat. 518,) provides as follows: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed."

The Circuit Court remarked, that by operation only of the express terms of § 5046, the right of action which, before the adjudication in bankruptcy, belonged to the creditors, was taken from them and given to the assignee; and that, when the assignee asserted such right, he claimed under the creditors and not under the bankrupt, citing *Brownell* v. *Curtis*, 10 Paige, 210; *Jones* v. *Yates*, 9 B. & C. 532; *Van Heusen* v. *Radcliff*, 17 N. Y. 580; *Bradshaw* v. *Klein*, 2 Bissell, 20; *Kane* v. *Rice*, 10 Nat. Bank. Reg. 469; *In re Leland*, 10 Blatchford, 503, 507; *Trimble* v. *Woodhead*, 102 U. S. 647; *Dudley* v. *Easton*, 104 U. S. 99.

The Circuit Court further said that, in determining as to the effect of lapse of time upon the right of action in this case, it became necessary, first, to inquire whether there was a discovery of the fraud by those under whom the plaintiff claims; that actual personal knowledge of the facts constituting the

fraud need not be shown, to charge a person who had been quiescent for a period longer than that fixed by statute, with discovery thereof; that it was enough if he was put upon inquiry, with the means of knowledge accessible to him, citing *Burke* v. *Smith*, 16 Wall. 390, 401, and *Wood* v. *Carpenter*, 101 U. S. 135, 138; that, in the present case, Joseph Kittel and Joseph J. Kittel were judgment creditors of the bankrupt, and as such included in his schedules in bankruptcy; that, appearing by the attorney who brought the present suit and represents the other creditors, the Kittels, on July 7, 1875, brought a suit in the Supreme Court of the State of New York against those who are defendants in the present suit, to set aside as fraudulent the very conveyances attacked in this suit, and duly filed a *lis pendens;* that, in their complaint in that suit, the Kittels averred not only that those conveyances were made by an insolvent, but also that the grantees had full knowledge of the insolvency and participated in the fraud, and that the conveyances were without adequate consideration; that as to one parcel, the Kittels expressly alleged that the nominal consideration for the conveyance was $1000, "a grossly inadequate consideration;" as to another parcel, that though there was a pretended consideration of $18,000 in the deed, there was "really no consideration whatever;" and as to the third parcel, that though the alleged consideration expressed in the conveyance was $4300, the transfer was made "in reality, if for any consideration whatever, for a debt of $500;" that it was by endeavoring to prove that the facts as to those conveyances are substantially as they were set forth in the Kittels' suit, that the plaintiff in this suit sought to make out his case; that it, therefore, appeared that, upwards of eleven years before the plaintiff brought this suit, all the facts constituting the fraud had been discovered by one of the creditors under whom he claims; that the six-years' statute of limitations began to run at least from the commencement of the Kittels' suit; and that the bar became complete long before the beginning of the present suit.

The plaintiff alleges in his bill that a decree was made in the Kittels' suit on November 30, 1885, in favor of the plain-

tiffs therein; and that it was not until he was informed of that decree, which was in July, 1886, that he received any knowledge or information of the conveyances and transfers of Smith's property, or of any facts or circumstances relating thereto or tending to show, or to lead to inquiry as to, any fraudulent conveyance, transfer, or disposition of property by Smith.

But this is not sufficient to avoid the allegation of laches in bringing the present suit, or to bar the application of § 5057 of the Revised Statutes in regard to the two years' limitation. *Bailey* v. *Glover*, 21 Wall. 342; *Wood* v. *Carpenter*, 101 U. S. 135; *Kirby* v. *Lake Shore Railroad*, 120 U. S. 130; *Norris* v. *Haggin*, 136 U. S. 386.

Although this court has attached to § 5057 of the Revised Statutes a qualification, that qualification is that where relief is sought on the ground of fraud, it is necessary, in order to postpone the right of action on the part of the assignee in bankruptcy until the discovery of the fraud, that ignorance of it should have been produced by affirmative acts of the guilty party, in concealing the facts, and that there should have been no fault or want of diligence or care on the part of the person who claims the right of action; in other words, that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him, or ought to have been so discovered or known.

In the present case, the deeds of conveyance by Smith were recorded. The suit by the Kittels was a public suit. Notice of *lis pendens* was filed in it, giving the name and the address of the attorney for the plaintiffs, and they were creditors through whom the present plaintiff claims, their names being included as creditors in the bankruptcy schedules. Charles Jones, the assignee in bankruptcy, was a lawyer of long standing, familiar with such matters. The bill does not set forth what were the impediments to an earlier prosecution of

the claim, how the plaintiff came to be so long ignorant of his rights, the means, if any, used by the defendants fraudulently to keep him in ignorance, or how and when he first obtained knowledge of the matters alleged in his bill. *Badger* v. *Badger*, 2 Wall. 87, 95; *Richards* v. *Mackall*, 124 U. S. 183, 189; *Greene* v. *Taylor*, 132 U. S. 415, 443.

We think the present is a clear case in favor of the bar of limitation, both by the statute of New York and by the bankruptcy statute.

Decree affirmed.

TEXAS & PACIFIC RAILWAY COMPANY *v.* ANDERSON.

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

No. 1312. Submitted April 17, 1893. — Decided May 1, 1893.

A Circuit Court of Appeals cannot review by writ of error the judgment of a Circuit Court of the United States, in execution of a mandate of this court, when the action of the Circuit Court conforms to the mandate, and there are no proceedings subsequent thereto, not settled by the terms of the mandate itself.

The mandate in this case having stated that the receiver, against whom the action was originally brought, had been discharged and had died, and that the Railway Company had been made the party plaintiff in error, and having ordered that the plaintiff recover against the Railway Company her costs expended herein and have execution therefor, further ordered "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." Execution accordingly issued against the company for the amount of the judgment with interest at the rate which obtained in Texas when the judgment was rendered. *Held*, that this action conformed to the mandate, and was not subject to review by the Circuit Court of Appeals.

On September 13, 1888, judgment was rendered in the Circuit Court of the United States for the Eastern District of Texas against John C. Brown and Lionel A. Sheldon as

receivers of the Texas and Pacific Railway Company in favor of Ida May Cox for $10,000, with interest from date at eight per cent per annum, the then rate of interest in Texas, "to be paid in due course of their administration of their receivership." Sheldon having resigned as receiver and his resignation having been accepted, Brown, as sole receiver, prosecuted a writ of error from this court and gave a supersedeas bond. While the writ of error was pending the receiver made known to the Circuit Court that the objects and purposes contemplated in the several proceedings under which he had been appointed had been accomplished by settlement and agreement of the parties, and he was thereupon discharged as receiver and the property restored to the company. Subsequently, and before the case came on for hearing, the receiver died. Thereafter defendant in error filed a motion in this court to have the railroad company substituted in place of the receiver, and an order of substitution was entered by this court upon suggestion of the discharge and death of said receiver.

At the time of that order a stipulation, signed by counsel on both sides, was filed, which read as follows: "That the said Texas and Pacific Railway Company may be substituted as plaintiff in error in the above-entitled cause now pending and undetermined upon writ of error in this court, such substitution, however, not to affect any of the questions or controversies presented by the record herein, and the questions and controversies presented by the record are to stand for the decision of this court the same as if said substitution had not been made."

The cause having been argued the judgment was affirmed May 16, 1892. *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593, 601.

On May 19, 1892, the mandate of this court was issued, directed to the Circuit Court of the United States for the Eastern District of Texas, which, after reciting the judgment of that court against the receivers and the writ of error prosecuted by the remaining receiver, proceeded thus:

"And whereas at the October term, A. D. 1889, of said Supreme Court, the discharge of John C. Brown as receiver of the Texas and Pacific Railway Company, and also his death,

having been suggested, it was ordered that the Texas and Pacific Railway Company be made the party plaintiff in error in this cause;

"And whereas in the present term of October, in the year of our Lord one thousand eight hundred and ninety-one, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel;

"On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs and interest until paid, at the same rate per annum that similar judgments bear in the courts of the State of Texas, and that the said plaintiff recover against the said the Texas and Pacific Railway Company for her costs herein expended, and have execution therefor. May 16, 1892.

"You, therefore, are hereby commanded 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."

Pending the writ of error, the defendant Ida May Cox intermarried with one Scott Anderson. Upon reception of the mandate, execution was issued by the clerk of the Circuit Court of the United States for the Eastern District of Texas against the Texas and Pacific Railway Company for the full amount of the judgment with eight per cent interest and costs. The company thereupon filed its bill against the marshal in whose hands the execution had been placed, asking that he be restrained from levying the same upon the ground that there was no judgment to support the execution. A restraining order was granted, which was continued in force until November 22, 1892, when it was dissolved. On that day Mr. and Mrs. Anderson filed a motion that execution should issue in their names against the defendant company. This motion was resisted but the objections of the company thereto were overruled, and the court entered an order directing the clerk to record the mandate and to issue execution against the company for the sum recovered with interest at eight per cent from the date of the original judgment, and

costs, to which action of the court the company excepted, and a bill of exceptions having been signed and approved, a writ of error was allowed from the Circuit Court of Appeals for the Fifth Circuit. The case came on to be heard in that court upon the motion of the defendants in error to dismiss the writ of error for want of jurisdiction and upon the merits, whereupon the court granted a certificate stating the facts as above given, though with greater particularity, which concluded as follows:

"Whereupon, the court desiring the instruction of the honorable the Supreme Court of the United States for the proper decision of the questions arising herein, it is hereby ordered that the following questions and propositions of law be certified to the honorable the Supreme Court of the United States in accordance with the provisions of section 6 of the act entitled 'An act to establish Circuit Courts of Appeals and define and regulate in certain cases the jurisdiction of the Circuit Courts of the United States, and for other purposes,' approved March 3, 1891, to wit:

"First. Does the act of March 3, 1891, entitled 'An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' give to said Circuit Courts of Appeals jurisdiction by appeal or writ of error or otherwise to review the decrees, orders, or judgments made by District Courts or existing Circuit Courts construing a mandate from the Supreme Court of the United States and in executing the same?

"Second. Was it the intention of the Supreme Court of the United States in affirming the judgment in the case of John C. Brown, plaintiff in error, *v.* Ida May Cox, defendant in error, that said judgment should be subject to the general equitable jurisdiction of the court in which such receiver was appointed and be paid in due course of the administration of said receivership, or did it intend that execution should issue directly against the Texas and Pacific Railway Company for the amount of said judgment?

"Third. At the date said judgment was originally recovered, to wit, September 15, 1888, it bore interest under the law of

the State of Texas at the rate of 8 per cent per annum. Subsequently, to wit, on April 13, 1891, the statute of the State of Texas fixing the rate of interest that judgments of this kind should bear was amended, so that instead of bearing eight per cent interest judgments thereafter obtained were made to bear only six per cent interest per annum. Should the judgment in this case bear interest at the rate of eight per cent per annum or at the rate of six per cent per annum?"

Mr. John F. Dillon, *Mr. Winslow S. Pierce* and *Mr. Henry Hubbard* for plaintiff in error.

Mr. W. Hallett Phillips for defendant in error.

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

The Circuit Court was correct in awarding execution against the company under the mandate. The judgment was originally against the receiver, to be paid in due course out of the assets in his hands, but the receiver had been discharged and the property restored to the company, and the company had been substituted as the party to the writ of error here, and been made in all respects as liable to the defendant in error as if it had itself brought the writ. The judgment was made final by the order of this court, and was not again subject to be reviewed by the court below in the exercise of its equitable powers or otherwise. If the judgment had been reversed, the company would have recovered its costs against the defendant in error, and the reversal would have been a bar to any liability on the judgment as such. It so happened that it was affirmed, and the company was equally concluded. While the only question is as to the order of this court, we do not think there is any conflict between the mandate and the stipulation, or that the language of the stipulation in any respect limited the liability of the company in case of affirmance. Every point the receiver could have presented was raised on behalf of the company, and disposed of after elabo-

rate argument and careful consideration, and the stipulation in that regard was fully complied with. If it had been intended to reserve the present contention, it is enough to say that that intention was not expressed and cannot be inferred, and the matter was determined by our judgment. The Circuit Court properly attempted to exercise no discretion in the premises, but discharged its duty by carrying the mandate into effect according to its terms. This court awarded execution against the company for the costs here, but it was for the Circuit Court to award execution for the amount of the judgment, as it was directed to do, and as it did, and interest was properly included at the rate which obtained under the law of Texas at the time judgment was rendered, the change in the law in that respect operating only prospectively. Inasmuch as its action conformed to the mandate, and there were no proceedings subsequent thereto not settled by the terms of the mandate itself, the case falls within the rule often heretofore laid down and a second writ of error cannot be maintained. *Cook* v. *Burnley*, 11 Wall. 672, 677; *Stewart* v. *Salamon*, 97 U. S. 361; *Humphrey* v. *Baker*, 103 U. S. 736.

For these reasons, the answer to the first question certified must be that, upon the facts stated in the certificate, the Circuit Court of Appeals cannot review by writ of error this judgment of the Circuit Court in execution of the mandate of this court. This dispenses with the necessity of answering the other questions certified.

Ordered accordingly.

HAGER *v.* SWAYNE.

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

No. 232. Submitted April 21, 1893. — Decided May 1, 1893.

The action which § 3011 Rev. Stat., as amended by the act of February 27, 1877, 19 Stat. 240, 247, c. 69, authorizes to be brought to recover back an excess of duties paid, cannot be maintained by a stranger, suing solely in virtue of a purchase of claims from those who did not see fit to prosecute them themselves.

Opinion of the Court.

THE case is stated in the opinion.

Mr. Assistant Attorney General Parker for plaintiff in error.

Mr. Charles Page for defendant in error.

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

This was an action brought by R. H. Swayne in the Circuit Court of the United States for the Northern District of California to recover from the defendant, Joseph S. Hager, collector of the port of San Francisco, the sum of $3799.56 on account of duties illegally exacted by the collector on divers importations of cotton shoes and silk shoes, brought into said port in the year 1886 by several importers from ports in China. The complaint contained forty-seven counts for various amounts alleged to be due upon an equal number of importations made by many different firms and persons, and the plaintiff claimed to be entitled to recover the aggregate sum by reason of having become the owner of these several claims by way of purchase and assignment.

Issue having been joined, a trial by jury was waived by stipulation, and it was agreed that all the importations of cotton shoes referred to in the several counts might be considered under one head, and all the importations of silk shoes under another. The Circuit Court thereupon made its findings of fact and therefrom its conclusion of law that the plaintiff was entitled to recover the entire sum sued for. Judgment was accordingly entered against the collector, who brought the case by writ of error to this court.

The upper part of the shoes was composed of cotton or of silk and a portion of the soles was of felt, made up of coarse animal hair of different kinds and of wood fibre and starch or glue, all of which had been felted, mixed, and pressed into layers, which layers were in turn pressed together until the requisite thickness was reached. The most valuable material

of the shoe was the silk or cotton respectively, and no part contained hair of any kind in the textile fabric, nor were they made up by the tailor, seamstress, or manufacturer of similar character to a tailor or seamstress.

The collector decided that these shoes were dutiable under the paragraph of Schedule K of the tariff act of March 3, 1883, 22 Stat. 509, c. 121, fixing duty on wearing apparel of every description not specially numerated or provided for, composed wholly or in part of wool, worsted, the hair of the alpaca, goat, or other animals, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, at the rate of forty cents per pound and in addition thereto thirty-five per centum ad valorem ; and exacted of the importers payment of the duties accordingly. The importers, as found by the court, "for the purpose of getting possession of their said merchandise, paid the amount so required of them, but within the time required by law notified the collector of their dissatisfaction with and protest against his decision, and appealed to the Secretary of the Treasury, who affirmed the decision of the collector. The importers thereupon, for value, assigned their claims to the plaintiff, who, within the time required by law, commenced this action for the recovery of the said excess of duties." The Circuit Court held that the cotton shoes fell under the paragraph of Schedule I, (22 Stat. 506,) imposing thirty-five per cent ad valorem on manufactures of cotton not specially enumerated or provided for, and the silk shoes under the last paragraph of Schedule L, imposing fifty per cent on goods not specially enumerated, made of silk or of which silk was the component material of chief value. 37 Fed. Rep. 780.

It was held by this court in *Arnson* v. *Murphy*, 109 U. S. 238, that the common-law right of action against a collector to recover duties illegally collected was taken away by act of Congress, and a statutory remedy given, which was exclusive. Rev. Stat. §§ 2931, 3011. *Arnson* v. *Murphy*, 115 U. S. 579; *Cheatham* v. *United States*, 92 U. S. 85. While the common-law right was outstanding, the collector withheld as an indemnity the sum in dispute, but Congress provided that he must

pay into the Treasury all moneys received officially, and that the Secretary of the Treasury should refund erroneous and illegal exactions. Rev. Stat. §§ 3010, 3012½.

The suit to recover back an excess of duties necessarily could only be maintained as affirmatively specified in the statute. Section 3011 of the Revised Statutes, as amended by the act of Congress of February 27, 1877, 19 Stat. 240, 247, c. 69, provides:

"Any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one."

Section 2931 reads as follows:

"On the entry of any vessel, or of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury. The decision of the Secretary on

such appeal shall be final and conclusive; and such vessel, or merchandise, or costs and charges, shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains."

From these sections it appears that it is the "owner, importer, consignee, or agent of the merchandise, in the case of duties levied on merchandise," who must protest and appeal, and he is the person who, having made payment under protest "in order to obtain possession of merchandise imported for him," may maintain the action. It does not follow that devisees, representatives of the estate of deceased persons, assignees in bankruptcy or by operation of law, are excluded from bringing suit, for they take by devolution, and are regarded as succeeding in interest to the original party. But the statute does not contemplate that a stranger may bring the action, and such is a voluntary assignee of the mere naked right.

In *Castro* v. *Seeberger*, 40 Fed. Rep. 531, Castro had purchased the merchandise of the importer while it was in bond, and pending an appeal, and after the decision of the appeal paid the duties assessed in order to obtain possession of the property, and thereupon brought the suit; and it was decided by Judge Blodgett, holding the Circuit Court for the Northern District of Illinois, that the claim against the collector became attached to and followed the merchandise so as to make the purchaser, who paid the charges, constructively the importer

and entitled to maintain the action under the statute. The purchaser obtained an interest in the thing itself. The case here is wholly different; for these importers, after the decision of the Secretary, paid the duties and took the goods themselves, and then attempted to assign a bare right of action to this plaintiff.

By section 3477, all transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever might be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, were declared to be absolutely null and void, unless they were freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. The language is general which declares the nullity of such assignments, and the only cases where they are recognized is where a warrant has already issued. If there are any cases where the claim cannot be paid by warrant, then they do not come within the exception, but are affected by the general language. 16 Op. Atty. Gen. 261.

The mischiefs designed to be remedied by this section were declared by Mr. Justice Miller in *Goodman* v. *Niblack*, 102 U. S. 556, to be mainly two; first, the danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction; second, that by a transfer of such claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the Departments, the courts, or the Congress, as desperate cases, where the award is contingent on success, so often suggest.

It has been frequently held that the section does not include transfers by operation of law, or by will, in bankruptcy, or insolvency. *Butler* v. *Goreley*, 146 U. S. 303, and cases cited. But the legislation shows that the intent of Congress was

that the assignment of naked claims against the government for the purpose of suit, or in view of litigation or otherwise, should not be countenanced. At common law, the transfer of a mere right to recover in an action at law was forbidden as violating the rule against maintenance and champerty, and although the rigor of that rule has been relaxed, an assignment of a chose in action will not be sanctioned when it is opposed to any rule of law or public policy.

These considerations are apposite in arriving at the true construction of sections 2931 and 3011, and we are clear that the action provided for cannot be maintained by a stranger suing solely in virtue of a purchase of claims from those who did not see fit to prosecute them themselves.

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

Judgment reversed.

SHAEFFER *v.* BLAIR.

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

No. 178. Argued March 27, 1893.— Decided May 1, 1893.

By a contract in writing, A and B agreed that certain lands, for the sale and conveyance of most of which A held agreements of third persons, should be purchased for the mutual interest of A and B, and the legal title taken in A's name, and conveyed by him to B; that B should advance to A the sums required to pay the purchase money, as well as other expenses to be mutually agreed upon from time to time, and be repaid his advances, with interest, out of the net proceeds of sales; that A should attend to preparing the lands for sale, and sell them, subject to B's approval, at prices mutually agreed upon, and retain a commission of five per cent on the gross amount of sales, and, until B was reimbursed for his advances, deposit the rest of the proceeds to B's credit in a bank to be mutually agreed upon; that, when B had been so reimbursed, "then the remainder of the property shall belong sixty per cent to B and forty per cent to A;" and that the property should be prepared for sale "by A or assigns" within a certain time, unless extended by mutual agreement. A fraudulently obtained from B much larger sums of money

than were needed to pay for the lands, procured conveyances of the lands to himself, and refused to convey them to B. *Held*, that, whether the contract did or did not create a partnership, (and *it seems* that it did not,) the equitable title in the lands, after reimbursing B for his advances with interest, belonged three fifths to B and two fifths to A; and that A's fraudulent misconduct, while it deprived him of the right to the stipulated commissions, did not divest him of his title in the lands.

THIS was a bill in equity, filed December 8, 1885, by John I. Blair, a citizen of Missouri, against Samuel C. Shaeffer, a citizen of Ohio, and other persons, citizens of other States, claiming under him, setting forth a contract in writing between the plaintiff and Shaeffer, dated February 4, 1884, (which is copied in the margin,[1]) and praying that Shaeffer might be

[1] Whereas, by virtue of a certain contract made by Samuel C. Shaeffer, of Lancaster, Ohio, with P. Cardenas, of New York city, for the purchase of thirty-six and $\frac{47}{100}$ acres of land in Jackson County, Missouri, and known as lot 7 of the partition of the estate of Thomas West, deceased, by the circuit court of Jackson County, Missouri, on October 18, 1880, as per contract dated November 1, 1883, for which said land the said Shaeffer was to pay the said Cardenas the sum of $21,882 on or before February 8, 1884. Now it is agreed, as said contract is made by said Shaeffer for said land, and for prudential purposes, that the same shall be conveyed by warranty deed to said Shaeffer; and that John I. Blair, of Blairstown, New Jersey, has paid for the same by giving to said Shaeffer a check on the National Park Bank of New York city for the sum of $21,882, signed by the president of the Belvidere National Bank of New Jersey, to enable him to pay for the said land.

And whereas, by another agreement made by said Shaeffer with Marion West, of Jackson County, Missouri, dated July 24, 1882, and October 21, 1882, whereby said Marion West sold the interests of Frank West, Thomas West and Joseph C. West, minor heirs of Thomas West, deceased, and known as lots 5, 6 and 8, of the partition of the estate of said Thomas West, deceased, by the circuit court of Jackson County, Missouri, on October 18, 1880; for which said land, by said contract, said Shaeffer was to pay the sum of $44,559; $10,000 to be paid cash upon the delivery of deed; and the remainder, $34,559, to wit, $17,279.50 on or before February 8, 1885, and $17,279.50 on or before February 1, 1886, bearing eight per cent interest from February 1, 1883, and secured by mortgage on said premises. The said John I. Blair has given to said Shaeffer a check, signed by the president of the Belvidere National Bank of New Jersey, on the National Park Bank of New York city, for $10,000, to enable said Shaeffer to pay that much on account of said lands, and for prudential reasons to obtain a deed for the same in his own name. The said Blair is to pay the

ordered to convey to the plaintiff the lands described in that contract, and that it be adjudged that the defendants had no title or interest therein, and for further relief.

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balance of the purchase money at maturity, amounting to $34,559, given by said Shaeffer and secured by mortgage.

This makes at this time the cash payments on the above two contracts $21,882 and $10,000, making $31,882, which is to bear eight per cent interest until paid out of the sales of the land aforesaid, the interest to be added to the principal yearly, and bear eight per cent interest until paid.

Within four months after said Shaeffer shall have obtained the title to said lands, or sooner, if desired by said Blair, said Shaeffer to make a warranty deed to said Blair for said lands.

Now it is further agreed that, for the mutual interest of said Blair and Shaeffer, it may be deemed advisable to obtain certain releases for pretended claims made by the Anthony heirs to said property, the sum for said purpose to be mutually agreed upon, which sum said Blair agrees to furnish to said Shaeffer, upon telegraphic notice, to aid him in securing said releases; and said Shaeffer afterwards to deed by release deed said lands to said Blair. Said money to bear same rate of interest and governed by same conditions as hereinbefore stipulated, the same to be endorsed on this contract, or other written evidences given that said Blair paid the money.

It is deemed for the mutual interest of said Blair and Shaeffer, that said Shaeffer purchase the sixty-nine acres of land from John S. West, adjoining the above-described lands, at a price not to exceed $400 per acre, amounting to $27,600, and to obtain a warranty deed therefor. Said John I. Blair has given said Shaeffer the president's check of the Belvidere National Bank of New Jersey, on the National Park Bank of New York city for $14,600, as part payment for said sixty-nine acres of land. If said property cannot be purchased for said $27,600, then said $14,600 check to be returned to said Blair unused. Said Blair agrees to assume and pay $13,000 mortgage on said property, which said Shaeffer will give to said West, payable in one or two years, and bearing eight per cent interest, in case said purchase can be made; said Shaeffer, within four months after obtaining title to said land, to deed same to said Blair. All the money paid and furnished and assumed, to pay for said land, by said Blair, to bear eight per cent interest, and be added to the principal each year until paid.

All moneys necessary to stake off lots, grade streets, advertising, office furniture, fixtures, rents, stationery, taxes, and such other expenses as may become necessary for the improvements and sale of said property, as may be mutually agreed upon from time to time by said Blair and Shaeffer, shall be furnished by said Blair.

Said Shaeffer is to deduct and receive five per cent commission upon gross sales of all lots sold at the agreed price or over, made by said Blair and Shaeffer; and the remainder to be deposited in some bank in Kansas City, that may be mutually agreed upon, to the credit of said John I. Blair, until

Statement of the Case.

At the hearing in the Circuit Court, upon pleadings and proofs, the case appeared to be in substance as follows: In February, 1884, Shaeffer obtained and received from the plaintiff sums of money amounting to $92,882.70, upon fraudulent representations that they were needed to pay for the lands described in the contract; and, within a month after its date, procured conveyances of those lands to himself, by paying therefor sums amounting to $59,789.30 only, and paid $500 for taxes and other necessary expenses, leaving the sum of $32,593.40 due to the plaintiff; and afterwards refused, on

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all the money he has paid or advanced, with interest as aforesaid, shall have been returned to him. At the end of each month, said Shaeffer is to report the amount to the credit of said Blair, the same to be subject to said Blair's draft on account of the money advanced or paid for the property and otherwise as aforesaid.

All contracts for the sale of said land or lots to be made in triplicate, and approved by said John I. Blair, or some one appointed by him; on the back of said contracts the word "approved" or "rejected" to be written and signed by said John I. Blair, as aforesaid; one copy of said contract to be retained by said Shaeffer, and one by the purchaser. It shall be specified on the face of said contracts that they shall not be valid unless approved as specified; and all contracts to be made payable to said John I. Blair.

When said Blair shall have been paid in cash, for all the money advanced and furnished by him for the purchase of said lands, and other moneys, and the interest thereon, as specified, then the remainder of the property shall belong, sixty per cent to said Blair and forty per cent to said Shaeffer; and then said Shaeffer shall not be required to deposit in the aforesaid bank, as aforesaid specified, to the credit of said Blair, more than sixty per cent of the net proceeds of sales of said lands or lots.

If it is at this time desirable to divide said lots or land between said Blair and Shaeffer, said Blair to take sixty per cent, and said Blair to convey the title to forty per cent of said property or lots by warranty deed to Shaeffer; or said Shaeffer to sell the lots or lands as aforesaid, and divide the net proceeds of sale, sixty per cent to said Blair and forty per cent to said Shaeffer.

It is understood that said property, or any portion thereof, to be staked out and prepared for sale within one year, by said Shaeffer or assigns, after the Kansas City Belt Railway shall have been completed to said property, unless otherwise postponed in writing by said Blair and Shaeffer.

In witness whereof the parties hereto have hereunto set their hands and seals on this 4th day of February, 1884, at Kansas City, Missouri.

SAMUEL C. SHAEFFER. [SEAL.]

JOHN I. BLAIR. [SEAL.]

demand, to convey the lands to the plaintiff. The three tracts of land described in the contract contained, respectively, about thirty-six and a half acres, about one hundred and thirty-eight acres, and sixty-nine acres, near Kansas City, in the State of Missouri, and were worth more at the time of the contract than the sums paid by the plaintiff, and greatly increased in value afterwards.

In an action at law against Shaeffer, submitted to the Circuit Court without a jury at the same time with the present suit in equity, the plaintiff recovered judgment for the aforesaid sum of $32,593.40. Upon that judgment no writ or error was sued out.

In the present suit, the Circuit Court held that the contract sued on created no partnership between the plaintiff and Shaeffer, and conferred on Shaeffer only the right of an agent to sell, with a share in the profits by way of compensation; and that Shaeffer, by his fraudulent conduct, had forfeited all his rights under the contract, including not only the five per cent commission on sales, but the share of forty per cent in the net profits remaining after payment of the sums advanced by the plaintiff; and entered a decree for the plaintiff, as prayed for. 33 Fed. Rep. 218. From this decree Shaeffer appealed to this court.

Mr. C. D. Martin and *Mr. R. A. Harrison* for appellant.

Mr. Charles O. Tichenor for appellee.

I. It is contended that the payment by Blair for these lands was only a loan to Shaeffer, with the lands as security. But the contract creates no debt in favor of Blair. It carefully shields Shaeffer from any liability for the money which Blair is compelled to pay from time to time. Blair even agrees "to assume and pay" a mortgage which Shaeffer contemplates giving under the contract for a part of the purchase money. Blair binds himself to pay everything; Shaeffer binds himself to pay nothing; Shaeffer, under the contract, must get one-twentieth of the gross sales of the land, even if it is sold for one-half its cost.

Argument for Appellee.

II. Another defence, as stated in the answer, is, that "it does appear by said contract, and it is true and so intended by said Blair and Shaeffer, that said contract created a partnership concerning said lands and the proceeds of the sale thereof." Is this claim valid?

There are certain tests by which this question must be solved. What does the instrument show that they intended by it in this respect? For persons cannot be made to assume the relations of partners, as between themselves, when their purpose is that no partnership shall exist. *Burckle* v. *Echart*, 1 Denio, 337; *Beecher* v. *Bush*, 45 Michigan, 188; *Hazzard* v. *Hazzard*, 1 Story, 371; *London Assurance Co.* v. *Drennen*, 116 U. S. 461; *McDonald* v. *Matney*, 82 Missouri, 358.

It is nowhere stated in the contract that the parties were to be partners. There is nothing said about a firm name; in fact, there was no business to be carried on. The contract is not in the form of partnership contracts. There is nothing in it to lead Blair to suspect that he was making himself liable to a suit for dissolution, subjecting the land which he had bought and paid for to the risk of going into the hands of a receiver, to be sold under order of court, attended with delays, vexation and great expense. The word "assigns" is significant; a word not used in a partnership contract. To assign is to dissolve.

The relation of the parties to each other was simply that of principal and agent. In no way was Blair the agent of Shaeffer, and the latter never had the authority of a partner. The contract made him an agent with limited powers; if he exercised any discretion he violated his contract. He did not have the power of an ordinary real estate agent, and his acts could have created no partnership liabilities, even as to third persons, for the contract was entitled to record and when recorded was notice.

Lord Wensleydale says, in *Cox* v. *Hickman*, 8 H. L. Cas. 268, 312: "The law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject, if this true principle were more

constantly kept in view. . . . A man who allows another to carry on trade, whether in his own name or not, to buy and sell and to pay over all the profits to him, is undoubtedly the principal, and the person so employed the agent, and the principal is liable for the agent's contracts in the course of his employment." See also *Winel* v. *Stone*, 30 Maine, 384; *Thompson* v. *Bowman*, 6 Wall. 316.

In the leading case of *Meehan* v. *Valentine*, 145 U. S. 611, 623, this court, while criticising what was said by Lord Wensleydale as to agency, approves of the rule laid down in *Cox* v. *Hickman;* and Mr. Justice Gray, speaking for the court, says: "If they do this, the incidents or consequences follow, that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them, that one shall not be so liable, though good between themselves, is ineffectual as against third persons."

Here there was no community of interest in the land. True, Shaeffer, at first, took the title not because he owned an interest, but for prudential reasons. He held it for Blair, and was compelled to convey to him. Shaeffer was never to get any interest unless the speculation turned out favorably, and then solely as compensation, because there were profits. Such an interest did not work a change, either in possession or title. *Drennen* v. *London Assurance Co.*, *supra;* *Musser* v. *Brink*, 68 Missouri, 242. There was no community of profit; no interest in the profits as principal; no specific interest in profits as profits, in contradistinction to a stipulated portion of the profits as compensation for services.

So, then, we say, Shaeffer was to have no partnership or property right, from the start, in the profits; but his interest was only at the end, when the land was sold; and not even then, unless he had performed the services contemplated by

the contract on his part. *Hanna* v. *Flint*, 16 California, 76; *Walker* v. *Hirsch*, 27 Ch. D. 460; *Durkee* v. *Gunn*, 41 Kansas, 496; *Holmes* v. *Old Colony Railroad*, 5 Gray, 58. *Seymour* v. *Freer*, 8 Wall. 202, is not in conflict with our contention.

If the contract of February 4, 1884, created neither the relation of partnership nor that of debtor and creditor, it made Shaeffer the agent of Blair for the purposes specified in the contract. *Dieringer* v. *Meyer*, 42 Wisconsin, 311; *Phœnix Mutual Life Ins. Co.* v. *Holloway*, 57 Connecticut, 310; *Vennum* v. *Gregory*, 21 Iowa, 326; *Balsbaugh* v. *Frazer*, 19 Penn. St. 95; *Farnsworth* v. *Hemmer*, 1 Allen, 494; *S. C.* 79 Am. Dec. 756.

Blair's case is stronger than any case cited, for the evidence shows that the fraud accomplished was by means of the contract, and was in pursuance of a design formed prior to the execution of the contract. Even though the contract made them partners, yet, under such circumstances, a court would decree it a nullity, leaving Blair with the land which he bought to put into the partnership. *Hynes* v. *Stewart*, 10 B. Mon. 429; *Gibson* v. *Cunningham*, 92 Missouri, 131; *Newbigging* v. *Adam*, 34 Ch. D. 582; *Oteri* v. *Scalzo*, 145 U. S. 578.

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

The decision of this case turns upon the construction of the contract of February 4, 1884, by which the parties agreed to buy certain lands and to sell them again for the joint benefit of both.

The provisions of that contract were, in substance, that those lands, in the greater part of which Shaeffer already had an equitable title under agreements of third persons to sell and convey them to him, should be purchased, for the mutual interest of the parties; that the legal title in all the lands should be taken in Shaeffer's name, and be conveyed by him to Blair; that Blair should advance the sums required to enable Shaeffer to pay the purchase money of the lands, as

well as the necessary expenses of preparing them for sale and selling them, and should be repaid his advances, with interest, out of the net proceeds of sales; that Shaeffer should stake out the lands for sale, make the necessary improvements, sell them, retain a commission of five per cent upon the gross amount of sales, and, until Blair should have been reimbursed for his advances, deposit the rest of the proceeds in a bank to Blair's credit; that the expenses of improving and selling the lands, the time within which they must be prepared for sale, the price at which they might be sold, and the bank in which the proceeds should be deposited by Shaeffer, should be mutually agreed upon between him and Blair, and all contracts of sale by Shaeffer should be approved by Blair; and that, when Blair should have been reimbursed for all his advances, "then the remainder of the property shall belong, sixty per cent to said Blair and forty per cent to said Shaeffer," and be divided between them accordingly, either by Blair's conveying the title in two fifths of the lands to Shaeffer, or by Shaeffer's selling the lands and paying sixty per cent of the proceeds to Blair.

The contract evidently contemplated that, while the sales to be made by Shaeffer should be subject to Blair's approval, no sales should be made by Blair without Shaeffer's consent. This clearly appears from several provisions of the contract. It is by Shaeffer, or, as said in the last clause of the contract, "by said Shaeffer or assigns," that the lands are to be staked out into lots and prepared for sale. "Said Shaeffer is to deduct and receive five per cent commission upon gross sales of all lots sold at the agreed price or over, made by said Blair and Shaeffer," that is to say, "of all lots sold" by Shaeffer "at the agreed price or over," the price (not the sales) being "made by said Blair and Shaeffer." The provision that all contracts of sale shall be made in triplicate, and approved in writing by Blair, and one copy retained by Shaeffer, clearly implies that all contracts of sale shall be initiated by Shaeffer. And after Blair shall have been reimbursed his advances, then, if the lands are not themselves divided between them, it is Shaeffer who is to sell them and divide the proceeds.

In short, Shaeffer was to contribute to the venture his equitable title in the greater part of the lands to be purchased, as well as his own services; Blair was to contribute all the money required to carry out the enterprise; the legal title was to be taken in Shaeffer's name, and conveyed by him to Blair; Shaeffer was to attend to preparing the lands for sale, and to sell them, subject to Blair's approval; Shaeffer was to receive a commission of five per cent on the gross amount of sales; out of the rest of the proceeds, Blair was to be repaid his advances; and after Blair had been reimbursed, the property was to belong, three fifths to Blair and two fifths to Shaeffer, and to be divided between them accordingly, either in lands or in money.

Taking into consideration the whole scope of the contract, and the fact that, before it was made, Shaeffer had an equitable interest in the greater part of the lands, which was in fact, and was evidently considered by both parties to be, of greater value than the price which he had agreed to pay for them; that the title to all the lands was to be taken in Shaeffer's name in the first instance, and to be conveyed by him to Blair; and especially the express stipulation that, after Blair should have been fully reimbursed for his advances, out of the proceeds of sales, "then the remainder of the property shall belong, sixty per cent to said Blair and forty per cent to said Shaeffer," and should be divided between them accordingly; the conclusion appears to us to be inevitable, that the conveyance of the legal title by Shaeffer to Blair, like the deposit of proceeds of sales made by Shaeffer to Blair's credit, was intended as security only for Blair's advances; that Shaeffer was to have and retain an equitable title in two fifths of the land, subject to the claim of Blair for reimbursement; and that Shaeffer's fraudulent misconduct, while it might properly defeat any claim of his for commissions, did not divest him of his equitable title in the lands, as recognized and stipulated for in the contract.

There may doubtless be a partnership in the purchase and the resale of lands, as of any other property. But this contract contains no expression to indicate an intention of the

parties to become partners. It does not authorize either party, without the consent of the other, to sell any property, or to contract any debts, on behalf of both. If the enterprise proves unsuccessful, the contract does not provide or contemplate that Shaeffer shall share the loss. And the phrase "said Shaeffer or assigns" in the last clause (unless supposed to be inadvertently inserted) is hardly consistent with the idea of a partnership. There is great difficulty, therefore, in the way of construing this contract as creating a partnership between Blair and Shaeffer. *Thompson* v. *Bowman*, 6 Wall. 316; *Seymour* v. *Freer*, 8 Wall. 202; *Meehan* v. *Valentine*, 145 U. S. 611, 623.

But it is unnecessary to express a decisive opinion upon that point, because, whether Shaeffer was acting as a partner, or only as an agent, in performing the duties required of him by the contract, the fraudulent misconduct proved against him deprived him of the right to the stipulated commissions. *Denver* v. *Roane*, 99 U. S. 355; *Wadsworth* v. *Adams*, 138 U. S. 380. And whether he was or was not a partner, that misconduct did not operate to forfeit his equitable title in the lands.

The result is, that Blair is not entitled to the entire property, except as security for the sums advanced by him, and for any reasonable expenses, including the amount ascertained by the judgment at law between the parties, (so far as they remain unpaid,) with interest computed according to the contract; and that, after reimbursing him for such advances and expenses, the lands belong, in equity, three fifths to Blair and two fifths to Shaeffer.

The decree of the Circuit Court, adjudging that Shaeffer has no title or interest in the lands, is therefore erroneous, and must be reversed; and the case is to be remanded to that court, with directions to order that the lands, or so much thereof as may be necessary to pay and satisfy the sums due to the plaintiff for advances and expenses, be forthwith sold, and the proceeds applied to the payment of those sums; and that any lands or proceeds remaining, after so reimbursing the plaintiff, be divided between him and Shaeffer in the proportions aforesaid.

Names of Counsel.

Decree reversed, and case remanded to the Circuit Court for further proceedings in accordance with the opinion of this court.

MR. JUSTICE BREWER dissented.

MR. JUSTICE FIELD was not present at the argument, and took no part in the decision.

CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY *v.* McKEEN.

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

No. 1024. Submitted December 12, 1892. — Decided May 1, 1893.

This case coming on to be heard before the Circuit Court of Appeals, consisting of the Circuit Judge and two District Judges, one of the judges was found to be disqualified to sit in it, and another was unwilling to sit, whereupon the court certified to this court questions and propositions of law concerning which it desired the instruction of this court, and directed the clerk to transmit with the certificate twenty copies of the printed record in the cause. *Held*,

(1) That the certificate was irregular, as a quorum of the court did not sit in the case;

(2) That it did not comply with rule 37 of this court, inasmuch as it did not contain a proper statement of the facts on which the questions or propositions of law arose;

(3) That the act of March 3, 1891, does not contemplate the certification of questions or propositions of law to be answered in view of the entire record in a cause; although this court may order an entire record to be brought up in order to decide, as if the case had been brought up by writ of error or appeal.

THE case is stated in the opinion.

Mr. Lawrence Maxwell, Jr., for appellant.

Mr. W. H. H. Miller and *Mr. John M. Butler* for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court.

This is a certificate from the United States Circuit Court of Appeals for the Seventh Circuit. It appears therefrom that the case came on to be heard before the Circuit Judge and two District Judges holding that court, on January 13, 1892, the Circuit Justice not being in attendance or able at that time to attend; that one of said judges was unwilling and another disqualified to sit upon the final hearing and determination of the appeal, and that it appearing to the court that the appeal involved questions of law of great importance which should be certified to the Supreme Court of the United States, it was thereupon ordered that certain questions and propositions of law be, and the same were thereby, certified to this court as questions or propositions concerning which the Circuit Court of Appeals desired the instruction of this court for their proper decision. After stating the questions, the certificate concluded with a direction to the clerk to transmit to the clerk of the Supreme Court of the United States, in connection with the certificate, twenty copies of the printed record in the cause, and it is apparent that reference to that record is necessary in order to the correct determination of the questions. On December 12, 1892, a motion was made in this court that the transcript of the record sent up by the Circuit Court of Appeals be received, and that the whole record and the cause be retained in this court for its consideration. On December 19, this motion was denied, and it was further ordered that "counsel be allowed to submit briefs on the questions whether the certificate in this cause is valid, and if so, whether it is sufficient under the act creating the Circuit Court of Appeals to be proceeded upon by this court." No suggestions have been made or briefs submitted by counsel.

We are of opinion that a certificate of questions or propositions of law concerning which a Circuit Court of Appeals

desires the instruction of this court for their proper decision is irregular when a quorum of its members does not sit in the case, (*United States* v. *Emholt*, 105 U. S. 414,) and that this certificate does not comply with rule thirty-seven of this court, inasmuch as it does not contain a proper statement of the facts on which the questions or propositions of law arise. While we have the power to require the whole record and cause to be sent up to us for consideration and decision, the sixth section of the Judiciary Act of March 3, 1891, does not contemplate that questions or propositions of law shall be propounded and the entire record thereupon transmitted for us to answer such questions or propositions in view thereof. It is for us, when questions or propositions are certified, accompanied by a proper statement of the facts on which they arise, to determine whether we will answer them as propounded or direct the whole record to be placed before us in order to decide the matter in controversy in the same manner as if the case had been brought up by writ of error or appeal.

We must decline, therefore, to answer the questions contained in this certificate, and order the case to be

Dismissed.

ABADIE *v.* UNITED STATES.

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

No. 260. Submitted April 24, 1893. — Decided May 1, 1893.

On the authority of *Cameron* v. *United States*, 146 U. S. 533, this case is dismissed because it does not appear that the jurisdictional amount is involved.

THE case is stated in the opinion.

Mr. James Herrmann for appellant.

Mr. Assistant Attorney General Maury for appellees.

Opinion of the Court.

THE CHIEF JUSTICE: This is an appeal from a decree of the Circuit Court of the United States for the Northern District of California in a proceeding under the act of Congress of February 25, 1885, entitled "An act to prevent unlawful occupancy of the public lands," 23 Stat. 321, c. 149, whereby appellant was directed to remove a fence and enclosure from certain sections of land therein described, in default of which it was decreed that the same should be destroyed by the marshal for said district. The value of the fence was claimed to exceed $5000; but the fence was not the matter in dispute, nor was the appellant deprived thereof. For want of the jurisdictional amount, *Cameron* v. *United States*, 146 U. S. 533, the appeal must be

Dismissed.

UNITED STATES *v.* JONES.

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

No. 262. Submitted April 24, 1893. — Decided May 1, 1893.

A bill of exceptions signed after the final adjournment of the court for the term, without an order extending the time for its presentation, or the consent of parties thereto, or a standing rule authorizing it to be done, is improvidently allowed; and when the errors assigned arise upon the bill, the judgment will be affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Parker for plaintiffs in error.

Mr. T Alexander and *Mr. N. C. Blanchard* for defendants in error

THE CHIEF JUSTICE: Judgment was rendered in this case July 18, the writ of error sued out and allowed July 23, and the court adjourned for the term, July 30, 1889. So far as

disclosed by the record the bill of exceptions was not tendered to the judge or signed by him until October 7, 1889, and no order was entered extending the time for its presentation, nor was there any consent of parties thereto, nor any standing rule of court which authorized such approval. The bill of exceptions was therefore improvidently allowed. *Müller* v. *Ehlers*, 91 U. S. 249; *Jones* v. *Grover & Baker Sewing Machine Co.*, 131 U. S. Appx. cl; *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293. As the errors assigned arise upon the bill of exceptions, we are compelled to affirm the judgment, and it is so ordered.

Affirmed.

NASH *v.* HARSHMAN.

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

No. 957. Submitted April 17, 1893. — Decided May 1, 1893.

This case is dismissed upon the authority of *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262.

THIS action was commenced in the court of common pleas of Logan County, Ohio, to foreclose a mortgage made by Nash to Harshman of real estate then owned by him, and conveyed by him to one Dupee after the execution of the mortgage. Nash and Dupee were both made defendants. After issue joined the cause was removed to the Circuit Court of the United States on the defendants' motion, on the ground of local prejudice. Trial was had there which resulted in a decree, December 4, 1890, against Nash for the payment of the debt, and against Dupee for the sale of the land on failure of Nash to make the payment within ten days from the decree. On the 11th of December, Nash took an appeal to this court, which was allowed, and a receiver was appointed to take possession of the estate and hold and manage it pending the appeal. The appellee moved to dismiss the appeal or affirm the judgment, assigning the following reasons therefor:

Statement of the Case.

"1. No proper bond for appealing said cause to this court has been given; and none was required by said Circuit Court to be given, but in allowing this appeal, said court assumed to excuse and dispense with the bond required by law, whereby the allowance of appeal is rendered invalid and this court acquires no jurisdiction thereby.

"2. This appeal is not taken and prosecuted by the party against whom the decree of the court below was rendered.

"3. It is apparent upon an inspection of the record that said appeal is frivolous and utterly groundless, and was taken for the purposes of delay merely."

Mr. Louis D. Johnson for the motion.

No one opposing.

THE CHIEF JUSTICE: The appeal is dismissed. *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262.

INTERSTATE COMMERCE COMMISSION *v.* ATCHISON, TOPEKA AND SANTA FÉ RAILROAD COMPANY.

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

No. 1275. Submitted April 24, 1893. — Decided May 1, 1893.

No appeal now lies to this court from decisions of the Interstate Commerce Commission.

THIS was a motion to dismiss for want of jurisdiction.

The motion was also entitled in the following cases: Atlantic & Pacific Railroad Company; Burlington & Missouri River Railroad Company; California Central Railway Company; California Southern Railroad Company; Chicago, Kansas & Nebraska Railway Company; Missouri Pacific

Railway Company; St. Louis & San Francisco Railway Company; Southern California Railroad Company. Accompanying the motion was the following "Statement:"

"May 22, 1889, complaint was filed before the Interstate Commerce Commission against the appellees by the Board of Trade of San Bernardino, California, alleging said companies' maintenance of freight rates discriminative against San Bernardino, and in violation of the act of February 4, 1887, to regulate commerce (24 Stats. 379).

"Upon hearing, order was entered by the Commission on July 19, 1890, requiring the appellees to change and modify such rates. The appellees failed to obey such order, whereupon the Interstate Commerce Commission commenced this proceeding to enforce such obedience in the U. S. Circuit Court for the Southern District of California, on May 1, 1891, pursuant to section 16 of the Interstate Commerce Act (amended act of March 3, 1889, 25 Stats. 859). That court decreed in favor of the appellees on April 25, 1892, on the sole ground that upon the proof presented the alleged unlawful discrimination in rates did not exist, (50 Fed. Rep. p. 295; Trans. p. 202,) and thereupon, on May 14, 1892, (Trans. p. 4163,) the Commission appealed to this court.

"Such decision was rendered and this appeal was taken *after* the creation of the Circuit Courts of Appeals. The question is whether such direct appeal lies to this court."

Mr. George R. Peck, *Mr. A. T. Britton* and *Mr. A. B. Browne* for the motion.

Mr. W. A. Day opposing.

THE CHIEF JUSTICE: The motion to dismiss is granted. *McLish* v. *Roff*, 141 U. S. 661; *Lau Ow Bew* v. *United States*, 144 U. S. 47; *Hubbard* v. *Soby*, 146 U. S. 56; *Railway Company* v. *Osborne*, 146 U. S. 354.

Appeal dismissed.

RICHMOND AND DANVILLE RAILROAD COMPANY *v.* ELLIOTT.

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

No. 199. Argued April 5, 6, 1893. — Decided May 1, 1893.

On the trial of an action by a coupler and switchman of a railroad company, whose wages were $1.50 per day, against another company, to recover for injuries received while in the discharge of his duties from the explosion of the boiler of a locomotive, he was asked, as a witness, what were his prospects of advancement in the service of the company, and answered that he thought by staying he would be promoted; that he had been several times, in the absence of the yard-master, called upon to discharge his duties; that there was a "system by which you go in there as coupler or train-hand, or in the yard, and if a man falls out you stand a chance of taking his place;" and that the average yard-conductor obtained a salary of from $60 to $75 a month. *Held*, that there was error in admitting this testimony.

If a railway company, in purchasing a locomotive from a manufacturer of recognized standing makes such reasonable examination of it as is possible without tearing the machinery in pieces, and subjects it fully to all the ordinary tests which are applied for determining the efficiency and strength of completed engines, and such examination and tests disclose no defect, it cannot, in an action by a stranger, be adjudged guilty of negligence on account of a latent defect which subsequently caused injury to such party.

On February 8, 1887, defendant in error commenced this action in the Superior Court of Fulton County, Georgia, to recover damages for personal injuries. The case was removed to the Circuit Court of the United States for the Northern District of Georgia, in which court a trial was had on the 2d of November, 1888, and a verdict returned in favor of the plaintiff for $10,000. Judgment having been entered thereon, defendant sued out a writ of error from this court.

The facts were these: The plaintiff was an employé of the Central Railroad and Banking Company, which company had, under an arrangement with the defendant, the right to use its

yard in Atlanta, Georgia, for switching purposes and in the making up of trains. He was one of the crew of a switch engine belonging to the Central Company, and on the night of November 25, 1886, while in the discharge of his duties in the yard, engine No. 515, belonging to the defendant, exploded its boiler, and a piece of the dome thereof struck him on the leg and injured him so that amputation became necessary. The explosion of this boiler was charged to be owing to negligence on the part of the defendant, in this respect, "that more steam was allowed to generate than the engine had capacity to contain;" that the boiler was defective, and that the defendant had notice of the defect.

Mr. Henry Jackson for plaintiff in error. *Mr. T. J. Leftwich* was with him on the brief.

Mr. C. T. Ladson for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

The first question to which our attention is directed arises on the admission of testimony in respect to the probability of plaintiff's promotion in the service of his employer, and a consequent increase of wages. It appears that he was working in the capacity of coupler and switchman for the Central Company, and had been so working for between four and five years; that he was 27 years of age, in good health, and receiving $1.50 per day. He was asked this question: "What were your prospects of advancement, if any, in your employment on the railroad and of obtaining higher wages?" In response to that, and subsequent questions, he stated that he thought that by staying with the company he would be promoted; that in the absence of the yard-master he had sometimes discharged his duties, and also in like manner temporarily filled the place of other employés of the company of a higher grade of service than his own; that there was a "system by which you go in there as coupler or train-hand or in the yard, and if a man falls out you stand a chance of

taking his place;" and that the average yard-conductor obtained a salary of from sixty to seventy-five dollars a month.

We think there was error in the admission of this testimony. It did not appear that there was any rule on the part of the Central Company for an increase of salary after a certain length of time, or that promotion should follow whenever a vacancy occurred in a higher grade of service. The most that was claimed was that when a vacancy took place a subordinate who had been faithful in his employment, and had served a long while, had a chance of receiving preferment. But that is altogether too problematical and uncertain to be presented to a jury in connection with proof of the wages paid to those in such superior employment. Promotion was purely a matter of speculation, depending not simply upon the occurrence of a vacancy, but upon the judgment or even whim of those in control. Of course, there are possibilities and probabilities before every person, particularly a young man, and a jury in estimating the damages sustained will doubtless always give weight to those general probabilities, as well as to those springing from any peculiar capacities or faculties. But that is a different matter from proving to the jury the wages which some superior officer receives, and then exaggerating in the minds of the jury the amount of the damage which has been sustained, by evidence tending to show that there is a chance of plaintiff being promoted at some time to such higher office. It is enough to prove what the plaintiff has been in fact deprived of; to show his physical health and strength before the injury, his condition since, the business he was doing, *Wade* v. *Leroy*, 20 How. 34; *Nebraska City* v. *Campbell*, 2 Black, 590; *Vicksburg & Meridian Railroad* v. *Putnam*, 118 U. S. 545, 554; the wages he was receiving, and perhaps the increase which he would receive by any fixed rule of promotion. Beyond that, it is not right to go and introduce testimony which simply opens the door to a speculation of possibilities. Nor was the error in the admission of this testimony cured by the instructions. On the contrary, they seem to emphasize that this chance of promotion was a matter to be

considered. This is what the court said: "I permitted some evidence to be introduced on the subject of the line of promotion in the business in which he was engaged. The plaintiff says, and the jury could consider the fact, that he had a probability of promotion in the line of services in which he was engaged; that the salary of the next grade of services in which he was engaged is from sixty to seventy-five dollars per month; the jury can consider that in finding what his financial or pecuniary loss is. I have permitted the evidence to go to the jury, and I will state to you that the jury ought not to be governed by a mere conjecture or possibility in a matter of that sort; it ought to be shown to the reasonable satisfaction of the jury that the man after a while would earn more money than he was then earning; it ought to be shown to your reasonable satisfaction; it is a matter for you to determine. The evidence has gone to you, and if you believe, if it has been shown to your reasonable satisfaction, that this man would earn more money at some future period, you would be authorized to consider that fact." Obviously, this directs their attention to this matter, and invites them to consider it in determining the damages which the plaintiff has sustained. While it does say that the jury should not be governed by any mere conjecture or possibility, yet it speaks of the matter as though there was placed before them a probability of promotion which they ought to consider. That probability was only such as was disclosed by the testimony we have referred to. Such an uncertainty cannot be made the basis of a legal claim for damages. The Code of Georgia of 1882, in section 3072, declares: "If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrongdoer." Such declaration is only an affirmation of the general law in respect thereto.

A case very much in point was before the Supreme Court of Georgia. *Richmond & Danville Railroad* v. *Allison*, 86 Georgia, 145, 152. In that case the plaintiff (the action being one for personal injuries) was a postal clerk in the railway

mail service of the United States, and on the trial the assistant superintendent of the railway mail service, under whom the plaintiff was employed, was permitted to give testimony as to the chances of promotion. This was adjudged error. The court thus discussed the matter: "We think this evidence shows that Allison's promotion was too uncertain, and the possibility of an increase of his salary from $1150 to $1300 too remote to go to the jury, and for them to base a verdict thereon. While it is proper in cases of this kind to prove the age, habits, health, occupation, expectation of life, ability to labor, and probable increase or diminution of that ability with lapse of time, the rate of wages, etc., and then leave it to the jury to assess the damages, we think it improper to allow proof of a particular possibility, or even probability, of an increase of wages by appointment to a higher public office, especially where, as in this case, the appointment is somewhat controlled by political reasons. The deputy clerk of this court, for example, is very efficient and faithful, and if there should be a vacancy in the office of clerk of the court, it is not only possible, but very probable, that he would be appointed to fill the vacancy, thereby obtaining a much larger salary than he now receives; but if he should be injured as Allison was, and were to sue the railroad company for damages, we do not think it would be competent for him to prove the possibility or probability of his appointment to fill a vacancy in the office of clerk, especially as the *personnel* of the court, upon which such appointment must depend, might change in the meantime. To allow the jury to assess damages in behalf of the plaintiff on the basis of a large income arising from a public office which he has never received, which is merely in expectancy and might never be received, or, if received at all, might come to him at some remote and uncertain period, would be wrong and unjust to the defendant. We believe the rule of most of the railroads in this State is to promote their employés. An employé commences at the lowest grade, and if he is competent, capable, and efficient he is very likely to be promoted upon the happening of a vacancy above him. If one occupying a lower grade of service were injured,

would he be allowed to prove, unless he had a contract to that effect, that his prospects of promotion to a higher grade and better salary were good, and would the jury be allowed to base their calculation and estimate of the damages upon a much larger salary which he never received, but merely had a prospect of receiving? It will be observed that the testimony in this case shows that there were two others in the same class with Allison, equally competent and efficient as he was, and it is by no means certain that Allison would have been preferred to each of them in case of vacancy, and promoted above them; so it could not be said that he was in direct line of promotion." And this decision is in harmony with the general course of rulings. *Brown* v. *Cummings*, 7 Allen, 507; *Brown* v. *Chicago, Rock Island &c. Railway*, 64 Iowa, 652; *Chase* v. *Burlington, Cedar Rapids &c. Railroad*, 76 Iowa, 675. For this error, which it may well be believed worked substantial injury to the rights of the defendant, the judgment will have to be reversed.

Another matter is this: The injury was caused by the explosion of the boiler of an engine, and it is insisted that the testimony shows that the engine was handled properly and carefully; that the defect in the iron casting of the dome-ring, which, after the explosion, was found to have existed, was a defect which could not with the exercise of reasonable care have been discovered by the company; and that it took all reasonable and proper care to test the boiler and engine, and from such test no defect was discovered. Hence the contention is, that the court should have instructed the jury to find a verdict for the defendant. Perhaps, in view of what may be developed on a new trial, it is not well to comment on the testimony in respect to these matters. Whether there was negligence in respect to the accumulation of steam is a question of fact, involving, first, the capacity of the boiler, the amount of steam which had accumulated, and the precautions which were taken to prevent its going above a certain pressure. With regard to the defect in the iron casting, which seems to have been revealed by the explosion, it may be said that it is not necessarily the duty of a purchaser of

machinery, whether simple or complicated, to tear it to pieces to see if there be not some latent defect. If he purchases from a manufacturer of recognized standing, he is justified in assuming that in the manufacture proper care was taken, and that proper tests were made of the different parts of the machinery, and that as delivered to him it is in a fair and reasonable condition for use. We do not mean to say that it is never the duty of a purchaser to make tests or examinations of his own, or that he can always and wholly rely upon the assumption that the manufacturer has fully and sufficiently tested. It may be, and doubtless often is, his duty when placing the machine in actual use to subject it to ordinary tests for determining its strength and efficiency. Applying these rules, if the railroad company after purchasing this engine made such reasonable examination as was possible without tearing the machinery to pieces, and subjected it fully to all the ordinary tests which are applied for determining the efficiency and strength of completed engines, and such examination and tests had disclosed no defect, it cannot in an action by one who is a stranger to the company be adjudged guilty of negligence because there was a latent defect, one which subsequently caused the destruction of the engine and injury to such party. We do not think it necessary or proper to go into a full discussion of the facts, but content ourselves with stating simply the general rules of law applicable thereto.

For the error first above noticed, the judgment will be

Reversed and the case remanded with instructions to grant a new trial.

UNITED STATES v. MOCK.

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

No. 233. Submitted April 21, 1893. — Decided May 1, 1893.

When the defendant in an action of trespass brought by the United States against him for cutting and carrying away timber from public lands admits the doing of those acts, the plaintiffs are entitled to at least nominal damages in the absence of direct evidence as to the value of the standing trees.

It is not to be presumed in such case as matter of course that the government permitted the trespass, and any instruction by the court pointing that way is error.

THIS action was commenced by the filing of a complaint on May 6, 1884, in the Circuit Court of the United States for the Northern District of California, in which complaint it was alleged that the plaintiff was the owner, in 1879, of a certain tract of land in the county of Fresno, State of California, describing it, upon which tract of land were growing trees; that during that year the defendant unlawfully and wrongfully cut down and carried off certain of these trees, to wit, five hundred pine trees, and manufactured them into lumber, producing 1,500,000 feet of lumber, of the value of $15,000, for which sum judgment was asked. Defendant answered with a general denial. The case was tried before a jury in April, 1888. On the trial it appeared, from the testimony of defendant as well as that of other witnesses, that in 1879 defendant had built a saw-mill adjoining the tract, and operated it for a little less than three months; that it had a capacity of about ten thousand feet board measure a day; that he had five white men and two or three Indians employed at the mill; and that the timber was cut in the vicinity of the mill. The defendant also admitted that he knew that the tract described in the complaint was government land, and that he did not at any time enter it as a homestead or preëmption, and that a portion,

though only a small portion, of the timber which he sawed, was cut from that tract. There was the further testimony on the part of the government of two timber agents, that after the commencement of this action they went upon the land and counted the number of stumps, and found 814 stumps of pine trees, of the diameter of from two to three feet. There was also given in evidence an estimate of the amount of lumber that would be made from a tree of the size indicated by such stumps. There was evidence tending to show the price and value of lumber in that vicinity in the year 1879, but not of the value of standing trees. In its instructions the court referred to the estimate made by the timber agents of the amount of lumber that would have been manufactured from the timber cut upon the premises, and the admission made by the defendant that he had cut some timber, stated that there was no testimony that he had cut all the timber that had been cut thereon, and that the jury had no right to guess, and that unless proof had been offered which created a reasonable certainty in their minds as to the amount of timber cut by the defendant, and its value, the verdict must be for the defendant, and then proceeded as follows:

"There are two elements entering into these cases. This is an action of trespass, a tort. It is wrong for one person to go on another person's land and cut and remove timber without the consent of the owner; so the going of any person on the public domain and cutting and removing from it timber without the consent of the government is wrong, just as much as if I went on any of your ranches or vineyards, cut and removed the crops without your consent. But there is a vast difference in the character and quality of actions. A gentleman may permit the public to use a portion of his domain as a highway for years, and as long as it is being done with his tacit consent nobody would be held a trespasser for doing so; but when he notifies the public that it must cease, then that tacit right ceases, and anybody who went on there might be justly held as a trespasser. The history of the country in regard to trespassing on the public domain and cutting timber for the use of the people in building their homes upon their farms and for

general domestic purposes may be considered. As I observed, the government is the proprietor of the soil. It has always owned the soil and the timber on it and the mines beneath it; but it is a matter of common knowledge in this country that the country could not have been settled up otherwise than by the practice and custom which has grown up in advance of legislation.

"It is a matter of history that the government permitted the early pioneers, as they went ahead to make their homes for themselves, to go on the public domain and take such timber as was necessary for domestic use, and although there never was any law or license to that effect, it was done with the knowledge of every department of the government — legislative, judicial, and executive. The earliest law that was passed that I remember was in 1833, forbidding, under pains and penalties, the entering on lands that had been reserved on which there were valuable forests of live oak and pine for ship-building. It is possible that there was other legislation following that, but I do not remember any until 1878, and during all that time every department of the government knew how the country was being settled, and that men went on and felled trees with this tacit permission, or, if there was not a tacit permission, at least there was no reprehension of their acts. In this case, in order to judge wisely and fairly of this defendant as to whether he was a wanton trespasser, you will have to take into consideration the concurrent circumstances surrounding his acts. While I wish you to understand that I am not aware of any license having ever been given in the last sixty years to any party to go on the public domain and cut timber, no court has ever held, and no court would be justified in holding, that these men were all criminals who went on and put up a little mill for the purpose of aiding their neighbors in procuring lumber for domestic purposes. I say you will not judge correctly whether these men were wilful and wanton trespassers in the sense in which a trespass is wilful and wanton, unless you take into account the contemporaneous history of the country and these matters, which are familiar to you all. If this party was a wilful

trespasser and cut from the public domain this timber wantonly and maliciously, the government is entitled to recover from him the full value of the timber by him so cut and removed from the public domain, without allowing at all for the increased value that he put upon it; for it will not be permitted that a man shall trespass on your property and commit waste and wanton destruction by removing it, that you shall be merely indemnified for the original value — in other words, you may recover your property and its value wherever you find it, whether the man has added to its value since he got it or not. This case is somewhat different from the case yesterday. This case presents this naked fact: That if you return a verdict for the government, it must be for the value of the lumber manufactured. Now, no evidence has been offered in the case showing the market value of the trees, or if they had any market value one way or the other. There is no evidence in the case to warrant you in concluding that the trees had any market value in 1879 or at any other time. The only evidence offered by the government is as to the value of the timber after it was cut and made into lumber, and in that way this case differs from the case yesterday. Yesterday I instructed you in that case that if you find that although there was a trespass, that it was not wilful, you might determine the value of the timber as it stood on the ground. In this case there is no evidence of that kind."

The jury found a verdict for the defendant, and the government has brought the case here on error.

Mr. Assistant Attorney General Parker for plaintiffs in error.

No appearance for defendant in error.

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

The only errors alleged are in the charge. The specific portions to which the attention of the court was called at the time and exceptions taken are that which refers to the history

of the attitude of the government toward pioneers and others who took timber from government lands for domestic use, and that which declared that no verdict could be returned in favor of the government except for the value of the lumber manufactured. In these there was obvious error. Although there was no direct evidence of the value of the standing trees, yet it did appear that they were manufactured into lumber, and that the lumber had commanded a price of from eight to nine dollars a thousand feet, and when the government proved or defendant admitted that he cut and carried away some of the timber on this tract, the government was entitled to at least a verdict for nominal damages. As to any further right of recovery, see *Wooden-ware Co.* v. *United States*, 106 U. S. 432; *Benson Mining Company* v. *Alta Mining Company*, 145 U. S. 428.

Nor were the observations of the court in reference to the attitude of the government justifiable. Whatever propriety there might be in such a reference, in a case in which it appeared that the defendant had simply cut timber for his own use, or the improvement of his own land, or development of his own mine, (and in respect to that matter, as it is not before us, we express no opinion,) there certainly was none in suggesting that the attitude of the government upheld or countenanced a party in going into the business of cutting and carrying off the timber from government land, manufacturing it into lumber, and selling it for profit; and that was this case. There is no pretence that the defendant cut timber for his own use; he says himself he sold it all. He ran a sawmill, cut timber, manufactured it into lumber, and made profit out of the sale of the lumber. There is nothing in the legislation of Congress or the history of the government which carries with it an approval of such appropriations of government property as that.

The judgment must be reversed, and a new trial ordered.

Reversed.

No. 235, UNITED STATES v. HUMPHRIES AND MOCK. Error to the Circuit Court of the United States for the Northern District of

California. Submitted April 21, 1893. Decided May 1, 1893. BREWER, J.: This case is so nearly like the case just decided, that it is unnecessary to refer to the facts in detail. There also appears in this a further matter of error, in that the court, over the objections of the government, permitted the defendants to introduce evidence that their mill was not profitable. Certainly, whether they made money or not, does not affect the right of the government to recover, or the measure of recovery.

The judgment in this case will also be *Reversed, and a new trial ordered.*

Mr. Assistant Attorney General Parker for plaintiffs in error.

No appearance for defendants in error.

UNITED STATES *v.* DUMAS.

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

No. 230. Submitted April 20, 1893. — Decided May 1, 1893.

An order of the Postmaster General, made in the exercise of the discretion given him by the act of June 17, 1878, 20 Stat. 140, c. 259, § 1, withholding commissions from a postmaster, and allowing a stated compensation in place thereof, in consequence of alleged false returns in the postmaster's accounts, is not final and conclusive in an action by the United States against the postmaster and the sureties on his bond, to recover moneys alleged to be illegally withheld; but is competent evidence on the part of the government, which may be explained or contradicted by the defendants.

THIS was an action brought by the United States to recover from Anna M. Dumas, and the sureties on her official bond, money alleged to have been illegally retained by her while postmaster at Covington, St. Tammany Parish, Louisiana.

It appears from the record that Anna M. Dumas was postmaster at the above-named place from January 1, 1881, to August 3, 1885, and that on October 1, 1883, a bond, in lieu of a former one, was executed. This bond was in the usual form, and was given to insure the faithful performance of her

Statement of the Case.

duties as postmaster. The accounts rendered by her as postmaster at the end of each quarter were examined September 1, 1886, by the Auditor of the Treasury for the Post Office Department. This examination resulted in a claim that she had made false returns of the business done at the post office at Covington, whereby she is alleged to have illegally retained from the government the sum of $709.89 in excess of her commissions for the period from October 1, 1883, to August 3, 1885, the time covered by the conditions of the bond last executed. A statement of accounts, certified to by the Auditor, to which is appended copies of papers pertaining to the accounts, is made a part of the record. A demand was made on June 8, 1887, upon her, and the sureties on her bond, to make good the deficit. Payment was not made, and the Postmaster General issued the following order:

"Order No. 161.] POST OFFICE DEPARTMENT,
OFFICE OF THE POSTMASTER GENERAL,
WASHINGTON, D. C., *August 11th*, 1888.

"Being satisfied that A. M. Dumas, late P. M., Covington, St. Tammany Co., La., has made false returns of business at the post office at said place during the period from Jan. 1, 1881, to Aug. 3, 1885, thereby increasing her compensation beyond the amount [s]he would justly have been entitled to have by law; now, in the exercise of the discretion conferred by the act of Congress entitled 'An act making appropriations for the service of the Post Office Department for the fiscal year ended June 30, 1879, and for other purposes,' approved June 17, 1878, (section 1, chapter 259, Supplement to Revised Statutes,) I hereby withhold commissions on the returns aforesaid, and allow as compensation (in place of such commissions and in addition to box-rents) deemed by me, under the circumstances, to be reasonable during the period aforesaid, the rate of $72.50 per quarter from Jan. 1, 1881, to March 31, 1883, and $95 per quarter from April 1, 1883, to August 3, 1885, and the Auditor is requested to adjust her accounts accordingly. (Signed) WM. F. VILAS,
"*Postmaster General.*"

Counsel for Plaintiffs in Error.

At the trial of the cause in the court below the issue before the jury was whether Anna M. Dumas, as postmaster, did collect and receive in her official capacity from October 1, 1883, to August 3, 1885, in excess of the compensation fixed and allowed her in the order of the Postmaster General, and above all proper expenditures, the sum of $709.89. On this issue the plaintiffs in error requested the court to give the following instruction to the jury:

"If the jury are satisfied that plaintiffs have proven that the Postmaster General of the United States, being satisfied that Anna M. Dumas, late postmaster at Covington, Louisiana, had made false returns of business in said post office, withheld the commissions of said Anna M. Dumas, as such postmaster, and allowed her such compensation, in lieu of said commission, as he, the said Postmaster General, deemed reasonable; and if the jury further find that the amount sued for by plaintiffs in the cause is arrived at by reason of such withholding of said commissions and by the allowance to her of such compensation by said Postmaster General, then the jury must find for the United States."

This instruction the court refused to give, and charged the jury in regard to the order (No. 161) of the Postmaster General as follows: "This order was in its nature provisional. The adjustment is only *prima facie* evidence that the account is as stated therein."

The jury found a verdict for the defendants and judgment was entered accordingly. The bill of exceptions does not show the character of the evidence admitted or refused to be admitted. The plaintiffs sued out a writ of error, and assign as errors that the court below erred in refusing to instruct the jury as requested by the attorney of the United States, and in charging the jury as to the force and effect of the order of the Postmaster General, and the accounts of the postmaster as certified by the auditor.

Mr. Assistant Attorney General Maury for plaintiffs in error.

Argument for Plaintiffs in Error.

It can hardly be denied that Congress had the power to make the decision of the Postmaster General final and conclusive in cases like the present.

The argument of hardship has no relevancy, because every postmaster must be conclusively presumed to have accepted office with full knowledge of the laws and regulations which he is expected to obey.

Furthermore, a power of this kind in the Postmaster General is the same, in principle, as that vested in the architect, in almost every building contract, for the purpose of securing a speedy determination of questions that may arise between the contracting parties during the execution of the contract.

If the power claimed for the Postmaster General, under the act of 1878, were an isolated instance, a plausible argument might be deduced therefrom to support the ruling below, that Congress did not intend that anything done under the power should be more than provisional; but the statutes show that Congress does not hesitate to vest in executive officers summary power to make and execute decisions, without opportunity to show cause to the party to be affected, when the exigencies of the public service require prompt, decisive action.

By Rev. Stat. § 3962, the Postmaster General is empowered to make deductions from the pay of contractors "for failures to perform service according to contract and impose fines upon them for delinquencies," and where a contractor fails to perform a trip the Postmaster General may deduct from his pay as much as three times the price of the trip "if the failure be occasioned by the fault of the contractor or carrier."

By § 4010, the Postmaster General is authorized "to impose fines on contractors for transporting the mail, between the United States and any foreign country, for any unreasonable and unnecessary delay" in the departure of such mail, or the performance of the trip.

Without multiplying instances, reference may be made to § 3371 Rev. Stat. which, as it originally stood, provided that, where a manufacturer of tobacco, snuff, or cigars sold or removed for sale any such article without using the proper stamps, the Commissioner of Internal Revenue might, at any

time within two years, "upon such information as he can obtain," assess the proper tax and certify the same to the collector.

Certainly, then, there is nothing more summary in the power given by the act of 1878 than is contained in the instances above given, and it must be conceded that in those instances Congress intended the execution of the powers to be final and conclusive everywhere; in other words, that the fine imposed on a mail contractor by the Postmaster General, for delinquency, should be a valid charge in his accounts and that no court should review this action. And the same may be said of the collector's assessments under § 3371.

Congress, in like manner, intended that the action of the Postmaster General, under the power in question, should be binding on the courts as one of those "matters appertaining to the postal service" which, being "left to the discretion and judgment of the Postmaster General, the exercise of that judgment and discretion cannot in general be interfered with and the results following defeated." *United States* v. *Barlow*, 132 U. S. 271, 280.

In a word, this case would seem to be governed by the principle laid down by this court in *Martin* v. *Mott*, 12 Wheat. 19, 31, namely, that "whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. . . . It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse."

It would seem plain, therefore, that it was error in the learned judge to refuse to give any effect whatever in this case, to the order of the Postmaster General, and treat the case of the United States as without evidence on which the jury could act.

No appearance for defendants in error.

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

It is insisted for the government that the order of the Postmaster General and the certified transcript of the accounts, which state the amount of the liability of Anna M. Dumas at $709.89, are final and conclusive. If this proposition is correct, and the order and the transcript constitute conclusive rather than *prima facie* evidence of the balance due the United States, then the instruction given was erroneous, and that requested should have been given.

The order of the Postmaster General was made, as it recites, in the exercise of the discretion conferred by the first section of the act of Congress approved June 17, 1878, 20 Stat. 140, c. 259, § 1, which provides "that in any case where the Postmaster General shall be satisfied that a postmaster has made a false return of business, it shall be within his discretion to withhold commissions on such returns, and to allow any compensation that under the circumstances he may deem reasonable." Now an order made in pursuance of this provision is certainly not conclusive upon a postmaster that his returns of business are actually false in fact, when by the same section of the act it is made a misdemeanor, punishable by fine or imprisonment or both, to make a false return to the Auditor for the purpose of fraudulently increasing his compensation. Neither can it be properly held that, when the Postmaster General is satisfied that a postmaster has made a false return of business, and exercises his discretion "to withhold commissions on such returns," his order in the matter is a final and conclusive determination that the postmaster is not entitled to any commissions as such, or that his compensation shall be absolutely fixed and limited by the allowance made. In a suit for his commissions or compensation, such an order withholding the one, and making a discretionary allowance as to the other, would certainly not conclude the postmaster. It was not the intention of Congress by this provision of the statute to confer upon the Postmaster General the discretion to deprive a postmaster of his commissions, or to vest him with authority to deny all commissions, and allow only such compensation as he might deem proper, as a final settlement and adjudication of the postmaster's rights in the premises.

By a preceding clause of the same section, it is provided "that when the compensation of any postmaster of this class [4th] shall reach one thousand dollars per annum, exclusive of commissions on money-order business, and when the returns to the Auditor for four quarters shall show him to be entitled to a compensation in excess of that amount under section seven of the act of July twelfth, eighteen hundred and seventy-six, the Auditor shall report such fact to the Postmaster General, who shall assign him to his proper class and fix his salary as provided by said section." A similar provision in the act of March 3, 1883, was before this court in the case of the *United States* v. *Wilson*, 144 U. S. 24, and it was held that a postmaster who is assigned by the Postmaster General to a particular class at a designated salary from a designated date was entitled to compensation at the rate thus fixed from such date without regard to his appointment by the President and confirmation by the Senate. The action of the Postmaster General in assigning a postmaster to his proper class and fixing his salary accordingly, under such provisions of the statute, is essentially different from the exercise of the discretion conferred of withholding commissions on such returns as the Postmaster General may be satisfied are false. "To withhold" commissions seems fairly to imply a temporary suspension, rather than a total and final denial or rejection of the same. If such withholding is not conclusive upon the postmaster, how can the allowance made, while the commissions are being withheld, be treated or regarded as a final and conclusive adjudication as to the compensation the postmaster is, or shall be, entitled to receive? The court below regarded the order in question as provisional in its character, and accordingly held, in substance, that it did not so conclusively fix and determine the commissions and compensation of the postmaster as to make the statement of her accounts based thereon conclusive against her and her sureties.

The contrary proposition urged on behalf of the United States involves the assertion that the falsity of the postmaster's returns is actually and finally established by the order of the Postmaster General, and that the accounts adjusted in accord-

ance therewith amount to more than *prima facie* evidence of the correctness of the balance claimed to be due from the defendants.

We think this contention of the government cannot be sustained, and that the ruling of the Circuit Court on the question was correct.

As to the competency, merely, of this evidence there can be no question, for it is provided by section 889, Revised Statutes, that "in any civil suit in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits."

The force and effect of such testimony has been several times considered by this court. Thus in *United States* v. *Eckford's Executors*, 1 How. 250, a statement of account by the officers of the Treasury was held not to be conclusive, but only *prima facie* evidence. So in *United States* v. *Hodge*, 13 How. 478, a Treasury transcript offered in evidence was held to be competent, but not conclusive. In *Watkins* v. *United States*, 9 Wall. 759, nothing more appeared in the shape of evidence than the certified transcript of accounts, and being held to be *prima facie* evidence, it warranted judgment for the government for the amount, therein shown to be due, in the absence of any testimony explaining or contradicting it. But that case does not hold that certified transcripts of accounts are conclusive upon the officer. So in *Soule* v. *United States*, 100 U. S. 8, 11, it was held that "Treasury settlements of the kind are only *prima facie* evidence of the correctness of the balance certified; but it is as competent for the accounting officers to correct mistakes and to restate the balance as it is for a judge to change his decree during the term in which it was entered. Errors of computation against the United States are no more vested rights in favor of sureties than in favor of the principal. All such mistakes in cases like the present may be corrected by a restatement of the account."

In the same line, it has been held by this court that the adjustment of accounts made by the auditor is *prima facie*

evidence, not only of the fact and the amount of the indebtedness, but also of the time when and the manner in which it arose; and that an objection to the statement does not lie to its competency, but to its effect. *United States* v. *Stone*, 106 U. S. 525.

It would be manifestly unjust to compel the principal and sureties of a bond to pay an alleged indebtedness based upon a statement of account, when there are palpable errors upon the face of the statement; or when the defendants are prepared to show by affirmative evidence that there are in fact errors in the accounts. As already stated, the bill of exceptions contains nothing to show the character of the evidence introduced, by way of explanation or contradiction of the certified transcript of accounts presented by the government. The single question raised and presented by plaintiffs in error was whether the order of the Postmaster General, in connection with the certified statement of account, was final and conclusive on the defendants in error. We hold that it was merely evidence which, unexplained or uncontradicted, would have warranted a judgment in favor of the plaintiffs in error for the balance shown thereby to be due. But this evidence did not conclude the defendants, and, for aught that appears from the record, they may have explained or contradicted the statement, or shown it to be incorrect; and as it does not appear what the evidence was on this subject, we are unable to say that the judgment was wrong, there being no error in the charge of the court.

Nor is there anything said or decided in *United States* v. *Barlow*, 132 U. S. 271, 280, cited and relied on by plaintiff in error in conflict with this conclusion. In that case Mr. Justice Field, speaking for the court, said: "We admit that where matters appertaining to the postal service are left to the discretion and judgment of the Postmaster General, the exercise of that judgment and discretion cannot in general be interfered with, and the results following defeated. But the very rule supposes that information upon the matters upon which the judgment and discretion are invoked is presented to the officer for consideration, or knowledge respecting them is possessed

by him. He is not at liberty, any more than a private agent, to act upon mere guesses and surmises, without information or knowledge on the subject." This ruling of the court falls far short of holding that the transcript of accounts is conclusive upon the officer.

Our conclusion is that the order of the Postmaster General and the certified accounts produced by the government in the present case were only *prima facie* evidence of the balance claimed against the defendants in error, and that there was no error in the court below in so holding; and the judgment is accordingly *Affirmed.*

UNITED STATES *v.* DUMAS. No. 231. Error to the Circuit Court of the United States for the Eastern District of Louisiana. Submitted April 20, 1893. Decided May 1, 1893. MR. JUSTICE JACKSON: This case, in all essential respects, is similar to that of *United States* v. *Dumas*, No. 230, just decided, the only difference being that this suit is based upon a bond for a different period, and against a different set of sureties, but it involves the same questions and on the same state of facts as presented in the former case. For the reasons given in the opinion in the former case the judgment below in this case is *Affirmed.*

LEGGETT *v.* STANDARD OIL COMPANY.

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

No. 225. Argued April 20, 21, 1893. — Decided May 10, 1893.

The second claim in reissued letters patent No. 5785, granted March 10, 1874, to Edward W. Leggett for an improvement in lining oil barrels with glue, viz.: "for a barrel, cask, etc., coated or sized by the material and by the mode or process whereby it is absorbed into and strengthened the wood fibre, substantially as herein described" is void as it is an expansion of the claim in the original patent so as to embrace a claim not specified therein.

The first claim therein, viz.: "the within described process of coating or lining the inside of barrels, casks, etc., with glue, wherein the glutinous material, instead of being produced by reduction from a previously solid state, is permitted to attain only a certain liquid consistency and is then applied to the package and permitted to harden thereon for the first time, substantially as herein set forth and described," is void: (1) because it was a mere commercial suggestion, and not such a discovery as involved the exercise of the inventive faculties; and, (2), by reason of such prior use as to prevent the issue of any valid patent covering it.

The invalidity of a new claim in a reissued patent does not affect the validity of a claim in the original patent, repeated in the reissue.

The poverty or pecuniary embarrassment of a patentee is not sufficient excuse for postponing the assertion of his rights, or preventing the application of the doctrine of laches.

THE case is stated in the opinion.

Mr. Edmund Wetmore, (with whom was *Mr. Samuel C. Reed* on the brief,) for appellant.

Mr. Charles C. Beaman, (with whom was *Mr. Joseph H. Choate* on the brief,) for appellee.

MR. JUSTICE JACKSON delivered the opinion of the court.

This is a suit in equity brought April 8, 1887, in the Circuit Court of the United States for the Southern District of New York by Edward W. Leggett, a citizen of New York, against the Standard Oil Company, an Ohio corporation, for the alleged infringement of reissued letters patent No. 5785, granted to the complainant March 10, 1874, for an "improvement in lining oil barrels with glue."

The original patent No. 143,770 was issued October 21, 1873. The specification and claim of this original patent are as follows:

"Be it known that I, Edward Wright Leggett, of the city, county, and State of New York, have invented an improved process of coating or lining the inside of barrels, casks, etc., for the purpose of rendering the same impervious to water, oil, or any contained substance, of which the following is a specification:

Opinion of the Court.

"This invention relates to that class of processes employed for the coating or lining of the insides of barrels for the above-mentioned purpose, and consists in preparing from any suitable glutinous substance glue, said glue being permitted to attain but a certain consistency and then applied directly as a coating or lining.

"In carrying out my invention I proceed as follows: Take any of the materials from which glue may be made and proceed in the usual or any suitable manner for the manufacture of glue until the soup has attained a certain consistency.

"This consistency must be considerably less than that which is required wherein semi-fluid, solid, or cake glue is to be produced, and while it is in this half-finished state, so to speak, it is applied directly to the inside of the barrel, or cask, where, after due evaporation, it will be found that said cask or barrel is lined thoroughly and completely with glue, inasmuch as a pressure of steam generated by the heat applied is sufficient to force the thin glutinous fluid well into the pores and recesses of the wood, thus insuring a perfect lining.

"I am aware that barrels, etc., have been lined or coated with glue when said glue has been subjected to a process of reduction by dilution from its original consistency to a sufficiently liquid state, but I am not aware of any process wherein the glutinous material has been permitted to attain only its proper consistency and then applied directly, thus saving the time, labor, and expense heretofore employed by continuing the manufacture of the glutinous soup until it has attained a semi-fluid or gelatinous consistency, thus necessitating a reduction by dilution and reheating before it is fit for application, as set forth in this specification, travelling over, as it were, the same ground, backward and forward, two or three times, whereas by my process this trouble is entirely dispensed with by operating as within described.

"This invention has nothing to do with the glue-lined barrel as an article of manufacture, but relates particularly to a new and inexpensive process of constructing a glue-lined barrel, cask, etc.

"Heretofore the glue has been taken in its complete state

as an article of manufacture, has been reheated, diluted, and then applied, but such a process necessarily carries with it all the expense of preparing the glue at first as an article of trade or commerce.

"My process contemplates taking the glue when at a proper consistency and applying it to the inside of the package, permitting it to harden for the first time upon that surface.

"I claim as my invention:

"The within-described process of coating or lining the inside of barrels, casks, etc., with glue, wherein the glutinous material, instead of being produced by reduction from a previously solid state, is permitted to attain only a certain liquid consistency and is then applied to the package and permitted to harden thereon for the first time, substantially as herein set forth and described."

An application for the reissue of this patent was filed February 2, 1874, and contained substantially the same specification. It repeated the claim of the original patent, and in addition thereto made a second claim for "a barrel, cask, etc., coated or sized by the material and by the mode or process substantially as herein described." On February 6, 1874, the examiner rejected the second claim thus made for the reason "that a barrel coated by the process described has no features or characters to distinguish it from a barrel coated with glue as prepared in the ordinary way." Thereafter the patentee amended the specification on which the reissue was applied for by inserting the following:

"The distinguishing feature of this improvement may be found on examination to be the superior integrity of the lining by the use of soup glue; by its peculiar character it is more freely absorbed by the wood penetrating into fibre deeper than by the ordinary mode. Hence the sizing or coating is not only upon the surface, but penetrates into the wood, thereby presenting a thicker covering to the action of the oil, and this sizing is not liable to be broken off or cracked in handling the cask, as part of the coating is absorbed into the fibre and cells of the wood, which gives additional strength to it."

The reissue was thereupon allowed March 10, 1874, with a second claim for "a barrel, cask, etc., coated or sized by the material and by the mode or process, whereby it is absorbed into and strengthened by the wood fibre substantially as herein described."

In both the original and reissued patents the specifications disclaim any idea or invention in a glue-lined barrel as such. The first claim of the reissue, like the first claim of the original, is limited to a process, and the specification of the original declares that the invention "relates particularly to a new and inexpensive process of constructing a glue-lined barrel, cask," etc. The reissued specification broadens this description by adding at this point the following words: "better adapted to the purpose designed by coating and sizing, as set forth, than by the ordinary means," and by the additional paragraph in the specification of the reissue, above recited.

Among the defences set up in the answer were (1) non-infringement; (2) want of patentable novelty in the invention; (3) anticipation thereof by various other specified American patents; and (4) prior use of the patented process by a large number of persons in New York, Pennsylvania, Ohio, and Massachusetts, whose names are given.

After replication filed and after some of the proofs had been taken by the respondent on the question of prior use of the patented invention by other persons, the complainant, by leave of court, filed an amended bill setting up, in addition to the averments of the original bill, the claim that, prior to the issue of his original patent, he had disclosed his secret or process to the defendant company on its promise that no use would be made of the process, or any part of it, without his consent; but that the defendant, disregarding this promise, did use said process without his permission, and thereby violated its said agreement with him, by reason whereof the defendant in equity should be estopped from denying or in any way questioning the validity of the complainant's invention and the letters patent issued therefor.

The defendant filed a supplemental answer denying the new averments of the amended bill, and interposed the defences of

the statute of limitations and of laches, so far as the amended bill sought or attempted to hold it liable in any way on the alleged promise not to use complainant's secret or process. Replication having been filed and voluminous proofs taken on the questions presented by the pleadings, the court on the hearing upon the merits entered a decree dismissing the complainant's bill with costs. From that decree the present appeal is prosecuted. The opinion of the court below is reported in 38 Fed. Rep. 842, and the ground upon which the decision proceeded was that there was a lack of patentable invention in the thing patented.

We are of opinion that there is no error in the judgment of the court below for various reasons. In the first place, the second claim of the reissue, secured, as it was, by important changes in the specification of the original patent, was a manifest enlargement or broadening of the patent. It is not pretended that there was any mistake, accident, or inadvertence in either the specification or the claim of the original patent such as would render it void or inoperative, and warrant the granting of a reissue thereof with an additional and enlarged claim. After the complainant had secured his patent for the process, which was all he could claim under the original specification, he ascertained that he was still not protected against the use by the defendant of barrels, casks, etc., coated or lined by the process covered by his patent; and it was then that he conceived the idea of a reissue which should be broad enough to include not only the claim set forth in the original, but also a claim for a barrel, cask, etc., coated or sized with glue, by the process described. This was in effect an expansion of the claims in order to embrace an invention not specified in the original patent, and, therefore, rendered the second claim of the reissue invalid, under the well-settled rule of this court, as announced in *Miller* v. *Brass Company*, 104 U. S. 350; *Mahn* v. *Harwood*, 112 U. S. 354; *Wollensak* v. *Reiher*, 115 U. S. 96, and other cases. It is shown by the complainant's own testimony that he procured the reissue for the purpose of having it cover barrels so as to make the defendant an infringer. Furthermore, to give the second claim of the

reissue any validity in its application to the barrel cannot be permitted, in view of the rejection of the second claim first presented in the application for reissue, and which necessitated the modification of the specification as above stated, and which declared that the "distinguishing feature of his improvement *may be found on examination* to be the superior integrity of the lining by the use of soup glue," etc. The second claim being allowed upon this amendment of the specification, if it had any validity at all, cannot properly cover the coated barrel, cask, etc., as a product, but would have to be limited in its operation to the "glue soup," or material used in coating or sizing barrels, and the alleged superiority thereof in being absorbed into and strengthened by the wood fibre in some way distinguishable from and superior to the coating with glue in the ordinary way. But there is, however, no testimony in the record that barrels coated or sized by the complainant's process are, in fact, distinguishable from barrels lined in the ordinary way, or that barrels so "glued" are any better than those coated by the old process. The testimony shows that barrels lined under either the old or the new process are practically indistinguishable.

This second claim of the reissue, being a manifest attempt to broaden the original patent, cannot, in view of the amended specification on which it was based or procured, be held to cover a glue-lined barrel as an article of manufacture, which was distinctly disclaimed by the original specification.

But the invalidity of this new claim in the reissue does not impair the validity of the original claim, which is repeated and made the first claim of the reissued patent. *Gage* v. *Herring*, 107 U. S. 640, 646. The complainant's rights, therefore, must be determined upon the validity of the claim of the original patent, and upon the estoppel set up against the defendant, growing out of its alleged promise not to use his process or secret without his consent. This latter claim cannot possibly be sustained, for the reason that the promise, if made, in no way misled or deceived the patentee to his injury or damage. According to his own testimony he had not

applied, and had not thought of applying, for a patent on his process at the time of disclosing his secret, but shortly thereafter he concluded that he had acted unwisely in imparting it to the defendant, and at once applied for and obtained his original patent for the very purpose of protecting himself against the defendant's use thereof. He did not, therefore, rely upon that alleged promise, but took proceedings by obtaining a patent to directly guard against its violation. He did not disclose his process to the defendant as an invention, or as one which he proposed to patent. Under such circumstances no estoppel arises against the defendant from questioning the validity of the patent, which was not then in existence, and which the defendant did not know was to be claimed as an invention.

So far as the alleged promise embodies any element of a contract or of an undertaking to compensate the complainant for the use of his so-called secret, the statute of limitations and laches interposed by the defendant was clearly a bar to any recovery on that ground, because the alleged promise, if the proof was sufficient to establish it, was made in September, 1873, and the amended bill seeking relief thereon was not filed until January 13, 1888 — some fourteen or fifteen years later. This lapse of time not only constitutes a bar, such as the statute of limitations interposes, but shows such laches as will clearly preclude any right to relief. *McLean* v. *Fleming*, 96 U. S. 245; *Speidel* v. *Henrici*, 120 U. S. 377; *Galliher* v. *Cadwell*, 145 U. S. 368, 372.

No sufficient reason is given for this delay in suing. It is sought to be excused on the ground of the plaintiff's poverty during this period; but in the case of *Hayward* v. *National Bank*, 96 U. S. 611, 618, this court said that a party's poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights. So that this alleged promise of the defendant can in no way avail the complainant in the present case, either as a ground on which to predicate any claim for relief or as an estoppel upon the defendant from denying the validity of the patent.

In addition to these difficulties in the way of the complain-

ant succeeding in this case, his alleged invention was clearly anticipated by the prior use and sale of liquid glue, or size, used for various purposes, including that of coating barrels. The patentee's claim of novelty is based upon the theory that prior to 1873 and 1874 oil barrels were lined with the ordinary glue of commerce dissolved into a hot liquid glue of the proper consistency, and that the discovery made by him, after repeated experiments, was that the same effect could be accomplished, with better and less expensive results, by using the hot liquid or "glue soup" at a proper consistency in the process of manufacture, before it had been prepared for commercial purposes by drying; and that by the use of "glue soup" labor, expense, and the loss incident to the process of drying the jelly glue, so as to render it marketable in that shape, were avoided. In other words, the claim of invention in his patent is, that previous to his discovery the process in lining barrels with glue had been to melt the dried glue of commerce and pour it into a barrel, close up the barrel, and roll it around until the inside surface thereof was thoroughly coated; and that his discovery made it cheaper for the oil people to manufacture their own glue and use it in the same manner, but before it had been dried.

This use of the liquid glue before drying differed in no essential respect from the use of the liquid glue which had been obtained by melting the dried glue of commerce, and certainly does not rise to the dignity of invention. It would have occurred, and did occur, as the testimony shows, to manufacturers of glue where there was occasion or necessity for using glue in large quantities. The alleged invention was properly held by the court below to be a commercial suggestion that would naturally occur to any one engaged largely in the use of glue. It was well known that liquid glue had these coating and sticking qualities before it had ever been dried for commercial purposes, and to use it in its liquid state certainly did not embody the quality of invention. The only object or reason in drying the glue at all is to preserve it for transportation and commercial purposes, it being in its liquid or jelly condition susceptible to atmospheric influences under

the operation of which it is more liable to be spoiled than when dried. It may be true, as claimed, that the adhesive qualities of glue before it is dried are somewhat superior to what they are after the glue has been dried, and then remelted for actual use. But this is merely a question of degree, and the application of the "glue soup" before drying cannot properly be called a discovery, such as involves the exercise of the inventive faculties.

But aside from this, and even admitting that such a discovery and use of liquid glue would involve invention or patentable novelty, it is clearly established by the evidence in the record that there had been such a prior use of the alleged discovery as to preclude the issue of any valid patent covering it. Whatever advantages there may be in using liquid glue, or "glue soup" before it is dried, over a similar use of remelted dried glue, were well known prior to the date of the complainant's application for the patent in question. It is shown by the testimony that in various general publications and trade journals published in Germany in the years 1869, 1870, and 1871, and circulated in this country, the advantages of using hot or liquid glue are set out, as well as the description of the manufacture of glue jelly by different parties and in different localities; and from extracts produced from these journals, which are standard authorities on chemical industries, and contain information on the subject in question, it is shown that manufacturers in Germany were making and selling liquid glue in its jelly form for the same purposes and uses for which the glue in its dried form is ordinarily used; and that it was considered better and cheaper to use it in that condition rather than go to the expense and labor of first drying it. In the glue industries, both in this country and in Germany, the fact was well recognized that the adhesive qualities of glue, before it was dried, were superior to what they were after the glue had been dried for commerce, and that by using it before drying there would be a great saving of time, expense, and loss. It was shown that in some instances the glue jelly was prepared and put away in hermetically-sealed casks for commercial use in the future.

In addition to these publications relating to the use of "glue soup," it is shown that glue in that state or condition had been used in the extensive glue factory of Peter Cooper & Company, at Williamsburg, (now a part of Brooklyn,) New York, as early as 1859 or 1860. It is proven that in the Cooper factory barrels used for the purpose of shipping neat's foot oil were lined or coated with hot liquid glue, that had never been dried, substantially in the same manner, and by the identical process described in complainant's patent. In fact, the process on which he claims a patent was well known at that factory long prior to the date of his alleged invention, and no one seems to have had any idea that it was either new, or could be considered such a secret or discovery as involved invention, or was entitled to protection.

It is furthermore shown by the testimony that precisely this same process of lining oil barrels with hot "glue soup," was used in the oil regions of Pennsylvania and Ohio as early as 1861.

It is not deemed necessary to go into this evidence more in detail. It is not successfully impeached or contradicted by the complainant. In addition to this, the complainant concedes in his own testimony that his "glue soup" is the same thing as "sizing," which was in use long prior to the date of his invention by manufacturers of writing and wall paper.

It being thus clearly established that the use of liquid glue was well known to glue manufacturers and oil refiners, and had been actually applied in the very way and for the very purposes described by the complainant, long before the date of his alleged invention, it is too clear for discussion that he could have no valid patent which would cover a process for using liquid glue for coating or sizing purposes as a new discovery or invention; and our conclusion, therefore, is that the decree of the court below was clearly correct, and should be

Affirmed.

MOSES *v.* LAWRENCE COUNTY BANK.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 166. Submitted March 23, 1893. — Decided May 10, 1893.

Under a statute of frauds which requires the consideration of a promise to answer for the debt of another to be expressed in writing, a guaranty by a third person of the payment of a negotiable promissory note need not itself express any consideration, if written upon the note before it is delivered and first takes effect as a contract; but must, if written afterwards.

A negotiable promissory note, even if not purporting to be "for value received," imports a consideration; and the endorsement of such a note is itself *prima facie* evidence of having been made for value.

A promissory note payable to the maker's own order first takes effect as a contract upon endorsement and delivery by him.

The statute of frauds of a State, even as applied to commercial instruments, is a rule of decision in the courts of the United States.

THIS was an action, brought April 16, 1888, by a national bank, organized under the acts of Congress, and doing business in and a citizen of Pennsylvania, against six persons, citizens of Alabama and residing in the Middle District of Alabama, to recover the amount due on a guaranty of a promissory note.

The complaint alleged that, on August 15, 1887, the Sheffield Furnace Company, an Alabama corporation, made a promissory note for $12,111.51, payable to its own order four months after date at the banking house of Moses Brothers, in Montgomery; that contemporaneously with the making of the note, and before its delivery or negotiation, and in order to give it credit and currency, its payment at maturity was guaranteed by the defendants, for a valuable consideration, by an endorsement in writing on the note in these words, "We hereby guarantee the payment of the note at maturity," signed by the defendants, and which was intended by them to induce, and which in fact induced, James P. Witherow and

Statement of the Case.

all others to whom the note and guaranty were offered for negotiation and sale, to take the note and guaranty and to give value therefor; that the note, with the guaranty thereon, was before its maturity duly endorsed for value by the Sheffield Furnace Company to the order of Witherow; that afterwards, and before the maturity of the note and guaranty, Witherow endorsed the note, guaranteed as aforesaid, to the plaintiff for value; that afterwards, and before the maturity of the note and guaranty, the defendants endorsed in writing on the note their waiver of protest and notice; that the note was not paid at maturity, and that the note and guaranty remained unpaid and the property of the plaintiff.

The defendant pleaded twelve pleas, of which the only ones material to be stated were as follows:

Fourth. That the guaranty sued on was a special promise to answer for the debt of another, and did not express any consideration for the promise.

Fifth. That the note was given by the Sheffield Furnace Company for a debt owing to Witherow before it was made, and was not founded upon a consideration paid or liability accrued at the time of the making thereof, and the guaranty was without any consideration.

Eighth. That the Sheffield Furnace Company paid the debt sued on to Witherow before this action was commenced.

Twelfth. That the guaranty sued on was a special promise to answer for the debt of another, and did not express any consideration therefor, and was not executed contemporaneously with, nor before the negotiation of, the note of which it guaranteed the payment.

The plaintiff demurred to the fourth and fifth pleas, because they did not deny that the defendants endorsed the guaranty upon the note contemporaneously with its execution and before any negotiation thereof; and also demurred to these pleas, as well as to the twelfth, because they did not deny that the defendants endorsed the guaranty upon the note before its negotiation to the plaintiff and in order to give it credit and currency, nor allege that the plaintiff had notice of any want of consideration for the guaranty.

Argument for Defendant in Error.

To the eighth plea, a replication was filed, alleging that the plaintiff became the owner of the note for a valuable consideration before maturity, and that no part thereof had ever been paid to the plaintiff, or to any one authorized by the plaintiff to receive it. To this replication the defendant demurred.

The court sustained the demurrers to the pleas, and overruled the demurrer to the replication.

Issue was then joined on the eighth plea and the replication thereto; and a trial by jury was had upon that issue, at which the plaintiff gave in evidence the note, purporting to be "for value received," and the following endorsements thereon, in the order in which they appeared upon the note: 1st. "Pay to the order of J. P. Witherow," signed by the Sheffield Furnace Company. 2d. An endorsement in blank by Witherow. 3d. "We hereby guarantee the payment of this note at maturity," signed by the defendants. 4th. Another blank endorsement by Witherow under the guaranty. No other evidence was introduced. Thereupon the court instructed the jury to render a verdict for the plaintiff for the amount sued for, with interest; a verdict was returned accordingly; and the defendant, having duly excepted to the evidence and to the instruction, tendered a bill of exceptions and sued out this writ of error.

Mr. John D. Roquemore and *Mr. J. N. Arrington*, for plaintiffs in error, submitted on their brief.

Mr. J. M. White and *Mr. W. E. Gunter* filed a supplemental brief for plaintiffs in error.

Mr. Henry B. Tompkins, for defendant in error, submitted on his brief and supplemental brief, in which it was contended:

This suit is governed by the general commercial law, irrespective of what may be the statute law or the decisions of the courts in Alabama. *Swift* v. *Tyson*, 16 Pet. 1; *Oates* v. *National Bank*, 100 U. S. 239; *Railroad Co.* v. *National Bank*, 102 U. S. 14; *Pana* v. *Bowler*, 107 U. S. 529, 541.

Argument for Defendant in Error.

In the case of *Davis* v. *Wells*, 104 U. S. 159, 169, the court say: "It has always been held in this court that, notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit and liberally to promote the use and convenience of commercial intercourse."

There is doubtless a conflict of authority as to whether or not a guaranty endorsed upon a promissory note in the form of the one now under consideration passes by assignment of the original obligation, and is negotiable under commercial law. The weight as well as the importance of the authorities is in favor of the negotiability of such guaranty. *McLaren* v. *Watson*, 26 Wend. 425; *White* v. *Howland*, 9 Mass. 314; *S. C.* 6 Am. Dec. 71; *Coleman* v. *Fuller*, 105 N. C. 328; *Partridge* v. *Davis*, 20 Vermont, 499; *Killian* v. *Ashley*, 24 Arkansas, 511; *S. C.* 91 Am. Dec. 519; *Studabaker* v. *Cody*, 54 Indiana, 586; *Ketchell* v. *Burns*, 24 Wend. 456; *Jones* v. *Berryhill*, 25 Iowa, 289; *Nevius* v. *Bank of Lansingburg*, 10 Michigan, 547; *Everson* v. *Gere*, 40 Hun, 248; *Toppan* v. *Cleveland &c. Railroad*, 1 Flip. 74; *Hall* v. *Smith*, 21 How. 283.

Independently of all this, it is contended by counsel for defendant in error that the action of the court in sustaining the demurrers to the pleas was right for another and independent reason.

The plea of the general issue, as shown in the original brief, was, under the laws of Alabama, filed in this cause; and by the law of Alabama, as well as by the common law, all the defences set up by the plaintiffs in error in their special pleas they could have availed themselves of under plea of the general issue, except possibly the plea of payment set forth in the eighth plea, which was not demurred to.

In Alabama the plea of general issue is a mere general denial of the allegations of the complaint, without offering any special matter of defence. It casts on the plaintiff the onus of proving every material allegation of the complaint, and limits the defence to evidence in disproof of such material allegations. *Petty* v. *Dill*, 53 Alabama, 641, 645.

The whole question before the court was whether or no the

instrument sued upon, taken altogether, constituted a good and binding guaranty in favor of the assignee of Witherow against those signing the guaranty. That these guarantors were bound to pay the money at maturity, see the following authorities: *Richter* v. *Frank*, 41 Fed. Rep. 859; *Davis* v. *Wells*, 104 U. S. 159, 166, 169; *Davis Sewing Machine Co.* v. *Richards*, 115 U. S. 524, 527; *Louisville Manufacturing Co.* v. *Welch*, 10 How. 461, 475; *Wiles* v. *Savage*, 1 Story, 22; *Lawrence* v. *McCalmont*, 2 How. 426, 452; *Hall* v. *Weaver*, 34 Fed. Rep. 104, 108.

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

By the statute of frauds of Alabama, a special promise to answer for the debt, default or miscarriage of another is void, "unless such agreement, or some note or memorandum thereof, expressing the consideration," is in writing, and subscribed by or in behalf of the party to be charged. Alabama Code of 1887, § 1732. The words "value received," or acknowledging the receipt of one dollar, sufficiently express a consideration. *Neal* v. *Smith*, 5 Alabama, 568; *Bolling* v. *Munchus*, 65 Alabama, 558.

Every negotiable promissory note, even if not purporting to be "for value received," imports a consideration. *Mandeville* v. *Welch*, 5 Wheat. 277; *Page* v. *Bank of Alexandria*, 7 Wheat. 35; *Townsend* v. *Derby*, 3 Met. 363. And the endorsement of such a note is itself *prima facie* evidence of having been made for value. *Riddle* v. *Mandeville*, 5 Cranch, 322, 332.

The promissory note, in the case at bar, having been made payable to the maker's own order, first took effect as a contract upon its endorsement and delivery by the maker, the Sheffield Furnace Company, to Witherow, the first taker. *Lea* v. *Branch Bank*, 8 Porter, 119; *Little* v. *Rogers*, 1 Met. 108; *Hooper* v. *Williams*, 2 Exch. 13; *Brown* v. *De Winton*, 6 C. B. 336.

A guaranty of the payment of a negotiable promissory

note, written by a third person upon the note before its delivery, requires no other consideration to support it, and need express none other, (even where the law requires the consideration of the guaranty to be expressed in writing,) than the consideration which the note upon its face implies to have passed between the original parties. *Leonard* v. *Vredenburgh*, 8 Johns. 29; *D'Wolf* v. *Rabaud*, 1 Pet. 476, 501, 502; *Nelson* v. *Boynton*, 3 Met. 396, 400, 401; *Bickford* v. *Gibbs*, 8 Cush. 154; *Nabb* v. *Koontz*, 17 Maryland, 283; *Parkhurst* v. *Vail*, 73 Illinois, 343.

The demurrers to the fourth and fifth pleas, therefore, were rightly sustained.

But a guaranty written upon a promissory note, after the note has been delivered and taken effect as a contract, requires a distinct consideration to support it; and if such a guaranty does not express any consideration, it is void, where the statute of frauds, as in Alabama, requires the consideration to be expressed in writing. *Leonard* v. *Vredenburgh*, and other cases, above cited; *Rigby* v. *Norwood*, 34 Alabama, 129.

The demurrer to the twelfth plea, therefore, should have been overruled, and judgment rendered thereon for the defendant, unless the court saw fit to permit the plaintiff to file a replication to that plea.

It was argued on behalf of the original plaintiff that the validity and effect of the guaranty must be governed by the general commercial law, without regard to any statute of Alabama. But there can be no doubt that the statute of frauds, even as applied to commercial instruments, is such a law of the State as has been declared by Congress to be a rule of decision in the courts of the United States. Act of September 24, 1789, c. 20, § 34, 1 Stat. 92; Rev. Stat. § 721; *Mandeville* v. *Riddle*, 1 Cranch, 290, and 5 Cranch, 322; *D'Wolf* v. *Rabaud*, 1 Pet. 476; *Kirkman* v. *Hamilton*, 6 Pet. 20; *Brashear* v. *West*, 7 Pet. 608; *Paine* v. *Central Vermont Railroad*, 118 U. S. 152, 161.

It was also contended that the order sustaining the demurrers, if erroneous, did not prejudice the defendant, because he might have availed himself of the defence of the statute of

frauds under the general issue. That might have been true, if he had pleaded the general issue. *Kannady* v. *Lambert*, 37 Alabama, 57; *Pollak* v. *Brush Electric Association*, 128 U. S. 446. But he did not plead it, and had the right to rely on his special pleas only. Alabama Code, § 2675.

The suggestion of counsel, that by the practice in Alabama the entry of an appearance of counsel for the defendant was equivalent to filing a plea of the general issue, is too novel to be accepted without proof, and seems inconsistent with *Grigg* v. *Gilmer*, 54 Alabama, 425. If the record did not show what the pleadings were, it might be presumed that the general issue was pleaded. *May* v. *Sharp*, 49 Alabama, 140; *Hatchett* v. *Molton*, 76 Alabama, 410. But in this case twelve pleas are set forth in the record, and it cannot be assumed that there was any other.

The eighth plea was payment. The defendant introduced no evidence to support this plea, and has, therefore, no ground of exception to the rulings and instruction at the trial of the issue joined thereon.

But the erroneous ruling on the demurrer to the twelfth plea requires the

Judgment to be reversed, and the case remanded to the Circuit Court for further proceedings in conformity with this opinion.

NIX *v.* HEDDEN.

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

No. 137. Submitted April 24, 1893. — Decided May 10, 1893.

The court takes judicial notice of the ordinary meaning of all words in our tongue; and dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court.

Tomatoes are "vegetables" and not "fruit," within the meaning of the Tariff Act of March 3, 1883, c. 121.

Statement of the Case.

THIS was an action, brought February 4, 1887, against the collector of the port of New York, to recover back duties, paid under protest, on tomatoes imported by the plaintiff from the West Indies in the spring of 1886, which the collector assessed under "Schedule G. — Provisions," of the Tariff Act of March 3, 1883, c. 121, imposing a duty on "Vegetables, in their natural state, or in salt or brine, not specially enumerated or provided for in this act, ten per centum *ad valorem*"; and which the plaintiffs contended came within the clause in the free list of the same act, "Fruits, green, ripe or dried, not specially enumerated or provided for in this act." 22 Stat. 504, 519.

At the trial, the plaintiff's counsel, after reading in evidence definitions of the words "fruit" and "vegetables" from Webster's Dictionary, Worcester's Dictionary and the Imperial Dictionary, called two witnesses, who had been for thirty years in the business of selling fruit and vegetables, and asked them, after hearing these definitions, to say whether these words had "any special meaning in trade or commerce, different from those read."

One of the witnesses answered as follows: "Well, it does not classify all things there, but they are correct as far as they go. It does not take all kinds of fruit or vegetables; it takes a portion of them. I think the words 'fruit' and 'vegetable' have the same meaning in trade to-day that they had on March 1, 1883. I understand that the term 'fruit' is applied in trade only to such plants or parts of plants as contain the seeds. There are more vegetables than those in the enumeration given in Webster's Dictionary under the term 'vegetable,' as 'cabbage, cauliflower, turnips, potatoes, peas, beans, and the like,' probably covered by the words 'and the like.'"

The other witness testified: "I don't think the term 'fruit' or the term 'vegetables' had, in March, 1883, and prior thereto, any special meaning in trade and commerce in this country, different from that which I have read here from the dictionaries."

The plaintiff's counsel then read in evidence from the same dictionaries the definitions of the word "tomato."

The defendant's counsel then read in evidence from Webster's Dictionary the definitions of the words "pea," "egg plant," "cucumber," "squash" and "pepper."

The plaintiff then read in evidence from Webster's and Worcester's dictionaries the definitions of "potato," "turnip," "parsnip," "cauliflower," "cabbage," "carrot" and "bean."

No other evidence was offered by either party. The court, upon the defendant's motion, directed a verdict for him, which was returned, and judgment rendered thereon. 39 Fed. Rep. 109. The plaintiffs duly excepted to the instruction, and sued out this writ of error.

Mr. Edwin B. Smith for plaintiff in error.

Mr. Assistant Attorney General Maury for defendant in error.

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

The single question in this case is whether tomatoes, considered as provisions, are to be classed as "vegetables" or as "fruit," within the meaning of the Tariff Act of 1883.

The only witnesses called at the trial testified that neither "vegetables" nor "fruit" had any special meaning in trade or commerce, different from that given in the dictionaries; and that they had the same meaning in trade to-day that they had in March, 1883.

The passages cited from the dictionaries define the word "fruit" as the seed of plants, or that part of plants which contains the seed, and especially the juicy, pulpy products of certain plants, covering and containing the seed. These definitions have no tendency to show that tomatoes are "fruit," as distinguished from "vegetables," in common speech, or within the meaning of the Tariff Act.

There being no evidence that the words "fruit" and "vegetables" have acquired any special meaning in trade or commerce, they must receive their ordinary meaning. Of that

meaning the court is bound to take judicial notice, as it does in regard to all words in our own tongue; and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court. *Brown* v. *Piper*, 91 U. S. 37, 42; *Jones* v. *United States*, 137 U. S. 202, 216; *Nelson* v. *Cushing*, 2 Cush. 519, 532, 533; *Page* v. *Fawcet*, 1 Leon. 242; Taylor on Evidence, (8th ed.) §§ 16, 21.

Botanically speaking, tomatoes are the fruit of a vine, just as are cucumbers, squashes, beans and peas. But in the common language of the people, whether sellers or consumers of provisions, all these are vegetables, which are grown in kitchen gardens, and which, whether eaten cooked or raw, are, like potatoes, carrots, parsnips, turnips, beets, cauliflower, cabbage, celery and lettuce, usually served at dinner in, with or after the soup, fish or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert.

The attempt to class tomatoes with fruit is not unlike a recent attempt to class beans as seeds, of which Mr. Justice Bradley, speaking for this court, said: "We do not see why they should be classified as seeds, any more than walnuts should be so classified. Both are seeds in the language of botany or natural history, but not in commerce nor in common parlance. On the other hand, in speaking generally of provisions, beans may well be included under the term 'vegetables.' As an article of food on our tables, whether baked or boiled, or forming the basis of soup, they are used as a vegetable, as well when ripe as when green. This is the principal use to which they are put. Beyond the common knowledge which we have on this subject, very little evidence is necessary, or can be produced." *Robertson* v. *Salomon*, 130 U. S. 412, 414.

Judgment affirmed.

CALIFORNIA *v.* SAN PABLO AND TULARE RAILROAD COMPANY.

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

No. 257. Argued April 24, 1893. — Decided May 10, 1893.

If, pending a writ of error to reverse a judgment for the defendant in an action by a State to recover sums of money for taxes, the defendant offers to the plaintiff, and deposits in a bank to its credit, the amount of those sums, with penalties, interest and costs, which by a statute of the State have the same effect as actual payment and receipt of the money, the writ of error must be dismissed.

THIS was an action, brought March 10, 1886, by the State of California against the San Pablo and Tulare Railroad Company, a corporation of California, in the Superior Court of the city and county of San Francisco, (and thence removed by the defendant into the Circuit Court of the United States, upon the ground that it was a suit arising under the Constitution and laws of the United States,) to recover taxes assessed by the State Board of Equalization, under sections 4 and 10 of article 13 of the constitution of California, (which are copied in the margin,[1]) as state and county taxes for the year July 1,

[1] SEC. 4. A mortgage, deed of trust, contract or other obligation, by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other quasi public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract or obligation, less the value of such security, shall be assessed and taxed to the owner of the property; and the value of such security shall be assessed and taxed to the owner thereof in the county, city or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof: Provided, that if any such security or indebtedness shall

1885, to June 30, 1886, upon the defendant's franchise, roadway roadbed, rails and rolling stock in the counties of Alameda, Contra Costa and San Joaquin.

The defendant, in its answer, filed March 19, 1886, and averring the facts necessary to present the question, set up the following defence: "The provision of section 4 of article 13 of the constitution of the State of California, providing for the assessment of the property of railroad and other quasi public corporations, is in contravention of the provisions of the Fourteenth Amendment of the Constitution of the United States, in that it discriminates against such corporations; in this, that whereas under said section 4 of said article 13 of the constitution of the State of California, if the property of natural persons, or corporations not quasi public, has a mortgage, lien or incumbrance thereon, they are not liable to assessment or taxation upon such property, but only upon the value of their interest in such property over and above the value of such mortgage, lien or incumbrance; whereas, in the case of the property of railroad and other quasi public corporations, no such allowance or deduction is made, had or allowed with respect to any mortgage, lien or incumbrance there may be upon such property; and also in this, that while section 10 of article 13 of the constitution of the State of California provides the same mode for the assessment of the franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county, whether such property be owned by

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be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year.

SEC. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization, at their actual value; and the same shall be apportioned to the counties, cities and counties, cities, towns, townships and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts.

railroad or other quasi public corporations or by private corporations or by natural persons, yet section 4 of article 13 of said constitution permits or allows indebtedness secured by mortgage, trust deed, or otherwise, to be deducted from the value of such property, only when it is owned by natural persons or corporations not quasi public, and denies such deduction when the property is owned by railroad or other quasi public corporations."

On July 14, 1886, the attorneys for the parties filed in this and three similar cases the following stipulation in writing:

"It is hereby stipulated that jury trials in the above entitled actions are hereby waived, and that said causes may be submitted to the court upon the testimony referred to in the stipulation this day made and filed in the case of *The People of the State of California* v. *The Central Pacific Railroad Company*, subject to the same terms and conditions. It is hereby further stipulated that special findings of facts in all of the above entitled actions are waived. It is hereby further stipulated and agreed that the said case of *The People of the State of California* v. *The Central Pacific Railroad Company* shall by the losing party be taken to the Supreme Court of the United States; and that the decision of said court in said case shall be applicable to and be treated by each party as the decision of said court in the above entitled actions; it being the intention and desire of the parties hereto to save the expense of separate writs of error; and that all the above entitled actions shall abide the final decision of said Supreme Court of the United States in the said case of *The People of the State of California* v. *The Central Pacific Railroad Company*, provided the said decision shall be made upon points involved therein; and if not so made, then the judgments in any of the above cases in which the point is not involved shall be set aside and findings of fact therein shall be made."

On July 15, 1886, the Circuit Court gave judgment for the defendant in the present case.

In the case of *California* v. *Central Pacific Railroad*, referred to in that stipulation, this court did not decide the question now presented, but on April 30, 1888, reversed the

judgment of the Circuit Court on other grounds. 127 U. S. 1, 45.

On March 6, 1889, the parties, by another stipulation in writing, agreed that the previous judgment of the Circuit Court in the present case be set aside, and the case submitted to the Circuit Court upon an agreed statement of facts, "on which findings shall be made and conclusions of law drawn by the court."

On September 6, 1889, the Circuit Court, pursuant to this stipulation, ordered its former judgment to be set aside, and made and filed findings of fact in accordance with the agreed statement.

By these findings of facts, it appeared that, before and at the time of the assessment of these taxes, the defendant owed a debt secured by mortgage of its railroad, its franchise and its rolling stock and appurtenances, to the amount of more than $3000 a mile; that the State Board of Equalization valued and assessed the defendant's franchise, roadway, roadbed, rails and rolling stock, not separately, but together, (and not including any other kind of property,) at their full value, without deducting the value of the mortgage or any part thereof, although knowing of its existence, and did not deem or treat the mortgage as an interest in the property, and assessed the whole value of the property to the defendant as if there had been no mortgage thereon, but made the assessment upon the same basis for valuation as all other property in the State was valued for the purpose of taxation; and that there were at that time divers railroads in the State, owned and operated by corporations other than railroad corporations, and by individuals and partnerships.

Upon the facts found, the Circuit Court concluded, as matter of law, that the defendant was entitled to judgment. Judgment was entered accordingly, and the State of California sued out this writ of error.

The Attorney General of the State admitted in his brief, and, when this case was called for argument, stated in open court, the following fact:

"In the year 1893, the defendant offered and tendered to

Mr. William H. H. Hart, for the State of California.

the plaintiff a sum of money equal to the taxes, penalties, interest and attorney's fee, to recover which this action was brought, and costs of suit, which offer and tender have not been accepted; but the money has been deposited by the defendant in bank, in accordance with the provisions of section 1500 of the Civil Code of California, which reads as follows: 'An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this State of good repute, and notice thereof is given to the creditor.'"

Mr. William H. H. Hart, Attorney General for the State of California, after stating the fact of the offer and deposit of money as aforesaid, said:

I respectfully submit that this offer should not prevent the hearing of this cause and a decision of the constitutional question involved.

There are other cases depending upon the determination of this. It will be seen in the record, that there was a stipulation in this case, and three others, that the decision that might be made in this court in the case of *The People of the State of California* v. *The Central Pacific Railroad Co.*, should be treated as a decision in all of the cases, provided the decision should be upon points involved therein, and if not so made, then the judgment of the Circuit Court in any of these cases should be set aside and findings of fact therein made. That case having been decided against the State because the assessment included steamboats and federal franchise, (see 127 U. S. 1,) and the question made in the present case under the Fourteenth Amendment not having been passed upon, counsel of the parties signed a stipulation to have the judgment set aside in this case, and to submit the same to the Circuit Court upon the facts stated in the stipulation, and it was accordingly thus submitted and decided by the Circuit Court, the design of the stipulation thus submitting the case being to obtain a decision which would also dispose of the remaining two cases embraced

in the stipulation first made, that stipulation having been made to carry out the design of the first, that is, to obtain a decision that will dispose of all these cases.

Therefore, nothing short of a payment of what is claimed in those two cases, as well as in this, should be regarded as dispensing with a decision of the constitutional question raised in this case, and which is the same in the three cases.

It is of the utmost importance to the people of the State of California, that it be determined whether an assessment of the property of railroad corporations in the manner required by the constitution of California is valid, so it may be known, when these assessments are made, whether they can be included in the sources of revenue that can be relied upon in the administration of the government of that State, or whether such corporations are at liberty to decline to pay taxes, and to pay only what sums and when they may choose, merely as voluntary contributions to the public funds of California.

The court declined to hear further argument.

Mr. George A. Johnson, a former Attorney General of the State of California, and *Mr. Samuel Shellabarger* and *Mr. Jeremiah M. Wilson* also submitted briefs for the plaintiff in error.

Mr. George F. Edmunds, *Mr. Harvey S. Brown* and *Mr. Creed Haymond* submitted briefs on the merits for the defendant in error.

Mr. Harvey S. Brown also submitted a brief on a motion to dismiss the writ of error.

Mr. Justice Gray delivered the opinion of the court.

Upon the fact most properly and frankly admitted in open court by the Attorney General of the State of California, there can be no doubt that this writ of error must be dismissed, because the cause of action has ceased to exist. Any obligation of the defendant to pay to the State the sums sued for in this case, together with interest, penalties and costs, has been

extinguished by the offer to pay all these sums, and the deposit of the money in a bank, which by a statute of the State have the same effect as actual payment and receipt of the money. And the State has obtained everything that it could recover in this case by a judgment of this court in its favor. The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.

The case at bar cannot be distinguished in principle from previous cases in which writs of error have been dismissed by this court under similar or analogous circumstances. *Lord* v. *Veazie*, 8 How. 251, 255; *Cleveland* v. *Chamberlain*, 1 Black, 419; *Wood Paper Co.* v. *Heft*, 8 Wall. 333; *San Mateo County* v. *Southern Pacific Railroad*, 116 U. S. 138; *Little* v. *Bowers*, 134 U. S. 547; *Singer Manuf. Co.* v. *Wright*, 141 U. S. 696. See also *Elgin* v. *Marshall*, 106 U. S. 578.

Writ of error dismissed.

DALZELL *v.* DUEBER WATCH CASE MANUFACTURING COMPANY.

SAME *v.* SAME.

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

Nos. 213, 214. Argued April 18, 19, 1893. — Decided May 10, 1893.

An oral agreement for the sale and assignment of the right to obtain a patent for an invention is not within the statute of frauds, nor within section 4898 of the Revised Statutes requiring assignments of patents to be in writing; and may be specifically enforced in equity, upon sufficient proof thereof.

A manufacturing corporation, which has employed a skilled workman, for a stated compensation, to take charge of its works, and to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents obtained for inventions made by him while so employed, in the absence of express agreement to that effect.

Specific performance will not be decreed in equity, without clear and satisfactory proof of the contract set forth in the bill.

Where, at the hearing in equity upon a plea and a general replication, the plea, as pleaded, is not supported by the testimony, it must be overruled, and the defendant ordered to answer the bill.

THESE were two bills in equity, heard together in the Circuit Court, and argued together in this court.

On March 31, 1886, Allen C. Dalzell, a citizen of the State of New York, and the Fahys Watch Case Company, a New York corporation, filed a bill in equity against the Dueber Watch Case Manufacturing Company, a corporation of Ohio, for the infringement of two patents for improvements in apparatus for making cores for watch cases, granted to Dalzell, October 27, 1885, for the term of which he had, on January 21, 1886, granted a license, exclusive for three years, to the Fahys Company.

To that bill the Dueber Company, on June 4, 1886, filed the following plea: "That prior to the grant of the said

letters patent upon which the bill of complaint is based, and prior to the application therefor, and prior to any alleged invention by said Dalzell of any part, feature or combination described, shown or claimed in either of said letters patent, the said defendant, being then engaged in the manufacture of watch cases in the city of Newport in the State of Kentucky, and the said Dalzell having been in its employ as a tool-maker for a year preceding, it, said defendant, at the request of said Dalzell, reëmployed said Dalzell at increased wages to aid in experimenting upon inventions upon machinery and tools to be used in the manufacture of various portions of watch cases; that said Dalzell did then and there agree with said defendant, in consideration of said increased salary as aforesaid to be paid to him, and which was paid to him by this defendant, to dedicate his best efforts, skill and inventive talent and genius towards the perfecting and improvement of watch-case machinery and such other devices as this defendant should direct and order, and in experimenting under the direction of this defendant for this purpose, and further agreed that any inventions or improvements made or contributed to by him, said Dalzell, should be patented at the expense of this defendant, and for its benefit exclusively, and that said Dalzell should execute proper deeds of assignment, at the expense of this defendant, to be lodged with the applications for all such patents in the United States Patent Office, and said patents were to be granted and issued directly to this defendant; that, in pursuance of said agreement, said Dalzell entered upon said employment, and while thus employed at the factory of this defendant, and while using its tools and materials, and receiving such increased wages from it, as aforesaid, the said alleged inventions were made; that said patents were applied for, with the permission of this defendant, by the said Dalzell; and that all fees and expenses of every kind, necessary or useful for obtaining said patents, including as well Patent Office fees, as fees paid the solicitor employed to attend to the work incident to the procuring of said patents and drawing said assignments to this defendant, were paid by this defendant; and that, notwithstanding the foregoing, said Dalzell did

not sign the said deeds, although he had promised so to do, but fraudulently and secretly procured the said patents to be granted to himself; of all of which this defendant avers the complainant the Fahys Watch Case Company had notice, at and prior to the alleged making of the license by said Dalzell to it, more particularly referred to in the bill of complaint; and defendant avers that by reason of the premises the title in equity to said patents is in this defendant."

The plea, as required by Equity Rule 31 of this court, was upon a certificate of counsel that in his opinion it was well founded in point of law; and was supported by the affidavit of John C. Dueber, that he was the president of the Dueber Company, that the plea was not interposed for delay, and that it was true in point of fact.

After a general replication had been filed and some proofs taken in that case, including depositions of Dueber and of Dalzell, the Dueber Company, on January 17, 1887, filed a bill in equity against Dalzell and the Fahys Company, for the specific performance of an oral contract of Dalzell to assign to the Dueber Company the rights to obtain patents for his inventions, and for an injunction against Dalzell and the Fahys Company, and for further relief.

This bill contained the following allegations:

"That heretofore, to wit, prior to November 1, 1884, the said defendant Dalzell was in the employment of your orator, making and devising tools to be used in the construction of watch cases; that on or about said last-mentioned date, at the request of said Dalzell, his wages were raised, in consideration of a promise then made by said Dalzell to your orator that in the future his services would be of great value in the devising and perfecting of such tools; that, in pursuance of said promise and contract, the said Dalzell continued in the employ of your orator, and wholly at its expense, to devise and construct various tools to be used in your orator's watch-case factory in the manufacture of various parts of watch cases; that said Dalzell was so employed for a great length of time, to wit, a whole year, a large part of which time he was assisted by various workmen employed and paid by your orator to assist

him, the said Dalzell, in constructing such tools and in the experiments incident thereto."

"That subsequently thereto, and when said tools were completed, said Dalzell requested your orator to apply for letters patent for the various inventions embodied in all of said tools, for the use and benefit of your orator, representing to your orator that he, said Dalzell, had made valuable discoveries and inventions while engaged in designing and constructing said tools, and further representing that, if your orator did not secure the exclusive right to said inventions by letters patent, in all probability some of the workmen employed at your orator's factory, who were familiar with the said inventions and the construction of said tools, might go to some other and rival watch-case company, and explain to it the construction of such tools, and make similar tools for such other company, in which case your orator would be without remedy."

"That said Dalzell then and there, and as a further inducement to your orator to have letters patent applied for for said inventions, voluntarily offered to your orator that, if your orator should permit him, Dalzell, to apply for letters patent, and your orator pay all the expenses incident to obtaining such letters patent, such letters patent might be taken for the benefit of your orator, and that he, Dalzell, would not ask or require any further or other consideration for said inventions and such letters patent as might be granted thereon, which proposition was then and there accepted by your orator, and it was then fully agreed between said parties that said Dalzell should immediately proceed, through a solicitor of his own selection, to procure said patents for and in the name of your orator, and that your orator should pay all bills that might be presented by said Dalzell or such solicitor as might be selected to attend to the business of procuring said patents."

This bill further alleged that Dalzell did, in pursuance of that agreement, select a solicitor and apply for the two patents mentioned in the bill for an infringement, and three other patents; that, when some of the patents had "passed for issue," the solicitor employed by Dalzell sent blank assignments thereof to the Dueber Company with a request that

Counsel for Appellee.

Dalzell sign them, and thus transfer the legal title in the inventions to the Dueber Company, and enable the patents to be granted directly to it; that it exhibited these assignments to Dalzell, and requested him to sign them; that Dalzell replied that he would postpone signing them until all the patents had "passed for issue," and would then sign all together, to all which the Dueber Company assented; that the Dueber Company paid all the fees and expenses necessary or useful in obtaining the patents; but that Dalzell fraudulently procured the patents to be granted to himself, and refused to assign them to the Dueber Company, and, as that company was informed and believed, conveyed, with the intention of defrauding it, certain interests in and licenses under the patents to the Fahys Company, with knowledge of the facts; and that Dalzell and the Fahys Company confederated and conspired to cheat and defraud the Dueber Company out of the patents, and, in pursuance of their conspiracy, filed their bill aforesaid against the Dueber Company.

Annexed to this bill was an affidavit of Dueber that he had read it and knew the contents thereof, and that the same was true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believed it to be true.

To this bill answers were filed by Dalzell and the Fahys Company, denying the material allegations; and a general replication was filed to these answers.

By stipulation of the parties, the evidence taken in each case was used in both. After a hearing on pleadings and proofs, the Circuit Court dismissed the bill of Dalzell and the Fahys Company; and entered a decree against them, as prayed for, upon the bill of the Dueber Company. 38 Fed. Rep. 597. Dalzell and the Fahys Company appealed from each decree.

Mr. J. E. Bowman and *Mr. Edmund Wetmore* for appellants.

Mr. James Moore for appellee.

Mr. Justice Gray, after stating the substance of the pleadings and decrees, delivered the opinion of the court.

The more important of these cases, and the first to be considered, is the bill in equity of the Dueber Watch Case Manufacturing Company to compel specific performance by Dalzell of an oral agreement, alleged to have been made by him while in its employment, to assign to it the right to obtain patents for his inventions in tools for making parts of watch cases.

An oral agreement for the sale and assignment of the right to obtain a patent for an invention is not within the statute of frauds, nor within section 4898 of the Revised Statutes requiring assignments of patents to be in writing; and may be specifically enforced in equity, upon sufficient proof thereof. *Somerby* v. *Buntin*, 118 Mass. 279; *Gould* v. *Banks*, 8 Wend. 562; *Burr* v. *De la Vergne*, 102 N. Y. 415; *Blakeney* v. *Goode*, 30 Ohio St. 350.

But a manufacturing corporation, which has employed a skilled workman, for a stated compensation, to take charge of its works, and to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents obtained for inventions made by him while so employed, in the absence of express agreement to that effect. *Hapgood* v. *Hewitt*, 119 U. S. 226.

Upon the question whether such a contract was ever made by Dalzell, as is alleged in the bill of the Dueber Company, the testimony of Dalzell and of Dueber, the president and principal stockholder of the Dueber Company, is in irreconcilable conflict.

Dalzell was a skilled workman in the manufacture of various parts of watch cases, and was employed by the Dueber Company, first for eight months as electroplater and gilder, and then for a year in its tool factory, at wages of twenty-five dollars a week, from February, 1883, until November, 1884, and thenceforth at wages of thirty dollars a week, until January 19, 1886, when he left their employment, and immediately entered the employment of the Fahys Company, and executed to that company a license to use his patents.

The matters principally relied on by the Dueber Company, as proving the contract sought to be enforced, are a conversation between Dalzell and Dueber at the time of raising his wages in November, 1884; another conversation between them in the spring of 1885; and oral promises said to have been made by Dalzell in the summer of 1885, to assign to the Dueber Company his rights to obtain patents. It will be convenient to consider these matters successively.

The bill alleges that Dalzell's wages were raised in November, 1884, at his request, "and in consideration of a promise then made by said Dalzell to" the Dueber Company "that in the future his services would be of great value in the devising and perfecting of such tools," and that, "in pursuance of said promise and contract," Dalzell continued in the company's employ, at its expense, and with the assistance of its workmen, to devise and construct such tools.

Dueber's whole testimony on this point appears in the following question and answer: "Qu. Please state the circumstances which induced your company to increase Mr. Dalzell's wages at the time they were increased. Ans. Mr. Dalzell came to me in the office, and he says, 'Mr. Dueber, a year is now up since I worked for you in this factory. I suppose you are satisfied with the improvements I have made, and I have come to have my wages raised, and I will show you that, if you raise my wages, the improvements I will make this year will justify you in doing so.' I asked him what wages he wanted; he said 'thirty dollars per week,' and he was paid that until the time he left. When that year was up, nothing was said about wages."

This testimony tends to show no more than that Dalzell expressed a confident belief that, if his wages should be raised, the improvements which he would make during the coming year would justify the increase. It has no tendency to prove any such promise or contract as alleged in the bill, or any other promise or contract on Dalzell's part. So far, therefore, no contract is proved, even if full credit is given to Dueber's testimony.

As to what took place in the spring of 1885, the bill alleges

that, subsequently to the aforesaid interview, "and when said tools were completed," Dalzell requested the company to apply, for its own use and benefit, for patents for inventions which he represented that he had made "while engaged in designing and constructing said tools," and which, he suggested, might, if not secured by letters patent, be made known and explained by some of the workmen then employed there to rival companies; and, as a further inducement to the company to have such patents applied for, voluntarily offered, if the company would permit him to do so, and would pay all expenses of obtaining patents, to apply therefor, for the benefit of the company, and "not ask or require any further or other consideration for said inventions and such letters patent as might be granted thereon;" and that this proposition was "then and there accepted by" the company, and "it was then fully agreed between said parties" that Dalzell should immediately proceed, through a solicitor of his own selection, to procure the patents in the name of the company, and the company should pay the necessary expenses.

Upon this point, Dueber's testimony was as follows: "Qu. Who first suggested the idea of patenting these devices, and when? Ans. Mr. Dalzell, in the spring of 1885. Qu. Please state all that took place at that time. Ans. Mr. Dalzell came to me and said, 'Mr. Dueber, we have got a very good thing here; let us patent this for the benefit of the concern; we have some men here, who may run away and carry those ideas with them.' I objected at first; finally he says, 'If you will pay for getting them out, I don't want anything for them.' I then said, 'Let us go over to Mr. Layman to-morrow, and attend to it.' He said he knew a more competent lawyer than that, that he would send for." Dueber also testified that, when Dalzell first suggested taking out letters patent, Dueber told him that he did not think the improvements of sufficient value to justify taking out patents and paying for them; and that "about all" that Dalzell replied was, "We have a good many men here who may carry off these ideas into other shops, and I want to retain them for this concern."

All this testimony of Dueber was given in September, 1886,

before the filing of the bill for specific performance. Being recalled, after this bill had been filed, he testified, on cross-examination, that he now considered the inventions covered by the patents sued on as valuable, because the company had spent a great deal of money on them; and he declined or evaded giving any other reason.

Bearing in mind that there was no proof whatever of any previous agreement between the parties on the subject, the contract as alleged in the bill and testified to by Dueber, by which Dalzell is said to have voluntarily offered, with no other motive than to prevent workmen from injuring the Dueber Company by communicating the inventions to rival companies, and for no other consideration than the payment by the Dueber Company of the expenses of obtaining patents, and without himself receiving any consideration, benefit or reward, and without the company's even binding itself, for any fixed time, to pay him the increased wages, or to keep him in its service, is of itself highly improbable; and it may well be doubted whether, if such a contract were satisfactorily proved to have been made, a court of equity would not consider it too unconscionable a one between employer and employed, to be specifically enforced in favor of the former against the latter. *Cathcart* v. *Robinson*, 5 Pet. 264, 276; *Mississippi & Missouri Railroad* v. *Cromwell*, 91 U. S. 643; *Pope Manuf. Co.* v. *Gormully*, 144 U. S. 224.

Moreover, Dueber throughout manifests extreme readiness to testify in favor of the theory which he is called to support, and much unwillingness to disclose or to remember any inconsistent or qualifying circumstances. The record shows that he has at different times made oath to four different versions of the contract:

1st. On March 16, 1886, when the Dueber Company filed a petition in the superior court of Cincinnati against Dalzell to compel him to assign his patents to it, Dueber made oath to the truth of the statements in that petition, one of which was "that, at the time of the making of application for said patents, it was agreed, for a valuable consideration before that time paid, that said patents and inventions were the property

of this plaintiff, and should be transferred to it immediately upon the issue thereof, and prior to the grant of the patents."

2d. On June 4, 1886, he made oath that the plea was true in point of fact, which stated that the whole contract, both for an increase of Dalzell's wages and for his assignment to the Dueber Company of his rights to patents for his inventions, was made "prior to any alleged invention by said Dalzell," and in consideration of an increase of wages to be thereafter paid.

3d. In September, 1886, he testified that the increase of wages was made upon the mere statement of Dalzell that he would show that the improvements he would make during the coming year would justify the increase; and that the subsequent contract to assign the patent rights was after the inventions had been made.

4th. On January 17, 1887, he made oath to the truth, of his own knowledge, of this bill, which alleged that Dalzell's wages were raised "in consideration of a promise" by Dalzell "that in the future his services would be of great value in the devising and perfecting of such tools," and also alleged that the agreement to assign the patent rights was made after the inventions.

Dalzell, being called as a witness in his own behalf, directly contradicted Dueber in every material particular; and testified that the real transaction was that, after his inventions had been made, and shown to Dueber, the latter was so pleased with them that he, of his own accord, raised Dalzell's wages, and offered to furnish the money to enable him to take out patents. There is much evidence in the record, which tends to contradict Dalzell in matters aside from the interviews between him and Dueber, and to impeach Dalzell's credibility as a witness. But impeaching Dalzell does not prove that Dueber's testimony can be relied on.

What took place, or is said to have taken place, after these interviews may be more briefly treated.

Whitney, the solicitor employed at Dalzell's suggestion, applied for and obtained the patents in Dalzell's name, and was paid his fees and the expenses of applying for the patents

by the Dueber Company with Dalzell's knowledge. In the summer of 1885, before the patents were issued, he sent blank assignments thereof to the Dueber Company to be signed by Dalzell, which Moore, the general manager of the company, as well as Dueber, in the absence of each other, asked Dalzell to sign.

Upon what Dalzell then said, as upon nearly every material point in the case, the testimony is conflicting. Dueber and Moore testified, in accordance with the allegations in the bill, that Dalzell replied that he would not sign any of them until all the patents had "passed for issue," and would then sign all together. But the manner in which they testified to this does not carry much weight. And Dalzell testified that he positively refused to assign the patents until some arrangement for compensating him had been agreed upon.

Parts of a correspondence of Whitney with Dueber, and with Dalzell, during the summer of 1885, were put in evidence, which indicate that Whitney, while advising Dalzell as to his interests, sought to ingratiate himself with the Dueber Company. But they contain nothing to show any admission by Dalzell that he had agreed, or intended, to assign the patent rights to the Dueber Company, without first obtaining some arrangement whereby he might be compensated for his inventions.

The Circuit Court, in its opinion, after alluding to various matters tending to throw discredit on the testimony of each of the principal witnesses, said, "The case is one on which different minds may well reach a contrary opinion of the merits." 38 Fed. Rep. 599. We concur in that view; and it affords of itself a strong reason why the specific performance prayed for should not be decreed.

From the time of Lord Hardwicke, it has been the established rule that a court of chancery will not decree specific performance, unless the agreement is "certain, fair and just in all its parts." *Buxton* v. *Lister*, 3 Atk. 383, 385; *Underwood* v. *Hitchcox*, 1 Ves. Sen. 279; *Franks* v. *Martin*, 1 Eden, 309, 323. And the rule has been repeatedly affirmed and acted on by this court. In *Colson* v. *Thompson*, Mr. Justice Washing-

ton, speaking for the court, said: "The contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy." 2 Wheat. 336, 341. So this court has said that chancery will not decree specific performance, "if it be doubtful whether an agreement has been concluded, or is a mere negotiation," nor "unless the proof is clear and satisfactory, both as to the existence of the agreement and as to its terms." *Carr* v. *Duval*, 14 Pet. 79, 83; *Nickerson* v. *Nickerson*, 127 U. S. 668, 676; *Hennessy* v. *Woolworth*, 128 U. S. 438, 442.

For these reasons, we are of opinion that the contract set forth in the bill for specific performance has not been so clearly and satisfactorily proved as to justify a decree for specific performance of that contract; and that the decree for the plaintiff on the bill of the Dueber Company must, therefore, be reversed, and the bill dismissed.

The decree sustaining the plea to the bill against the Dueber Company for an infringement, and ordering that bill to be dismissed, is yet more clearly erroneous; for none of the evidence introduced by either party tended to prove such a contract as was set up in that plea. The only issue upon the plea and replication was as to the sufficiency of the testimony to support the plea as pleaded; and as the plea was not supported by the testimony, it should be overruled, and the defendant ordered to answer the bill. *Stead* v. *Course*, 4 Cranch, 403, 413; *Farley* v. *Kittson*, 120 U. S. 303, 315, 318; Equity Rule 34.

It is proper to add that the question whether the Dueber Company, by virtue of the relations and transactions between it and Dalzell, had the right, as by an implied license, to use Dalzell's patents in its establishment, is not presented by either of these records, but may be raised in the further proceedings upon the bill against the Dueber Company for an infringement.

Syllabus.

Decrees reversed, and cases remanded to the Circuit Court, with directions to dismiss the bill for specific performance, and to overrule the plea to the other bill, and order the defendant to answer it.

MR. JUSTICE BREWER dissented.

WADE *v.* CHICAGO, SPRINGFIELD AND ST. LOUIS RAILROAD COMPANY.

AMERICAN LOAN AND TRUST COMPANY *v.* WADE.

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

Nos. 247, 248. Submitted April 21, 1893. — Decided May 10, 1893.

The "after-acquired property" clause in a railroad mortgage covers not only legal acquisitions, but also all equitable rights and interests subsequently acquired either by or for the railroad company, the mortgagor.

Where negotiable paper has been put in circulation, and there is no infirmity or defence between the antecedent parties thereto, a purchaser of such securities is entitled to recover thereon, as against the maker, the whole amount, irrespective of what he may have paid therefor.

A railroad company contracted with a construction company to build and complete its railroad on a line designated on a map of the same, and to furnish and equip it, agreeing to pay for the same in stock and mortgage bonds, to be issued from time to time as sections should be completed. A mortgage was made of the road and property then existing and afterwards to be acquired. The construction company began work and completed a small section, for which it received the stipulated pay in stock and bonds. It parted with the latter for a good consideration, and they eventually came by purchase into the possession of W. No further section was completed, but work was done at various points on the line, and the construction company acquired for the railroad company rights of way through nearly or quite the entire route. Subsequently another railroad company acquired these properties through the construction company, and completed the road. *Held*, that W., being a *bona fide* holder of the bonds secured by the first mortgage, who had purchased the bonds in good faith, had through the mortgage a prior lien on the whole line

for the full amount of the face of his bonds, which was not affected by the fact that the new company acquired its rights and property, not directly from the first company, but through intervening conveyances.

THE case is stated in the opinion.

Mr. Frederick N. Judson, *Mr. Charles S. Taussig* and *Mr. Samuel P. Wheeler* for Wade and Hopkins, Trustees, appellants in No. 247 and appellees in No. 248.

Mr. Adrian H. Joline for Pratt, Trustee, the Mercantile Trust Company and the Central Trust Company, appellees in No. 247; and for Pratt, Trustee, appellant in No. 248.

MR. JUSTICE JACKSON delivered the opinion of the court.

The appellants, Belle N. B. Wade and Warner M. Hopkins, testamentary trustees of the estate of Robert B. Wade, as holders of fifty first-mortgage bonds of the Chicago, Springfield and St. Louis Railroad Company, on January 27, 1887, filed their bill in the United States Circuit Court for the Southern District of Illinois, for the purpose of enforcing a mortgage lien upon the property and railway of said company, extending from Springfield, Illinois, to East St. Louis, Illinois. The material facts of the case, as set out in the bill and as disclosed by the record, are as follows:

The Chicago, Springfield and St. Louis Railroad Company was incorporated January 17, 1883, under the general laws of Illinois, to build and operate a proposed line of railroad from Springfield to East St. Louis in that State. After surveying the route and designating the same on a map filed in the office of the company, and after securing certain rights of way on the line of the road, on March 3, 1883, it entered into a contract with the Empire Construction Company, of which one Wing was president and sole stockholder, to build, finish, and equip the proposed railway of the Chicago, Springfield and St. Louis Railroad Company within a stipulated time. The contract provided as follows:

"These articles of agreement made and entered into this

third day of March A. D. 1883, by and between the Empire Construction Company, a corporation of the State of Illinois, party of the first part, and the Chicago, Springfield and St. Louis Railroad Company, a railroad corporation of the same State, party of the second part, witnesseth:

"That for and in consideration of the covenants and payments hereinafter recited to be made by said party of the second part, said party of the first part, hereby for itself, its successors and assigns, covenants and agrees to furnish all the material and labor necessary to construct, iron, bridge, and complete the railroad of said party of the second part, as now surveyed and designated on a map filed in the office of the party of the second part, which railroad commences at a point on the Gilman and Clinton branch of the Illinois Central Railroad at the city of Springfield, and extends by way of Litchfield and Mount Olive to the bridge junction at East St. Louis, Illinois, a distance of about ninety-eight (98) miles, passing through the towns of Pawnee, Litchfield, Mount Olive, Alhambra, Marine, Troy, and Collinsville, with four and one-half ($4\frac{1}{2}$) miles of side track, (necessary to the places marked on said map for the business of the line at the time of the opening,) and to furnish the said railroad with depots, water tanks, and turn-tables, and to equip the same with engines and cars as hereinafter provided.

"The road and side tracks hereby agreed to be constructed are those on said map marked and specified only, and said map is hereby referred to for further particulars in this behalf; and the said road and side tracks are to be built in manner and according to the specifications and conditions following; and the bridges, depots, water tanks, turn-tables, engines, and cars are to be those only also hereinafter mentioned in the specifications."

Certain specifications were made a part of the contract, but they need not be recited.

In consideration of the premises and of the undertakings of the construction company thus set forth, the railroad company agreed to pay therefor, in its negotiable bonds to be issued thereafter, the amount of $2,500,000, and $990,000 of its

capital stock fully paid and non-assessable. The bonds were to be secured by a trust deed or mortgage in proper form and duly executed by the company upon all its property, real or personal, owned by it or afterwards acquired, including its franchises of every kind. The construction company, its successors or assigns, were to receive from the trustee twenty-five bonds to the amount of $25,000, and eighty shares of capital stock of the value of $8000, as each mile of the road was constructed and completed, and on the chief engineer's certificate obtained therefor.

The contract further provided that the construction company, its successors or assigns, for the purpose of construction, should have the right to the full and free possession, use, and control of said railway, equipment, and property of the railroad company, as constructed, made or furnished under the agreement, or otherwise obtained, together with the right to use and operate said railway in the name of the railroad company under its franchises necessary thereto, for the transportation of persons and property, until the final and ultimate completion and acceptance of said railroad, without charge therefor by the railroad company, and also at its own cost keep said railroad in good repair and condition, ordinary wear and tear excepted.

The contract further provided that if at any time a change of the route of the said road was necessary to be made, it was agreed that the same might be done on certificate of the chief engineer and approval of the president of the construction company, and thereupon all of the terms and conditions of the contract as to said modified route were to be the same as agreed in respect to the route then specified on the map.

In pursuance of this contract, and under proper authority of law, by vote of the stockholders of the railroad company, its board of directors was authorized to issue bonds of the company in the sum of $2,500,000, to pay for the building of the road, and to execute to the Central Trust Company of New York a mortgage upon all the properties and franchises, which were particularly described in the mortgage, as follows:

"All and singular the several pieces or parcels of land

forming the track or roadway of said railroad company from a point on the Gilman and Clinton branch of the Illinois Central railway at the city of Springfield and extending by way of Litchfield and Mt. Olive to the bridge junction at East St. Louis, Illinois, a distance of about ninety-eight miles, passing through the towns of Crow's Mills, Pawnee, White Oak, Litchfield, Mt. Olive, Alhambra, Nervine, Troy, and Collinsville, and being in or through the counties of Sangamon, Montgomery, Macoupin, Madison, and St. Clair, whether the same is now acquired and owned by said railroad company or may be hereafter acquired and owned by said company; also the railroad of said party of the first part and any and all its branches thereof, and any and all switches and turnouts thereof, together with all the rails, bridges, depots, stations, station-houses, section-houses, fences, and other structures and appurtenances thereto belonging now owned by said railroad company, or that may hereafter be constructed, completed, finished, acquired, or owned by said company; also, all the tolls, income, issues, and profits and alienable franchises of said party of the first part, connected with its railroad or relating thereto, including its rights and franchises as a corporation; and also, all and singular the property of every kind hereinafter mentioned, whether now owned or that may hereafter be acquired and owned by said railroad company, that is to say, all the rolling stock of every description, all the machine shops, car shops, and blacksmith shops, all the machinery, stationary engines, and all articles used in the construction, replacing, and repairing thereof, together with all the tools and materials, and any and all other property now owned or hereafter to be acquired by said party of the first part."

This mortgage was duly executed and properly recorded near that date in the several counties through which the railroad was located and was to be constructed. The bonds secured thereby were 2500 in number, of the denomination of $1000 each, redeemable in gold May 1, 1913, with interest-bearing coupons attached, payable semiannually at the American Exchange National Bank, New York. These bonds

were delivered to the trustee, to be by it delivered to the construction company in amounts of $25,000, on the certificate of the engineer of the railroad company as each mile of the road was completed, under and in accordance with the terms of the contract of the construction company with the railroad company. And in addition to the bonds to be thus delivered eighty shares of non-assessable stock of the railroad company, at the par value of $8000, were to be delivered to the construction company upon the same conditions.

The construction company under, and in pursuance of, this contract commenced the construction of the railroad, and in July, or early in August, 1883, had completed two miles of the road, and thereafter, in October, 1883, received from the Central Trust Company, upon certificate of the chief engineer of that fact, fifty of the mortgage bonds.

These bonds, so received by the construction company, were deposited on November 5, 1883, by Wing, the representative of said company, with a trustee as collateral security to secure the payment of the sum of $35,000, evidenced by the note of said Wing, and endorsed by Robert B. Wade for the accommodation of Wing and the said construction company. By the terms of the pledge of these bonds the trustee was authorized, upon the failure of Wing or the construction company, to pay said note at maturity, to sell said bonds, which sale it was agreed might be made without notice to Wing or to the construction company, and by express terms Wade was to have the same power or privilege of purchasing at said sale as any other person. Demand was made upon Wing at the maturity of the note to pay the same, which he failed to do, and thereupon the trustee holding the collateral, on due notice of time, place, and terms of sale, sold the bonds. They were purchased by the testamentary trustees of Wade, he having died in the meantime, for the sum of $20,000, which amount was credited upon a judgment on the note, previously confessed by Wing, and the balance of the indebtedness was subsequently collected by process of law. Under this purchase the appellants became the holders of the bonds.

These bonds, amounting to $50,000, were all that were ever

actually issued under the above-described mortgage of the Chicago, Springfield and St. Louis Railroad Company, for while the construction company graded considerable portions of the road, and acquired for the railroad company rights of way throughout a large part, if not the entire route, it failed to complete any other mile or miles of the road so as to become entitled to additional bonds.

In April, 1885, the railroad company becoming satisfied that the construction company was unable to execute its contract, or would fail to perform the same, the stockholders authorized its board of directors to "make such arrangements with said company or other parties as will secure the construction of this road and preserve the rights of all parties interested, and that they be authorized to modify or change said contract or make a new contract with the Empire Construction Company if they think necessary to secure the building of this road, maintaining the legal rights of all parties concerned, and upon the surrender of all outstanding bonds said directors may satisfy the present mortgage, and issue new bonds and secure same by mortgage on the property and franchises of this road."

Acting under this authority the railroad company on April 29, 1885, entered into a new contract with the construction company, which need not, however, be specially noticed, as it was vacated and cancelled on May 23, 1885, in compliance with the request of said construction company.

Wing, who was the chief promoter of the Chicago, Springfield and St. Louis Railroad Company, and the sole stockholder and owner of the Empire Construction Company, after suspending operations under the contract of the latter with the railroad company, organized and caused to be incorporated on May 19, 1885, the St. Louis and Chicago Railway Company. This company was incorporated to construct a railroad from Litchfield to Springfield in Illinois on the line of the Chicago, Springfield and St. Louis Railroad Company, and on May 26, 1885, a few days after the organization of the new company and after the construction company had been released from its contract with the Chicago, Springfield and St. Louis Railroad

Company, the said construction company by Wing, as its president, conveyed and transferred to H. H. Cooley & Company, a firm composed of a brother and a brother-in-law of Wing, for the consideration of $142,015.11 the following-described property: All right of way acquired by the Empire Construction Company for the Chicago, Springfield and St. Louis Railroad Company between Litchfield, Illinois, and Springfield, Illinois, estimated, as per voucher, to be of the value of $4785.40; all cross-ties between Litchfield and Springfield, Illinois, on the side (site) of survey made for the Chicago, Springfield and St. Louis Railroad Company, estimated, per voucher, to be of the value of $2546; all embankments, excavations, trestle-work, tiling, and all other work done in the building and construction of a railroad on the line of survey between Litchfield and Springfield, Illinois, done and constructed by the Empire Construction Company, estimated, per voucher, to be of the value of $72,134.22; all contracts for right of way guaranteed the Empire Construction Company for the Chicago-Springfield Railroad Company, estimated, per voucher, at the sum of $19,000; all right of way contracted for the Chicago, Springfield and St. Louis Railroad Company by the Empire Construction Company, estimated, per voucher, at the sum of $12,000; all right of way in Litchfield acquired by the Empire Construction Company for the right of way for the Chicago, Springfield and St. Louis Railroad Company, estimated to be of the value of $10,000; all engineering services and engineering in tile construction, location, surveys, estimates, and superintendence of construction in the work done between Litchfield and Springfield, Illinois, estimated, as per voucher, at $4672.93; all estimates, rights, and advantages accrued to the Empire Construction Company by reason of any contract heretofore existing, and all rights in the Empire Construction Company resulting from work done, material furnished, money expended, and included in the term "miscellaneous," as per vouchers, $16,876.56; all surveys, contracts, profiles, books, and all property belonging to the Empire Construction Company, except that of like nature as above enumerated, on the line of the Chicago, Springfield and St.

Louis Railroad Company south of the line of the Indianapolis and St. Louis Railroad Company.

This conveyance was duly recorded in Montgomery County, Illinois, May 27, 1885. On the same day the above conveyance was executed, H. H. Cooley & Company, by deed, duly recorded in Montgomery County, Illinois, transferred the same property to the St. Louis and Chicago Railway Company in consideration of one dollar, and of a contract entered into that day by H. H. Cooley & Company with the St. Louis and Chicago Railway Company to build a line of railroad north from Litchfield to Springfield, a distance of about forty-five miles. This road was completed in 1886 on the same line substantially as that surveyed for the Chicago, Springfield and St. Louis Railroad Company, and described in the conveyance of the Empire Construction Company to H. H. Cooley & Company. The St. Louis and Chicago Railway Company, on July 1, 1885, executed a mortgage to the Mercantile Trust Company of New York to secure an issue of its bonds to the amount of $500,000, which bonds were put in circulation and are outstanding. The mortgage securing the bonds was duly recorded in each of the counties through which the said railroad extended.

It further appears from the record, and the findings of fact in the decree of the court below, that, on June 12, 1886, the Empire Construction Company conveyed to the said firm of H. H. Cooley & Company, for the express consideration of $5000, all the real estate and personal property, rights, and easements acquired by said construction company for the Chicago, Springfield and St. Louis Railroad Company *south* of the Indianapolis and St. Louis Railway, and between Litchfield and Alhambra, Illinois, over the line surveyed, and on the rights of way acquired, for the Chicago, Springfield and St. Louis Railroad Company, together with all embankments, excavations, trestle-work, and all other work done in the building and construction of a railroad on the line of said Chicago, Springfield and St. Louis Railroad Company *south* of Litchfield; and on the same date, June 12, 1886, the firm of Cooley & Company, for the express consideration of $75,000, conveyed

the same property and rights to the Litchfield and St. Louis Railway Company, which the said Wing and associates also organized and incorporated, under the laws of Illinois, for the purpose of completing the road of the Chicago, Springfield and St. Louis Railroad Company between Litchfield and East St. Louis. This line was constructed between Litchfield and Mount Olive, a distance of about ten miles, but the new corporation appropriated the rights acquired for the Chicago, Springfield and St. Louis Railroad Company between Litchfield and Alhambra. The Litchfield and St. Louis Railway Company executed a mortgage to the Central Trust Company of New York for the purpose of securing $200,000 of bonds. It is claimed by the complainants that this mortgage was cancelled and discharged, but that does not distinctly appear from the record, and is not deemed material in the view we take of the case.

The Central Trust Company, as trustee of the mortgage of the Chicago, Springfield and St. Louis Railroad Company, executed in 1883, and also as trustee of the mortgage of the Litchfield and St. Louis Railway Company, executed in 1886, when applied to by the complainants, declined to institute foreclosure proceedings upon the first mortgage, and thereupon the complainants filed their bill making the three above-described railroad companies and the trustees of the mortgages executed by them, respectively, defendants to the bill. The complainants claim that, under the foregoing facts, the fifty bonds held by them are a lien upon the entire line originally surveyed, and partially constructed, for the Chicago, Springfield and St. Louis Railroad Company, by whom said bonds were issued, and that said company had made default in the payment of the same, and the interest coupons thereto attached, which matured May 1, 1884, and all interest coupons maturing since that date.

The bill was answered by the three railroad companies, viz., the Chicago, Springfield and St. Louis Railroad Company, the St. Louis and Chicago Railway Company, and the Litchfield and St. Louis Railway Company. Each of the companies admitted in its separate answer the execution of the various

mortgages ; that complainants were the holders of the fifty mortgage bonds issued by the Chicago, Springfield and St. Louis Railroad Company ; that said company had made default in the payment of the bonds and coupons as stated in the bill; and that said railroad company was insolvent; but they each denied that any of the insolvent company's property was in the possession of the other defendants.

The Central Trust Company, in its answer, admitted that the complainants had applied to it to file a bill to foreclose the mortgage made by the Chicago, Springfield and St. Louis Railroad Company, and that it had refused to do so, and declared its purpose of resigning its trusteeship under both of the mortgages aforesaid; that before the actual commencement of this suit it resigned its trusteeship under each of these mortgages, and that the reasons for so doing were that it was advised by counsel that, owing to its trust relation to holders of bonds secured by each mortgage, it ought not to take part on behalf of one or the other in any controversy between such bondholders; and that the rights of the complainants could be fully protected in any suit or suits brought by said complainants in their own names.

The answer of the Mercantile Trust Company admitted the execution of the mortgage to it of the St. Louis and Chicago Railway Company, but denied that it accepted the trust therein with notice and subject to the prior rights of the complainants as holders of the fifty bonds of the Chicago, Springfield and St. Louis Railroad Company; and as to other allegations of the bill it answered that it had no knowledge or information.

Proofs were taken upon the issues thus made, and the court below, on August 5, 1889, rendered its decision in the premises, dismissing the bill as to the St. Louis and Chicago Railway Company, and its trustee, the Mercantile Trust Company, and ordered and adjudged that the defendant, the Chicago, Springfield and St. Louis Railroad Company, or some one in its behalf, pay to the complainants, within ninety days, the sum of $22,976.59, being the said sum of $20,000 for which said bonds were bid off by complainants, and six per cent interest thereon

until paid, with costs of the suit to be taxed; and that in default of said payment all the right, title, interest, and equity of redemption of said Chicago, Springfield and St. Louis Railroad Company, and of the Litchfield and St. Louis Railway Company, and the St. Louis and Chicago Railway Company, in and to that portion of the property described in said mortgage, and lying south of the Indianapolis and St. Louis railroad, originally surveyed and laid out for the Chicago, Springfield and St. Louis Railroad Company, (which is specially described,) be sold by a special master without any equity of redemption, and that out of the proceeds of said sales, after the payment of costs and expenses attending the execution of the decree, the complainants be paid the amount decreed, with interest thereon at the rate of six per cent from the date of the decree.

After this decree was passed, the American Loan and Trust Company made application to intervene in the case as a trustee under a mortgage made April 1, 1887, by the St. Louis and Chicago Railway Company to secure bonds to the amount of $1,100,000, which the intervenor claimed was a lien on that portion of the railroad line and property *south* of Litchfield, on which the decision of the court below had awarded a lien to the complainants. This application of the American Loan and Trust Company was allowed, and by order of the court it was "made a defendant to this cause, with all rights of exceptions, appeal and the prosecution of writs of error, the said American Loan and Trust Company hereby entering its appearance and adopting and accepting the answer of the defendant, the Chicago, Springfield and St. Louis Railroad Company, as its answer herein, and agreeing that the replication to said answer heretofore filed shall stand as the replication to said answer as adopted by said American Loan and Trust Company, and it being further provided that this order shall not make it necessary to retake any of the evidence in this cause or to set aside any interlocutory proceedings or orders heretofore had or entered therein."

It appears from the proof that pending complainants' suit

the St. Louis and Chicago Railway Company had, in some way, acquired or been consolidated with the Litchfield and St. Louis Railway Company, and that the mortgage to the American Loan and Trust Company covered the whole line, both north and south of Litchfield.

The complainants appeal from so much of the decree of the Circuit Court as denied them a recovery upon the entire issue of bonds held by them — $50,000 and interest — and in denying them a prior lien upon the entire line of railroad, described in the bill as extending from Springfield to East St. Louis; and the American Loan and Trust Company appeal from so much of the decree as awarded complainants a lien for $22,976.59 on the Litchfield and St. Louis branch of the road, lying south of Litchfield. These constitute, in substance, the errors assigned by the respective appellants. The corporate existence of the American Loan and Trust Company having terminated during the pendency of these appeals, Dallas B. Pratt was substituted as trustee, and, by order of this court, has become a party to the record in place of his predecessor in the trust.

The testimony clearly establishes that the completed road *south* of Litchfield to Mount Olive was the same road surveyed, located and mapped for the Chicago, Springfield and St. Louis Railroad Company, which was located over the right of way acquired partly by the railroad company and partly by the construction company, under contract, for the railroad company. The court below found, as the proof clearly establishes, that "the Litchfield and St. Louis Railway Company took possession of the said uncompleted line of railroad and mingled other work and material therewith, and, upon a survey made and in accordance with plats and profiles thereto made for the Chicago, Springfield and St. Louis Railroad Company, did complete a line of railroad from Litchfield to Mount Olive, Illinois, and did also appropriate the rights acquired by and for the Chicago, Springfield and St. Louis Railroad Company between Mount Olive and Alhambra, Illinois."

It is further established by the proof that the defendant, the St. Louis and Chicago Railway Company, built and constructed

its road a distance of about eighteen miles on that portion of the line of the Chicago, Springfield and St. Louis railroad *north* of Litchfield, on the surveyed route and located line, and upon rights of way which had been theretofore acquired by and for the latter road. The rest of the line of the St. Louis and Chicago railway to Springfield, while slightly divergent from the line of the Chicago, Springfield and St. Louis railroad, was substantially the same, so that there is no practical difference between those portions of the line, either north or south of Litchfield.

It is further clearly established by the recitals in the conveyances made by the Empire Construction Company to H. H. Cooley & Company, and from said firm to the St. Louis and Chicago Railway Company, and to the Litchfield and St. Louis Railway Company — all of which conveyances were duly recorded — that the newly-organized railway companies, and their mortgagees were affected with full notice of the rights, properties, and interests which the Chicago, Springfield and St. Louis Railroad Company had in, to, and over the lines of road which the newly-organized roads completed under their contracts with Cooley & Company, as the successors or assignees of the Empire Construction Company.

It is clear, therefore, that the St. Louis and Chicago Railway Company and the Litchfield and St. Louis Railway Company must be held to occupy, in respect to the complainants, the same position which H. H. Cooley & Company and the Empire Construction Company would have occupied if the roads in question had been completed by either of them without the organization or incorporation of the two railroad companies which now claim and assert title to said lines of railway. Being charged with full notice and knowledge of the fact that the lines which they were completing belonged to the Chicago, Springfield and St. Louis Railroad Company, and with the further notice that that company had issued and put in circulation for value $50,000 in bonds, secured by its mortgage of 1883, they must be held to have acquired and to hold their rights in said lines in subordination to the rights of complainants. It may be true that all the rights of way, ease-

ments, embankments, and appurtenances which the Empire Construction Company acquired for the Chicago, Springfield and St. Louis Railroad Company under the contract between those parties did not invest that railroad company with a perfect legal title thereto; but it cannot be questioned that all the rights thus acquired conferred upon or gave to the Chicago, Springfield and St. Louis Railroad Company an equitable title and interest therein which would be covered by the "after-acquired clause" of its mortgage, and that the construction company had no right to transfer such interests over to third parties, especially as against the bonds in question, which the railroad company had issued for value, and the construction company had put in circulation.

The "after-acquired clause" in the mortgage of the Chicago, Springfield and St. Louis Railroad Company, under the decisions of this court, covers all acquisitions made to that property by either the construction company or others acquiring rights under it. *Dunham* v. *Cincinnati, Peru &c. Railway Co.*, 1 Wall. 254; *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459; *Porter* v. *Bessemer Steel Co.*, 122 U. S. 267; *Toledo &c. Railroad* v. *Hamilton*, 134 U. S. 296; *Central Trust Co.* v. *Kneeland*, 138 U. S. 414. In this latter case it was held that the "after-acquired property clause" of a mortgage will cover not only legal acquisitions, but all equitable rights and interests subsequently acquired by or for the mortgagor.

If the two newly-organized corporations, which have appropriated the line of road, rights of way, and easements of the Chicago, Springfield and St. Louis Railroad Company, had taken their transfers directly from the latter, it would admit of no question that the lien of complainants' bonds would extend over the whole line; and this result is not, and cannot be, changed by the fact that they have acquired their rights through the intervention and conveyances of the Empire Construction Company to Cooley & Company, and by that firm to the newly-organized companies, as those conveyances, together with the mortgage of the Chicago, Springfield and St. Louis Railroad Company, put them in full notice of the rights of the latter company, and also of the rights of its mortgagee. *Joy* v. *St. Louis*, 138 U. S. 1.

It cannot be assumed, therefore, that the St. Louis and Chicago and the Litchfield and St. Louis Railway Companies, or their mortgagees, are such *bona fide* transferees or purchasers for value of the partially constructed Chicago, Springfield and St. Louis railroad as to cut off the rights of bondholders secured by the prior mortgage of the latter company. Their acquisitions of the rights and interests of the Chicago, Springfield and St. Louis Railroad Company have in no way displaced the lien of complainants' mortgage, which had previously attached, not only to all of said partially constructed road, but to all accessions which might be made thereto, either by the mortgagor or others succeeding to its rights.

Under the facts in this case the newly-organized railway companies are in legal effect the successors of the Chicago, Springfield and St. Louis Railroad Company *cum onere*, and the mortgage lien held by the complainants upon the franchises and all property acquired in completing their mortgagor's railroad between the original termini, whether by itself or its successors, remains in full force; it follows, therefore, that the decree of the court below was erroneous in limiting the complainants to a lien on that portion of the road lying south of Litchfield, completed in the name of the Litchfield and St. Louis Railway Company. The same principles and consideration which entitle the complainants to a lien on that portion of the road lying south of Litchfield apply with equal force to the line lying north of Litchfield, and under the facts of the case, as already stated, they should have had their lien declared upon that portion of the railroad north as well as south of Litchfield. The complainants' lien has a clear and undoubted priority over the lien of the mortgage executed by the St. Louis and Chicago Railway Company to the American Loan and Trust Company on April 1, 1887, as that mortgage was executed *pendente lite* after the filing of complainants' bill herein.

The remaining question to be considered is whether complainants are entitled to a decree for the full amount of their bonds and interest, instead of the price they paid therefor

when the bonds were sold under pledge made by Wing, president of the construction company. The pleadings do not raise the question as to whether complainants were entitled to the full amount of their bonds. There was no issue presented on that question, and it was not proper, therefore, on the proof, even if the proof had warranted it, to have reduced the complainants' claim to the amount which they paid for the bonds when sold under the pledge thereof. The bonds were valid securities in the hands of the trustee for the protection of Wade as accommodation endorser for Wing, or the construction company, by whom they were pledged, and the pledgee or purchaser thereunder succeeded to the rights of the pledgor, and upon no principle could such purchaser, as against the maker, be restricted to what he might pay for the bonds. Negotiable securities once put in circulation for value may be transferred for less than their face, but the maker and those claiming under him cannot limit the right of a subsequent holder to a recovery of what he may have paid therefor.

In the case of *Cromwell* v. *County of Sac*, 96 U. S. 51, 60, in which it was held that the holder of such negotiable securities, regularly issued, is not limited to the amount which he may have paid therefor, it is said by the court, speaking by Mr. Justice Field: "We are of opinion that a purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against its maker, though he may have paid less than its par value, whatever may have been its original infirmity. We are aware of numerous decisions in conflict with this view of the law; but we think the sounder rule, and one in consonance with the common understanding and usage of commerce, is that the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities, and those of private corporations, are constantly fluctuating in price in the market, one day being above par and the next below it, and often passing within short periods from one-half of their nominal to their full value. Indeed, all sales of such securities are made with reference to prices current in the market, and not with reference to their

par value. It would introduce, therefore, inconceivable confusion if *bona fide* purchasers in the market were restricted in their claims upon such securities to the sums they had paid for them."

The same general principle is held in *Fowler* v. *Strickland*, 107 Mass. 552; *Moore* v. *Baird*, 30 Penn. St. 138; *Bange* v. *Flint*, 25 Wisconsin, 544; *Bank of Michigan* v. *Green*, 33 Iowa, 140; *Baily* v. *Smith*, 14 Ohio St. 396. By the decisive weight of authority in this country, where negotiable paper has been put in circulation, and there is no infirmity or defence between the antecedent parties thereto, a purchaser of such securities is entitled to recover thereon, as against the maker, the whole amount irrespective of what he may have paid therefor.

This was the position occupied by the complainants in respect to the bonds in question, which were regularly issued for value, and constituted *bona fide* debts against the mortgagor in the hands of Wade, or of the construction company before they were pledged. The testimony in respect to that pledge and the price at which the complainants purchased the bonds was objected to as incompetent, and it should have been excluded on two grounds: first, because there was nothing in the pleadings to warrant its introduction; and secondly, because nothing disclosed thereby authorized the scaling of the bonds, as was done by the decree. We are, therefore, of opinion that the decree was wrong in limiting complainants' right of recovery to the amount, and interest thereon, for which they purchased the bonds.

It is urged on behalf of Pratt that the principal of the bonds was not due; but in becoming a party to the cause the American Loan and Trust Company (to whose rights Pratt has succeeded) was required to adopt, and did adopt, the answer of the Chicago, Springfield and St. Louis Railroad Company, which admitted by its answer that it was in default in the payment of the bonds, and a similar admission was made by the St. Louis and Chicago Railway Company, under whose mortgage said trustee claims his rights were acquired. But aside from this, it is by no means certain, under the terms

of the Chicago, Springfield and St. Louis Railroad Company's mortgage, that the complainants did not have the right to foreclose, both for principal and for interest on their bonds.

This mortgage contained the provision "that upon default made in the payment of either interest or principal upon any one hundred of said bonds for the period of sixty days, then each and all of said bonds shall become absolutely due at the option of the majority in interest of the holders of said one hundred bonds in default; and upon decree rendered as aforesaid, judgment shall be made for the whole of said indebtedness thus due upon default of the part of said indebtedness as if all were absolutely due according to the terms of said bond." It was further provided that in the event of a sale the proceeds thereof, after defraying expenses incident thereto, should be applied in paying the several holders of the *then* outstanding bonds and coupons, secured by the mortgage, the amount of principal and interest, which might be due and unpaid, and in case of a deficiency in the fund to pay the same in full, then to distribute the fund *pro rata* among such holders. But the defendants having admitted that the bonds were in default, we do not feel disposed, in view of the fact that $50,000 constituted the entire issue, to reverse or modify the decree on the doubtful point as to whether the principal of the bonds under the terms of the mortgage could properly be treated as due.

Our conclusion is that there is no error in the decree of the Circuit Court of which the American Loan and Trust Company, or its successor, Pratt, can complain; and further, that the decree of the Circuit Court was erroneous in not allowing the complainants the full amount of their bonds, and in not declaring said bonds a lien upon the entire line of completed road from Springfield to Mount Olive.

The decree is accordingly reversed in this respect, and the cause remanded to the Circuit Court with directions to enter a decree in conformity with this opinion, and it is accordingly so ordered.

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

HEDDEN *v.* RICHARD.

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

No. 208. Submitted April 24, 1893. — Decided May 10, 1893.

The language of commerce, when used in laws imposing duties on importations of goods, and particularly when employed in the denomination of articles, must be construed according to the commercial understanding of the terms employed.

This rule is equally applicable where a term is confined in its meaning not merely to commerce but to a particular trade, and in such case, also, the presumption is that the term was used in its trade signification.

In an action against a collector to recover an excess of duties paid under protest, the defendant is entitled to show that words employed in a tariff act have a special commercial meaning in the trade, and to have it submitted to the jury whether the imported goods in question came within them.

THE case is stated in the opinion.

Mr. Assistant Attorney General Maury for plaintiff in error.

Mr. Edwin B. Smith for defendants in error.

MR. JUSTICE SHIRAS delivered the opinion of the court.

At various times in the year 1886 the defendants in error imported into the port of New York certain articles of furniture, for the account of Jacob and Josef Kohn, of Vienna, Austria, the manufacturers and consignors thereof, which the collector of the port classified as "furniture finished," under the provision for "cabinet ware and house furniture, finished," contained in Schedule D of the tariff act of March 3, 1883, and upon which he laid and collected duty at the rate of 35 per cent ad valorem. Against this classification and exaction the importers duly protested, claiming that the furniture was in piece and not finished, and therefore dutiable at 30 per cent

ad valorem, under the provision for "house or cabinet furniture, in piece, or rough, and unfinished," and on March 23, 1887, they brought an action in the Superior Court of the city of New York, which was duly remanded by *certiorari* into the Circuit Court of the United States for the Southern District of New York, against Edward L. Hedden, the collector, alleging that they had been compelled to pay him a certain amount in excess of the lawful duty on the goods, and demanded judgment for the amount of such excess, with interest. The defendant answered, asserting that the duty collected by him as aforesaid was assessed at the lawful rate, and the issue thus joined came for trial in the said court on May 14, 1886, before the court and a jury.

On the trial the plaintiffs in the action introduced testimony tending to show that the furniture in question consisted of Vienna bent wood chairs, settees, etc., which were imported into this country in separate parts or pieces, but varnished or polished, and requiring nothing but to be screwed together, (the holes for screws or bolts being already prepared,) and to have the ends of the screws or bolts "touched up" with paint or varnish, to form articles of furniture fit for use. The bolts or screws used came over with the furniture, and all the parts of the articles, as received by the importer, were ready to be put together. A sample chair, in the condition in which it was received by the importers, was brought into court by the plaintiffs, and the manner of putting the parts together was explained to the jury. The plaintiffs also introduced the testimony of a liquidator of duties at the custom-house of New York, to the effect that the difference between the amount of duties exacted from the plaintiffs and the sum which would have been collectible from them if the furniture had been assessed at 30 per cent ad valorem amounted, with interest, to $443.34.

The testimony on behalf of the defendant tended to show that the articles of furniture described were first put together at the factory in completed form, then varnished or polished, and then taken apart and packed for shipment. The term "finished," as applied to furniture, had, in the furniture trade,

on and prior to March 3, 1883, a particular trade meaning, namely, that an article had been varnished, stained, oiled, polished, or the like. The chair exhibited by the plaintiffs had been "finished," and was what was known to the trade as a "finished knocked down" chair. The terms "in piece" and "rough" had no special meaning in the trade, different from their general meaning, though the trade used the expression "in the rough" in the sense of "unfinished."

Upon the conclusion of the testimony the defendant's counsel moved the court (1) to direct the jury to find a verdict for the defendant on the ground that the uncontradicted evidence in the case and the exhibit showed that the furniture imported was "furniture finished," within the meaning of the statute; (2) that the jury be directed to find a verdict for the defendant on the ground that the plaintiffs had not proven facts sufficient to enable them to recover; and (3) to allow the case to go to the jury on the question of whether the furniture imported was "furniture finished," or "furniture in piece, or rough, and not finished," within the meaning of the statute. These motions having been successively made and denied, and exceptions to the denials duly taken, the court, on motion of the plaintiff's counsel, directed the jury to render a verdict in favor of the plaintiffs for the sum of $443.34. The jury then found a verdict for the plaintiffs in the said amount, and judgment was entered October 7, 1889, in accordance therewith. The defendant thereupon sued out a writ of error.

The subject of contention presented by this record is simply as to the proper construction of the statute. The collector put in testimony to show that in the furniture trade the word "finished" had a particular trade meaning, and the court below refused to permit the application of such meaning, if it should be found to exist, to the word as used in the act. The question is, therefore, whether, if a term used in a tariff law has a general meaning, as understood by society at large, and also a special trade signification, it is to be presumed that Congress used the word in its general sense, or in its trade sense.

With regard to the language of commerce, the general rule

laid down by this court is that it must be construed, when used in laws imposing duties on importations of goods, and particularly when employed in the denomination of articles, according to the commercial understanding of the terms used. *United States* v. *One Hundred and Twelve Casks of Sugar*, 8 Pet. 277; *Elliott* v. *Swartwout*, 10 Pet. 137. While it is true that "language will be presumed to have the same meaning in commerce that it has in ordinary use, unless the contrary is shown," *Swan* v. *Arthur*, 103 U. S. 597, 598, yet "the commercial designation of an article among traders and importers, where such designation is clearly established, fixes its character for the purpose of the tariff laws; . . . a specific designation *eo nomine* must prevail over general terms, and a commercial designation is the standard by which the dutiable character of the article is fixed." *Arthur* v. *Lahey*, 96 U. S. 112, 113, 114. This rule is equally applicable where a term is confined in its meaning, not merely to commerce, but to a particular trade, and in such case also the presumption is that the term was used in its trade signification.

While a customs law taxing an article which every one in the community might be expected to import, such as "wearing apparel," may use words which every one understands, and which, unless taken in the ordinary sense, would mislead the whole community, and cannot, therefore, be supposed to be intended in any other sense, unless there is something to indicate such intention, yet, on the other hand, a tariff law may use language not intended for the community at large, but for merchants, or for a particular trade, and such as to mislead those for whom it is intended, if not taken in the commercial or trade sense; and such language is that under consideration, speaking of a manufactured article in various stages of its construction. In such a case, as in the other case, the words are to be taken in the sense in which they will be naturally understood by those to whom they are addressed.

We are of opinion that as the collector offered to prove that the word in question had, at and prior to the passage of the act of 1883, a particular trade meaning, the court should have considered the trade meaning, if established, as applicable to

the matter at issue, and should have submitted the case to the jury, with instructions to render a verdict for the importers if they found that the furniture was not "finished" within the trade meaning of the term, and for the collector if they found the contrary.

The judgment of the court below is reversed, and the case remanded, with directions to award a new trial, and proceed in conformity with this opinion.

CADWALADER *v.* JESSUP AND MOORE PAPER COMPANY.

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

No. 276. Submitted April 27, 1893. — Decided May 10, 1893.

Old india-rubber shoes, invoiced as "rubber scrap" and entered as "scrap rubber," were exempt from duty, under the similitude clause, § 2499, of Title 33 of the Revised Statutes, as enacted by § 6 of the act of March 3, 1883, (22 Stat. 491,) as being substantially crude rubber, under § 2503, they having lost their commercial value as articles composed of india-rubber, or india-rubber fabrics, or india-rubber shoes.

THE case is stated in the opinion.

Mr. Assistant Attorney General Parker for plaintiff in error.

Mr. Edward L. Perkins for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the Court of Common Pleas, No. 3, for the county of Philadelphia, in the State of Pennsylvania, by the Jessup and Moore Paper Company against John Cadwalader, collector of customs for the district

of Philadelphia, to recover an alleged excess of customs duties, paid by the plaintiff under protest. The case was removed by the defendant by *certiorari*, into the Circuit Court of the United States for the Eastern District of Pennsylvania. The amount claimed was $236.25. The invoice in the case was of twenty-two bales of old "rubber scrap." They were entered as "scrap rubber," and 25 per cent ad valorem was charged on the merchandise, under the provision of Schedule N of § 2502 of the act of March 3, 1883, c. 121, 22 Stat. 513, which imposed a duty of 25 per centum ad valorem on "articles composed of india-rubber, not specially enumerated or provided for in this act."

Under the free list, § 2503 of the same act, under the head "Sundries," the following articles, when imported, were made exempt from duty: "India-rubber, crude and milk of." Section 2499 of Title 33 of the Revised Statutes was made, by § 6 of the same act, 22 Stat. 491, to read, after July 1, 1883, as follows: "There shall be levied, collected and paid on each and every non-enumerated article which bears a similitude, either in material, quality, texture or the use to which it may be applied, to any article enumerated in this title as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates are chargeable, there shall be levied, collected, and paid on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable. If two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates: *Provided*, That non-enumerated articles similar in material and quality and texture, and the use to which they may be applied, to articles on the free list, and in the manufacture of which no dutiable materials are used, shall be free."

The articles imported were old india-rubber shoes, purchased by manufacturers of india-rubber articles, to be ground into a powder, subjected to a blowing process to extract fibres of the lining, or to a high temperature to eliminate as much of the sulphur as possible, and then sheeted out and manipulated in the same manner and for the same purposes as crude rubber, the material being only equal in value to a medium grade of crude rubber.

It was contended by the importer that these old shoes, invoiced as "rubber scrap," and entered as "scrap rubber," were free, as being substantially crude rubber, on the ground that the evidence showed that they were non-enumerated articles, and were similar in material and quality and texture, and the use to which they were applied, within the meaning of § 2499, to crude rubber, and were, therefore, exempt from duty. The importer duly filed a protest against the exaction of the duty, and appealed to the Secretary of the Treasury, who affirmed the decision of the collector.

The case was tried before the Circuit Court and a jury, and evidence was given on both sides. At the close of the testimony, the plaintiff requested the court to charge the jury as follows: "1. Articles composed of india-rubber within the meaning of the existing tariff laws (sec. 2502, Schedule N) are articles prepared or manufactured from india-rubber, of which the preparation or manufacture constitutes some portion of their commercial value. If, therefore, you find that the commercial value possessed by the old rubber shoes upon which the plaintiffs in this case allege that the duty in this instance was improperly imposed was due solely to the rubber they contained, and not to the preparation or manufacture which they had undergone, they were not 'articles composed of rubber' within the meaning of the tariff laws as at present in force." The court affirmed that proposition and the defendant excepted.

The plaintiff also requested the court to charge the jury as follows: "2. If you find that the 'old rubber shoes' in question in this suit were not composed of india-rubber within the meaning of the tariff law, and if you find that said 'old rubber

shoes' were similar in material, quality, texture and the use to which they can be applied to crude rubber, your verdict must be for the plaintiffs." The court affirmed that proposition, and the defendant excepted.

The plaintiff also requested the court to charge the jury as follows: "3. Under all the evidence, your verdict must be for the plaintiffs." The court affirmed that proposition, and the defendant excepted.

The defendant requested the court to charge the jury as follows: "1. If you believe that the importation in suit is composed of india-rubber not specially enumerated or provided for in the act of March 3, 1883, your verdict should be for the defendant. 2. If you believe that the importation in suit bears a similitude in material, quality, texture, or the use to which it may be applied, to an article composed of india-rubber, then your verdict should be for the defendant. 3. Even if the importation in suit be used for the purpose of reclaiming, by chemical process, the rubber contained therein, yet if the product is inferior in material, quality, and texture to crude rubber, then it is not such a similitude to crude rubber as it is necessary under section 2499 for the plaintiff to prove to entitle him to recover, and your verdict should be for the defendant. 4. Your verdict in this case should be for the defendant." The court refused each request, and the defendant excepted to each refusal.

The court said to the jury that, if the plaintiff's first point was sound, the plaintiff was entitled to recover; that the court would instruct the jury *pro forma*, for the purpose of enabling them to find a verdict; that the law was correct as stated in the plaintiff's first point, and the plaintiff was entitled to recover, but that the court reserved the right to enter a verdict for the defendant, if it should be found that the law was not correctly stated in the plaintiff's first point. The court further said to the jury: "This action turns altogether upon a question of law on the constructions which are given to the act of Congress, and as we wish to give further time to the consideration of this question, and to have argument before the full bench upon the subject, I instruct you that the

law, as stated in plaintiff's first point, is a correct statement of the law, and in that view, under the facts here, the plaintiff is entitled to a verdict for the amount of duty exacted in excess of what should have been charged. This will be subject to consideration by the court hereafter, and the court reserves the right to enter a verdict for the defendant in case it should be satisfied that the law is not as stated in this point." The jury rendered a verdict in favor of the plaintiff for $255.72.

Subsequently, the defendant moved the court to grant judgment in his favor *non obstante veredicto*, the case was argued, the motion was denied, and judgment was entered in favor of the plaintiff for the amount of the verdict. The defendant has brought a writ of error, but we are not furnished with any brief in its support.

The uncontradicted testimony is to the effect that the only commercial use or value of the old india-rubber shoes, or scrap rubber, or rubber scrap in question, is by reason of the india-rubber contained therein, as a substitute for crude rubber; that the old shoes were of commercial use and value only by reason of the india-rubber they contained, as a substitute for crude rubber, and not by reason of any preparation or manufacture which they had undergone; that they could not fairly be called "articles composed of india-rubber," and as such dutiable at 25 per centum ad valorem; and that, although the shoes may have been originally manufactured articles composed of india-rubber, they had lost their commercial value as such articles, and substantially were merely the material called "crude rubber." They were not india-rubber fabrics, or india-rubber shoes, because they had lost substantially their commercial value as such. *Meyer* v. *Arthur*, 91 U. S. 570; *Worthington* v. *Robbins*, 139 U. S. 337, 341; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468; *Junge* v. *Hedden*, 146 U. S. 233, 237.

Under the act of October 1, 1890, c. 1244, (26 Stat. 607,) paragraph 613, the following articles are made exempt from duty: "India-rubber, crude and milk of, and old scrap or refuse india-rubber, which has been worn out by use and is fit only for remanufacture." The proper description of the im-

Statement of the Case.

portation in question in this case is that it is "old scrap or refuse india-rubber, which has been worn out by use and is fit only for remanufacture."

The decision below was correct, and the judgment is

Affirmed.

HOBBIE *v.* JENNISON.

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

No. 270. Submitted April 27, 1893. — Decided May 10, 1893.

An assignee for Michigan, of a patent for an improvement in pipes, made, sold and delivered in Michigan, pipes made according to the patent, knowing that they were to be laid in the streets of a city in Connecticut, a territory the right for which the seller did not own under the patent, and they were laid in that city: *Held*, under *Adams* v. *Burke*, 17 Wall. 453, that the seller was not liable, in an action for infringement, to the owner of the patent for Connecticut.

This was an action at law, brought in the Circuit Court of the United States for the Eastern District of Michigan, in August, 1886, by Isaac S. Hobbie and John A. Hobbie. The original defendants were Charles E. Jennison and Isaac H. Hill. The defendant Hill appeared and then withdrew his appearance, and the suit was discontinued as to him and proceeded as against Jennison. The action was brought for the infringement of letters patent of the United States, No. 45,201, granted to Arcalous Wyckoff, November 22, 1864, for an improvement in pipes for gas, water, etc., for seventeen years from that day. The plaintiffs had become, from May 31, 1876, the owners of the patent for the States of Maine, New Hampshire, Vermont, Rhode Island, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and West Virginia, and the District of Columbia. The declaration alleged that Jennison, on June 12, 1880, and on divers days between that day and November

22, 1881, at Hartford, Connecticut, and elsewhere in the plaintiffs' territory, and without their license or consent, made and used, and vended to others to be used, the patented invention, and within those dates did ship from Bay City, Michigan, to the Hartford Steam Company, of Hartford, Connecticut, large quantities of wooden pipe embodying the patented invention, with intent that the same should be laid and used at Hartford, and thus infringed the right of the plaintiffs under the patent, to their damage $5000.

The defendant joined issue, a trial by jury was duly waived, and the case was tried before Judge Brown, the District Judge, now a member of this court. He found in favor of the defendant, and a judgment in his favor for costs was entered. The opinion of Judge Brown is reported in 40 Fed. Rep. 887. The Circuit Court found the following facts:

"1. That, during all the times hereinafter mentioned, the plaintiffs in the action were assignees and owners of letters patent No. 45,201, dated November 22, 1864, granted to Arcalous Wyckoff for an improved pipe for gas, water, etc., for New York, New England, and all the Eastern States north of the Carolinas, and carried on business as manufacturers of the patented pipe at Tonawanda, in the State of New York, with sufficient facilities to supply the market in all the territory owned by them, and that, at the time of the sale of the pipe or casings hereinafter mentioned, defendant's firm was aware of the plaintiffs' title to said patent for the State of Connecticut.

"2. That the firm of Ayrault, Jennison & Co., which was composed of the defendant, Susan Hill, and one Miles Ayrault, was the assignee and owner of the same patent for the State of Michigan, and, during the greater part of the year 1880, manufactured and sold the patented pipe at Bay City, in the State of Michigan, to various persons.

"3. That, in the year 1880, the firm of Andrew Harvey & Son did business in Detroit, Michigan, as machinists and manufacturers of valve fittings and other supplies.

"4. That, in the fore part of 1880, the Hartford Steam Co., a corporation organized, existing, and doing business under the

laws of the State of Connecticut, at Hartford, in said State, undertook the project of laying down lines of steam-pipe apparatus for heating purposes in the streets of said Hartford, and that they had considerable correspondence with said Harvey & Son as to the best prices they could get for pipe casings and iron pipes, and also as to the best terms for freight from Bay City, Michigan, and elsewhere to Hartford, Connecticut; that, on the 5th day of May, 1880, said Hartford Steam Co., which had been negotiating for several weeks with Harvey & Son concerning the said project, completed a contract with them to lay down in Hartford the said steam-supply apparatus.

"5. That said Harvey & Son entered upon the performance of said job at Hartford as the agent and under the directions of the said Hartford Company; that they were also employed and acted as the agent of said Hartford Steam Supply Company in obtaining for them the best prices they could in the purchase of iron and wooden pipes, and in obtaining the best rates they could for freight from Michigan or elsewhere, and in obtaining rebates in freight when necessary; and that said steam company relied upon their judgment in said matters; and that, in all their negotiations and dealings with Ayrault, Jennison & Co., they acted on behalf of, and as the agents merely of, said Hartford Steam Co.

"6. That after said Hartford Co. had perfected said contract with said Harvey & Son, they sent various written orders, during the year 1880, by mail, to the address of said defendant at Bay City, Michigan, to ship to them at Hartford, Connecticut, certain quantities of wooden piping; that said defendants accepted the same and manufactured said piping at their factory under said patents and in conformity with the description and covered by the claim of said Wyckoff patent, and sold and delivered the same to the said Hartford Co. on board the cars at Bay City, Michigan, addressed to them, and that they had nothing to do with said piping after the delivery of the same on the cars at Bay City; that said Hartford Co. paid the freight thereon from Bay City to Hartford and sent drafts for the payment of said piping to defendants at Bay

City; that none of the wooden pipes used in the laying of said steam-supply apparatus at Hartford were sold to said Harvey & Son, but were all sold to said Hartford Steam Co., and that any orders made by Harvey & Son were made merely as the agents of the Hartford Steam Co.

"7. That said piping so purchased was laid down in Hartford during the term of said patent, and that during the negotiations connected with the sales and shipment of said pipe or casing defendant's firm knew that it was for use in the construction of steam-heating works in the city of Hartford, State of Connecticut, and that said Harvey & Son were to lay said pipe in Hartford.

"8. That the accounts for said sales to said Hartford Co. were kept on the books of said Ayrault, Jennison & Co. in the name of the Hartford Steam Co., and that a statement of the entire account from their books of said sales was sent to them at the close of the year.

"9. That said pipe or casing was laid down as a part of said works during the life of said patent, in the summer and fall of 1880, under said Harvey's directions, in the streets of Hartford.

"10. That by the acts and doings of defendant's firm in the premises, as above stated, the plaintiffs sustained damage, and if any recovery were permissible under the rules of law, they would be entitled to an inquiry to ascertain the amount of such damage, based on the testimony introduced by said plaintiffs."

As a conclusion of law from the foregoing facts, the court found that the plaintiffs were not entitled to recover in the action. The plaintiffs excepted to the conclusion of law and to the judgment, and brought a writ of error.

Mr. James A. Allen for plaintiffs in error.

The hindrance to carrying out the views of the court below on the merits of the case, was found in the authority of *Adams* v. *Burke*, 17 Wall. 453. The plaintiffs in error seek on this appeal a review of the application which has been made of

Argument for Plaintiffs in Error.

Adams v. *Burke*, to this case, rather than of the essential doctrine of that case. The contention of the dissenting members of this court in that cause was that use of a patented article lawfully purchased of an assignee of specific territory could only be had within such territory and in no case beyond or outside it within the United States, and that, as to use of the thing patented, the purchaser only acquired the right to such use within the territory held by the seller. A case may possibly arise in which this court will be called on to revise or modify the ruling of the majority of this court in deciding against this contention; but it is our view that the present case does not involve it. In *Adams* v. *Burke*, it is assumed that the patented coffin-lids were first lawfully sold to the purchaser without condition or restriction by assignees of the patent for the territory of Boston and vicinity; and then the question is presented whether, as an incident of such a lawful sale, the buyer could use outside the limits of the title of the assignor the article so lawfully and rightfully purchased. The case was heard *on bill and plea*, and the plea, which was accepted as true, and which was entitled to be liberally construed in favor of the pleader, expressly stated that the coffins containing the invention were manufactured by Lockhart & Seelye within a circle whose radius was ten miles, having the city of Boston as its centre, and sold within said circle by said Lockhart & Seelye without condition or restriction. The validity of the sale by Lockhart & Seelye was in that case assumed throughout, and no contest made upon it; only the effect and incidents of such a lawful sale were disputed and considered. There was no showing that the sellers sold the patented coffin-lids *for use in other territory*, or that they knew of or had in view any such use. In both stages of this case, in all references made to it, the lawfulness of the sale by Lockhart & Seelye to Burke was conceded and the dispute was whether or not, the sale and purchase being valid and lawful, as an incident thereof the purchaser might use the goods in other territory. In the present case the lawfulness, as against the plaintiffs in error, of the alleged sale of the patented pipe by Ayrault, Jennison & Company in the actual

circumstances of such sale, is exactly what is contested; the claim of the plaintiffs being that such sale and the shipments thereunder *expressly for use within the territory of the plaintiffs*, constituted an invasion upon the rights of the plaintiffs and as against them were unlawful. Actual sale, delivery and acceptance of the pipe at Bay City for general use, would be one thing; a form of delivery at Bay City with acceptance at Hartford, and knowledge and intent on the part of the seller that the sole use would be at Hartford, and shipments on that basis and understanding as against the plaintiffs, in our view would not constitute a lawful sale of the pipe at Bay City. The transaction would be treated in the light of its purpose and effect as a raid or invasion on the plaintiffs' territory and an attempt to displace and intrude upon his rightful market. If the defendants sought protection in such a transaction through a mere arrangement that delivery should be on cars at Bay City, the shield would be unavailing. The law would stamp the transaction with its real attributes and deem it unlawful.

The general current of decisions in the Circuit Courts has shown no inclination to extend the doctrine of *Adams* v. *Burke*, by loose or liberal interpretations. In those courts it has been repeatedly ruled that a sale in the territory of one assignee for the purpose of selling again to users in the territory of another assignee was unlawful. *California Electrical Works* v. *Finck*, 47 Fed. Rep. 583; *Standard Folding Bed Co.* v. *Keeler*, 37 Fed. Rep. 693; *Hatch* v. *Adams*, 22 Fed. Rep. 434; *Hatch* v. *Hall*, 30 Fed. Rep. 613.

Mr. George H. Lothrop for defendant in error.

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

As a result of the findings of fact, the Circuit Court held that the sale and delivery of the pipe by the defendant were made at Bay City, Michigan, but that, in view of the decision of this court in *Adams* v. *Burke*, 17 Wall. 453, the defendant

could not be held as an infringer by reason of his knowledge that the pipe was to be used in a territory of which the plaintiffs held the monopoly. The Circuit Court said that, in the case of *Adams* v. *Burke*, an undertaker had purchased patented coffin-lids from certain manufacturers who held the right from the patentee to manufacture and sell within a circle whose radius was ten miles, having the city of Boston as a centre; that the undertaker lived outside of that circle, and within a territory owned by the plaintiff under the patent, and he made use of the coffin-lids in his business; that the owner of the territory in which the undertaker carried on his business brought suit against him as an infringer, and it was held by this court that, the sale having been made by a person who had full right to make, sell, and use the invention within his own territory, such sale carried with it the title to the use of the machine without as well as within such territory; that the action in that case was brought against the user, but this court announced a principle of law which was equally applicable to the seller; that if the user of the article was not liable to the patentee, it was because he purchased it of a person who had the legal right to sell it; that if it was legal for him to buy, it was equally legal for the other party to sell; and that, in the opinion of this court, in the case, as well as in the dissenting opinion, it was stated, in substance, that the question raised was whether an assignment of a patented invention for a limited district conferred upon the assignee the right to sell such patented article to be used outside of such limited district. The Circuit Court further said that there was no evidence in *Adams* v. *Burke* that the sale was made under the belief on the part of the seller that the article was to be used within his territory, and that the case was authority for the broad proposition, that the sale of a patented article by an assignee within his territory carries the right to use it everywhere, notwithstanding the knowledge of both parties that a use outside of the territory is intended.

We understand that to be the true interpretation of the decision in *Adams* v. *Burke*. It is said in the opinion in that case, that when the patentee, or the person having his rights,

sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and parts with the right to restrict that use; that the patentee, or his assignee, having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentee; that, although the right of the assignees of the coffin-lid patent to manufacture, to sell, and to use the coffin-lids was limited to the circle of ten miles around Boston, a purchaser from them of a single coffin acquired the right to use that coffin for the purpose for which all coffins are used; that, so far as the use of it was concerned, the patentee had received his consideration, and it was no longer within the monopoly of the patent; that it would be to engraft a limitation upon the right of use, not contemplated by the statute nor within the reason of the contract, to say that it could only be used within the ten-mile circle; and that, whatever might be the rule when patentees subdivided territorially their patents, as to the exclusive right to *make* or to *sell* within a limited territory, this court held that, in the class of machines or implements it had described, when they were once lawfully made and sold, there was no restriction on their *use* to be implied, for the benefit of the patentee or his assignees or licensees.

The plaintiffs in error contend that the decision in *Adams* v. *Burke* is not applicable to the present case; that in *Adams* v. *Burke* it was assumed that the patented coffin-lids were first lawfully sold to the purchaser, without condition or restriction, by assignees of the patent for the territory of Boston and vicinity; that then the question was presented whether, as an incident of such a lawful sale, the buyer could use outside of the limits of the territory of the assignees the article so lawfully purchased; that it was not shown in that case that the sellers sold the patented coffin-lids for use in other territory, or knew of, or had any interest in such use; that, in the case now before us, the lawfulness, as against the plaintiffs, of the alleged sale of the patented pipe by the defendant, in the actual circumstances of such sale, was contested, the claim of the plain-

tiffs being that such sale and the shipment thereunder, expressly for use within the territory of the plaintiffs, constituted an invasion of their rights and were unlawful as against the plaintiffs; and that actual sale, delivery, and acceptance of the pipe at Bay City for actual use would be one thing, but a form of delivery at Bay City, with an acceptance at Hartford, and knowledge and intention on the part of the defendant that the sole use would be at Hartford, and shipments on that basis and understanding, would not constitute a lawful sale of the pipe at Bay City, as against the plaintiffs.

But we are of opinion that the case of *Adams* v. *Burke* cannot be so limited; that the sale was a complete one at Bay City; and that neither the actual use of the pipes in Connecticut, or a knowledge on the part of the defendant that they were intended to be used there, can make him liable. *Adams* v. *Burke*, in the particular in question, is cited with approval by this court in *Birdsell* v. *Shaliol*, 112 U. S. 485, 487; *Wade* v. *Metcalf*, 129 U. S. 202, 205; and *Boesch* v. *Gräff*, 133 U. S. 697, 703.

The authorities which are cited on the part of the plaintiffs, holding that where a person makes one element of a patented combination, with the intent that other persons shall supply the other elements and thus complete the combination, he is guilty of infringement because he contributes to it, establish a doctrine applicable to the case of a naked infringer. But in the present case, the defendant was not such an infringer, because he had a right under the patent to make, use, and vend the patented article in the State of Michigan, and the article was lawfully made and sold there. The pipes in question were not sold by the Hartford Steam Company in Connecticut, but were merely used there, and necessarily perished in the using.

It is easy for a patentee to protect himself and his assignees, when he conveys exclusive rights under the patent for particular territory. He can take care to bind every licensee or assignee, if he gives him the right to sell articles made under the patent, by imposing conditions which will prevent any other licensee or assignee from being interfered with. There

is no condition or restriction in the present case in the title of the defendant. He was the assignee and owner of the patent for the State of Michigan.

Judgment affirmed.

MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY *v.* EMMONS.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 240. Submitted April 21, 1893. — Decided May 10, 1893.

The statutes of the State of Minnesota, requiring railway companies to fence their roads, are not in conflict with the Constitution of the United States.

THE case is stated in the opinion.

Mr. Albert E. Clarke for plaintiff in error.

Mr. Edward J. Hill for defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

The plaintiff below, the defendant in error here, is a citizen of Minnesota, and for some years previously and at the commencement of this action was the owner of a farm in that State of one hundred and sixty acres, which he occupied with his family as a homestead. He enclosed the farm with a suitable fence, cultivated it, and kept stock upon it. In October, 1879, he sold and conveyed to the defendant, a railway corporation organized under the laws of the State, a right of way for a railroad across the farm fifty feet wide on each side of the road. Soon afterwards the company constructed the road on the right of the way purchased, but neglected to build and maintain any fences on either side of it, or cattle guards where the road enters and leaves the land purchased, as required by

the statute of the State; and to recover damages for such failure the present action was brought.

The statute which was passed by the legislature in 1876 provided that all railroad companies in the State should, within six months after its passage, "build or cause to be built good and sufficient cattle guards at all wagon crossings, and good and substantial fences on each side" of their roads, and declared that they should be liable for domestic animals killed or injured by their negligence, and that a failure to build and maintain cattle guards and fences as above provided should be deemed an "act of negligence on the part of such companies;" and, by its fourth section, that any company or corporation owning and operating a line of railroad within the State, which had failed and neglected to fence its roads, and to erect crossings and maintain cattle guards, as required by the terms of its charter, and the amendments thereof, should thereafter "be liable, in case of litigation, for treble the amount of damages suffered by any person, in consequence of such neglect, to be recovered in a civil action; or actual damages if paid within ten days after notice of such damages." General Laws, Minnesota, 1876, c. 24.

In 1877 this last section was amended so as to declare that "any company or corporation guilty of the failure or neglect mentioned should be liable for all damages sustained by any person in consequence of such failure or neglect." General Laws, Minnesota, 1877, c. 73; General Statutes, Minnesota, 1878, c. 34, § 57.

On the trial it appeared in evidence that the defendant had operated its road and run daily trains through the farm, without building the required fences on each side of its track, or constructing cattle guards at the wagon crossings; and the plaintiff, who kept cattle upon his land, was in consequence obliged, at much expense, to watch his cattle for some years before the commencement of this action, to keep them from being killed by passing trains, which subjected him to great inconvenience, loss of time, and expenditure of money, and deprived him of the free and beneficial use and enjoyment of his land, and lessened its value. He recovered a verdict of

one thousand dollars for the damages sustained, upon which, and for costs, judgment was entered in his favor.

This case had, on a previous occasion, been before the Supreme Court of the State on appeal. The court below had held that the complaint did not state facts sufficient to constitute a cause of action, and dismissed it and refused a motion for a new trial. On appeal from the order denying the motion the ruling below was reversed and a new trial granted. In giving its decision, the Supreme Court, among other things, held that to regulate the carrying on of any business liable to be injurious to the property of others, like that of operating a railroad, so that it shall do the least possible injury to such property, was as much within the police power of the State as regulating it with a view to protect life from its dangers; and that the State might, under that power, require railroads to be so constructed, maintained, and operated, and so protected and enclosed, that they would injure as little as possible the farms or lands through or alongside of which they run, and that the legislation of the State having this object in view was valid.

It was objected below that the statute, as thus interpreted, denied to the railroad companies the equal protection of the laws of the State, as required by the first section of the Fourteenth Amendment. The point of the objection, as indicated in the opinion of the Supreme Court, so far as we can understand it, was this, that the statute in requiring railway companies to fence their roads was a police regulation, having for its object to prevent animals from getting on the tracks and the consequent danger of injury to the animals themselves and to railway passengers and employés; and, therefore, to impose penalties and authorize a recovery of damages for non-compliance with the law for other than the resultant injuries to animals and railway passengers and employés, was in excess of the police power of the State, and a departure from its general law, which imposed penalties and damages only for the direct injuries sought to be prevented, and did not extend them so as to cover consequential and possible resulting injuries.

The answer to this is that there is no inhibition upon a State to impose such penalties for disregard of its police regulations as will insure prompt obedience to their requirements. For what injuries the party violating their requirements shall be liable, whether immediate or remote, is a matter of legislative discretion. The operating of railroads without fences and cattle guards undoubtedly increases the danger which attends the operation of all railroads. It is only by such fences and guards that the straying of cattle, running at large, upon the tracks can be prevented and security had against accidents from that source; and the extent of the penalties which should be imposed by the State for any disregard of its legislation in that respect is a matter entirely within its control. It was not essential that the penalty should be confined to damages for the actual loss to the owner of cattle injured by the want of fences and guards; it was entirely competent for the legislature to subject the company to any incidental or consequential damages, such as the loss of rent, the expenses of keeping watch to guard cattle from straying upon the tracks, or any other expenditure to which the adjoining owner was subjected in consequence of failure of the company to construct the required fences and cattle guards. No discrimination is made against any particular railroad companies or corporations; all are treated alike, and required to perform the same duty, and, therefore, no invasion was attempted of the equality of protection ordained by the Fourteenth Amendment.

It was also objected that the statutes of Minnesota, in requiring the defendant to build partition fences for the benefit of adjoining land owners, or to pay damages for not building them, imposes upon the company a duty not required by contract, common law, or its charter, and is, therefore, a violation of the right conferred by the charter to buy and hold lands for specified purposes, the same as any other land owner.

To this position we answer that the extent of the obligations and duties required of railway corporations or companies by their charters does not create any limitation upon the State against imposing all such further duties as may be deemed

essential or important for the safety of the public, the security of passengers and employés, or the protection of the property of adjoining owners. The imposing of proper penalties for the enforcement of such additional duties is unquestionably within the police powers of the States. No contract with any person, individual or corporate, can impose restrictions upon the power of the States in this respect.

The objection that by allowing damages for the diminution of value in the adjoining farm caused by the failure of the company to fence its roads and to construct proper cattle guards, is taking property of the defendant without due process of law, falls with the supposed invalidity of such consequential damages which we hold to be within the discretion of the legislature to impose. *Judgment affirmed.*

MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error, *v.* NELSON. Error to the Supreme Court of the State of Minnesota. No. 241. Submitted April 21, 1893. Decided May 10, 1893. MR. JUSTICE FIELD. The facts in this case are similar to those in the case just decided, and by stipulation is to be disposed of in the same way. Judgment is accordingly

Affirmed.

BALTIMORE AND OHIO RAILROAD COMPANY *v.* BAUGH.

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

No. 89. Argued December 9, 12, 1893. — Decided May 1, 1893.

Whether the engineer and fireman of a locomotive engine, running alone on a railroad and without any train attached, are fellow-servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former, is not a question of local law, to be settled by the decisions of the highest court of the State

Statement of the Case.

in which a cause of action arises, but is one of general law, to be determined by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant.

Such engineer and such fireman, when engaged on such duty are, when so considered, fellow-servants of the railroad company, and the fireman is precluded by principles of general law from recovering damages from the company for injuries caused, during the running, by the negligence of the engineer.

Chicago, Milwaukee & St. Paul Railway v. *Ross*, 112 U. S. 377, explained and distinguished.

JOHN BAUGH, defendant in error, was employed as a fireman on a locomotive of the plaintiff in error, and while so employed was injured, as is claimed, through the negligence of the engineer in charge thereof. He commenced a suit to recover for these injuries in the Circuit Court of the United States for the Southern District of Ohio.

The circumstances of the injury were these: The locomotive was manned by one Hite, as engineer, and Baugh, as fireman, and was what is called in the testimony a "helper." On May 4, 1885, it left Bellaire, Ohio, attached to a freight train, which it helped to the top of the grade about twenty miles west of that point. At the top of the grade the helper was detached, and then returned alone to Bellaire. There were two ways in which it could return, in conformity to the rules of the company: one, on the special orders of the train dispatcher at Newark, and the other, by following some regular scheduled train, carrying signals to notify trains coming in the opposite direction that the helper was following it. This method was called in the testimony "flagging back." On the day in question, without special orders, and not following any scheduled train, the helper started back for Bellaire, and on the way collided with a regular local train, and in the collision Baugh was injured. Baugh had been in the employ of the railroad company about a year, had been fireman about six months, and had run on the helper, two trips a day, about two months. He knew that the helper had to keep out of the way of the trains, and was familiar with the method of flagging back.

No testimony was offered by the defendant, and at the close

of the plaintiff's testimony the defendant asked the court to direct a nonsuit, which motion was overruled, to which ruling an exception was duly taken. In its charge to the jury the court gave this instruction: "If the injury results from negligence or carelessness on the part of one so placed in authority over the employé of the company, who is injured, as to direct and control that employé, then the company is liable." To which instruction an exception was duly taken. The jury returned a verdict for the plaintiff for $6750, and upon this verdict judgment was entered. To reverse which, the railroad company sued out a writ of error from this court.

Mr. John K. Cowen, (with whom was *Mr. Hugh L. Bond, Jr.*, on the brief,) for plaintiff in error.

Mr. L. Danford, (with whom was *Mr. James C. Tallman* on the brief,) for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

The single question presented for our determination is, whether the engineer and fireman of this locomotive, running alone and without any train attached, were fellow-servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former.

This is not a question of local law, to be settled by an examination merely of the decisions of the Supreme Court of Ohio, the State in which the cause of action arose, and in which the suit was brought, but rather one of general law, to be determined by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant.

The question as to what is a matter of local, and what of general law, and the extent to which in the latter this court should follow the decisions of the state courts, has been often presented. The unvarying rule is, that in matters of the latter class this court, while leaning towards an agreement with the

views of the state courts, always exercises an independent judgment; and as unvarying has been the course of decision, that the question of the responsibility of a railroad corporation for injuries caused to or by its servants is one of general law. In the case of *Swift* v. *Tyson*, 16 Pet. 1, the first proposition was considered at length. On p. 18 it is thus stated: "But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage, but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the thirty-fourth section of the Judiciary Act of 1789, c. 20, furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to which they apply. That section provides 'that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply.' In order to maintain the argument, it is essential, therefore, to hold that the word 'laws,' in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often reëxamined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the

State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character."

Notwithstanding the interpretation placed by this decision upon the thirty-fourth section of the Judiciary Act of 1789, Congress has never amended that section; so it must be taken as clear that the construction thus placed is the true construction, and acceptable to the legislative as well as to the judicial branch of the government. This decision was in 1842. Forty years thereafter, in *Burgess* v. *Seligman*, 107 U. S. 20, the matter was again fully considered, and it was said by Mr. Justice Bradley, on pp. 33 and 34, that "the Federal courts have an independent jurisdiction in the administration of state laws, coördinate with and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two coördinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they always do in reference to the doctrines of commercial law and general jurisprudence. . . . As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local

prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail." And in the note referred to over fifty cases are cited, in which the proposition had been in terms stated or in fact recognized. Since the case of *Burgess* v. *Seligman* the same proposition has been again and again affirmed.

Whatever differences of opinion may have been expressed, have not been on the question whether a matter of general law should be settled by the independent judgment of this court, rather than through an adherence to the decisions of the state courts, but upon the other question, whether a given matter is one of local or of general law. Thus in the case of *Bucher* v. *Cheshire Railroad Co.*, 125 U. S. 555, these facts appeared: A statute of Massachusetts forbade travel on the Lord's day, except for necessity or charity, under penalty of a fine not exceeding ten dollars. The plaintiff, while riding in the cars of the defendant in violation of that statute, was injured through its negligence. The defendant pleaded his violation of this statute as a bar to any recovery, citing repeated decisions of the highest court of that State sustaining such a defence. This court followed those decisions. It is true, as said in the opinion, that there was no dispute about the meaning of the language used by the legislature, so this court was not following the construction placed upon the statute by the Massachusetts court, but only those decisions as to its effect. And yet, from that opinion two of the Justices dissented, holding that, notwithstanding it was a dispute as to the effect of a state statute, it was still a question of general law.

Again, in the case of *Detroit* v. *Osborne*, 135 U. S. 492, 499, the plaintiff was injured while walking in one of the streets of

Detroit, through a defect in the sidewalk. The Supreme Court of Michigan had held that the duty resting upon the city, of keeping its streets in repair, was a duty to the public, and not to private individuals, the mere neglect of which was a non-feasance only, for which no private action for damages arose. This court followed that ruling, although conceding that it was not in harmony with the general opinion, nor in accordance with views of its own, and this was done on the ground that the question was one of a purely local nature. This quotation was made from the opinion in *Claiborne County* v. *Brooks*, 111 U. S. 400, 410, as fully expressing the reasons for so following the rulings of the Michigan court: "It is undoubtedly a question of local policy with each State what shall be the extent and character of the powers which its various political and municipal organizations shall possess, and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State." Observations of a similar nature are pertinent to other cases, in which this court has felt itself constrained to yield its own judgment to the decisions of the state courts.

Again, according to the decisions of this court, it is not open to doubt that the responsibility of a railroad company to its employés is a matter of general law. In *Railroad Company* v. *Lockwood*, 17 Wall. 357, 368, the question was as to the extent to which a common carrier could stipulate for exemption from responsibility for the negligence of himself or his servants, and notwithstanding there were decisions of the courts of New York thereon, the State in which the cause of action arose, this court held that it was not bound by them, and that in a case involving a matter of such importance to the whole country it was its duty to proceed in the exercise of an independent judgment. In *Hough* v. *Railway Company*, 100 U. S. 213, 226, was presented the liability of a company to its servant for injuries caused by negligence, and Mr. Justice Harlan thus expressed the views of the entire court: "Our attention has been called to two cases determined in the

Supreme Court of Texas, and which, it is urged, sustain the principles announced in the court below. After a careful consideration of those cases, we are of opinion that they do not necessarily conflict with the conclusions we have reached. Be this as it may, the questions before us, in the absence of statutory regulations by the State in which the cause of action arose, depend upon principles of general law, and in their determination we are not required to follow the decisions of the state courts." In *Myrick* v. *Mich. Cent. Railroad*, 107 U. S. 102, 108, the question was whether a bill of lading, issued by a railroad company, whereby the company agreed to carry cattle beyond its own line to the place named for final delivery, was a through contract. The ticket or bill of lading was issued in Illinois, and the rulings of the Supreme Court of that State, as to the effect of such a ticket or bill of lading, were claimed to be conclusive; but this court declined to follow them, and in the exercise of its own judgment placed a different construction upon the contract. And in the recent case of *Railway Company* v. *Prentice*, 147 U. S. 101, 106, where the question arose as to the right to recover from the railway company punitive damages for the wanton and oppressive conduct of one of its conductors towards a passenger, it was said: "This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers, — such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment, — is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several States."

Not only that, but in the cases of *Wabash Railway* v. *McDaniels*, 107 U. S. 454, a case arising in the State of Indiana; *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478, arising in West Virginia; and *Chicago, Milwaukee &c. Railway* v. *Ross*, 112 U. S. 377, coming from Minnesota — all three cases being actions by employés to recover damages

against railroad companies for personal injuries — the question of the liability of the company was discussed as one of general law, and no reference made to the decisions of the State in which the injuries took place. And, in the last case, the instruction given by the circuit judge, which was sustained by this court, was in direct opposition to the rulings of the Supreme Court of Minnesota. Thus, in *Brown* v. *Winona & St. Peter Railroad Company*, 27 Minnesota, 162, a case called to the attention of this court, that court held that "a master is not liable to one servant for injuries caused by the negligence of a co-servant in the same common employment," and "that the negligent servant is superior in authority, or an overseer of the one injured, does not take the case out of this rule." And in the opinion, on p. 165, it is said: "It is upon this point that the authorities disagree. Some courts, the Supreme Court of Ohio being the leading one, hold that where the injured servant is subordinate to him whose negligence causes the injury, they are not 'fellow-servants,' and the master is liable. On the other hand, the great majority of courts, both in this country and in England, hold that mere difference in grade of employment, or in authority, with respect to each other, does not remove them from the class of fellow-servants as regards the liability of the master for injuries to one caused by the negligence of the other." The same doctrine was announced in *Brown* v. *Minneapolis & St. Louis Ry. Co.*, 31 Minnesota, 553, and *Fraker* v. *St. Paul, Minneapolis &c. Railway*, 32 Minnesota, 54, both decided before the *Ross case*, and reaffirmed since in *Gonsior* v. *Minneapolis & St. Louis Railway*, 36 Minnesota, 385. Indeed, in all the various cases in this court, affecting the relations of railroad companies to their employés, it has either been directly affirmed that the question presented was one of general law, or else the discussion has proceeded upon the assumption that such was the fact.

An examination of the opinions in the cases in the Ohio Supreme Court, which are claimed to be authoritative here, discloses that they proceed not upon any statute, or upon any custom or usage, or, upon anything of a local nature, but simply announce the views of that court upon the question

as one of general law. We agree with that court, in holding it to be a question of general law, although we differ from it, as to what the rule is by that law. Indeed, the Ohio court is not wholly satisfied with that doctrine, as appears from the cases of *Whaalan* v. *Mad River &c. Railroad*, 8 Ohio St. 249, and *Pittsburg, Fort Wayne &c. Railway* v. *Devinney*, 17 Ohio St. 197. In the last case it disagrees with the conclusions reached by this court in the case of *Chicago, Milwaukee &c. Railway* v. *Ross*, *supra*, and holds that a conductor of a train is not always to be regarded as a vice-principal or representative of the company. In that case, a brakeman on one train was injured through the negligence of the conductor of another, and they were held to be fellow-servants, and the latter not a vice-principal or representative of the company, for whose negligence it was responsible. The opinion in that case is significant as showing that the question was regarded as one of common or general law; that the ordinary rule is in accordance with the views we have reached in this case; and that the Ohio doctrine is confessedly an exception. We quote from it as follows (p. 212): "The true general rule is, and so it must be, that when men are employed for the prosecution of a lawful but hazardous business, they assume the hazards of such employment arising from the negligence of coemployés, and stipulate for compensation according to their estimate of such hazards; subject, however, to this exception, that the master is liable for such injuries as accrued to the servant from the negligence of a fellow-servant in the selection of whom the master has been culpably negligent; and to this we in Ohio have added the further exception of a case where the servant injured is subordinate to, and acting under the orders of, the culpable fellow-servant. For the reasoning on which the decisions establishing this exception are based, the members of this court, as now constituted, are not responsible; nor are we at all bound to carry out their logic to its ultimate consequences. In subsequent cases, strictly analogous in their facts, those decisions will doubtless be accepted as authoritative; but the case now before us does not require us to review them. In adding this last-named exception to the rule else-

where generally established, we have already diverged from the general current of judicial decision elsewhere. A majority of the court are unwilling to increase the divergency; doubting, as we do, the wisdom of such a step, and being unwilling to assume the responsibility of what would savor so strongly of judicial legislation."

But passing beyond the matter of authorities, the question is essentially one of general law. It does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property, but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the "common law." There is no question as to the power of the States to legislate and change the rules of the common law in this respect as in others; but in the absence of such legislation the question is one determinable only by the general principles of that law. Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the States is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution. To-day, the volume of interstate commerce far exceeds the anticipation of those who framed this Constitution, and the main channels through which this interstate commerce passes are the railroads of the country. Congress has legislated in respect to this commerce not merely by the Interstate Commerce Act and its amendments, 24 Stat. 379, c. 104, but also by an act passed at the last session, requiring the use of automatic couplers on freight cars. Public Acts, 52d Cong. 2d Sess., c. 113. The lines of this very plaintiff in error extend into half a dozen or more States, and its trains are largely employed in interstate commerce. As it passes from State to State, must the rights, obligations and duties subsisting between it and its employés change at every state line? If to a train running from Baltimore to Chicago it should, within the limits of the State of Ohio, attach a car for a distance only within that State, ought the law controlling the relation of a brakeman on that car to the

company to be different from that subsisting between the brakemen on the through cars and the company? Whatever may be accomplished by statute — and of that we have now nothing to say — it is obvious that the relations between the company and employé are not in any sense of the term local in character, but are of a general nature, and to be determined by the general rules of the common law. The question is not local, but general. It is also one of the vexed questions of the law, and perhaps there is no one matter upon which there are more conflicting and irreconcilable decisions in the various courts of the land than the one as to what is the test of a common service, such as to relieve the master from liability for the injury of one servant through the negligence of another. While a review of all these cases is impossible, it may be not amiss to notice some, and to point out what are significant factors in such a question.

Counsel for defendant in error rely principally upon the case of *Railroad Co.* v. *Ross*, 112 U. S. 377, taken in connection with this portion of rule No. 10 of the company: "Whenever a train or engine is run without a conductor, the engineman thereof will also be regarded as conductor, and will act accordingly." The *Ross case*, as it is commonly known, decided that "a conductor of a railroad train, who has a right to command the movements of a train and control the persons employed upon it, represents the company while performing those duties, and does not bear the relation of fellow-servant to the engineer and other employés on the train." The argument is a short one: The conductor of a train represents the company, and is not a fellow-servant with his subordinates on the train. The rule of the company provides that when there is no conductor, the engineer shall be regarded as a conductor. Therefore, in such case he represents the company, and is likewise not a fellow-servant with his subordinates. But this gives a potency to the rule of the company which it does not possess. The inquiry must always be directed to the real powers and duties of the official and not simply to the name given to the office. The regulations of a company cannot make the conductor a fellow-servant with his subordinates,

and thus overrule the law announced in the *Ross case*. Neither can it, by calling some one else a conductor, bring a case within the scope of the rule there laid down. In other words, the law is not shifted backwards and forwards by the mere regulations of the company, but applies generally, irrespectively of all such regulations. There is a principle underlying the decision in that case, and the question always is as to the applicability of that principle to the given state of facts.

What was the *Ross case*, and what was decided therein? The instruction given on the trial in the Circuit Court, which was made the principal ground of challenge, was in these words: "It is very clear, I think, that if the company sees fit to place one of its employés under the control and direction of another, that then the two are not fellow-servants engaged in the same common employment, within the meaning of the rule of law of which I am speaking." The language of that instruction, it will be perceived, is very like that of the one here complained of, and if this court had approved that instruction as a general rule of law, it might well be said that that was sufficient authority for sustaining this and affirming the judgment. But though the question was fairly before the court, it did not attempt to approve the instruction generally, but simply held that it was not erroneous as applied to the facts of that case. This is evident from this language, found in the latter part of the opinion, (p. 394,) and which is used in summing up the conclusions of the court: "We agree with them in holding — and the present case requires no further decision — that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and, therefore, that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner. If, now, we apply these views of the relation of the conductor of a railway train to the company, and to the

subordinates under him on the train, the objections urged to the charge of the court will be readily disposed of. Its language in some sentences may be open to verbal criticism; but its purport touching the liability of the company is, that the conductor and engineer, though both employés, were not fellow-servants in the sense in which that term is used in the decisions." It is also clear from an examination of the reasoning running through the opinion, for there is nowhere an argument to show that the mere fact that one servant is given control over another destroys the relation of fellow-servants. After stating the general rule, that a servant entering into service assumes the ordinary risks of such employment, and, among them, the risk of injuries caused through the negligence of a fellow-servant, and after referring to some cases on the general question, and saying that it was unnecessary to lay down any rule which would determine in all cases what is to be deemed a common employment, it turns to that which was recognized as the controlling fact in the case, to wit, the single and absolute control which the conductor has over the management of a train, as a separate branch of the company's business, and says (p. 390): "There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. . . . We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the term is he a fellow-servant with the fireman, the brakemen, the porters, and the engineer. The latter are fellow-servants in the running of the train under his direction; as to them and the train, he

stands in the place of and represents the corporation." And it quotes from Wharton's Law of Negligence, sec. 232*a*: "The true view is, that, as corporations can act only through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporation." And also from *Malone* v. *Hathaway*, 64 N. Y. 5, 12: "Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employés, provide materials and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duty, exercising the discretion ordinarily exercised by principals, and, within the limits of the delegated authority, the acting principal."

The court, therefore, did not hold that it was universally true that, when one servant has control over another, they cease to be fellow-servants within the rule of the master's exemption from liability, but did hold that an instruction couched in such general language was not erroneous when applied to the case of a conductor having exclusive control of a train in relation to other employés of the company acting under him on the same train. The conductor was, in the language of the opinion, "clothed with the control and management of a distinct department;" he was "a superintending officer," as described by Mr. Wharton; he had "the superintendence of a department," as suggested by the New York Court of Appeals.

And this rule is one frequently recognized. Indeed, where the master is a corporation, there can be no negligence on the part of the master except it also be that of some agent or servant, for a corporation only acts through agents. The directors are the managing agents; their negligence must be adjudged the negligence of the corporation, although they are simply agents. So when they place the entire management of the corporation in the hands of a general superintendent, such general superintendent, though himself only an agent, is

almost universally recognized as the representative of the corporation, the master, and his negligence as that of the master. And it is only carrying the same principle a little further and with reasonable application, when it is held that, if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employés under them, vice-principals, representatives of the master, as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent. It was this proposition which the court applied in the *Ross case*, holding that the conductor of a train has the control and management of a distinct department. But this rule can only be fairly applied when the different branches or departments of service are in and of themselves separate and distinct. Thus, between the law department of a railway corporation and the operating department, there is a natural and distinct separation, one which makes the two departments like two independent kinds of business, in which the one employer and master is engaged. So, oftentimes there is in the affairs of such corporation what may be called a manufacturing or repair department, and another strictly operating department; these two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has the control of it, is as to it in the place of the master. But this is a very different proposition from that which affirms that each separate piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice-principal or representative of the master. Even the conclusion announced in the *Ross case* was not reached by a unanimous court, four of its members being of opinion that it was carrying the thought of a distinct

department too far to hold it applicable to the management of a single train.

The truth is, the various employés of one of these large corporations are not graded like steps in a staircase, those on each step being as to those on the step below in the relation of masters and not of fellow-servants, and only those on the same steps fellow-servants, because not subject to any control by one over the other. *Prima facie*, all who enter into the employ of a single master are engaged in a common service, and are fellow-servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow-servants. All enter into the service of the same master, to further his interests in the one enterprise; each knows when entering into that service that there is some risk of injury through the negligence of other employés, and that risk, which he knows exists, he assumes in entering into the employment. Thus, in the opinion in the *Ross case*, p. 382, it was said: "Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them he cannot recover compensation from his employer. The obvious reason for this exemption is, that he has, or, in law, is supposed to have, them in contemplation when he engages in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid."

But the danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply co-workers with him in it. Each is equally with the other an ordinary risk of the employment. If he is paid for the one, he is paid for the other; if he assumes the one, he assumes the other. Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and, thus assumed by the employé, it includes all co-workers to the same end, whether in control or not. But if the fact that the risk is or is not obvious does not

control, what test or rule is there which determines? Rightfully this, there must be some personal wrong on the part of the master, some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible. It may be said that this is only passing from one difficulty to another, as it leaves still to be settled what is positive duty and what is personal neglect; and yet, if we analyze these matters a little, there will appear less difficulty in the question. Obviously, a breach of positive duty is personal neglect; and the question in any given case is, therefore, what is the positive duty of the master? He certainly owes the duty of taking fair and reasonable precautions to surround his employé with fit and careful co-workers, and the employé has a right to rely upon his discharge of this duty. If the master is careless in the matter of employing a servant, it is his personal neglect; and if without proper care in inquiring as to his competency he does employ an incompetent person the fact that he has an incompetent, and, therefore, an improper employé is a matter of his personal wrong, and owing to his personal neglect. And if the negligence of this incompetent servant works injury to a co-servant, is it not obvious that the master's omission of duty enters directly and properly into the question of responsibility? If, on the other hand, the master has taken all reasonable precautions to inquire into the competency of one proposing to enter into his service, and as the result of such reasonable inquiry is satisfied that the employé is fit and competent, can it be said that the master has neglected anything, that he has omitted any personal duty; and this, notwithstanding that after the servant has been employed it shall be disclosed that he was incompetent and unfit? If he has done all that reasonable care requires to inquire into the competency of his servant, is any neglect imputable to him? No human inquiry, no possible precaution, is sufficient to absolutely determine in advance whether a party under certain exigencies will or will not do a negligent act. So it is not

possible for the master, take whatsoever pains he may, to secure employés who will never be guilty of any negligence. Indeed, is there any man who does not sometimes do a negligent act? Neither is it possible for the master, with any ordinary and reasonable care, always to secure competent and fit servants. He may be mistaken, notwithstanding the reasonable precautions he has taken. Therefore, that a servant proves to be unfit and incompetent, or that in any given exigency he is guilty of a negligent act resulting in injury to a fellow-servant, does not of itself prove any omission of care on the part of the master in his employment; and it is only when there is such omission of care, that the master can be said to be guilty of personal wrong in placing or continuing such servant in his employ, or has done or omitted aught justifying the placing upon him responsibility for such employé's negligence.

Again, a master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employé in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employé by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employé, or the latter's right to

insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employés to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor. But, it may be asked, is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge. But the latter duty is discharged when reasonable care has been taken in providing such safe place and machinery, and so the former is as fully discharged, when reasonable precautions have been taken to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution.

In the case of *Atchison, Topeka &c. Railroad* v. *Moore*, 29 Kansas, 632, 644, Mr. Justice Valentine, speaking for the court, thus succinctly summed up the law in these respects: "A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow-servants to work with him; and when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow-servants and co-employés. And at common law, whenever the master delegates to any officer, servant, agent, or employé, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employé

stands in the place of the master, and becomes a substitute for the master, a vice-principal, and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence. But at common law, where the master himself has performed his duty, the master is not liable to any one of his servants for the acts or negligence of any mere fellow-servant or co-employé of such servant, where the fellow-servant or co-employé does not sustain this representative relation to the master."

It would be easy to accumulate authorities on these propositions, for questions of this kind are constantly arising in the courts. It is enough, however, to refer to those in this court. In the cases of *Hough* v. *Railway Company*, 100 U. S. 213, and *Northern Pacific Railroad* v. *Herbert*, 116 U. S. 642, this court recognized the master's obligation to provide reasonably suitable place and machinery, and that a failure to discharge this duty exposed him to liability for injury caused thereby to the servant, and that it was immaterial how or by whom the master discharged that duty. The liability was not made to depend in any manner upon the grade of service of a co-employé, but upon the character of the act itself, and a breach of the positive obligation of the master. In both of them the general doctrine of the master's exemption from liability for injury to one servant through the negligence of a co-employé was recognized, and it was affirmed that the servant assumed all the risks ordinarily incident to his employment. In *Railroad Company* v. *Fort*, 17 Wall. 553, where a boy was injured through dangerous machinery in doing an act which was not within the scope of his duty and employment, though done at the command of his immediate superior, this court, while sustaining the liability of the master, did so on the ground that the risk was not within the contract of service, and that the servant had no reason to believe that he would have to encounter such a danger, and declared that the general rule was that the employé takes upon himself the risks incident to the undertaking, among which were to be counted the negligence of fellow-servants in the same employment. In the cases of

Randall v. *Balt. & Ohio Railroad*, 109 U. S. 478, and *Quebec Steamship Co.* v. *Merchant*, 133 U. S. 375, the persons whose negligence caused the injury were adjudged to be fellow-servants with the parties injured, so as to exempt the master from liability; and while the question in this case was not there presented, yet in neither case were the two servants doing the same work, although it is also true that in each of them there was no control by one over the other. It may safely be said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular piece of work destroys the relation of fellow-servants, and puts an end to the master's liability. On the contrary, all the cases proceed on the ground of some breach of positive duty resting upon the master, or upon the idea of superintendence or control of a department. It has ever been affirmed that the employé assumes the ordinary risks incident to the service; and, as we have seen, it is as obvious that there is risk from the negligence of one in immediate control as from one simply a co-worker. That the running of an engine by itself is not a separate branch of service, seems perfectly clear. The fact is, all the locomotive engines of a railroad company are in the one department, the operating department; and those employed in running them, whether as engineers or firemen, are engaged in a common employment and are fellow-servants. It might as well be said that, where a liveryman has a dozen carriages, the driver of each has charge of a separate branch or department of service, and that if one drives his carriage negligently against another employé the master is exempt from liability.

It may further be noticed that in this particular case the injury was not in consequence of the fireman's obeying any orders of his superior officer. It did not result from the mere matter of control. It was through negligence on the part of the engineer in running his engine, and the injury would have been the same if the fireman had had nothing to do on the locomotive, and had not been under the engineer's control. In other words, an employé carelessly manages an engine, and another employé who happens to be near enough is in-

jured by such carelessness. It would seem, therefore, to be the ordinary case of the injury of one employé through the negligence of another.

Again, this was not simply one of the risks assumed by the employé when entering into the employment, and yet not at the moment fully perceived and understood. On the contrary, the peril was known and voluntarily assumed. The plaintiff admits in his testimony that he knew they had no right to the track without orders, and that there was a local train on the road somewhere between them and Bellaire; and yet, with this knowledge, and without protest, he voluntarily rode on the engine with the engineer. *Hammond* v. *Railway Company*, 83 Michigan, 334; *Railway Company* v. *Leach*, 41 Ohio St. 388; *Wescott* v. *Railroad Co.*, 153 Mass. 460.

In the first of these cases, the party injured was a section hand, who was injured while riding on a hand-car, in company with a fellow-laborer and the section foreman, and the negligence claimed was in propelling the hand-car along a curved portion of the track, with knowledge of an approaching train, and without sending a lookout ahead to give warning. In respect to this, Mr. Justice Cahill, speaking for the court, says: "But if this conduct was negligent, it was participated in by Hammond. The latter had been going up and down this section of the road daily for three months. Whatever hazard there was in such a position was known to him, and he must be held to have voluntarily assumed it. . . . Where, as in this case, the sole act of negligence relied on is participated in, and voluntarily consented to by the person injured, with full knowledge of the peril, the question of the master's liability does not arise."

So, in this case, Baugh equally with the engineer knew the peril, and with this knowledge voluntarily rode with the engineer on the engine. He assumed the risk.

For these reasons we think that the judgment of the Circuit Court was erroneous, and it must be.

Reversed and the case remanded for a new trial.

Mr. Justice Field dissenting.

Dissenting Opinion: Field, J.

I am unable to concur in the judgment of reversal in this case. I think the judgment of the Circuit Court is correct in principle and in accordance with the settled law of Ohio, where the cause of action arose, which, in my opinion, should control the decision.

The plaintiff below, the defendant in error here, is a citizen of the State of Ohio, and the defendant, the Baltimore and Ohio Railroad Company, is a corporation created under the laws of Maryland. The present action was brought by the plaintiff in the Court of Common Pleas of the county of Belmont, in the State of Ohio. The defendant claimed citizenship in Maryland, by virtue of its incorporation in that State, and it petitioned for and obtained a removal of the action to the Circuit Court of the United States for the Southern District of Ohio. The plaintiff was a fireman on a locomotive of the defendant, which, on the 4th of May, 1885, had been employed in assisting a freight train from Bellaire in Ohio to the top of the grade, about twenty miles west of that place, when it was detached from the freight train to return to Bellaire. It would seem that by the regulations or usages of the company it was to return in conformity with orders from the train dispatcher, or upon information from him as to the use or freedom of the road, or, in the absence of such orders or information, by following close behind some regular scheduled train which would carry signals to notify trains coming in the opposite direction that the locomotive was following it. It does not appear what special orders or what information, if any, was on this occasion received by the engineer from the train dispatcher, and by his order the locomotive started back without following any scheduled train. He appears to have relied upon his ability to avoid the train possibly coming in the opposite direction by going upon a side track and waiting until it passed. The result was that the locomotive on its way collided with the regular local passenger train, which was running on its schedule time and had the right of the road. In the collision the plaintiff below was injured to such an extent that his right arm had to be amputated near the shoulder and he was rendered unable to use his

right leg in walking. To recover damages for the injuries sustained he brought the present action against the railroad company, and the question presented is whether the company was liable for the injuries. He obtained a verdict for $6750, for which, and costs, judgment was entered in his favor.

The locomotive, with the tender attached to it, was called a helper, because it was used in helping trains up the grade from Bellaire. After it was detached from the train helped, it passed under the direction of the engineer, who was from that time its conductor by appointment under the regular rules of the company. The ninth rule provides that "trains are run under the charge of the conductors thereof, and their directions relative to the management of trains will be observed, except in cases where such directions may be in violation of the rules of this company or of safety, in which cases engineers will call the attention of the conductors to the facts as understood by them, and decline compliance; conductors and enginemen being in such cases held equally responsible." And the tenth rule provides that "whenever a train or engine is run without a conductor the engineman [that is, the engineer] thereof will also be regarded as conductor, and will act accordingly." The engineer was thus invested from that time with the powers and duties of a conductor. He could then control the movements of the locomotive, and, in the absence of special orders, direct when it should start on its return to Bellaire, the places at which it should stop, and the speed with which it should proceed. The position that the company could not alter its relations to the engineer and those under his direction by such appointment does not rest upon any tenable ground. There certainly is no substantial reason why the company may not at any time constitute one of its employés a conductor of an engine or train. It is a matter resting in its discretion to appoint a conductor or to remove him from that position at any time. The duties and liabilities of the officer and his relations to the company depend upon the nature of the office which he at the time holds, not upon his duties and relations in a previously existing employment. If the corporation acting by its directors,

either by special designation or by established rule, appoint a person as conductor, generally or for a limited time, he takes the duties and incurs the responsibilities of the appointment from that date. The person previously a subordinate or co-employé becomes thereby the superior of the fellow-laborer in his powers and changed in his relations to the company. To say that he continues in his previous subordination and relationship to the company would be like stating that a common soldier taken from the ranks and put in command of a company or regiment of which he was a member still retains his subordinate relations to his former fellow-soldiers and to the commander-in-chief. To hold that an engineer in the position placed by the rule of the company did not become a conductor in fact is refusing to give effect to the express terms of the rule. It is declaring that he shall not be what the established rule of the company declares he shall be. I do not think that this position can be maintained.

A conductor of a train or engine is, by the very nature of the office, its manager and director in the particular service in which it is employed within the general regulations of the company. He directs, subject to such general regulations, when the train or engine shall start, at what speed it shall travel, what special route it shall take within the designated limits of the company, and, when necessary, may designate who shall be employed under him. In the case before us he represented the company in all these respects; otherwise the company was without a representative on the helper, which will not be contended. In its management, he, as conductor, stood in the place of the company, and if any one was injured by his negligence in the discharge of his duties, the company was responsible.

The court below instructed the jury in substance as follows: That the law assumes that where a person enters into any employment he takes the risks incident to that employment so far as they may result from the nature of the employment itself, or from the negligence or default of his fellow-servants, that is, of those who are not placed in authority and control over him, but who occupy substantially the same relation to

the company as he does; but that if an injury results to an employé from the negligence or carelessness on the part of one placed in authority over the employés of the company so as to direct and control them, the company is liable; that, therefore, if the engineer and the fireman were fellow-servants, as thus described, the plaintiff could not recover; but that, if the engineer was the agent or representative of the company and the fireman acted under his direction and was subject to his orders, and the injury resulted from the default or negligence or wrong of the engineer, then it must be attributed to the company as the negligence, default, or wrong of the company.

In thus instructing the jury the court followed the law as settled by the decisions of the Supreme Court of Ohio — in which State the cause of action arose and the case was tried — that the company was liable if the negligence was by one acting in the character of its representative or agent in directing and controlling the movements of the locomotive, and the party injured was subject to his orders. Any other ruling would have been at variance with those decisions. The law of Ohio on the matter under consideration was the law to control. The courts of the United States cannot disregard the decisions of the state courts in matters which are subjects of state regulation. The relations of employés, subordinate to the directors of the company but supervising and directing the labors of others under them, to their principals, and the liability of the principals for the negligent acts of their subordinate supervising and directing agents, are matters of legislative control, and are in no sense under the supervision or direction of the judges or courts of the United States. There is no unwritten general or common law of the United States on the subject. Indeed, there is no unwritten general or common law of the United States on any subject. (See Tucker's Blackstone, vol. 1, Appendix, 422, 433.) The common law may control the construction of terms and language used in the Constitution and statutes of the United States, but creates no separate and independent law for them. The federal government is composed of independent States, "each of

which," as said in *Wheaton* v. *Peters*, 8 Pet. 591, 658, "may have its local usages, customs and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common-law right is asserted, we must look to the State in which the controversy originated." And there are few subjects upon which there is such diversity of opinion and conflict of decision, not merely between the courts and judges of the different States, but between the judges of the federal courts, as the liability of employers for the negligent acts of their subordinate agents, having control and direction of servants in a common employment under them. Even as to what shall be deemed a common employment, Mr. Beach, a leading writer on contributory negligence, states that there are many "hundreds of clearly irreconcilable decisions." Conceding that a Federal court, sitting within a State where the law relating to the subject under consideration is unsettled and doubtful, must exercise an independent judgment and declare the law upon the best light it can obtain, this rule has no application where the law of the State is neither unsettled nor doubtful, but is established and certain, and recognized as such by its judicial authorities. While, as we have indicated, there is no general or common law throughout the country — that is, of the United States — as to the extent and limits of the liability of a corporation to its employés in the case of a common employment under a supervising and directing agent, in Ohio the law on the subject is neither uncertain nor doubtful; it has been settled there for many years. In *Little Miami Railroad* v. *Stevens*, 20 Ohio, 415, it was held by the Supreme Court of that State, over forty years ago, that where an employer placed one in his employ under the direction of another, also in his employ, such employer was liable for injury to the person placed in a subordinate situation by the negligence of his superior; and that decision has been adhered to ever since. There a railroad company had placed an engineer in its employ under the control of a conductor of one of its trains, who directed

when the cars were to start and when to stop, and it was held liable for an injury received by him caused by the negligence of the conductor. A collision had occurred by reason of the omission of the conductor to inform the engineer of a change of place ordered in the passing of trains. The company claimed exemption from liability on the ground that the engineer and conductor were fellow-servants, and that the engineer had assumed by his contract the risk of the negligence of the conductor, and also that public policy forbade a recovery in such cases; but the court rejected both positions. In *Cleveland, Columbus &c. Railroad* v. *Keary*, 3 Ohio St. 201, the same court affirmed the doctrine thus declared, and held that where a brakeman in the employ of a railroad company, on a train under the control of a conductor having exclusive command, was injured by the carelessness of the conductor, the company was responsible, holding that the conductor was the representative of the company upon which rested the obligation to manage the train with skill and care. In its opinion the court said no service was common that did not admit a common participation, and no servants were fellow-servants when one was placed in control over the other. In *Berea Stone Co.* v. *Kraft*, 31 Ohio St. 287, 292, decided in 1877, that court held that a master was liable for an injury to a servant resulting from the negligence of a superior servant. There the corporation was organized to quarry and manufacture stone, and, whilst in the employment of the company and engaged in loading stone on its cars, one of the employés received an injury through the carelessness and negligence of an agent and servant of the company in the selection and use of unsafe and dangerous implements and machinery for the purpose of loading the stone upon the cars for transportation. The unsafe and defective machinery was selected by the foreman of the quarry. It was contended that the foreman and the laborers under him were fellow-servants, but the court held that the foreman, occupying substantially the relation of principal, was in no just or proper sense a fellow-servant, nor in what might be properly denominated a common service, and said: "The relation existing between them was such as

brings the case clearly within the rule established by repeated adjudications of this court and now *firmly settled in the jurisprudence of the State:* that where one servant is placed by his employer in a position of subordination to and subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for such injury." It will be observed that the court states in this opinion that the rule of liability was then firmly settled in the jurisprudence of the State. If any rule of law can be considered as settled by judicial decisions, that rule is settled as the law of Ohio. The question is not whether that is the best law for Ohio, but whether it is the law of that State. It will be time to consider of its change or improvement when that matter is submitted to us, which is not yet. If the law were expressed in a statute, no Federal court would presume to question its efficacy and binding force. The law of the State on many subjects is found only in the decisions of its courts, and when ascertained and relating to a subject within the authority of the State to regulate, it is equally operative as if embodied in a statute, and must be regarded and followed by the federal courts in determining causes of action affected by it arising within the State. *Bucher* v. *Cheshire Railroad*, 125 U. S. 555; *Detroit* v. *Osborne*, 135 U. S. 492, 497. For those courts to disregard the law of the State as thus expressed upon any theory that there is a general law of the country on the subject at variance with it, in cases where the causes of action have arisen in the State, and which, if tried in the state courts, would be governed by it, would be nothing less than an attempt to control the State in a matter in which the State is not amenable to Federal authority by the opinions of individual Federal judges at the time as to what the general law ought to be, — a jurisdiction which they never possessed, and which, in my judgment, should never be conceded to them. That doctrine would inevitably lead to a subversion of the just authority of the State in many matters of public concern. It would also be in direct conflict with section 721 of the Revised Statutes, which declares that "the laws of the several States,

except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." This provision is a reënactment of section 34 of the original Judiciary Act. 1 Stat. 73, 92, c. 20. Under the term "laws," as here mentioned, are included not merely those rules and regulations having the force of law which are expressed in the statutes of the States, but also those which are expressed in the decisions of their judicial tribunals. The latter are far more numerous and touch much more widely the interests and rights of the citizens of a State in their varied relations to each other and to society in the acquisition, enjoyment, and transmission of property, and the enforcement of rights and redress of wrongs. The term "laws" in the Constitution and the statutes of the United States is not limited solely to legislative enactments unless so declared or indicated by the context. When the Fourteenth Amendment ordains that no State shall deny to any person within its jurisdiction "the equal protection of the laws" it means equal protection not merely by the statutory enactments of the State, but equal protection by all the rules and regulations which, having the force of law, govern the intercourse of its citizens with each other and their relations to the public, and find expression in the usages and customs of its people and in the decisions of its tribunals. The guaranty of this great amendment, "as to the equal protection of the laws," would be shorn of half of its efficacy, if it were limited in its application only to written laws of the several States, and afforded no protection against an unequal administration of their unwritten laws. It has never been denied, that I am aware of, that decisions of the regular judicial tribunals of a State, especially when concurring for a succession of years, are, at least, evidence of what the law of the State is on the points adjudged. The law, being thus shown, is as obligatory upon those points in another similar case, arising in the State, as if expressed in the most formal statutory enactments. If this is not so, I may ask, in anticipation of what I may say hereafter, what becomes of the judicial independence of the States?

The doctrine that the application of the so-called general and unwritten law of the country to control a state law, as expressed by its courts, in conflict with it, has the sanction of Congress by its supposed knowledge of the decisions of this court to that effect, and its subsequent silence respecting them, does not strike me as having any persuasive force. The silence of Congress against judicial encroachments upon the authority of the States cannot be held to estop them from asserting the sovereign rights reserved to them by the Tenth Amendment of the Constitution. Such silence can neither augment the powers of the general government nor impair those of the States. Silence by one or both will not change the Constitution and convert the national government from one of delegated and limited powers, or dwarf the States into subservient dependencies. Acquiescence in or silence under unauthorized power can never give legality to its exercise under our form of government.

Marshall, when a member of the Virginia convention called to consider the question of the adoption of the Constitution of the United States, in answer to an inquiry as to the laws of what State a contract would be determined, answered: "By the laws of the State where the contract was made. According to those laws, and those only, can it be decided." 3 Elliott's Debates, 556.

Judge Tucker, in the appendix to the first volume of his edition of Blackstone, says that the common law has been variously administered or adopted in the several States. Is the Federal judicial department to force upon these States views of the common law which their courts and people have repudiated? I cannot assent to the doctrine that there is an atmosphere of general law floating about all the States, not belonging to any of them, and of which the Federal judges are the especial possessors and guardians, to be applied by them to control judicial decisions of the state courts whenever they are in conflict with what those judges consider ought to be the law.

The present case presents some singular facts. The verdict and judgment of the court below were in conformity with the

law of Ohio, in which State the cause of action arose and the case was tried, and this court reverses the judgment because rendered in accordance with that law, and holds it to have been error that it was not rendered according to some other law than that of Ohio, which it terms the general law of the country. This court thus assumes the right to disregard what the judicial authorities of that State declare to be its law, and to enforce upon the State some other conclusion as law which it has never accepted as such, but always repudiated. The fireman, who was so dreadfully injured by the collision caused by the negligence of the conductor of the engine, that his right arm had to be amputated from the shoulder and his right leg was rendered useless, could obtain some remedy from the company by the law of Ohio as declared by its courts, but this court decides, in effect, that that law, thus declared, shall not be treated as its law, and that the case shall be governed by some other law which denies all remedy to him. Had the case remained in the state court, where the action was commenced, the plaintiff would have had the benefit of the law of Ohio. The defendant asked to have the action removed, and obtained the removal to a Federal court because it is a corporation of Maryland, and thereby a citizen of that State by a fiction adopted by this court that members of a corporation are presumed to be citizens of the State where the corporation was created, a presumption which, in many cases, is contrary to the fact, but against which no averment or evidence is held admissible for the purpose of defeating the jurisdiction of a Federal court. *Louisville Railroad Co.* v. *Letson*, 2 How. 497; *Cowles* v. *Mercer County*, 7 Wall. 118; *Paul* v. *Virginia*, 8 Wall. 168, 178; *Steamship Co.* v. *Tugman*, 106 U. S. 118, 120. Thus in this case a foreign corporation not a citizen of the State of Ohio, where the cause of action arose, is considered a citizen of another State by a fiction, and then, by what the court terms the general law of the country, but which this court held in *Wheaton* v. *Peters*, has no existence in fact, is given an immunity from liability in cases not accorded to a citizen of that State under like circumstances. Many will doubt the wisdom of a system which permits such a vast

difference in the administration of justice for injuries like those in this case, between the courts of the State and the courts of the United States.

I am aware that what has been termed the general law of the country — which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject — has been often advanced in judicial opinions of this court to control a conflicting law of a State. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States — independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence. As said by this court, speaking through Mr. Justice Nelson, "the general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States." *The Collector* v. *Day*, 11 Wall. 113, 124.

To this autonomy and independence of the States their legislation must be as free from coercion as if they were separated entirely from connection with the Union. There must also be the like freedom from coercion or supervision in the action of their judicial authorities. Upon all matters of cognizance by the States, over which power is not granted to the general government, the judiciary must be as free in its action as the courts of the United States are independent of the state courts in matters subject to Federal cognizance. "Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow," as said by the court in the case cited, "as a reasonable, if not a necessary, consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated, by the taxing power of another government," to which we may add, nor by the supervision and action of another government in any form. "We have said," continues the court in the same case, "that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen States were in possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States."

Such being the nature of the judicial department, and the free exercise of its powers being essential to the independence

of the States, how can it be said that its decisions as to the law of the State, upon a matter subject to its cognizance, can be ignored and set aside by the courts of the United States for the law or supposed law of another State or sovereignty, be it the general or special law of that State or sovereignty? If a Federal court exercise its duties within one of the States where the law on the subject under consideration is uncertain and unsettled, "where," as Chief Justice Marshall said, "the state courts afford no light," it must, as we have already stated, exercise an independent judgment thereon, and pronounce such judgment as it deems just. But no foreign law, or law out of the State, whether general or special, or any conception of the court as to what the law ought to be, has any place for consideration where the law of the State in which the action is pending is settled and certain. A law of the State of that character, whether expressed in the form of a statute or in the decisions of the judicial department of the government, cannot be disregarded and overruled, and another law, or notion of what the law should be, substituted in its place without a manifest usurpation by the Federal authorities. I cannot permit myself to believe that any such conclusion, when more fully examined, will ultimately be sustained by this court. I have an abiding faith that this, like other errors, will, in the end "die among its worshippers."

The independence of the States, legislative and judicial, on all matters within their cognizance is as essential to the existence and harmonious workings of our Federal system, as is the legislative and judicial supremacy of the Federal government in all matters of national concern. Nothing can be more disturbing and irritating to the States than an attempted enforcement upon its people of a supposed unwritten law of the United States, under the designation of the general law of the country, to which they have never assented and which has no existence except in the brain of the Federal judges in their conceptions of what the law of the States should be on the subjects considered.

The theory upon which inferior courts of the United States take jurisdiction within the several States is, when a right is

not claimed under the Constitution, laws, or treaties of the United States, that they are bound to enforce, as between the parties, the law of the State. It was never supposed that, upon matters arising within the States, any law other than that of the State would be enforced, or that any attempt would be made to enforce any other law. It was never supposed that the law of the State would be enforced differently by the Federal courts sitting in the State, and the state courts; that there could be one law when a suitor went into the state courts and another law when the suitor went into the Federal courts, in relation to a cause of action arising within the State — a result which must necessarily follow if the law of the State can be disregarded upon any view which the Federal judges may take of what the law of the State ought to be rather than what it is.

As said by the Supreme Court of Pennsylvania at an early day — as far back as 1798 — "the government of the United States forms a part of the government of each State." *Respublica* v. *Cobbett*, 3 Dall. 473. To which the same court, over a half century later, added: "It follows that its courts are the courts of each State; they administer justice according to the laws of the State as construed and settled by its own supreme tribunal. This has been more than once solemnly determined by the Supreme Court of the Union to be the rule of their decision, whenever the construction of the Constitution of the United States, treaties, or acts of Congress does not come in question." *Commonwealth* v. *Pittsburg and Connellsville Railroad*, 58 Penn. St. 44.

In *Shelby* v. *Guy*, 11 Wheat. 361, 367, this court, in considering the meaning to be given to the words "beyond the seas," in a statute of limitations of Tennessee, said: "That the statute laws of the States must furnish the rule of decision to this court so far as they comport with the Constitution of the United States in all cases arising within the respective States, is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws, in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of

that construction. It is obvious that this admission may, at times, involve us in seeming inconsistencies, as, where States have adopted the same statutes and their courts differ in the construction. Yet that course is necessarily indicated *by the duty imposed on us to administer, as between certain individuals, the laws of the respective States, according to the best lights we possess of what those laws are.*"

In *Beauregard* v. *New Orleans*, 18 How. 497, 502, which was before us in 1855, this court, in speaking through Mr. Justice Campbell, said: "The constitution of this court requires it to follow the laws of the several States as rules of decision wherever they properly apply. And the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the State, especially when applied to the title of lands. No other course could be adopted with any regard to propriety. Upon cases like the present the relation of the courts of the United States to a State is the same as that of its own tribunals. They administer the laws of the State, and to fulfil that duty they must find them as they exist in the habits of the people and in the exposition of their constituted authorities. *Without this the peculiar organization of the judicial tribunals of the States and the Union would be productive of the greatest mischief and confusion.*"

The position that the plaintiff, the fireman, voluntarily assumed the risk in this case, because he knew the helper had no right to the track without orders, and there was possibly a local train somewhere on the track, by continuing on the train instead of leaving it, does not strike me as having much force. It was not considered of sufficient importance to be called to the attention of the court below, or of the jury. Its suggestion now seems to be an afterthought of counsel. It is not positively shown that any special orders as to the movement of the helper on its return, or any information as to the use or freedom of the road, were received by the engineer from the train dispatcher; but the fireman had no actual knowledge on that point, though he had a right to presume that such was the case, from the fact that immediately upon the receipt of

an order given to the conductor, at Burr's Mills, the latter directed that the helper start back. Nor did the fireman have any actual knowledge whether the train he was directed to follow was or was not a regular scheduled train, though he had a right to presume that it was, from the orders of the conductor. His information as to what was known, and consequently directed or omitted, by the engineer on that subject was too imperfect for him to act upon it. His continuance as fireman on the locomotive after its movement to return to Bellaire was not with sufficient knowledge of any failure of the engineer to give the proper orders as to a scheduled train to justify an abandonment of the locomotive. It was under the direction of the engineer, not of the fireman, and he may have felt confident that it could be run on a side track if necessary to avoid any possible collision with a train coming in the opposite direction, as was sometimes done. It would be a dangerous notion to put into the heads of firemen and other employés of a railroad company that if they had reason to believe, without positive information on the subject, that dangers attended the course pursued by the movements of the train under the direction of its conductor, they would be deemed to assume the risk of such movements if they did not expostulate with him, and, if he did not heed the expostulation, leave the train, even after it had commenced one of its regular trips. A strange set of legal questions would arise, more embarrassing to the courts than the fellow-servant question, if such action should be deemed essential to the retention by the employé of the right to claim indemnity for injuries which might follow from the course pursued. If the employés could abandon a train after it had commenced one of its regular trips when they had reason to believe, without absolute information, that danger might attend their continuance on it, new strikes of employés would spring up to embarrass the commerce of the country and annoy the community, founded upon such alleged apprehensions. The circumstances attending the cases in which an employé has been held to have voluntarily assumed the risks of an irregular, improper or ill-advised movement of a train, under directions of its

conductor, are essentially different from those of the case before us. The testimony in the record, upon which the allegation is made that the fireman voluntarily assumed the risks taken by the engineer with knowledge of their existence, is of the most flimsy and unsatisfactory character conceivable. It only discloses general ignorance by him of what the engineer did, or of information upon which he acted, as will be seen by its perusal. The allegation, which is founded upon a few broken and detached sentences, loses its entire force when the context is read. The whole testimony bearing upon this subject is given in the note below.[1]

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[1] The detached and broken sentences, upon which the allegation is made that the plaintiff voluntarily assumed the risk in the case, are printed in italics in the passage from the record in which they are given below with their context:

As to orders received on the morning the train started back to Bellaire:

Record, p. 40. — "Q. Now, Mr. Baugh, do you know of any orders that was received that morning by your train? A. Yes, sir.

"Q. What do you know of? A. All I know is an order thrown off while we were at Burr's Mills, and I gave it to the engineer, and he told me to let him out; that we would go.

"Q. What was that order? A. I don't know.

"Q. Do you know what it was? A. No, sir.

"Q. What happened immediately after you gave your engineer that order? A. He told me to let him out.

"Q. What did happen immediately after you gave that order to the engineer? A. He started to go.

"Q. Who opened the switch? A. I did it.

"Q. What did you do then? A. Shut the switch and got on the engine."

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Record, p. 41. — "Q. Do you know what time it was when you started out of the switch at Burr's? A. No, sir.

"Q. Did you know then what time of day it was? A. No, sir.

"Q. Did you pay any attention to that at all? A. No; I did not. It was not my business to pay attention.

"Q. Well, I was going to ask you was that any part of your duty? A. No, sir.

"Q. Whose direction were you under? A. Under my engineer's.

"Q. Did you receive any orders as you went west that morning at Lewis' Mills? A. I don't know.

"Q. On your helper, who received the orders? A. The engineer did. He received all the orders."

Record, p. 47. — "Q. Now, Mr. Baugh, when you got up to Burr's Mills,

It only remains to notice the observations made upon the decision in the *Ross case*, which seem to me to greatly narrow

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to that turn-table, just explain to the jury the process by which that engine would get back to Bellaire? A. We had all the trains on the road to contend with, and we had to run inside tracks when coming down to keep out of the way of them.

"Q. When did you first learn the fact that you had to keep out of the way — out of the way of what trains? A. All the trains that was expected.

"Q. The schedule trains, would it not be? A. I reckon.

"Q. *What was the process — what right had you to go back after you got to Burr's Mills or the turn-table? You had no right to the track at all unless you had orders, had you?* A. *No, sir; didn't have no right without orders.*

"Q. And you proposed to get a right to the track by writing an order which you have said you did write? A. I was going to flag on the engine. I did not want to run them on my orders.

"Q. You had been running the length of time, whatever it was; you knew the time of this local train out of Bellaire? A. No, sir.

"Q. You were in the habit of meeting it? A. I did not know what time they left.

"Q. You knew where you met them always? A. No, sir; we would not meet them perhaps once in a month. We would not meet them once a month sometimes.

"Q. You knew the time of the local train? A. No, sir.

"Q. You knew there was a local train on the road running out of Bellaire in the morning? A. Yes, sir.

"Q. You knew when you were running — knew where you met them? A. I did not know anything about it that time.

"Q. Is it not a part of your duty to learn these things? I want to know if you did not know that there was a local train and has been for the last ten years running out of Bellaire about the same time — about the same hour and the same minute. A. No, indeed; I did not.

"Q. And you were at work at — in the shops and yard and did not know anything about it? A. No, sir; I did not.

"Q. You entirely overlooked that fact? No answer."

* * * * * * *

Record, p. 49. — "Q. *Did you know that there was a local train coming out about that time?* A. I knew there was a local train on the road some place.

"Q. Between you and Bellaire? A. Yes, sir.

"Q. I wish you would explain to the jury what you mean by flagging. You say your intention was to flag down to Bellaire. How is that done? A. We make out an order and give it to the engineer on the train we want to follow; sign the engineer's name; and I went with this flag on the train, and our engine followed behind until we met another train, and then we would side track there and pass.

"Q. That is, you would keep far enough ahead so that if you met a train you would signal it and stop the train? A. I would go right on the train that had the right of way of the track and our engine followed after."

its effect and destroy its usefulness as a protection to employés in the service of large corporations, under the direction and control of supervising agents. That was an action brought by a locomotive engineer in the employ of the Chicago, Milwaukee and St. Paul Railroad Company to recover damages for injuries received in a collision which was caused by the negligence of the conductor of the train. The company claimed exemption from liability on the ground that the conductor and engineer were fellow-servants; but the court charged the jury that it was clear that if the company saw fit to place one of its employés under the control and direction of another, then the two were not fellow-servants engaged in the same common employment, within the meaning of the rule of law which was the subject of consideration, and that by its general order the company made the engineer, in an important sense, subordinate to the conductor. To this charge exceptions were taken. The correctness of the charge was the question discussed in the case by counsel, and determined by the court. Its correctness was necessarily sustained by the judgment of affirmance, which could not have been rendered if the exceptions to it were well taken. The majority of the court in their opinion, whilst admitting that the charge is much like the one in the present case, and might be well said to be sufficient authority for sustaining and affirming the judgment, contend that the court did not attempt to approve the instruction generally, but simply held that it was not erroneous as applied to the facts of the case, and in support of this view cite the language of the court used to show that the conductor of a railway company, exercising certain authority, represents the company, and, therefore, for injuries resulting from his negligent acts the company was responsible, and the statement that the case required no further decision. Clearly, it did not require any further decision, for it covers the instruction objected to, that if the company saw fit to place one of its employés under the control and direction of another, then the two were not fellow-servants engaged in the same employment within the meaning of the rule of law as to fellow-servants. A conductor of a railway company, direct-

ing the movements of its train, and having its general management, illustrates the general doctrine asserted and sought to be maintained throughout the opinion in the *Ross case*, that railroad companies in their operations, extending in some instances hundreds and even thousands of miles, and passing through different States, must necessarily act through superintending agents; employés subordinate to the company, but superior to the employés placed under their direction and control. The necessity of this doctrine of subordinate agencies standing for and representing the company was well illustrated in the duties and powers of a conductor of a train or engine. They were stated as an illustration of the necessity and wisdom of the rule, and not to weaken or narrow the general doctrine asserted in the decision of the court, and which its opinion, in almost every line, attempted to maintain. The necessity of subordinate agencies exists whenever a train or engine is removed from the immediate presence and direction of the head officers of the company.

The opinion of the majority not only limits and narrows the doctrine of the *Ross case*, but, in effect, denies, even with the limitations placed by them upon it, the correctness of its general doctrine, and asserts that the risks which an employé of a company assumes from the service which he undertakes is from the negligence of one in immediate control, as well as from a co-worker, and that there is no superintending agency for which a corporation is liable, unless it extends to an entire department of service.

A conclusion is thus reached that the company is not responsible in the present case for injuries received by the fireman from the negligent acts of the conductor of the engine.

There is a marked distinction in the decisions of different courts upon the extent of liability of a corporation for injuries to its servants from persons in their employ. One course of decisions would exempt the corporation from all responsibility for the negligence of its employés, of every grade, whether exercising supervising authority and control over other employés of the company, or otherwise. Another course of

decisions would hold a corporation responsible for all negligent acts of its agents, subordinate to itself, when exercising authority and supervision over other employés. The latter course of decisions seems to me most in accordance with justice and humanity to the servants of a corporation.

I regret that the tendency of the decision of the majority of the court in this case is in favor of the largest exemptions of corporations from liability. The principle in the *Ross case* covers this case, and requires, in my opinion, a judgment of affirmance.

MR. CHIEF JUSTICE FULLER dissenting.

I dissent because, in my judgment, this case comes within the rule laid down in *Chicago, Milwaukee &c. Railway* v. *Ross*, 112 U. S. 377, and the decision unreasonably enlarges the exemption of the master from liability for injury to one of his servants by the fault of another.

PATRICK *v.* BOWMAN.

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

No. 157. Argued March 22, 23, 1893. — Decided April 24, 1893.

B., an attorney at law, residing at St. Louis, went to Leadville, Colorado, on business of P. While there he obtained knowledge of a mineral tract, and after communicating with P., he acquired a part ownership in it on behalf of P. and himself. P. came to Colorado and took charge of the development of the property by sinking a shaft, the proportionate part of the expense of which was to be borne by B., who then returned to his business. Subsequently a correspondence by mail and by telegraph took place between P. and B., which ended in the acquisition of B.'s interest by P. The property became very valuable. When B. learned this he filed a bill in equity to set aside his conveyance to P., as having been fraudulently obtained, and for an accounting, and for the payment of his share of the profits to him by P. On the correspondence and other facts

Statement of the Case.

in evidence, as recited and referred to in the opinion of the court, *Held*, that the evidence showed that the parties had made a complete settlement of their rights under the contract, and that B. had parted with all his interest in the property, and the bill must be dismissed.

When an offer is made and accepted, by the posting of a letter of acceptance before notice of withdrawal is received, the contract is not impaired by the fact that a revocation had been mailed before the letter of acceptance.

This was a bill in equity originally filed by Bowman in the Circuit Court of St. Louis, and subsequently removed to the Circuit Court of the United States, against William F. Patrick and James M. Patrick, to rescind a sale made October 19, 1882, by Bowman to William F. Patrick, his then partner, of a $\frac{5}{48}$ interest in the Col. Sellers and Accident mines at Leadville, Colorado, and for an account of profits received by Patrick from that interest. The theory of the bill was that Patrick had concealed from the plaintiff the discovery of ore in one of these mines in the summer of 1882, and thereby induced him to part with his interest at much less than its value.

The facts of the case were substantially as follows: In February, 1882, Bowman, then a resident of St. Louis, Missouri, and temporarily in Leadville on legal business, as attorney of William F. Patrick, was introduced by one William H. Wilson, a mining promoter, to one Stebbins, who with others owned two adjacent mining claims in Leadville known as the Col. Sellers and Accident claims, upon which no shaft had then been sunk to mineral, and it was then unknown whether the property had any value. The owners were looking for some one who would sink a shaft for a share in the property. Bowman, at Stebbins' request, visited the property, was pleased with it and its surroundings, and soon afterwards asked Patrick to join him in sinking the shaft. The result was that on February 17, 1882, an agreement was entered into between Stebbins and the other owners of the mine upon one part, and Bowman and Patrick upon the other, by which the latter undertook, in consideration of an undivided one-half of the property, a deed of which was deposited in escrow, to sink a shaft on the property to limestone in place or bed rock, if pay mineral

Names of Counsel.

should not be sooner found, and to obtain patents from the United States to said property, and further agreed to commence work in sinking the shaft within thirty days from the date of the contract. It seems the mineral in that district lies in nearly horizontal bodies, at the contact between porphyry and limestone, the porphyry being the overlying rock and of varying thickness. The shaft was to be sunk through the surface earth and gravel known as "wash" and the porphyry. The indications are generally apparent in the shaft, if there be an ore body below and it be near, the porphyry becoming iron stained, and sometimes small seams or stringers of mineral are found in the porphyry leading to the mineral body below.

Bowman and Patrick were, between themselves, to be equal partners in the venture, each paying half of the expenses. Patrick, living at Leadville, was to superintend the sinking of the shaft, and keep Bowman advised of all that should happen in the partnership venture. In March, 1882, and for some time afterwards, Patrick was indebted to Bowman for money advanced by him on account of certain legal business then in his charge. Bowman returned to St. Louis and did not meet Patrick again until June 19th, when they had a settlement, at which Bowman exhibited a willingness to sell out his interest to Patrick. A correspondence, both by letter and telegram, began soon after that date, which is fully set forth in the opinion of the court, and which resulted in a deed by Bowman of his entire interest in the property.

Upon the hearing in the Circuit Court upon pleadings and proofs, a decree was entered setting aside the sale, and adjudging that William F. Patrick refund the sum of $57,099.69, the amount of profits received by him on Bowman's interest to March 19, 1889, the date of the final decree. 36 Fed. Rep. 138. From that decree Patrick appealed to this court.

Mr. Charles C. Parsons for appellant.

Mr. E. McGinnis for appellee.

Opinion of the Court.

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

This case turns upon the question whether the correspondence between these parties subsequent to the execution of the contract of February 17, 1882, and the conduct of Bowman in that connection indicated a completed understanding between them, prior to the discovery of ore in paying quantities, that Patrick was to purchase Bowman's interest.

The theory of the plaintiff in this connection is that Patrick, being present on the spot, and having the sole charge and management of the sinking of the shaft, was bound to keep the plaintiff advised of the progress of the work and the prospects of the mine, pending the negotiations for the purchase of his interest, and that, having failed to apprise him of the discovery of a large body of ore on the 31st of August, the sale subsequently made was fraudulently procured and should be annulled. The defendants do not dispute the legal principle laid down by this court in *Brooks* v. *Martin*, 2 Wall. 70, that where one partner is present in sole charge of the business, while the other is at a distance, in order to sustain a sale of the absent partner's interest it must be made to appear that the price paid approximates a fair consideration for the thing purchased, and that all the information in the possession of the purchaser necessary to enable the seller to form a sound judgment of the value of what he sells should be communicated by the buyer to him. Defendants, however, claim, that the parties had reached an understanding as to the terms and conditions of the sale before the discovery of the ore, and that William F. Patrick was under no obligation to apprise plaintiff of this fact; that even if the plaintiff had a right to rescind the sale, he did not act with sufficient promptness, and that his failure for four years to institute these proceedings should debar him from a recovery.

The nature of the defence in this case requires a statement somewhat in detail of the succession of events following the contract of February 17, 1882, and of the correspondence between the parties. Bowman seems to have left Leadville

the day following the execution of the contract with the understanding that Patrick should remain there, and superintend the opening of the shaft — in short, that he should be the resident partner of the enterprise. He and Bowman were each to contribute one-half, and to have an equal interest in the venture. On March 25th, Bowman sold to James M. Patrick, brother of the defendant, William F., one-third of his half interest, in consideration of Patrick paying one-third of Bowman's share of the cost of sinking the shaft, Bowman agreeing to make all necessary advances for the first year, and Patrick agreeing to repay him the sums so advanced. Bowman did not return to Denver until early in May, having in the meantime received several letters from William F. Patrick, giving a general idea of the progress of the work, and of certain litigation connected with the property.

At this time, Wilson claimed that he had introduced Bowman to Stebbins, and had been instrumental in procuring for Bowman the contract for an interest in the property, and that in fairness Bowman should let him have a share in this contract. Bowman assented to this, and assigned to Wilson a one-fourth interest. At this visit, too, a settlement seems to have been had in which it was agreed that Bowman would owe Patrick $288.70, if Wilson paid his assessment, and $465 if he did not. And, as Patrick says, "the understanding between Mr. Bowman and myself was that I was to draw for either $465 or $288.70." Wilson's time to pay would expire May 18th. On May 13th, Patrick drew on Bowman for $465. This draft was presented for payment on May 15th, when Bowman telegraphed to Patrick: "Must know Wilson's conclusion. Rebates not satisfactory. Answer at once;" and on the same day wrote to Patrick as follows: "Wilson made a claim . . . for an interest in the Col. Sellers and Accident. I yielded to his request. . . . He named the interest and promised his share of the money. You were to collect of him, or forfeit his claim for non-payment. Your brother's interest I agreed to carry, and am willing to, but now you draw on me without collecting of Wilson or securing his relinquishment. This much I expected you to do. I have

telegraphed you, but can get no answer. I leave in an hour for Chicago."

The parties did not meet again until June 19th, when Patrick went to St. Louis to talk over the Col. Sellers matters, and at this interview they had a settlement of their accounts up to May 8th, in which a balance of $288.69 was found due from Bowman, for which he gave his note to Patrick, who had it discounted at once for its face. Of this $288.69, the sum of $245.75 was for James Patrick's share of the expenses, which Bowman was to advance for him, and for which amount James soon afterwards gave his note to Bowman.

In the meantime, and on May 11, Wilson had assigned his interest to John Livezey. These assignments to James Patrick and Wilson left Bowman the owner of ten forty-eighths of the contract, or five forty-eighths of the entire property, which was the interest he subsequently conveyed to William F. Patrick. Up to the time of this interview of June 19th, nothing, apparently, had been said with reference to a sale. But at the time of this settlement, it seems that Bowman, who appeared despondent, suggested to Patrick that he thought he only ought to do a little work every ten days as specified in the contract, to prevent its becoming forfeited, and that that would keep it alive. Patrick says: "He made me a proposition at that time, as I remember, after I secured this note, if I would surrender the note he would surrender all his right, title and interest under that contract to me, and I told him at the time that I had about all that I could carry, and I didn't think I could afford to take it, but thought I knew a man out West who I thought would take it, and that on my return I would speak to him in regard to it."

At this interview Bowman told him that he was going to leave in a few days for Bayfield, Wisconsin, and gave him that as his post-office address during the summer. Patrick started back for Leadville that evening, and on arriving at Denver wrote Bowman at St. Louis, under date of June 22d, as follows: "In regard to your interest in the Col. Sellers, I think I know a man who will pay the note you gave me, $288.69, and take your interest off your hands and let me go

right ahead with the work, which I would very much like to do. If you are willing to let it go on these terms, which is the same proposition you made me in your office, please telegraph me immediately and I will try and make the arrangement."

On June 27th he wrote another letter in the following terms: "I would also like to have an answer with regard to the proposition I made you about the Col. Sellers, to return you your note and forfeit your share in the contract. There is a party here who will take it." On the following day, June 28th, he wrote still another letter to this effect: "Please let me know what we are to do in this new complication, and also about the Col. Sellers, as I am anxious to continue work on that property and see what is there." These letters were all addressed to St. Louis, and were forwarded to Bayfield, Wisconsin, and as Bowman was then in the woods, he did not receive either of them until the 13th of July, when he received the one of June 22d, and at once telegraphed to Patrick: "Yours of June 22 received yesterday; proposition accepted; send note." To this Patrick replied, under date of July 15th, by telegraph: "Acceptance too late. Proposition was dependent upon immediate acceptance in St. Louis. See my letter of fifth." Bowman must have gone to St. Paul on this or the following day, since on July 16th he wrote Patrick the following letter: "When I came out of the woods I found your letter of June 22d waiting my answer, and I telegraphed you on the same day, accepting your proposition to surrender to you all my remaining interest in the property adjoining the A. Y. on your surrendering my note; and on a perusal of your subsequent letters received here at St. Paul to-day I learn that is your wish; I do not complain of it. My judgment differs from yours as to the course to pursue, and I should not stand in your way, and will not; if you wish any papers signed, send and I will sign them. My address is Bayfield, Wis."

Before Bowman received Patrick's letters, and telegraphed his reply, Patrick claims that he wrote the following letter to Bowman on July 5th, addressed not to St. Louis or to Bayfield, but to St. Paul:

"LEADVILLE, *July* 5, 1882.

"Mr. Frank J. Bowman, Merchants' Hotel, St. Paul, Minn.

"DEAR SIR: I send you a statement of all amounts paid on the Col. Sellers contract since our settlement from which you will see that the am't due from you thereon is $952.32 for which am't I will draw on you to-morrow. I wish to notify you and hereby do so, that if the draft is not paid that I will apply to Stebbins and Robinson and their partners for a new contract in my own name. I have consulted an attorney here and am satisfied that we are obliged to continue the work in order to comply with our contract and that your plan of doing a little work every ten days would not be acting according to its letter or spirit and would cause a forfeiture of the contract and loss of the am't we have spent in sinking the first 100 feet. The same attorney also tells me that under our contract if you do not pay your proportion when called upon you forfeit your rights under said contract. I want to deal fairly with you and will tell you that in my opinion the shaft which is now 165 feet deep is looking very promising and I think we are not very far from the contact. My reasons for thinking so are that the porphyry is now heavily iron stained. Hope you will pay the draft and that we may continue the work together but if you do not I will have to protect myself and will do so by taking a new contract as I have said.

"I withdraw my offer to return your note of $288.70 dated June 19th 1882 in case you assign your interest in the contract to me.

"Yours truly W. F. PATRICK."

On the following day Patrick drew upon Bowman for $952.32, which included the amount of James Patrick's share of the expenses and also part of certain expenses for repairing the shaft. The draft was mailed to the bank in St. Paul, and was returned to Patrick because Bowman was not at St. Paul. We see no reason to doubt that this draft was drawn in good faith, with the expectation that it would be presented to Bowman, though, as Patrick says, he did not think it would be paid, because of his conversation with Bowman at St. Louis

on June 19th, when he expressed himself as dissatisfied with the way the work was going on. The letter of July 5th seems never to have been received.

On August 2d, defendant wrote Bowman as follows, evidently in reply to Bowman's letter of the 16th of July: "Yours of the 16th ult. received. In accordance with your request therein, I send the within paper for your signature. I sold the note in St. Louis before getting your reply, so will have to wait until it matures, which will be September 19th." Enclosed in this letter was a memorandum of agreement, signed by William F. Patrick, reciting the contract of February 17th, 1882; the performance of considerable work in developing the lode; the unwillingness of Bowman to continue such work or to pay the costs; the execution of the note of June 19th, 1882; and providing that, *if* Patrick should pay the note when it became due, Bowman would release to him all his right, title, and interest to the contract with the owners of the property, and would execute and deliver to Patrick a good and sufficient deed of conveyance of the same, Patrick agreeing to release Bowman from any liability under the contract.

In reply to this, and on August 28th, Bowman wrote to Patrick from his camp on Brule River, Wisconsin, as follows: "I send you the contract you desire, and trust that this will settle our matters pleasantly and amicably. I have inserted a clause concerning your brother's interest, but he may not care to retain it. My address will be St. Paul, until September 10th, then I shall return to St. Louis and business. P.S. — Mails are slow here."

With this letter was a contract signed by Bowman, which was a substantial copy of the one signed by Patrick, but containing a reservation for the use of Patrick's brother. This contract, however, made it obligatory upon Patrick to pay the note, and gave him no option in that particular as was given in the contract enclosed in his letter to Bowman.

Having signed this contract, Bowman enclosed it in his letter of August 28th, and mailed it the same day to Patrick at Leadville, where it arrived after Patrick had left. It was forwarded to him at Knoxville, Tennessee, where he received

it on September 7th. He made no reply, however, and there was no further correspondence between the parties.

On October 19, 1882, Bowman having returned to St. Louis, James Patrick went to Bowman's office, and said he had called by request of his brother, to get him to execute a deed to his brother for his interest in the Col. Sellers. The Patricks testify that they were both present in Bowman's office; that they talked over the matter of Bowman's relations to James with regard to an interest in the contract; and that W. F. Patrick then agreed to take a conveyance of Bowman's entire interest, to assume Bowman's liability, and to advance James' share of the expenses. This matter being settled, Bowman acknowledged and delivered a deed of his interest in the property. There is a dispute between Bowman and the Patricks as to whether the former made any inquiry of them as to whether any mineral had been discovered in the Col. Sellers shaft. It is clear they never mentioned the matter to him, and there is no doubt Patrick failed to inform Bowman of the discovery of a large body of ore that had been made in the last days of August. If, at that time, there was a completed understanding between them that Patrick was to buy out Bowman's interest and release him from his liability upon the note, there was no obligation to make such disclosure. If, upon the other hand, no such understanding had been reached, it was then incumbent upon Patrick to inform Bowman of the progress of the work before taking from him the deed of October 19th.

We think this question must be answered by referring to the correspondence between these parties, between June 19th and August 13th, upon which day the first indication of mineral was discovered in the shaft, the policy of suppressing all information was inaugurated.

The letter of June 22d must be read in connection with the conversation at St. Louis on June 19th, in which Bowman offered Patrick all his interest in the enterprise, if Patrick would return the note Bowman had just given him. Patrick replied that he had already as much as he could carry, but upon his return to the West he would speak to a man whom

he thought might take the offer. Accordingly, in his letter of June 22d, he does not offer to buy Bowman's interest himself, but says: "I think I know a man who will pay the note you gave me, $288.69, and take your interest off your hands. . . . If you are willing to let it go on these terms, which is the same proposition you made me in your office, please telegraph me immediately, and I will try and make the arrangement." Now, while it is true this is not upon its face a proposition to buy Bowman's interest himself, but a mere promise to try and make an arrangement with another party, and a call upon Bowman to let him know whether such a proposition would be accepted if made, in reality we think it should be considered as a proposition made by Patrick himself, for the following reasons:

The man he had in mind was Col. Bissell of Leadville, whom he had not yet seen, and whom he had no good reason to believe would take the property. It was a mere conjecture on his part. Before he wrote his next letter, he went on to Leadville, saw Col. Bissell, and "spoke to him in regard to it, and he declined to take it, and declined to take the interest and pay that note, and, as I told Bowman, I was carrying all I could." Notwithstanding this, in his letter of June 27th, he says: "*I would also like to have an answer in regard to the proposition I made you about the Col. Sellers, to return you your note and forfeit your share in the contract. There is a party here who will take it.*" And again on the 28th: "Please let me know what we are to do . . . about the Col. Sellers, as I am anxious to continue work on that property and see what is there." Now, it does not clearly appear whether he had seen Col. Bissell or not when he wrote these two letters, but in either case the letters were untrue, though they may have been written in good faith, and with the expectation that Col. Bissell would eventually take the interest; but there was no party there who had given him any assurance that he would. Patrick was thereby placed in the position of holding himself out not only as the agent of an unknown principal, but of one whom he had no authority to represent. In such case his contract, though of course not

binding upon any one else, is binding upon the agent, at least if the credit be given to such agent. *Welch* v. *Goodwin*, 123 Mass. 71; *Worthington* v. *Cowles*, 112 Mass. 30; *Cobb* v. *Knapp*, 71 N. Y. 348; *Blakely* v. *Bennecke*, 59 Missouri, 193; *Eichbaum* v. *Irons*, 6 W. & S. 67; *Meech* v. *Smith*, 7 Wend. 315; *Winsor* v. *Griggs*, 5 Cush. 210; Mechem on Agency, secs. 542, 550, 557.

In this case there is abundant evidence that the proposition contained in the three letters of June 22d, 27th, and 28th was treated by both parties as the proposition of Patrick himself. In his attempted retraction of July 5th, Patrick says: "*I withdraw* my offer to return your note for $288.70, dated June 19, 1882, in case you assign your interest in the contract *to me*." And in his letter of July 16th, Bowman says: "When I came out of the woods I found your letter of June 22d, waiting my answer, and I telegraphed you on the same day accepting *your proposition* to surrender *to you* all my remaining interest in the property adjoining the A. Y. on your surrendering my note." Of this letter Patrick says: "*I decided to accept* the proposition contained in the letter, and instead of applying to the owners for a new contract . . . I decided to accept the proposition which was contained in Bowman's letter of July 16th. I had a contract prepared such as he indicated he would sign in that letter, . . . and I sent that contract to him by mail after signing it myself." In his letter of August 2d, which was written before the discovery of ore, Patrick enclosed a contract for Bowman to sign, in which his own name is mentioned as grantee, and Bowman in his letter of August 28th also enclosed a draft of his own, in which also Patrick is named as grantee. So, too, in his letter of September 2d, Patrick says: "I sent you from Leadville an agreement concerning the Col. Sellers, in which I agreed to pay that note, $288.70, and you relinquish all rights under the agreement." The matter was finally consummated on October 19th, by a deed direct from Bowman to Patrick of his interest in the mine. Indeed, there is not a word of testimony, except as gathered from the three letters written in June, that the proposition was other than

that of Patrick himself. For these reasons we think the offer should be considered as one made by Patrick to take Bowman's interest in the mine, and release him from his liability upon the note.

The letter of June 22d, which was addressed to Bowman at St. Louis, was forwarded to Bayfield, Wis., and reached him in the woods at a distance from a telegraph office. He proceeded at once to Ashland, Wis., the nearest telegraph station, and on July 13th telegraphed Patrick as follows: "Yours of June 22d received yesterday; proposition accepted; send note." To this Patrick replied by telegraph, sent both to St. Louis and Ashland, as follows: "Acceptance too late. Proposition was dependent upon immediate acceptance in St. Louis. See my letter of the 5th." In view of the fact that Patrick was informed when in St. Louis, June 19th, that Bowman was about starting for the woods for the summer, and that his letters of June 22d, 27th, and 28th were sent to St. Louis, where he must have known that Bowman had gone, we do not think the acceptance was too late, although it might have been otherwise had the circumstances been such that a prompt reply must have been expected. After having sent this telegram, and before receiving the reply, Bowman left Ashland, and went to St. Paul, where he received the letters of June 27th and 28th, and answered them by his letter of July 16th, *renewing his acceptance of the proposition he had already made by telegram.* The tone of this letter certainly indicates that he had not received Patrick's telegram of July 15th when he wrote it. Indeed, it is improbable that he should have done so, as one copy of that telegram was sent to St. Louis and another to Ashland, after Bowman had left there.

These letters and telegrams, taken together, indicate a complete understanding between these parties that Bowman should sell out his interest in the mine to Patrick on condition that the latter released him from liability upon the note. It is true the letter of June 22d contained no definite proposition, but a mere offer by Patrick to see if he could find a purchaser, and hence Bowman's telegram of July 13th might not

be construed as binding Patrick to anything; yet the letter of June 27th did contain, or at least recognize a proposition as coming from Patrick himself, and Bowman's answer thereto of July 16th, construed in connection with his telegram, was a distinct acceptance of such proposition. Nor is this understanding affected by Patrick's attempted revocation of the offer in his letter of July 5th. Bowman denies that he ever received this letter, and as there is no direct evidence that he did, his denial must be accepted as conclusive. Under such circumstances the revocation is of no avail to release either party from the obligations of his contract. The authorities are abundant to the proposition that when an offer is made and accepted by the posting of a letter of acceptance, before notice of withdrawal is received, the contract is not impaired by the fact that a revocation had been mailed before the letter of acceptance. Thus, in the case of *Tayloe* v. *Merchants' Fire Insurance Co.*, 9 How. 390, in which the point decided was that a contract by correspondence was completed when the party to whom the promise was made placed a letter in the post-office accepting the terms, Mr. Justice Nelson, in delivering the opinion of the court, said (p. 400): "We are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed a valid undertaking on the part of the company, that they will be bound according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted." This case was cited and followed in *Byrne* v. *Van Tienhoven*, 5 C. P. D. 344, and *Stephenson* v. *McLean*, 5 Q. B. D. 346. Other cases to the same effect are *Adams* v. *Lindsell*, 1 B. & Ald. 681; *Dunlop* v. *Higgins*, 1 H. L. Cas. 381; *Harris' case*, L. R. 7 Ch. 587; *The Palo Alto*, 2 Ware, 343; *Wheat* v. *Cross*, 31 Maryland, 99.

There is, indeed, in a case of this kind some reason for urging that the party making the revocation should be estopped to claim that his attempted withdrawal was not

binding upon himself; but this could not be done without infringing upon the inexorable rule that one party to a contract cannot be bound unless the other be also, notwithstanding that the principle of mutuality thus applied may enable a party to take advantage of the invalidity of his own act.

It is quite evident that Bowman himself regarded this as a settlement of his rights under his contract with Patrick, leaving only the details to be arranged between them. His conduct from this time indicates a clear intention on his part to abandon any further interest in the property. It is evident that he intended to make no further claim upon Patrick, and it is equally clear that Patrick could have sustained no further action against him for the expenses of sinking the shaft. Indeed, the testimony leaves it doubtful whether Bowman ever contributed anything more than a nominal amount of money to the enterprise. At the interview in St. Louis on June 19th there seems to have been a settlement had by him up to May 8th, in which Patrick claimed of him $552.93, three-eighths of the expenses up to May 8th, which was reduced to $288.69, by a credit of some $264.24, claimed by Bowman against Patrick, for which amount, less $264.24, he gave his note. He seems neither to have paid nor settled for any portion of the money expended by Patrick since May 8th, ($603.75,) nor to have given any assurances that the additional liabilities to be incurred would be met by him. He said that he was "hard up;" could not settle the expenses incurred since May 8th; asked Patrick to wait for him as a matter of accommodation; and suggested that only a little work should be done every ten days on the shaft — just enough to save a forfeiture of their contract. He not only made no provision for the payment of his note of June 19th, or of the further expenses which he must have known would be required, but apparently took no further interest in the sinking of the shaft, and manifested in his letter of July 16th a willingness to sign any papers Patrick might send him, and subsequently did sign a release of his interest to Patrick. There is much dispute between the parties as to whether Bowman made any inquiries with regard to the progress of the work on October

19th; but it is scarcely presumable that he would have signed the deed at that time, without instituting very careful inquiries with regard to the work, unless he had treated the matter as abandoned — since from the time that had elapsed he must have known that it was either a success or a failure. In a subsequent conversation with Wilson he said that his reason for selling out to Patrick was that he was not able to carry the assessments. He made substantially the same statement to James Patrick, and added that, even if he had had money enough, the constant fear of litigation and "jumpers" would have caused him to sell out, and wished him to express his congratulations to his brother upon the success of the enterprise.

In short, he gave no further attention to the matter for four years, when, from some letters between members of the defendant's family, which fell into his hands, he was apprised of the fact that a large body of ore had been discovered about the 31st of August, the knowledge of which Patrick had concealed from him. Conceding that if the negotiations had then been open, it would have been Patrick's duty to inform his partner of all that had taken place, he was under no obligation to do so if the contract were complete. He might well be reluctant to give him information which would only lead to disputes and litigation.

In the view we have taken of this case, it becomes unnecessary to consider the conduct of Patrick after August 13th, in suppressing the information with regard to the discovery of the ore, or the question of laches which the defendant urges with so much earnestness.

The decree of the court below will, therefore, be

Reversed, and the case remanded with instructions to dismiss the bill.

Mr. Justice Brewer, with whom concurred Mr. Chief Justice Fuller, dissenting.

I am unable to concur in the foregoing opinion. Accepting the rule laid down in *Brooks* v. *Martin*, 2 Wall. 70, as con-

trolling, it is undisputed that no conveyance was made by Bowman to Patrick until October 19, 1892. It is undisputed that long before that Patrick knew of a large body of valuable mineral in the shaft, and that he did not communicate the fact of this discovery to Bowman. It is also not open to question that the property then conveyed was worth very much more than Bowman received. But it said that prior thereto there was a completed understanding that Patrick was to purchase Bowman's interest. What is meant by the term "completed understanding" is doubtful. If by it is meant that a binding contract had been entered into before October 19, I deny the fact. If only that Patrick knew the terms upon which Bowman was willing to sell, I deny that the law is that knowledge of such fact relieved Patrick from the obligation to make full disclosure up to the time of the actual purchase. It may be conceded that Bowman was willing to sell in consideration of the surrender of his note, and Patrick knew of this willingness, but can it be that knowledge by a resident partner that the non-resident partner is willing to sell at a fixed price releases him from the obligation of full disclosure, enables him to continue his explorations to discover the value of the property, and, when ore of large value is finally discovered, complete the purchase without disclosing that fact? I do not so understand the law. Until a definite contract has been entered into between the parties, binding alike on vendor and purchaser, and understood to be binding alike on both, the rule laid down in *Brooks* v. *Martin* compels the resident partner to make full disclosure. The question is not whether Bowman acted badly, but whether Patrick fully discharged the duties resting upon him as resident partner. If he says that before the purchase was actually made there was a completed contract which relieved him from his obligations of disclosure, must he not make it clear that such completed contract was in fact made? It is true, Bowman was willing to sell during June and July, providing he could get his note back; but this willingness to sell was based upon the facts as they then existed, or at least as known to him. The shaft had been sunk many feet, no mineral had been discovered, no indications of mineral dis-

closed. He might well have said, I am ready to abandon this if you will only give me back my note; but can it be that this willingness to sell, communicated as it was to Patrick, will sustain a purchase in the succeeding October, after mineral had been discovered, the value of the property largely advanced, and without any disclosure of those facts to Bowman?

As the transactions between Patrick and Bowman, intermediate June 19 and October 19, were all by letter or telegram, there can be no dispute as to what took place. It appears that Patrick wrote three letters after the interview of June 19: one June 22, another June 27, and a third June 28. The first says this: "In regard to your interest in the 'Col. Sellers,' I think I know a man who will pay the note you gave me, $288.69, and take your interest off your hands. . . . If you are willing to let it go on these terms . . . please telegraph me immediately, and I will try and make the arrangement." This letter did not reach Bowman until the 13th of July, when he telegraphed, "Yours of June 22 received yesterday; proposition accepted; send note." To which Patrick replied on July 15: "Acceptance too late; proposition was dependent upon an immediate acceptance in St. Louis. See my letter of 5th."

How out of this a contract can be deduced I do not understand. Patrick does not offer to purchase, does not say that he knows any one who will purchase, but simply asks Bowman if he is willing to sell at such a price, and promises, if so, to try and find a purchaser. It was this letter only which Bowman had received at the time of his telegram, and only the proposition or suggestion contained in it which he by that telegram accepted. It seems to me that it would puzzle a pleader to so frame a declaration as to show that that letter and acceptance created any contract between the parties.

Something is suggested as to an undisclosed principal, and it is said that the agent is bound when the principal is not. I do not appreciate the pertinency of that suggestion, for there is in this letter no assertion of an undisclosed principal for whom the agent makes the proposition. All that Patrick says is that if Bowman will consent to sell upon the terms

named he thinks he knows of some one who will buy, and will try to make the arrangement. It is true that on June 27, Patrick does say that there is a party who will take the property on those terms, and it may be said that here is an allegation of an undisclosed principal. But that letter had not then been received by Bowman, and nothing in it was covered by his acceptance of July 13. The acceptance specifically referred to the letter of June 22, which contained the only proposition or suggestion which Bowman then knew. Out of that I can torture no binding contract — no "completed understanding." On the 15th, two days after this telegram from Bowman, Patrick telegraphed: "Acceptance too late; proposition was dependent upon an immediate acceptance in St. Louis." In the face of this, can it be said that there was a binding contract or a completed understanding? Did Patrick, when he sent this telegram, understand that he had bought Bowman's interest, or was bound by any contract of purchase? I do not understand the force of the English language if it can fairly be said, in the face of such a telegram from the subsequent purchaser, that there was a completed understanding between the parties in respect to the sale. Patrick's declaration that the acceptance was too late was justifiable if he had been theretofore acting in good faith. His three letters in June were all directed to Bowman at St. Louis, although he knew that Bowman was going to spend the summer in Wisconsin, and had given his address, "Bayfield, Wisconsin." Directing to St. Louis, and calling for a telegram immediately, was a notification that that was not a continuing proposition, but one which must be received and acted on immediately. If it was not a proposition requiring haste he would naturally have addressed these letters to Bayfield, Wisconsin, the address given by Bowman, and in the vicinity of his summer outing in the woods. Sending to St. Louis was because he thought he might possibly reach him before he left for the summer, and thus have the question settled promptly, and so when he telegraphed on the 15th of July he could properly say: "Acceptance too late; proposition was dependent upon an immediate acceptance in St. Louis." It is unnecessary to

refer to the letter which Patrick claims to have written on July 5, as it is conceded that that letter was never received by Bowman. It is significant only, as indicating Patrick's state of mind, by these closing words: "I withdraw my offer to return your note of $288.70, dated June 19, 1882, in case you assign your interest in the contract to me."

Reliance is placed on Bowman's letter, in which he used the words "your proposition," but this it seems to me is trivial. The proposition or suggestion was one which did come in a letter from Patrick; and though Bowman does not write out in detail the full description of that proposition, but refers to it in the brief way he does, that cannot enlarge the scope or change the character of the proposition as it was sent in the letter by Patrick. That meant only that which it said; and when Bowman telegraphed an acceptance of that specific proposition, neither party was bound beyond the terms expressed. That made no binding contract of sale, and when Patrick, two days after Bowman's telegram, replied that the acceptance was too late, there was nothing concluded between the parties. That Patrick understood that there was nothing binding is further evidenced by the fact that before Bowman's telegram of July 13, and on July 5, he had received advice from his counsel that Bowman's interest could be obtained in another way, and without paying anything, and so in attempting to carry out the plan suggested by counsel he sent a letter to Bowman at the Merchants' Hotel in St. Paul, and drew a draft upon him at St. Paul for his supposed share of the expenses to date. To say that, while he was trying to obtain possession of Bowman's interest by proceedings of this character, there was a completed understanding between the parties for the purchase of that interest, is something I cannot understand. Evidently Patrick did not have the utmost reliance upon this plan suggested by his counsel, and although that draft was returned unpaid, yet as the indications of approaching mineral became clearer his desire to purchase from Bowman became stronger, and he concluded that the better way was to come back to the original proposition of purchase, and so, on August 2 he sent a

proposed contract. Still, as at the date at which that contract was sent, it was not absolutely sure that mineral in paying quantities would be found in the mine, the contract which he sent to Bowman for his signature was simply a contract binding Bowman to sell, and not binding himself to buy. Obviously he was not then sure that he would purchase. He wanted to get an option from Bowman, something that would bind him to sell, and then sink the shaft a little further, and make some more developments before he bound himself to purchase. And yet it is said that before this there was a completed understanding, a binding contract between these parties for the purchase of Bowman's interest. Bowman, knowing nothing of the disclosures made by the sinking of the shaft, and not knowing that the indications of approaching mineral were stronger and clearer, was still willing to sell on the terms named, but was not willing to give an option to buy; and so, on August 28, he prepared a contract binding both parties, and enclosed it in a letter to Patrick at Leadville, but before it had reached there Patrick had gone East. Nothing further took place until the day of the conveyance, October 19.

It is suggested that Bowman evidently regarded the matter as settled, leaving only the details to be arranged. It seems to me the important question is not how Bowman, but how Patrick, regarded it. Did he understand that the thing was settled between them? Certainly not, when he telegraphed that the acceptance was too late; certainly not, when he sent a contract not for a purchase, but giving him an option to purchase, binding Bowman and not himself.

And in this respect, Patrick's testimony as to his understanding of the matter is significant. On his direct examination he testified that the party he had in mind when he wrote the letter of June 22 was his own attorney in Leadville, Col. J. B. Bissell. His testimony was in these words:

"It was Col. J. B. Bissell, and when I came up to Leadville I spoke to him in regard to it, and he declined to take it, and declined to take the interest and pay that note, and, as I told Bowman, I was carrying all I could; so between the 22d of

June and that time I changed my mind, that is, between the 22d of June and July 5, in regard to it."

In reference to the advice given him by Col. Bissell, he testified:

"He said it was no use of paying that note or having anybody else buy it; when another assessment was due to draw on Bowman, and if he does not pay your draft promptly just apply to the owners of the Col. Sellers, that is, to Stebbins, Robinson, and others, for a new contract in your own name, leaving Bowman out, and when I wrote the letter of July 5 it was my intention to do that, and when I received Bowman's telegram of the 15th of July I so notified him in that telegram."

Further on in his deposition appears the following, also on direct examination:

"Q. When was your partnership with the plaintiff in the working of the Col. Sellers and Accident mining claims under the contract, Defendant's Exhibit 'A,' terminated?

"A. It was terminated, as I regarded it, on the receipt of the plaintiff's letter of July 16, and by my acceptance of the proposition contained therein, and the forwarding of the contract which was prepared by C. C. Parsons."

And on cross-examination this appears:

"Q. You recognized it to be your duty as a partner, when you wrote a letter accepting what you call Bowman's proposition of July 16, 1882, to tell him what occurred before you wrote that letter, didn't you?

"A. I did not regard him as my partner after I received that letter of July 16; he had not paid.

"Q. Didn't you regard him as your partner up to the time that you mailed an answer to that letter?

"A. Yes; but I accepted his proposition and I thought that ended the partnership.

"Q. In your view when did your partnership with Bowman end; when you received his letter of July 16, 1882, or when you mailed your answer to it?

"A. Take the two together.

"Q. It can't be both. When did you conclude that Bow-

man was not your partner, and was not entitled to the information?

"A. When I accepted his proposition of July 16."

According, therefore, to his own testimony, Patrick understood that the partnership relation, with the obligations of disclosure, continued until he had accepted the proposition in Bowman's letter of the 16th of July. When he mentally accepted that proposition, he alone knows or can tell. What he did after that was, on the second day of August, to send to Bowman, for signature, an agreement giving him an option to purchase, which never was signed. The contract which Bowman did prepare, a contract binding both parties, and which Bowman signed and forwarded on August 28, was not signed and forwarded until after mineral had been in fact discovered, and was so signed and forwarded by Bowman in ignorance of that fact.

Were not the discoveries in the mine such as should have been disclosed? Let us see what there is in this record that does not depend upon the recollections of witnesses. On July 5, Patrick writes to his brother, saying: "The shaft in the Col. Sellers is looking very promising; for several feet the porphyry has been heavy iron-stained, and I have good reasons for thinking that we are near the contact. Acting on Col. Bissell's advice, I to-day write to Bowman telling him that if he did not pay up I would apply to the owners of the ground for a new contract in my own name, and leave him out. I don't suppose he will pay, but I will let you in on the new one on the same terms you are in the old." On July 30 this appeared in the Leadville *Herald:* "The Col. Sellers shaft, on Iron Hill, is now down about 215 feet. Some small streaks of ore have already been cut, one of them assaying nineteen ounces in silver. The sinking of the shaft is progressing rapidly, with the prospects that expected ore bodies will soon be cut." And Patrick was in Leadville at that time. On August 10, in the same paper, appeared this statement: "Late Tuesday night [which would be August 8, 1882] ore was encountered in the shaft of the Col. Sellers on Iron Hill, appearing first in one corner of the shaft. The ore is pyrites

in character, and is pronounced to be identical with that which was first cut in the A. Y. mine, which it adjoins. It is probable that it will be necessary to pass through several feet of it before the same class of ore which has enabled the A. Y. to make such shipments will be reached. The property is owned by W. F. Patrick, Charles Stebbins, George Simmons, John Livezey and others."

But we need not stop with this. On August 16 a contract was signed by Patrick and the original owners of the mine, in which it was recited that "a lode or vein is now by all believed to have been struck," and which provided for the delivery of the deed called for by the original contract, which deed was, in fact, delivered on August 31. We need not resort to the parol testimony, of which there is an abundance, but may rest upon this written contract to prove that within thirty-two days after Patrick had telegraphed that Bowman's acceptance was too late a vein of mineral had been discovered in this shaft, and that this discovery, known to Patrick, was made two months and three days at least before the deed was acquired from Bowman. Parol testimony tends to show that the discovery was made at a much earlier date. Did Patrick at this time understand that a purchase had been made? We have seen that this correspondence with Bowman does not show a binding contract, and we have noted his own version of the matter, but there is still other testimony very significant. A letter from his wife to his brother, the brother whose interest in the mine Bowman was carrying for a year, was produced, which is as follows:

"KNOXVILLE, *August* 21, 1882.

"Dear Jemmie: I have just received a letter from Will, in which he tells me I was mistaken about his securing B.'s interest in the Col. Sellers. He only had the written promise of it. The deed has not been delivered to him. In my letter to-day he tells me to caution all of our home folk not to mention the success of the prospect, and adds 'If you have said anything to home folk about the Col. S. caution them not to mention it whatever they do, for if it should get to St. L. and

to B.'s ears, it might cause me considerable trouble and expense to get him out of the contract. Please caution the family not to mention it until I get a deed from B.'

"I am sorry I have said anything about it, but as I have for pity's sake do not tell it, or if, like myself you have said anything to Fannie or Mr. McM., do write immediately and ask them to keep it secret, so much depends upon a rigid silence. As Will said, if Mr. Bowman hears it, he can cause him a great deal of trouble to say nothing of the expense. I feel dreadfully and I shall never again put myself in this position. I am going to the 'Quarry' early to-morrow to caution mother and father. Do help me to keep this business as quiet as possible. You see at a glance how much depends upon it. My sister is not so well to-day, although she is better than when I first came. With love, and an earnest request that you will burn this as soon as received, I am, hastily and truly,

"ANNIE."

And a letter of date August 28, from this same brother, James M. Patrick, to his wife, in which he says: "Willie has written to Annie (and she to me) telling her that there was an interest in the Col. Sellers which he wished to buy before the news of the strike got out, and wanted her and I to keep the matter quiet for a few weeks until he could get the deed." These letters show that it was known in the family that mineral had been discovered, and discovered long enough before August 21 for two or three letters to have passed between Knoxville and Leadville. Patrick had not, as shown by these letters, secured Bowman's interest. He had, it is true, received a letter from Bowman of July 16, in which the latter expressed his willingness to sell, said that he would not stand in his (Patrick's) way, and that if he (Patrick) wished any papers signed, to send them to him. In other words, he knew that Bowman was willing to sell, and had so expressed himself; he had not bought, and wanted the matter kept secret until the purchase was consummated.

Taking these letters in connection with the correspondence which passed between these parties and Patrick's own tes-

timony, it seems to me strange to say that there was a "completed understanding." It will not do to hold that, because Patrick had received Bowman's declaration of his willingness to sell — a declaration made in ignorance of any discovery of mineral — he, Patrick, could mentally accept Bowman's offer, and, without disclosing the fact that mineral had been discovered, proceed to secure a conveyance.

For these reasons I dissent from the opinion of the court, and I am authorized to say that the Chief Justice concurs in this dissent.

MR. JUSTICE FIELD did not sit in this case, and took no part in its decision.

METROPOLITAN BANK *v.* ST. LOUIS DISPATCH COMPANY.

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

No. 224. Argued April 20, 1893. — Decided May 10, 1893.

Courts of equity in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern actions at law.

A suit in equity to enforce a mortgage of the plant and good will of a newspaper published in Missouri, and of the accompanying membership in the Western Associated Press, which is commenced eight years after the right of action accrued, during which period the property had changed hands, and the original plant had been used up and new matter put in its place, is barred by the statute of limitations of that State, so far as it rests upon the theory of conversion of the properties by the defendant; and, so far as it proceeds upon the theory that the plant, the good will and the membership ought on equitable principles to be held subject to the lien of the mortgage, a court of equity must decline to assist a complainant who sleeps so long upon his rights, and shows no excuse for his laches.

THE Metropolitan National Bank of New York filed its bill of complaint against the St. Louis Dispatch Company, a cor-

poration organized under the laws of the State of Missouri; the Dispatch Publishing Company, a corporation likewise organized under the laws of that State, and H. L. Sutton, trustee, a citizen of Missouri, July 1, 1887, and an amended bill, April 21, 1888, which averred: "That on or about the first day of June, A.D. 1877, the said 'The St. Louis Dispatch Company' owned a certain daily evening newspaper in the city of St. Louis known as the 'St. Louis Dispatch,' and no other property whatsoever unconnected with and not appurtenant to the publication and operation of said newspaper; that the said 'The St. Louis Dispatch,' a newspaper, had been published continuously and daily for many years, to wit, since on or about the year 1852, and continued to be published daily excepting Sundays, up to the date hereinafter mentioned; that the said 'The St. Louis Dispatch,' a newspaper, was on the first day of June, A.D. 1877, a fully equipped journal, having a building under lease, all the machinery, type, presses, cases, forms, paper, furniture and tools useful or necessary for the printing and publishing of the same, a good circulation and advertising patronage, (known as its good will,) and a share of stock, in the Western Associated Press, under which it was entitled to receive telegraphic news and dispatches collected from all parts of the world, as hereinafter more particularly set forth."

That on said first day of June the St. Louis Dispatch Company, by deed of trust in the nature of a mortgage, duly recorded, conveyed to Henry L. Sutton as trustee the following-described property: The machinery, type, presses, cases, furniture, paper, forms and tools, together with the good will of the St. Louis Dispatch Company and its franchises of every kind and description, rights, privileges, and property, including its interest in the Western Associated Press, and any and all shares by it owned in the Western Associated Press; as also all accounts and choses in action or other valuable things by it owned or to it belonging wherever situated; as "also all other property of every other nature and character which the said party of the first part may acquire during the existence of this deed of trust;" to secure the payment of a note, dated

that day, to the order of Frank J. Bowman for the sum of $15,000, payable two years and six months after date, with interest at nine per cent per annum, payable one and one-half per cent on the first days of August, October, December, February, April, and June of each year until the payment of the principal sum; which note so secured was negotiated for value, and complainant became the legal holder thereof for value before maturity.

That at the time of the execution of said mortgage the Western Associated Press was a corporation organized under the laws of the State of Michigan, the sole purpose and object of its existence being "to procure intelligence for the newspaper press from all parts of the world, by telegraph, express, mail, or otherwise; and membership in said association was and is limited generally and specifically to owners and proprietors of newspapers and publishers of periodicals."

That at that date and prior thereto the St. Louis Dispatch Company was the legal owner on the books of the Western Associated Press of one share of stock, so called, in said association, (which was of great value,) represented by a certificate of membership, No. 38, which was upon the execution of the mortgage placed in the possession of the trustee with the following endorsement: "The within certificate of stock is hereby assigned and transferred to Henry L. Sutton, trustee in deed of trust bearing date June 1st, 1877, for like purposes as other property therein named is transferred, being the certificate of stock in the Western Associated Press therein referred to."

The bill then stated that on February 2, 1878, the St. Louis Dispatch Company made a second mortgage, conveying all of the property described in the first, and other property subsequently acquired, to a trustee in trust to secure another loan made by it, which was duly recorded, and under which a sale of the property took place December 9, 1878, (the sale so made being subject to the first mortgage,) one Arnold being the purchaser, who on the same day transferred it to Joseph Pulitzer.

That at the time of the sale, John A. Dillon was the owner

and publisher of a certain newspaper known as the "Evening Post," and was printing and publishing the same in the city of St. Louis; that the Post was the rival and competing newspaper with the Dispatch, and did not, nor did Dillon, own a membership in the Western Associated Press, nor any right to the telegraphic news and dispatches thereof; that neither the Post nor Dillon, in the business of carrying on and publishing the Post, had any presses, type, or paraphernalia for the printing or publication of a newspaper; that the Post had not been established but a few months before the said sale of the Dispatch newspaper, and had nothing of value, nor had the said Dillon, in connection with said publication, excepting a small circulation and advertising patronage and the name of the Post.

That on December 10, 1878, the said Dillon and the said Pulitzer consolidated the Post and the Dispatch, and on that day published a consolidated paper under the name of the "Post-Dispatch," and that Dillon acquired whatever interest in the Dispatch property came to him with full notice of the lien of the first mortgage and subject thereto.

It was further averred that on December 11, 1878, the "Dispatch Publishing Company" was organized as a corporation under the laws of Missouri, the object of which was the publication of a newspaper to be known and called the "Post and Dispatch;" that on that day, Pulitzer and Dillon, having consolidated the two papers, transferred the same to the Dispatch Publishing Company, which took the same subject to the mortgage on all the property of the "St. Louis Dispatch Company," and with full knowledge thereof; that thereupon, on the same day, the defendant, the Dispatch Publishing Company, entered into the possession of the building theretofore occupied by the St. Louis Dispatch Company in the publication of the St. Louis Dispatch, and of the good will of that newspaper, with the presses, type, etc., and all the rights, property, and franchises thereof, including the membership in the Western Associated Press represented then by certificate No. 38; that the Dispatch Publishing Company has ever since had the good will of the Dispatch Company, and the name

"Dispatch," and used the same building formerly occupied by the St. Louis Dispatch Company. The bill further alleges that the Dispatch Publishing Company paid the interest on the Bowman note on the first days of February, April, June and October, 1879, but the remaining instalment, payable on December 1, 1879, being the date on which the principal became due, they refused to pay, as also the principal; that upon such refusal the trustee, Sutton, demanded of the Dispatch Publishing Company the property of the St. Louis Dispatch Company, including its good will and all the property recited in the first mortgage, which the Dispatch Publishing Company wholly refused to surrender. That at that time the Dispatch Publishing Company had alienated, destroyed, or gradually used up all the machinery, type, presses, and property of a perishable nature of the St. Louis Dispatch Company.

The bill also averred that the good will of the St. Louis Dispatch newspaper was its chief element of value; that the good will so acquired by the Dispatch Publishing Company, of the St. Louis Dispatch Company, has been in the constant use and control of the first-named company, and has never been alienated; that the name of a newspaper is valuable and salable, and that the Dispatch Publishing Company acquired its name under the second mortgage, subject to the lien existing upon it, and still retains the name, "Dispatch," in the publication of its newspaper.

That the machinery, presses, etc., acquired by the purchase under the second mortgage by the Dispatch Publishing Company, it continued to use for a long time, but substituted new paraphernalia for publication from time to time, and that on the date of the maturity of the note the Dispatch Publishing Company had none of the original paraphernalia described in the first deed of mortgage; that the effect of the acquisition of the two properties known as the Evening Post and the St. Louis Dispatch was that the lien of the first mortgage attached to all the property of the Dispatch Publishing Company, and that the latter recognized the validity of the mortgage lien by paying the interest on the mortgage

debt and the assessment on the membership in the Western Associated Press; that the complainant and the trustee were induced by its conduct to believe that the Dispatch Publishing Company would pay the debt or surrender the property in case of a failure of compliance with the conditions of the trust deed; that the Dispatch Publishing Company continued to recognize the mortgage as a lien on said property, including the membership, up to the maturity of the note, when it refused to pay the same or surrender the property; that, for the reason that the good will and other property of the mortgagors was confused and intermingled with the property of the Dispatch Publishing Company so as to be incapable of separation or distinction therefrom, the property and good will of the latter ought in equity to be charged with the lien of the mortgage debt; and that at the time of the acquisition of said mortgaged good will, etc., the Dispatch Publishing Company agreed and assumed to pay said debt.

The bill further averred "that a membership in the Western Associated Press is always represented by a certificate of a share of stock therein, and that under the by-laws and constitution of said Western Associated Press, said membership is tenable and vendible only in connection with the publication of a newspaper or periodical, and in the manner laid down in the said constitution and by-laws which are herewith filed and made a part of this complaint and marked Exhibits F & G." And further, "that under the by-laws and articles of incorporation aforesaid, the legal title to said certificate of membership aforesaid could never have vested fully in any individual, firm or corporation until, and after said individual, firm or corporation should have become the purchaser of the good will and property of said St. Louis Dispatch Company and as successor in right and liability to said company; and if, after any sale whether of foreclosure or otherwise, the purchaser of said property did not continue a publication in connection therewith, the said membership would become lifeless and valueless because a publication in connection with it was and is necessary to the sustenance of its life and value; that the said trustee and complainant herein have no rights in

respect to said membership, except under said deed of trust, and can acquire no title thereto until a sale of the good will of the St. Louis Dispatch Company, now in possession of the defendant Dispatch Publishing Company, at which time the title intended to be conveyed to the complainant herein by said deed of trust would be effectuated to the purchaser of the good will and property of said St. Louis Dispatch Company."

That one year after the Dispatch Publishing Company had been in the use and enjoyment of the membership in the Western Associated Press, represented by certificate No. 38, it applied to the association for the issue of a new certificate, and the association issued to the Dispatch Publishing Company a new certificate, and placed the name of that company upon its books as a member in virtue of the right acquired as successor to the St. Louis Dispatch Company, which membership was represented by certificate No. 64, but was the same membership as that represented by certificate No. 38; that the assessments on the membership had always been paid by the Dispatch Publishing Company; and that said company, by using the membership for one year, without applying for a new certificate or to have its name placed on the books of the Western Associated Press as the successor of the St. Louis Dispatch Company, acknowledged the title of the latter.

The prayer was that the Dispatch Publishing Company be decreed to pay the complainant $15,000, with interest at the rate of nine per cent per annum since October 1, 1879, and that, to make that sum, the good will of the Dispatch Publishing Company be sold; also the personal property used by it in connection with its business and certificate No. 64 in the Western Associated Press. To this amended bill a demurrer was filed and sustained, and a final decree of dismissal rendered. Among other exhibits the by-laws of the Western Associated Press were filed with the bill and made a part thereof, and these provided, among other things, as follows:

"I. — Membership. Any proprietor of a daily newspaper who has heretofore signed the articles of association and is now an active member of the same, and his lawful assigns,

and any such person or firm or corporation within the territory of the Western Associated Press who shall hereafter be admitted in accordance with these by-laws, shall be a member of the association, provided that no new member shall be elected except upon the terms prescribed by Article XV.

"II. — Stock. The evidence of membership shall consist of a certificate of one share of the capital stock of the association, which certificate shall be transferable only on the books of the association as hereinafter provided."

"XII. — Transfers. Any member selling or transferring his newspaper may transfer his certificate of stock to the purchaser or successor in the ownership of such newspaper, and it shall be the duty of the secretary, upon request, to transfer the same on the books of the association to such purchaser or successor, who shall then sign the articles of association and by-laws and become a member, with the same rights and privileges as the original member. If any member shall discontinue the publication of a newspaper, or shall sell his newspaper to another member, his membership shall cease, and his certificate of stock shall be cancelled on the books of the association, and the treasurer shall refund to him the money paid to the association for the same."

"XIV. — Assessments. The board of directors shall have power to make assessments upon the members to defray the expenses incurred in collecting and transmitting intelligence, and for other purposes not inconsistent with the charter and by-laws, and the board may discontinue the use of the news so collected to any member failing to pay promptly his assessment. Any member to whom the use of the news has been so discontinued may be readmitted to the use of the same, within six months of the time of such discontinuance, upon his refunding to the other members of the association in the same city or town such increased assessment as they may have paid in consequence of said discontinuance.

"XV. — Admission of New Members. Applications for membership in this association shall be made in writing to the board of directors, and if a majority of said board shall vote for the admission of the applicant, he shall sign the

articles of association and by-laws, and pay into the treasury the sum of ten dollars or an additional amount equal to what would be his *pro rata* share in the property of the association. It shall then be the duty of the secretary to issue to him a certificate of one share of stock, and to enroll his name in the list of membership: *Provided*, That no new members shall be admitted without the unanimous consent of the members in the city or town where his business is carried on."

The opinion of the court, by Judge Thayer, will be found reported in 36 Fed. Rep. 722.

From the decree dismissing the bill an appeal was taken to this court, and while pending here a stipulation was filed setting forth the dissolution by decree of court of the Dispatch Publishing Company and the successorship thereto of the Pulitzer Publishing Company, as the owner and publisher of the newspaper and of the membership in the Western Associated Press, which had issued to said company a certificate April 2, 1892, numbered 93. The appearance of the new corporation and of two directors of the dissolved company as parties defendant was entered.

Mr. John M. Dickson for appellant.

Mr. C. E. Gibson for appellee. *Mr. C. Gibson* was with him on the brief.

Mr. Chief Justice Fuller delivered the opinion of the court.

In the language of counsel for appellant this bill "was filed for the foreclosure of a mortgage upon a certain newspaper, a newspaper plant, and a membership in the Western Associated Press." The contention is that the newspaper, plant, and membership were subject to the lien of the Sutton mortgage as one homogeneous property, and that any property of like kind substituted for any portion lost or destroyed became subject to this lien; that the identity of the newspaper, the membership, and the plant, remained up to July 1, 1887, when

the bill was filed, and that the defendant was estopped to deny such identity because of the similarity of the names; the wilful confusion of the good wills; the obtaining of the second certificate in lieu of the first; and because from the character of the plant all the changes made were in the nature of repairs, parts being replaced from time to time by reason of constant wear and tear, from which resulted a confusion of chattels, making the identification of the several parts of the plant impossible.

On December 1, 1879, when the note matured, and the defendant, the Dispatch Publishing Company, refused to pay it or to surrender the property on the demand of the trustee, the bill stated that none of the original presses, type, and paraphernalia for printing a newspaper, described in the mortgage, were in existence. The bill was not framed on the theory of holding the defendant for the value of the mortgaged chattels on the ground of wrongful conversion, nor was it charged that there was any wrongful intermingling of the original plant with that subsequently acquired, either by the St. Louis Dispatch Company, or the purchaser under the second mortgage, or his grantee, the Dispatch Publishing Company. The allegation was that the machinery, type, presses, and property of a perishable nature had been alienated or destroyed or gradually used up. This was done in the course of business, and as the plant on hand at the maturity of the note was an entirely new plant, not described in the mortgage, we think the mortgage could not be extended to it upon the theory of wilful intermingling. The clause in the Sutton mortgage in relation to after-acquired property was an executory agreement for the non-performance of which the mortgagee might recover compensation in damages as against the mortgagor, but as against the grantee of the purchaser at the sale, the lien of the mortgage could not embrace what had no existence when it was given, and was not acquired by the mortgagor, and if such grantee were liable at all it would be for the conversion of the existing property, and no foundation for such a charge is laid here, irrespective of the objection that the remedy would be at law.

Undoubtedly, good will is in many cases a valuable thing, although there is difficulty in deciding accurately what is included under the term. It is tangible only as an incident, as connected with a going concern or business having locality or name, and is not susceptible of being disposed of independently. Mr. Justice Story defined good will to be "the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessity, or even from ancient partialities or prejudices." Story Part. § 99.

As applied to a newspaper, the good will usually attaches to its name rather than to the place of publication. The probability of the title continuing to attract custom in the way of circulation and advertising patronage, gives a value which may be protected and disposed of, and constitutes property.

On the 9th of December, 1878, the St. Louis Dispatch Company ceased business as the publisher of a newspaper, and on that day another newspaper was published under the name of the Post-Dispatch. If the Dispatch Publishing Company acquired the good will of the St. Louis Dispatch Company, it also acquired the good will of the Post. The Sutton mortgage covered the good will of the St. Louis Dispatch, but it did not embrace the good will of the Dispatch Publishing Company or of the newspaper known as the Post-Dispatch, as existing July 1, 1887. Indeed, if there had been no consolidation with any other paper, and the good will that the St. Louis Dispatch had in 1878 had been conveyed to a separate concern, it could hardly be held that the good will of the latter eight years afterwards was the same good will which had been conveyed. Moreover, the good will of the Dispatch Publishing Company was from the first different from the good will named in the mortgage.

The paper was of a different name and issued by a different company and the good will was the joint good will, as we have said, of two papers. And if the Dispatch Publishing Company acquired on the 10th day of December, 1878, the good will belonging to the St. Louis Dispatch, for which it should have accounted, but refused to account, then it would be only liable as for a conversion, for the lien of the mortgage certainly could not extend to a good will which there was no pretence was ever embraced in it.

However, it is urged that the Dispatch Publishing Company did in fact acquire the place of business of the St. Louis Dispatch Company and the existing plant with the good will attached thereto, subject to the lien of the first mortgage; that when it consolidated the property and good will so acquired with the property and good will of the other newspaper, it retained the word "Dispatch" as part of the name; that it paid the interest up to October 1, 1879; and that its conduct was such as to amount to a direct representation to the mortgagee that it had agreed to put itself in the shoes of the mortgagor. Hence it is contended that the averment of the bill that the Dispatch Publishing Company agreed and assumed to pay the mortgage debt was justified as a legal conclusion upon the principle of estoppel. We do not concur in this view. It is admitted that there was no express or direct promise on the part of the defendant to pay the mortgage debt, and it cannot be held that the mere purchase of premises subject to a mortgage renders the purchaser personally liable to the mortgagee, as having assumed to pay it, or that the mere payment of interest in itself imposes that liability. *Elliott* v. *Sackett*, 108 U. S. 132; *Drury* v. *Hayden*, 111 U. S. 223; *Hall* v. *Morgan*, 79 Missouri, 47, 52.

There was no personal connection between the Dispatch Publishing Company and the complainant, and it is not charged that there was any representation that that company would be personally responsible for the debt, or that property acquired by it from other sources, and not embraced in the mortgage, should be subject to the mortgage lien. No fraud is alleged, but, in effect, only that the complainant was misled

by the payment of interest. What beneficial course the complainant was prevented from pursuing by reliance on the conduct of the Dispatch Publishing Company prior to the maturity of the note does not appear; but it does appear that on December 1, 1879, the Dispatch Publishing Company refused to pay the note and the last instalment of interest, and refused to surrender the property. Yet the complainant did not file this bill until nearly eight years afterwards. Clearly that delay is not attributable to the payment of interest nor to any conduct of the Dispatch Publishing Company prior to December 1, 1879. After that date the latter company confessedly held adversely to complainant, and it is difficult to see why any claim in respect of either the plant or the good will of the St. Louis Dispatch is not barred.

Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statutes of limitation which govern actions at law. In many other cases they act upon the analogy of cases at law; but even when there is no such statute governing a case, a defence founded upon the lapse of time and the staleness of the claim is available in equity. *Godden* v. *Kimmel*, 99 U. S. 201; *Speidel* v. *Henrici*, 120 U. S. 377.

Under the statute of limitations of Missouri, actions upon any writing, whether sealed or unsealed, for the payment of money or property, must be commenced within ten years, and actions for taking, detaining, or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract, must be brought within five years. Rev. Stats. Missouri, 1879, §§ 3229, 3230.

If the original plant were wrongfully used up, or by the consolidation the good will of the St. Louis Dispatch Company was wrongfully appropriated, the Dispatch Publishing Company became responsible as for a conversion. The rule in relation to wrongful admixture of property had no application; and it is not perceived how the act of appropriation in relation to either the plant or the good will could be made to operate, nearly eight years after adverse possession commenced, to extend the lien of the mortgage over property not

embraced in it. If the use of the word "Dispatch" in the title of the new newspaper became wrongful after the Dispatch Publishing Company refused to pay the note or to surrender the property, then the complainant should have made its objections promptly known and sought the appropriate remedy; but this it did not do, and it would be inequitable to accord relief by injunction after the lapse of so many years and the inevitable changes in the condition of the property. Such relief, however, is not invoked in this case, and the right to it, if it existed, would furnish no aid to the application to foreclose. It is very clear that the Circuit Court was right in holding that there was no plant or good will, the sale of which could be decreed.

The case stands on no different ground in respect of the membership in the Western Associated Press. As averred in the bill, and as shown by the articles and by-laws, such membership was always represented by a certificate of a share of stock, and could be held and sold only in connection with the publication of a newspaper or periodical, and in the manner prescribed. The object of the association was "the procuring of intelligence for the newspaper press from all parts of the world by telegraph," and the holders of certificates of membership were entitled thereby to receive the news thus collected. Applications for admission were obliged to be made in writing to the board of directors, and if a majority of the board voted for the admission of the applicant, he then signed the articles of association and by-laws and paid into the treasury the sum of ten dollars and an additional amount equal to what would be his *pro rata* share in the property of the association, but no new member could be admitted without the unanimous consent of all the members in the town or city where his business was carried on. The 12th by-law provided, among other things, that "if any member shall discontinue the publication of a newspaper, or shall sell his newspaper to another member, his membership shall cease and his certificate of stock shall be cancelled on the books of the association, and the treasurer shall refund to him the money paid to the association for the same."

The St. Louis Dispatch Company ceased publication December 9, 1878, and it was averred that about one year thereafter the Dispatch Publishing Company, which during that year had been in the use and enjoyment of the membership without apparent change of ownership, procured the issue of a new certificate numbered 64. If, as alleged, the Dispatch Publishing Company acknowledged the title of the St. Louis Dispatch Company to the membership by continuing to use it, while standing in the name of the St. Louis Dispatch Company, it certainly disavowed it when it applied for a new certificate and to have its name placed upon the books of the association. The Associated Press in issuing that certificate admitted a new corporation to its membership, and that membership was not the same membership which was hypothecated to secure the Bowman note. It does not appear that the old certificate was cancelled, but as the publication of the St. Louis Dispatch had been discontinued and the membership in that sense had ceased by the terms of the by-laws, it is perhaps to be inferred that that had been done. Apparently the association had the right to accord or deny the privileges of membership as it saw fit, and whether its action in the admission of the new corporation to membership was wholly independent of certificate No. 38, or based upon the substitution of one share for the other, it would seem to follow, upon the assumption that a membership could be pledged or mortgaged without its consent, that the association was directly interested in the contention raised by the complainant in respect of that action, and that the Circuit Court was right in holding that the question ought not to be determined in the absence of the association as a party.

But in any view, the membership of the Dispatch Publishing Company was held adversely to the complainant. At the time the bill was filed, it had been so held for nearly eight years in the name of the Dispatch Publishing Company, which had paid all the assessments upon it and enjoyed all its privileges as the owner. If it obtained that membership under the by-laws without reference to certificate No. 38, then of course the bill as framed would fail, and if it had

been allowed to avail itself of the old membership, still its liability, if any, would be for a conversion, and the defences of laches and limitations would apply.

Viewed as an action for conversion, recovery was clearly barred as to the plant and the good will, and also as to this certificate, which was issued independently of the mortgage and not embraced within it. And so far as the bill proceeds upon the theory that the plant, the good will and the membership ought on equitable principles to be held subject to the lien of the mortgage, the court properly declined to assist a complainant that had slept upon its alleged rights for nearly eight years, and shown no excuse for its laches in asserting them. Cases sustaining the proposition that a mortgage may be foreclosed even after the debt has become barred by limitation have no application, nor does the fact that the Bowman note was still alive when the suit was instituted, since the question in this aspect is whether either or any of these alleged properties should on equitable grounds be brought within the operation of the mortgage, and upon that question we regard the delay of the complainant as an insuperable obstacle to a decree in its favor.

Decree affirmed.

CATES *v.* ALLEN.

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

No. 153. Argued March 22, 1893. — Decided May 10, 1893.

A contract creditor who has not reduced his claim to judgment has no standing in a Circuit Court of the United States, sitting as a court of equity, upon a bill to set aside and vacate a fraudulent conveyance.

Scott v. *Neely*, 140 U. S. 106, affirmed and applied.

Holland v. *Challen*, 110 U. S. 15, and *Whitehead* v. *Shattuck*, 138 U. S. 146, distinguished.

The fact that a court of chancery may summon a jury cannot be regarded as the equivalent of the right of a trial by jury, secured by the Seventh Amendment to the Constitution.

Statement of the Case.

When a suit over which a state court has full jurisdiction in equity is removed to a Circuit Court of the United States on the ground of diverse citizenship, and it appears that the courts of the United States have no jurisdiction in equity over such a controversy, the cause should be remanded to the state court, instead of dismissing it for want of jurisdiction.

R. C. CATES, D. Andrews and L. L. Cates, as individuals and as composing the firms of Luke Cates & Company and Andrews, Cates & Company, made their deed of assignment for the benefit of creditors, December 7, 1886, whereby they conveyed their property to assignees therein mentioned to be converted into money and applied to the payment of their debts, certain creditors being preferred. J. H. Allen, T. W. West, and J. C. Bush, citizens, respectively, of Louisiana, Missouri, and Alabama, and doing business in New Orleans as general commission merchants and cotton factors, under the name of Allen, West and Bush, filed their bill of complaint, December 8, 1886, in the chancery court of Lee County, Mississippi, against R. C. Cates, L. L. Cates, D. Andrews, and the assignees mentioned in the assignment, alleging an indebtedness to the complainants of more than $16,000 on open account, and charging that the assignment above mentioned was fraudulent in law and in fact; made without any valuable consideration; and with the fraudulent intent to hinder, delay, and defraud the complainants and other creditors; and that the same ought to be set aside and the property assigned subjected to the payment of complainants' demand. The bill also charged that one of the assignees, who at the time of the filing of the bill was in possession of a large part of the assigned property, was insolvent, and that it would be dangerous to allow him to remain in the possession and control thereof; that he was in possession of the books of account and choses in action of the assignors, and was proceeding to collect the same; that there was danger that they would be lost to complainants and the other creditors; and that irreparable injury might thereby result. The bill prayed for answers under oath, and that on final hearing the assignment might be decreed to be void and set aside; that all the property

Counsel for Appellants.

covered by the assignment might be subjected to the payment of complainants' debts and then to the payment of such other demands as might be brought before the court; for an injunction; for a writ of sequestration; for a receiver; that the filing of the bill be held to give complainants the first lien on the effects of the said debtors in the hands of the assignees, or either of the parties or any other person; and for general relief. A writ of sequestration was issued and the sheriff took possession of the property, and a number of other creditors were subsequently admitted as co-complainants.

On December 15, 1886, Allen, West, and Bush and their co-complainants filed their petition to remove the cause into the United States District Court for the Northern District of Mississippi, exercising the jurisdiction of a Circuit Court of the United States, and bond was given and the cause removed accordingly. Receivers were thereafter appointed, and on April 15, 1887, the Tishomingo Savings Institution, a preferred creditor, was made a defendant. A demurrer was filed alleging as grounds that there was no equity on the face of the bill; that the claims of complainants had not been reduced to judgment; that they had no lien and were not entitled to file a bill under the law; and for want of proper parties. This demurrer was overruled and defendants answered. Evidence was taken and hearing had, and on October 28, 1887, the court adjudged the assignment to be fraudulent and void, and set the same aside; found the sum of $17,732.71 to be due Allen, West, and Bush; decreed that indebtedness to be a first lien and charge on the assets of Andrews, Cates & Co.; and ordered the receiver to pay said sum out of the proceeds of the sales and collections of and from the assets of that firm. Various other orders were entered in that behalf and with reference to other funds and appropriations for the claims of other creditors, which it is unnecessary to notice. The report of the receiver showed amounts paid to Allen, West, and Bush of nearly $14,000.

Mr. E. H. Bristow, with whom was *Mr. W. B. Walker* on the brief, for appellants.

Argument for Appellees.

Mr. John M. Allen for appellees.

The first question presented in this case is one not altogether free from difficulty, and one which has not, so far as I am aware, been directly passed upon by this court. That is the question as to whether or not the United States equity court will entertain a suit properly begun in a state chancery court, and removed in accordance with the laws for removal of causes from state to Federal courts, where the Federal Court would not have taken original jurisdiction. I am aware that since the final decree in the case under consideration that in the case of *Scott* v. *Neely*, 140 U. S. 106, this court has decided that a simple contract creditor cannot avail himself of the rights given by sections 1843 and 1845 of the code of Mississippi by filing a bill in the United States court. If the principles laid down in this case are applicable to removed cases, it would seem to settle the jurisdictional question against us. I cannot believe, however, that this case is necessarily controlled by the reasoning in the case of *Scott* v. *Neely*. We have here a case properly brought and cognizable in the chancery court of Lee county, Mississippi. If the allegations of the bill were true it entitled us not only to have the assignment set aside but gave us a lien on all the property assigned from the filing of the bill, and entitled us to a decree for the amount of our debt, to be satisfied out of this property.

Now, then, being citizens of different States, from the appellants, the defendants below, and having a controversy with a sufficient amount in controversy, we were entitled under the removal statute to remove the case to the United States Circuit Court, and this we did. Now the question is: did we forfeit any of our rights by this removal?

Does the law give us the right to remove and then destroy every right we had in the state court by the removal? I am sure this cannot be the law. Counsel for appellants admit that there are some cases of which the Federal Court would not have had original jurisdiction, but of which they can acquire jurisdiction by removal, and they cite the following

cases in support of this position: *Barney* v. *Bank*, 5 Blatchford, 107; *Sayles* v. *Ins. Co.* 2 Curtis, 212; *Warner* v. *Railroad*, 13 Blatchford, 231. I have examined these cases, but I do not find that they disclose a distinction in principle between them and this case.

This court has said time and again that a person loses no right by coming into the United States court. If this be true, we have certainly lost none. We have the right in the state court to try the issues raised by our bill and to have a decree condemning the property and giving us our money if we proved our case. Now we had the right of removal. Did we loose our other rights by exercising the right of removal? Suppose the petition for removal had been made by the defendants in the court below. Who can say they were not entitled to remove their case to the United States court? Then if they had the right of removal, could they remove a case from a court in which their adversary had a good case to a court where by the act of removal the case was destroyed? This could not be. If such were the case it would furnish a new method of defence. Then so far as the proceeding in the United States court is concerned, it makes no difference which party removed the case.

The conclusions reached by this court in the case of *Scott* v. *Neely* were founded on the judiciary act of 1789, defining the jurisdiction of equity courts and the further reasoning that to enforce the Mississippi statute in the United States equity court would be to deprive parties of their constitutional right to a trial by jury. I recognize the soundness of the reasoning in that case, based on the Federal statutes defining the jurisdiction of equity courts; but it does seem to me that the removal statute being an enactment of equal dignity, and of a later date amounts to a modification of the act of 1789, which would give the United States equity court jurisdiction to try and dispose of this case.

So far as the constitutional objection, that the appellants were deprived of the right of trial by jury is concerned, I do not think it can avail the appellants in this case. I do not understand that because a case is tried on the equity side of

the docket, that a party is necessarily deprived of the right to try an issue properly triable by a jury.

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

Complainants were simple contract creditors, who had not reduced their claims to judgment, and therefore had no standing in the United States Circuit Court, sitting as a court of equity, upon a bill to set aside and vacate a fraudulent conveyance. The suit was originally brought in the state court under sections 1843 and 1845 of the Code of Mississippi of 1880, which provided that the chancery courts of that State should have jurisdiction of bills exhibited by creditors who had not obtained judgments at law, or, having judgments, had not had executions returned unsatisfied, to set aside fraudulent conveyances of property or other devices resorted to for the purpose of hindering, delaying, or defrauding creditors, and might subject the property to the satisfaction of the demands of such creditors as if the complainants had had judgment and execution thereon returned no property found; and that "the creditor in such case shall have a lien upon the property described therein from the filing of his bill, except as against *bona fide* purchasers before the service of process upon the defendant in such bill."

These sections were considered in *Scott* v. *Neely*, 140 U. S. 106, and it was therein determined that the Circuit Courts of the United States in Mississippi could not under their operation take jurisdiction of a bill in equity to subject the property of the defendants to the payment of a simple contract debt in advance of any proceeding at law, either to establish the validity or amount of the debt, or to enforce its collection. It was there shown that the Constitution of the United States, in creating and defining the judicial power of the general government, had established the distinction between law and equity, and that equitable relief in aid of demands cognizable in the courts of the United States only on their law side could not be sought in the same action, although allowable in the

state courts by virtue of state legislation; *Bennett* v. *Butterworth*, 11 How. 669; *Thompson* v. *Railroad Companies*, 6 Wall. 134; *Scott* v. *Armstrong*, 146 U. S. 499, 512; and that the Code of Mississippi in giving to a simple contract creditor a right to seek in equity, in advance of any judgment or legal proceedings upon his contract, the removal of obstacles to the recovery of his claim caused by fraudulent conveyances of property whereby the whole suit involving the determination of the validity of the contract and the amount due thereon is treated as one in equity to be heard and disposed of without a trial by jury, could not be enforced in the courts of the United States because in conflict with the constitutional provision by which the right to a trial by jury is secured.

The principle that a general creditor cannot assail as fraudulent against creditors, an assignment or transfer of property made by his debtor until the creditor has first established his debt by the judgment of a court of competent jurisdiction, and has either acquired a lien upon the property, or is in a situation to perfect a lien thereon and subject it to the payment of his judgment, upon the removal of the obstacle presented by the fraudulent assignment or transfer, is elementary. Waite on Fraud. Con. sec. 73, and cases cited. The existence of judgment, or of judgment and execution, is necessary, first, as adjudicating and definitely establishing the legal demand, and, second, as exhausting the legal remedy.

This was well settled in Mississippi prior to the enactment in question. In *Partee* v. *Mathews*, 53 Mississippi, 140, it was ruled by the Supreme Court that no creditor but one who has a lien by judgment or otherwise, in full force at the time the bill is filed, can attack in equity a transfer of property as fraudulent; and that, as between equitable and legal assets, the creditor must exhaust legal means, by the issue of execution and its return *nulla bona*, in order to reach the first, while, as to the latter, a judgment which acts as a lien on the property sought to be charged would be sufficient as the basis of a bill.

In *Fleming* v. *Grafton*, 54 Mississippi, 79, the subject was very much considered, and the English and American author-

ities cited to a large extent, and the opinion concludes: "Courts of equity are not ordinarily tribunals for the collection of debts; some special reason must be offered by the creditor before they will extend aid to him. If he is a judgment creditor, he must show that he has a lien, either by judgment, if the statute gives such lien; if it arises from the execution, he must show that one has been issued; or, if it arises from a levy of the writ, that must have been made."

In *Scott* v. *Neely*, it was said by Mr. Justice Field, (p. 113,) speaking for the court: "In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment, or, to speak with greater accuracy, there must be, in addition to such acknowledged or established debt, an interest in the property or a lien thereon created by contract or by some distinct legal proceeding. *Smith* v. *Railroad Co.*, 99 U. S. 398, 401; *Angell* v. *Draper*, 1 Vern. 398, 399; *Shirley* v. *Watts*, 3 Atk. 200; *Wiggins* v. *Armstrong*, 2 Johns. 144; *McElwain* v. *Willis*, 9 Wend. 548, 556; *Crippen* v. *Hudson*, 3 Kernan, 161; *Jones* v. *Green*, 1 Wall. 330. . . . It is the existence, before the suit in equity is instituted, of a lien upon or interest in the property, created by contract or by contribution to its value by labor or material, or by judicial proceedings had, which distinguishes cases for the enforcement of such lien or interest from the case at bar."

The mere fact that a party is a creditor is not enough. He must be a creditor with a specific right or equity in the property; and this is the foundation of the jurisdiction in chancery, because jurisdiction on account of the alleged fraud of the debtor does not attach as against the immediate parties to the impugned transfer, except in aid of the legal right.

Doubtless new classes of cases may by legislative action be directed to be tried in chancery, but they must, when tested by the general principles of equity, be of an equitable character, or based on some recognized ground of equity interposition. This will be found to be true of the decisions in

Holland v. *Challen*, 110 U. S. 15; *Whitehead* v. *Shattuck*, 138 U. S. 146, and like cases.

The fact that section 1845 aims to create a lien by the filing of the bill does not affect the question, for in order to invoke equity interposition in the United States courts the lien must exist at the time the bill is filed and form its basis, and to allow a lien resulting from the issue of process to constitute such ground would be to permit state legislation to withdraw all actions at law from the one court to the other, and unite legal and equitable claims in the same action, which cannot be allowed in the practice of the courts of the United States, in which the distinction between law and equity is matter of substance and not merely of form and procedure. And as the ascertainment of the complainants' demand is by action at law, the fact that the chancery court has the power to summon a jury on occasion cannot be regarded as the equivalent of the right of trial by jury secured by the Seventh Amendment. *Whitehead* v. *Shattuck*, 138 U. S. 146; *Buzard* v. *Houston*, 119 U. S. 347.

The result is that this decree must be reversed, as the case comes directly within *Scott* v. *Neely*, from the rule laid down in which we have no disposition to recede. It is suggested that the bill might be sustained under the prayer for general relief, as brought for the administration of the assets under the assignment, but such relief would not be agreeable to the case made by the bill, which was directed to the setting aside of that instrument. The Circuit Court was, therefore, in error in proceeding in the case.

The bill was originally filed in the state court and removed December 15, 1886, under the act of March 3, 1875, 18 Stat. 470, c. 137, on the ground of diverse citizenship. By the fifth section of that act, if, in any suit "removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, . . . the said Circuit Court shall proceed no further therein but shall dismiss

the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just." Under the act of March 3, 1887, 24 Stat. 552, c. 373, a Circuit Court may remand a case upon deciding that it was improperly removed. So far as citizenship and amount were concerned the plaintiffs were entitled to file their petition for removal, but the nature of the controversy was such that the suit was not properly cognizable in the Circuit Court for the reasons heretofore given. While there are cases where the courts of the United States may acquire jurisdiction by removal from state courts when jurisdiction would not have attached if the suits had been originally brought therein, those are cases of jurisdiction over the parties and not of jurisdiction based upon the subject-matter of the litigation, and furnish no rule for the disposition of cases such as that before us. But it is not to be concluded where diverse citizenship might enable the parties to remove a case but for the objection arising from the nature of the controversy, that, if such removal has been had, the suit must be dismissed on the ground of want of jurisdiction. On the contrary, we are of opinion that it is the duty of the Circuit Court under such circumstances to remand the cause. The Circuit Court has jurisdiction to determine whether or not the case was properly removed, and this court has jurisdiction to pass upon that determination.

In *Thompson* v. *Railroad Companies*, 6 Wall. 134, an ordinary action at law was brought in the state court and removed to the United States court, where a bill in equity was substituted by leave of court, and the suit progressed as a suit in chancery. It was held that the distinctions between the two kinds of proceeding could not be obliterated by state legislation, and the decree was reversed, and the cause remanded with directions to dismiss the bill without prejudice. In the case before us a bill in equity sustainable in the state court was removed by the complainants under the act of 1875, and it was the duty of the Circuit Court upon ascertaining that it was improperly removed to remand the case. Under the acts of Congress that court was not compelled to dismiss the case,

but might have remanded it, and we may, therefore, direct it to do now what should have been done in the first instance. *Mansfield, Coldwater &c. Railway* v. *Swan*, 111 U. S. 379.

It will be for the state court to determine what orders should be made, if any, in regard to the amounts complainants have received under the decrees of the Circuit Court. As the removal was upon the application of appellees, they must be cast in the costs.

The decree of the Circuit Court is accordingly reversed with costs against the appellees, and the cause remanded to the Circuit Court with directions to render judgment against them for costs in that court, and to remand the cause to the chancery court of Lee County, Mississippi, and it is so ordered.

Mr. Justice Brown, with whom concurred Mr. Justice Jackson, dissenting.

This was a bill in equity filed in the state court by creditors, to set aside an alleged fraudulent assignment, under a provision of the Mississippi Code, which gives the chancery court of that State jurisdiction of bills by creditors who have not obtained judgments, or, having judgments, have not had executions returned unsatisfied, to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of defrauding creditors. The case was removed to the Circuit Court of the United States under the act of 1875, the second section of which provides: "That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, . . . in which there shall be a controversy between citizens of different States, . . . either party may remove said suit," etc.

In the opinion of the court this case is controlled by that of *Scott* v. *Neely*, 140 U. S. 106, in which it was held that the Circuit Courts of the United States in Mississippi could not, under this provision of the code of that State, take jurisdic-

tion of a bill in equity to subject the property of the defendants to the payment of a simple contract debt of one of them in advance of any proceedings at law, either to establish the validity and amount of the debt, or to force its collection, for the reason that in such proceedings the defendant is entitled under the Constitution to a trial by jury of the existence or the amount of the debt. While I freely concede the general rule to be as stated, that a bill of this kind will not be entertained without a prior judgment and execution at law, I am unwilling to admit that the Federal courts are incompetent to administer a state law which provides that such a bill may be filed by a simple contract creditor, where the requisite diversity of citizenship exists, and the requisite amount is involved. In a case where such a bill was filed in the state court the statute then in force gave to either party the absolute right of removal of the suit to the Federal court, upon the clear assumption that the Federal court had the same power to administer the law that the state court had. I freely concede that, if the state system of jurisprudence should invest the court of chancery with an ordinary common law jurisdiction, as, for example, with jurisdiction of an action upon a promissory note, such cause, when removed to the Federal court, would simply be placed on the common law side, and be tried by a jury. But in this case the jurisdiction of the Federal court as a court of chancery may be supported, not only upon the ground that the proof of the debt is merely an incidental feature of the bill, but upon the further ground, stated in the statute, that "the creditor in such case shall have a lien upon the property described therein from the filing of his bill," etc., a fact which in *Case* v. *Beauregard*, 101 U. S. 688, was held to obviate the necessity of a prior judgment and execution.

I had always supposed it to be a cardinal rule of Federal jurisprudence that the Federal courts are competent to administer any state statute investing parties with a substantial right. As was said in *Ex parte McNiel*, 13 Wall. 236, 243: "A state law cannot give jurisdiction to any Federal court, but that is not a question in this case. A state law may give

a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our National jurisprudence. A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality." So also in *Davis* v. *Gray*, 16 Wall. 203, 221: "A party by going into a National court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals." So also in the case of *Broderick's Will*, 21 Wall. 503, 520, it is said that "whilst it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of Circuit Courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the State." In the case of *Holland* v. *Challen*, 110 U. S. 15, a statute of Nebraska providing that an action might be brought and prosecuted to a final decree by any person claiming title to real estate, whether in actual possession or not, against any person claiming an adverse estate or interest therein, for the purpose of determining such estate and interest, and quieting title, was held to be enforceable in the Federal courts, although it dispensed with the general rule of equity that, in order to maintain a bill to quiet title, it was necessary that the party should be in possession, and that his title should have been established by law. The statute under consideration merely dispenses with the general rule of courts of equity that in order to maintain a creditor's bill a prior judgment and execution at law is necessary, and the case appears to me to be directly in point.

In this case the court of equity proceeds to establish the debt, not as a personal judgment against the debtor, which may be sued upon in any other court, but for a purpose special to that case, in order to reach property which has been fraudulently conveyed and to appropriate it to the payment of the debt. If the object of the proceeding were the establishment of a debt for all purposes, which should become *res adjudicata* in other proceedings, and be suable elsewhere as an established claim against the debtor, or were not a mere incident to the chancery jurisdiction, I can understand why the constitutional provision might apply. But in this case I see no more reason for requiring a common law action to establish the debt than in case of the foreclosure of a mortgage or the enforcement of a mechanics' lien, where proof of an existing debt is equally necessary to warrant a decree. In *Stewart* v. *Dunham*, 115 U. S. 61, a bill in equity was filed by creditors in the chancery court of Mississippi under this statute, was removed to the Circuit Court of the United States, and was prosecuted to a decree in that court, although it is but just to say that no question seems to have been made with regard to the jurisdiction in this particular. The same may be said of *Dewey* v. *West Fairmont Gas Coal Co.*, 123 U. S. 329, in which a bill under a similar statute of West Virginia was sustained in an opinion by Mr. Justice Matthews. Indeed, proceedings under these statutes, which are common to many of the States, are in the nature of an equitable attachment, and operate to impound the debtor's property for the payment of the claim.

The logical consequence of the position assumed by the court in this case is that it is compelled to remand the case for a reason entirely outside of the removal acts, and thus to deny to the removing party the benefit of the act. I understand the duty imposed by the fifth section of the act to remand a cause which it appears "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court," to be limited to disputes or controversies not within the jurisdiction of the Circuit Court by reason of the requisite citizenship not really existing, or being collusively obtained, as in *Hawes* v. *Oakland*, 104

U. S. 450, or where, upon an examination of the record, the requisite amount is found not to have been involved, as in *Walter* v. *Northeastern Railroad*, 147 U. S. 370.

I have never known of a Federal court admitting its inability to do justice between the parties and remanding the case upon that ground. In *Thompson* v. *Railroad Companies*, 6 Wall. 134, it appeared only that a civil action, removed from a state court, which was essentially a common law action, could not be proceeded with in a Federal court as an equity case — a proposition I certainly should not deny. Indeed, in that case it was said that "as the action was a purely legal one, if they [the plaintiffs] could have maintained it in their names in the state courts, they had an equal right to maintain it in their names when it arrived in the Federal court." The only error was in not proceeding with it as a common law action in the Federal court.

I am authorized to state that MR. JUSTICE JACKSON concurs in this dissent.

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

PETITION FOR A REHEARING OF A CASE DECIDED MARCH 6, 1893, AND REPORTED 148 U. S. 92.

No. 94. Submitted April 27, 1893. — Decided May 15, 1893.

The city of St. Louis is authorized by the Constitution and laws of Missouri, to impose upon a telegraph company putting its poles in the streets of the city, a charge in the nature of rental for the exclusive use of the parts so used.

THE defendants in error in this cause, decided on the 6th of March last and reported 148 U. S. 92, having asked leave to file a petition for a rehearing, the court, in granting leave, also gave the parties leave to file briefs on the question: "Whether the city of St. Louis has such interest in and

Counsel opposing the petition.

control over the streets, alleys and public places within its limits as authorizes it to impose upon the telegraph company a charge in the nature of rental for the exclusive use of portions thereof in the manner stated."

Mr. John F. Dillon, *Mr. Rush Taggart* and *Mr. Elenenious Smith* for petitioner filed a brief citing: Scheme and Charter of the city of St. Louis, adopted August, 1876, 2 Rev. Stats. Missouri, 1879, p. 1572; Constitution of Missouri, Art. IX, § 23, Art. XII, § 20; *St. Louis* v. *Bell Telephone Co.*, 96 Missouri, 623; *Julia Building Association* v. *Bell Telephone Co.*, 13 Mo. App. 477; *S. C.* affirmed 88 Missouri, 258; *Glasgow* v. *St. Louis*, 87 Missouri, 678; *Belcher Sugar Refining Co.* v. *St. Louis Grain Elevator Co.*, 101 Missouri, 192; *Lackland* v. *Northern Missouri Railroad*, 31 Missouri, 180, 185; *Glaessner* v. *Anheuser-Busch Brewing Association*, 100 Missouri, 508, 514; *Cummings* v. *St. Louis*, 90 Missouri, 259; *Matthews* v. *Alexandria*, 68 Missouri, 115; *Ferrenbach* v. *Turner*, 86 Missouri, 416; *Atlantic & Pacific Railroad* v. *St. Louis*, 66 Missouri, 228.

They contended that these cases showed conclusively: (1) That under the provisions of the "Scheme and Charter" of 1876, as well as the charters of the city that existed prior to that date, the superior and paramount control of the streets of the city of St. Louis is in the public represented by the Legislature of the State: (2) That the city has absolutely no power to rent, lease or in any manner convey any portion of the streets of the city for any use inconsistent with the public street uses proper: (3) That the city has no power to lease or in any manner dispose of any portion of the streets for private purposes; and only so far as public enterprises are concerned to the extent specially delegated: (4) That so far as a municipal corporation of the State of Missouri is concerned, it has not the power to rent portions of the street in the manner in which it has power to rent its unoccupied buildings, park privileges, etc.

Mr. W. C. Marshall filed a brief opposing.

Opinion of the Court.

BREWER, J. In the opinion heretofore announced it was said: "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 in this respect and represents the public in relation thereto." A petition for a rehearing has been filed, in which it is claimed that the court misunderstood the position of counsel; and, further, that in fact the city of St. Louis has no such control. Leave having been given therefor briefs on the question whether such control exists have been filed by both sides, that of the Telegraph Company being quite full and elaborate.

We see no reason to change the views expressed as to the power of the city of St. Louis in this matter. Control over the streets resides somewhere. As the legislative power of a State is vested in the legislature, generally that body has the supreme control, and it delegates to municipal corporations such measure thereof as it deems best. The city of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the legislature, but it framed its own charter under express authority from the people of the State, given in the constitution. Sections 20 and 21 of Article 9 of the Constitution of 1875 of the State of Missouri authorized the election of thirteen freeholders to prepare a charter to be submitted to the qualified voters of the city, which, when ratified by them, was to "become the organic law of the city." Section 22 provided for amendments, to be made at intervals of not less than two years and upon the approval of three-fifths of the voters. Sections 23 and 25 required the charter and amendments to always be in harmony with and subject to the constitution and laws of Missouri, and gave to the general assembly the same power over this city, notwithstanding the provisions of this article, as was had over other cities. In pursuance of these provisions of the constitution a charter was prepared and adopted, and is, therefore, the "organic law" of the city of St. Louis, and the powers granted by it, so far as they are in harmony with the constitution and laws of the State, and have not been set aside by any act of the general assembly, are the powers vested in the city. And this charter is an or-

ganic act, so defined in the constitution, and is to be construed as organic acts are construed. The city is in a very just sense an "*imperium in imperio*." Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter.

An examination of this charter (2 Rev. Stat. Mo. 1879, pp. 1572, and following) will disclose that very large and general powers are given to the city, but it would unnecessarily prolong this opinion to quote the many sections defining these powers. It must suffice to notice those directly in point. Paragraph 2 of section 26 of article 3 gives the mayor and assembly power, by ordinance "to establish, open, vacate, alter, widen, extend, pave, or otherwise improve and sprinkle all streets, avenues, sidewalks, alleys, wharves, and public grounds and squares, and provide for the payment of the costs and expenses thereof in the manner in this charter prescribed; and also to provide for the grading, lighting, cleaning and repairing the same, and to condemn private property for public uses, as provided for in this charter; to construct and keep in repair all bridges, streets, sewers and drains, and to regulate the use thereof," &c. The 5th paragraph of the same article grants power "to license, tax, and regulate . . . telegraph companies or corporations, street railroad cars," &c. Article 6 treats of public improvements, including the opening of streets. Section 2 provides for condemning private property, and "for establishing, opening, widening or altering any street, avenue, alley, wharf, market place or public square, or route for a sewer or water pipe." By section 4, commissioners are to be appointed to assess the damages. By section 5, it is made the duty of these commissioners to ascertain the actual value of the land and premises proposed to be taken, and the actual damages done to the property thereby; "and for the payment of such values and damages to assess against the city the amount of benefit to the public generally, and the balance against the owner or owners of all property which shall be especially benefited by the proposed improvement in the opinion of the commissioners, to the amount that each lot of such owner shall be benefited by the improvement." Except, therefore,

for the special benefit done to the adjacent property, the city pays out of its treasury for the opening of streets, and this power of the city to open and establish streets, and the duty of paying the damages therefor out of the city treasury, were not created for the first time by this charter, but have been the rule as far back as 1839.

Further than that, with the charter was, as authorized by the constitution, a scheme for an enlargement of the boundaries of the city of St. Louis, and an adjustment of the relations consequent thereon between the city and the county. The boundaries were enlarged, and by section 10 of the scheme it was provided that —

"SEC. 10. All the public buildings, institutions, public parks, and property of every character and description heretofore owned and controlled by the county of St. Louis within the limits as extended, including the court-house, the county jail, the insane asylum, and the poor-house, are hereby transferred and made over to the city of St. Louis, and all the right, title and interest of the county of St. Louis in said property, and in all public roads and highways within the enlarged limits, is hereby vested in the city of St. Louis, and divested out of the county; and in consideration of the city becoming the proprietor of all the county buildings and property within its enlarged limits, the city hereby assumes the whole of the existing county debt and the entire park tax." (2 Rev. Stat. Mo. 1879, p. 1565.)

Obviously, the intent and scope of this charter are to vest in the city a very enlarged control over public property and property devoted to public uses within the territorial limits.

It is given power to open and establish streets, to improve them as it sees fit, and to regulate their use, paying for all this out of its own funds. The word "regulate" is one of broad import. It is the word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply

regulates the use when it prescribes the terms and conditions upon which they shall be used. If it should see fit to construct an expensive boulevard in the city, and then limit the use to vehicles of a certain kind or exact a toll from all who use it, would that be other than a regulation of the use? And so it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been to in opening and improving the street. Unless, therefore, the telegraph company has some superior right which excludes it from subjection to this control on the part of the city over the streets, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of the streets was within the grant of power to regulate the use. That the company gets no such right from the general government is shown by the opinion heretofore delivered, nor has it any such from the State. The law in force in Missouri from 1866, gives certain rights in streets to "companies organized under the provisions of this article." Of course, the defendant, a corporation organized under the laws of the State of New York, can claim no benefit of this. It is true that, prior to that time, and by the act of November 17, 1855, (2 Rev. Stat. Mo. 1855, p. 1520,) the right was given to every telegraph corporation to construct its lines along the highways and public roads; but that was superseded by the legislation of 1866; and when in force it was only a permission, a license, which might be revoked at any time; and, further, whatever rights, if any, this defendant may have acquired to continue the use of the streets already occupied at the time of the revision of 1866, it cannot with any show of reason be contended that it received an irrevocable power to traverse the State and occupy any other streets and highways.

Neither have we found in the various decisions of the courts of Missouri, to which our attention has been called, any denial of the power of the city in this respect. It is true, in *Glasgow* v. *St. Louis*, 87 Missouri, 678; *Cummings* v. *St. Louis*, 90 Missouri, 269; *Glaessner* v. *Brewing Association*, 100 Missouri,

508; and *Belcher Sugar Refining Co.* v. *St. Louis &c. Grain Elevator Co.*, 101 Missouri, 192, the power of the city to devote the streets or public grounds to purely private uses was denied; but in the cases of *Julia Building Association* v. *Bell Telephone Co.*, 88 Missouri, 258, and *St. Louis* v. *Bell Telephone Co.*, 96 Missouri, 623, it was expressly held that the use of the streets for telephone poles was not a private use, (and of course telegraph poles stand on the same footing,) and that a private corporation carrying on the public service of transportation of messages might be permitted to use the streets for its poles. Counsel rely strongly upon the latter of these cases, in which the power of the city to regulate the charges for telephone service was denied. But obviously that decision does not cover this case. The relation of a telephone or telegraph company to its patrons, after the use of the streets has been granted, does not affect the use, and power to regulate the use does not carry with it by implication power to regulate the dealings between the corporation having such use and its individual patrons; but what the company shall pay to the city for the use is directly involved in a regulation of the use. The determination of the amount to be paid for the use is as much a matter of regulation as determining the place which may be used or the size or height of the poles. The very argument made by the court to show that fixing telephone charges is not a regulation of the use, is persuasive that fixing a price for the use is such a regulation. Counsel also refer to the case of *Atlantic and Pacific Railroad* v. *St. Louis*, 66 Missouri, 228, but there is nothing in that case which throws any light upon this. In that it appeared that there was an act of the legislature giving to the railroad company a specific right in respect to the construction of a track within the city limits, and it was held that the company was entitled to the benefit of that act, and to claim the right given by the general assembly, although it had after the passage of the act proceeded in the construction of the track under an ordinance of the city purporting to give it the privilege. But, as we have seen, the act of November 17, 1855, vested in defendant no general and irrevocable power to occupy the streets in

any city in the State through all time. We find nothing, therefore, in the cases cited from the Missouri courts which militates with the conclusions we have drawn as to the power of the city in this respect.

One other matter deserves notice: It will be seen by referring to our former opinion that one of the contentions of the counsel for the telegraph company was that by ordinance No. 11,604 the city had contracted with the company to permit the erection of these poles in consideration of the right of the city to occupy and use the top cross-arm free of charge. We quote this statement of counsel's claim from their brief: "Ordinance 11,604 granted defendant authority to set its poles in the streets of the city without any limitation as to time, for valuable considerations stipulated; and having been accepted and acted on by defendant, and all of its conditions complied with, and the city having acquired valuable rights and privileges thereunder, said ordinance and its acceptance constitute a contract, which the city cannot alter in its essential terms without the consent of the defendant; nor can it impose new and burdensome considerations." And in respect to this, further on they say: "No question is or can be raised as to the validity of the contract made by ordinance No. 11,604, and its acceptance." But if the city had power to contract with defendant for the use of the streets, it was because it had control over that use. If it can sell the use for a consideration, it can require payment of a consideration for the use; and when counsel say that no question can be made as to the validity of such a contract, do they not concede that the city has such control over the use of the streets as enables it to demand pay therefor?

The petition for a rehearing is

Denied.

PORTER v. SABIN.

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

No. 221. Argued April 19, 20, 1893. — Decided May 15, 1893.

After a state court has appointed a receiver of all the property of a corporation, and while the receivership exists, stockholders of the corporation cannot bring a suit against the officers in a court of the United States for fraudulent misappropriation of its property, without making the receiver, as well as the corporation, a party to the suit; although the state court has denied a petition of the receiver for authority to bring the suit, as well as an application of the stockholders for leave to make him a party to it.

THIS was a bill in equity, filed September 9, 1887, and amended January 7, 1888, in the Circuit Court of the United States for the District of Minnesota, by Henry H. Porter and Ransom R. Cable, citizens of Illinois, and stockholders in the Northwestern Manufacturing and Car Company, a corporation of Minnesota, in behalf of themselves and of all other stockholders in that corporation, against Dwight M. Sabin, its former president, and Joseph C. O'Gorman, its former auditor and treasurer, and both citizens of Minnesota. The amended bill made that corporation, and the Minnesota Thresher Manufacturing Company, also a corporation of Minnesota, parties defendant, and alleged in substance as follows:

That Sabin and O'Gorman, as such officers of the Northwestern Company, during the period from 1882 to May 10, 1884, had the entire control and management of its business, and, without the authority or knowledge of the corporation or of its board of directors, or of these plaintiffs, fraudulently issued large amounts of its commercial paper for the benefit of other companies, and, in order to conceal their fraudulent transactions, made false entries in the books of the corporation, by reason of all which it became insolvent and its capital was wholly lost.

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That on May 10, 1884, upon proceedings commenced against the corporation by some of its creditors in a court of the State of Minnesota, Edward S. Brown was appointed receiver of its estate and effects, and had since had the custody and possession thereof.

That on September 6, 1887, the plaintiffs caused to be presented to the state court a petition of the receiver, stating that he had been requested by the plaintiffs and others to commence a suit against Sabin and O'Gorman to recover from them such sums of money and the value of such property as had been lost to the corporation by their official misconduct, and did not deem it expedient to do so without the sanction of the court, and praying the court to make such order in the premises as it might deem expedient; that the petition of the receiver was opposed by a majority of the stockholders of the corporation, acting under the influence and in the interest of Sabin and O'Gorman, and was denied by the court.

"That, because of the unauthorized and fraudulent acts of said officers as aforesaid, and of the loss sustained by the Northwestern Manufacturing and Car Company in consequence thereof, a right of action exists in favor of said corporation against said officers to recover the amount of such loss; that, upon the appointment of a receiver of said corporation as aforesaid, such receiver was primarily the proper person to bring such a suit; that having made application to said receiver to bring such suit, which application has been duly presented to the court and authority to bring such action having been refused," these plaintiffs, "acting in their own behalf, and in behalf of the other stockholders of said corporation if they should choose to come in and be made parties to these proceedings, have the right to maintain said action for the common benefit of all parties interested in the result thereof."

That after the filing of the original bill, and on the same day, the plaintiffs applied to the state court for an order permitting the receiver to be made a party to the bill; that the application was opposed by Henry D. Hyde, claiming to represent creditors and stockholders, and particularly the

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Minnesota Thresher Manufacturing Company; and that the court denied that application, as well as a further application then made by the plaintiffs to exclude, from a contemplated order of sale then pending before it, the cause of action set out in the bill, and all other actions which stockholders might maintain in right of the corporation.

That the Northwestern Company had never been dissolved by any legal authority, and was still in existence; but that all its property and tangible assets had been placed in the hands of the receiver appointed by the state court, and under an order of that court had been sold by public auction as a whole, and delivered to the purchaser.

That the Minnesota Thresher Manufacturing Company was organized, under a general statute of Minnesota, for the purpose of purchasing at judicial sale all the stock and assets of the Northwestern Company, including its good will, and of continuing the business of that company, except the manufacture of cars; that Sabin and O'Gorman, for the purpose of suppressing inquiry into their official acts and misconduct, obtained control of the direction and management of the Minnesota Company, and procured that company to apply to the state court for an order directing the sale of the assets and rights of action of the Northwestern Company, as a whole; that the court, notwithstanding the plaintiffs "protested against such sale of all of said assets, and particularly the sale of such rights of action as the stockholders would have a right to maintain in the name of said corporation if the corporation itself was unable or unwilling to do so, or if the receiver was not authorized to do so," made an order for the sale of the entire assets of the corporation as a whole, described in the order of sale as follows: "All the stock, property, things in action, and effects of the defendant, the Northwestern Manufacturing and Car Company, of which E. S. Brown has been appointed receiver in this action, or to which the receiver may be entitled as the same shall exist at the time of such sale, including all real estate, buildings, machinery, tools, patterns, fixtures, materials, articles manufactured, unmanufactured, or in process of manufacture, cash

in hand, book accounts, letters patent, choses in action, bills receivable, and all other property, assets, claims, liens and demands of every name and nature, either in law or equity, and wherever situate;" that said property was accordingly sold on October 27, 1887, to Hyde, as agent and trustee for the Minnesota Company, for the sum of $1,105,000; that the court afterwards confirmed the sale, and directed the receiver, upon payment of the purchase money, to deliver to the purchaser all the assets included in the order of sale, which had not yet been delivered; and that the Minnesota Company was a party to the fraudulent scheme of Sabin and O'Gorman, and was not a purchaser in good faith, and acquired no title to the right of action involved in this suit.

"That the rights of action involved in this suit are of such a character that they can only be prosecuted by the corporation or its receiver or some one or more of its stockholders; and that it is not such an action or right of action as the corporation itself or its receiver, acting under the direction of the court, could sell or transfer to a purchaser so as to qualify such purchaser with the right to maintain such action and thereby deprive the stockholders of their rights in the premises."

The bill prayed for an account against Sabin and O'Gorman, and for payment and distribution of the sums thereupon found due; and that the Minnesota Company be declared to have no interest in this cause of action, or, at most, an interest subordinate to that of the plaintiffs and other stockholders who might become parties; and for further relief.

The defendants demurred to the bill: 1st. For want of jurisdiction, because the state court which appointed the receiver was the only court having jurisdiction in the premises. 2d. For want of equity. 3d. Because the receiver was a necessary party.

The Circuit Court sustained the demurrer, and dismissed the bill. 36 Fed. Rep. 475. The plaintiffs appealed to this court.

Mr. J. M. Flower for appellants.

Argument for Appellants.

I. The amended bill sets forth an equitable right of action. It is well settled that fraudulent or unauthorized acts of directors or officers of a corporation are injuries to the corporation, to remedy which the corporation may bring suit, as if the wrongs were inflicted by third parties. The transactions which brought about the condition of affairs described in the bill were very numerous, and to ascertain and establish the extent of the losses inflicted upon the company thereby, as well as the methods adopted to cover up and conceal the same, involves the examination of very long and complicated accounts. Equity will, unquestionably, take jurisdiction on the ground of fraud, the necessity for an accounting, and because the rights and interests of numerous stockholders, to say nothing of creditors, are at stake, for which there is really no remedy elsewhere.

II. The complainants are entitled to bring this suit. When corporate directors have committed breaches of trust, either by their frauds, *ultra vires* acts or negligence, and the corporation is unable or unwilling to institute a suit to remedy the wrong, a single stockholder may institute that suit, suing on behalf of himself and other stockholders and for the benefit of the corporation, to bring about a redress of the wrong done directly to the corporation, and indirectly to all stockholders. *Atwool* v. *Merryweather*, L. R. 5 Eq. 464 *n*, 468; *Dodge* v. *Woolsey*, 18 How. 331; *Hawes* v. *Oakland*, 104 U. S. 450.

As to when a formal demand upon a corporation, or its board of directors, to bring suit, may be dispensed with by the stockholders before commencing suit, the general doctrine seems to be, that when *fraud* and acts *ultra vires* are complained of, and the directory, or a majority of the stockholders, or the management of the corporation, is under the control of the guilty parties, the court will not require that demand should be made upon them to institute an action, in the name of the corporation, to convict themselves of fraud, before the jurisdiction of an equitable tribunal can be invoked by an innocent and injured stockholder. *Hawes* v. *Oakland*, 104 U. S. 450; *Tazewell Co.* v. *Farmers' Loan & Trust Co.*, 12 Fed. Rep. 752; *Heath* v. *Erie Railway*, 8 Blatchford, 347.

III. The receiver is not a necessary party to this suit. The circumstances surrounding this case are so exceptional in their character that no settled law of adjudication ought to be arbitrarily applied, if it be within the legitimate exercise of the powers of the court to create an exceptional rule which, while protecting the delinquent parties in the enjoyment of all their legal rights and providing for an equitable distribution of the fund, shall afford ample opportunity for a judicial investigation and determination of the fraudulent acts complained of.

Mr. Cushman K. Davis for appellees.

Mr. Frank B. Kellogg filed a brief for Sabin and O'Gorman, appellees.

Mr. Frank W. M. Cutcheon filed a brief for The Minnesota Thresher Manufacturing Co., appellee.

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

The right to maintain a suit against the officers of a corporation for fraudulent misappropriation of its property is a right of the corporation; and it is only when the corporation will not bring the suit, that it can be brought by one or more stockholders in behalf of all. *Hawes* v. *Oakland*, 104 U. S. 450. The suit, when brought by stockholders, is still a suit to enforce a right of the corporation, and to recover a sum of money due to the corporation; and the corporation is a necessary party, in order that it may be bound by the judgment. *Davenport* v. *Dows*, 18 Wall. 626. If the corporation becomes insolvent, and a receiver of all its estate and effects is appointed by a court of competent jurisdiction, the right to enforce this and all other rights of property of the corporation vests in the receiver, and he is the proper party to bring suit, and, if he does not himself sue, should properly be made a defendant to any suit by stockholders in the right of the corporation. All this is admitted in the plaintiffs' bill, as well as in the brief and argument submitted in their behalf.

Opinion of the Court.

The grounds on which they attempt to maintain this suit are that the court which appointed the receiver has denied his petition for authority to bring it, as well as an application of the plaintiffs for leave to make him a party to this bill.

Their position rests on a misunderstanding of the nature of the office and duties of a receiver appointed by a court exercising chancery powers, and of the extent of the jurisdiction and authority of the court itself.

In *Brinckerhoff* v. *Bostwick*, 88 N. Y. 52, and *Ackerman* v. *Halsey*, 10 Stewart, (37 N. J. Eq.) 356, cited for the plaintiffs, in which stockholders of a national bank were permitted to bring such a suit when a receiver had refused to bring it, the receiver was not appointed by a judicial tribunal, but by the comptroller of the currency, an executive officer.

When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. *Wiswall* v. *Sampson*, 14 How. 52, 65; *Peale* v. *Phipps*, 14 How. 368, 374; *Booth* v. *Clark*, 17 How. 322, 331; *Union Bank* v. *Kansas City Bank*, 136 U. S. 223; *Thompson* v. *Phenix Ins. Co.*, 136 U. S. 287, 297.

It is for that court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation, the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him. *Barton* v. *Barbour*, 104 U. S. 126; *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593, 601.

The reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the administration by that court of the estate in the receiver's hands to be interfered with, by a court of the United States, deriving its authority from another government, though exercising jurisdiction over the same territory. The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remains in its custody, to be administered and distributed by it. Until the administration of the estate has been completed and the receivership terminated, no court of the one government can by collateral suit assume to deal with rights of property or of action, constituting part of the estate within the exclusive jurisdiction and control of the courts of the other. *Wiswall* v. *Sampson*, *Peale* v. *Phipps* and *Barton* v. *Barbour*, above cited; *Williams* v. *Benedict*, 8 How. 107; *Pulliam* v. *Osborne*, 17 How. 471, 475; *People's Bank* v. *Calhoun*, 102 U. S. 256; *Heidritter* v. *Elizabeth Oil Cloth Co.*, 112 U. S. 294; *In re Tyler*, *ante*, 164.

The state court, upon further hearing or information, may hereafter reconsider its former orders, so far as no rights have lawfully vested under them, and may permit its receiver to sue or be sued upon any controverted claim. But should it prefer not to do so, the right of action of the corporation against its delinquent officers, like other property and rights of the corporation, will remain within the exclusive jurisdiction of that court, so long as the receivership exists.

It is not material to the decision of this case whether the sale of the entire assets of the corporation by order of the state court did or did not pass this right of action to the purchaser. If it did, neither the corporation, nor the receiver or any other person asserting this right in its behalf, can maintain an action thereon. If it did not, the right of action remains part of the estate of the corporation within the exclusive custody and jurisdiction of the state court.

Decree affirmed.

BIBB *v.* ALLEN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 269. Argued April 28, 1893. — Decided May 10, 1893.

Motions to suppress depositions for irregularities should be made before the case is called for trial, so that opportunity may be afforded to correct the defects or to retake the testimony.

A variance between the notice and the commission to take depositions such as misspelling the commissioner's name in the latter, affords no valid ground for the suppression of the depositions.

Where a principal sends an order to a broker doing business in an established market or trade, for a deal in that trade, he thereby confers upon the broker authority to deal according to any well-settled usage in such trade or market, especially when such usage is known to the principal, and is fair in itself, and does not change any essential particular of the contract between the principal and the broker, or involve any departure from the principal's instructions; provided the transaction for which the broker is employed be lawful in character and is not violative of good morals or public policy.

In an action by A., a cotton broker doing business on the New York Cotton Exchange, against B. for moneys claimed to be due for advances and commissions on account of various transactions for B. in selling as his agent cotton for future delivery, it was not error to admit in evidence the statutes of New York under which the said Cotton Exchange was organized, together with the rules and regulations of that body in pursuance of which the transactions in question were conducted, it appearing that B. knew that A. when acting as his agent, would transact the business through that Exchange, and in accordance with its rules and regulations.

By the agreed use of Shepperson's code, which provided that "unless otherwise stated as agreed, it is distinctly understood that all orders sent by this chapter are to be subject in every respect to the by-laws and rules of the market where executed," and further, that "with every telegram sent by this table the following sentence will be read as a part of the message, viz., this sale has been made subject to all the by-laws and rules of our cotton exchange in reference to contracts for the future delivery of cotton," the rules and regulations which were authorized to be made by the statutes of New York, under which the exchange was incorporated, entered into and formed a part of the transactions in this case.

Contracts for the future delivery of personal property which the vendor does not own or possess, but expects to obtain by purchase or otherwise,

Statement of the Case.

are valid, if at the time of making the contract an actual transfer of the property is contemplated by at least one of the parties to the transaction.

Slip contracts, in the form prescribed by the rules and regulations of the Cotton Exchange, constitute bought and sold notes, which, taken together, as they should be, afford a sufficient memorandum in writing between the brokers, or their principal, and the vendee of the cotton to satisfy the requirements of the statute of frauds.

The defence of the statute of frauds cannot be set up against an executed contract.

The employment of a broker to sell property for future delivery implies not only an undertaking to indemnify the broker in respect to the execution of his agency, but also implies a promise on the part of the principal to repay or reimburse him for such losses or expenditures as may become necessary or result from the performance of the agency.

B. and H. being sued as partners, and it appearing from the proof that H. was not a partner but merely a clerk, no objection to the misjoinder having been made by either of the defendants, judgment for the whole amount was properly entered against B., a substantial cause of action having been established.

The case of *Irwin* v. *Williar*, 110 U. S. 449, distinguished.

The defendants in error, citizens of the States of New York and Tennessee, and doing business in the city of New York as brokers, commission merchants, and cotton factors, under the firm name and style of Richard H. Allen & Company, brought this action of assumpsit, in February, 1887, against the plaintiff in error and one Hopkins, citizens of Alabama, as partners under the name of B. S. Bibb & Company, to recover the sum of $20,023.50 with interest, which was claimed as commissions for services rendered, and money paid and advanced by them for, and at the request of, the defendants in selling, for their account and as their agents, cotton for future delivery according to the rules and regulations of the New York Cotton Exchange, in the city of New York.

The declaration or complaint was in the usual form, and contained but a single count for work and labor done, services rendered, and money paid out and expended by the plaintiffs during the month of December, 1886, at the instance and request of the defendants, to the amount of $20,023.50, which, with interest thereon, was averred to be past due and unpaid. The defendants answered separately. Neither of them de-

nied the existence of a partnership between them, but both defended upon the merits. The answer of the defendant Hopkins consisted of two pleas: (1) non-assumpsit; (2) that the plaintiffs did not do the work and labor or pay the money mentioned in the complaint at his instance or request. The defendant Bibb filed an answer containing five pleas, the first two of which were the same as those interposed by Hopkins. His third plea was a general denial of the allegations of the complaint, while the fourth and fifth averred that the work and labor performed by the plaintiffs, as set forth in their declaration, was the making of eleven wagers for him on the price of cotton, and that the money paid by the plaintiffs for him was in the settlement of the losses of those wagers, and in each of these pleas the statute of the State of New York against wagers, bets, and gambling transactions was set out.

After issue joined on the pleas, the defendant Bibb, by leave of the court, filed a sixth plea, setting up that on November 10, 1886, the plaintiffs, as special agents for him, sold 10,000 bales of cotton by various contracts, as a speculation, and for future delivery in New York, and averred that the plaintiffs by their gross negligence and unskilfulness made said contracts in such forms that all of said contracts, under the laws of the State of New York, were unlawful and void, and not binding on any one of the parties to said contracts, or either of them, in this, that in and by the statute law of New York, in force at the time said contracts were made, it is declared that "every contract for the sale of any goods, chattels, or things in action, for the price of $50 or more, shall be void unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive a part of such goods, or the evidences or some of them of such things in action; or (3) unless the buyer shall at the time pay some part of the purchase money." It was further averred that no note or memorandum of any of the contracts of sale, made by plaintiffs for defendant, was made in writing and signed by the parties to be charged thereby, that no part of said

cotton was accepted by the buyer, and no part of the purchase money was paid therefor. The plea further alleged that on December 30, 1886, the plaintiffs, without the request of the defendants, but voluntarily, settled said void contracts, and paid to the buyers of the cotton under such contracts large sums of money, and concluded with the averment that, without this, the plaintiffs never did any work, or paid any money for the defendant.

Upon the trial of the cause before the court and a jury, the court, after stating to the jury that there was no evidence in the case upon which a verdict for the defendant Bibb could rest, on the ground that the contract sued on was a gambling contract and therefore void, further instructed them that "the defendant Bibb did not in his testimony deny the correctness of the account sued on, but did say that the plaintiffs were liable to him for their failure to execute his subsequent orders to them to sell, for future delivery, some twenty-two thousand bales of cotton, as shown in the evidence in this cause; but there being no claims by him in this suit against the plaintiffs on account of such failure to execute such orders, 'I charge you that if you believe the evidence you should find a verdict for the plaintiffs against the defendant Bibb for the amount of the account and interest.'" The court further charged the jury: "This case is made out as to defendant B. S. Bibb, and it is your duty to find a verdict against him for the account sued on and interest."

To the instruction that if they believed the evidence they should find a verdict for the plaintiffs against him for the account sued on and interest, the defendant Bibb excepted. The jury returned the following verdict: "We the jury, find for the plaintiffs against the defendant Bibb, and assess the damages at $22,476.38, and we find for the defendant T. H. Hopkins on the ground that he was not a partner of B. S. Bibb." Upon a return of this verdict the defendant Bibb objected to a judgment being rendered against him thereon, for the reason that the complaint and pleadings and said verdict did not authorize a judgment against him. No other ground of objection was stated or interposed. The court over-

Argument for Plaintiffs in Error.

ruled his objection, and entered judgment against him for the amount found by the jury, to which Bibb excepted. The present writ of error was prosecuted by him to reverse that judgment.

Mr. E. W. Pettus, (with whom was *Mr. George H. Craig* on the brief,) for plaintiffs in error.

The deposition of Richard H. Allen should have been suppressed. It was attempted to be taken according to the laws of Alabama instead of pursuant to the statutes of the United States. The alleged commission was issued to George H. Carey instead of to George H. Corey, the commissioner named in the notice served upon counsel for defendants. For these and other reasons a motion to suppress the deposition was made "before the trial commenced."

Whether the New York Cotton Exchange was incorporated or was a mere voluntary association was immaterial to any question in this case. The admission in evidence of the statutes of New York under which it was organized, together with the rules and regulations pursuant to which the business of the Exchange was conducted was therefore error. Nor did it matter that the transactions in question were conducted in accordance with the then prevailing course of business of the Exchange. The attempt was to prove a custom or course of business of a merely temporary character. *United States* v. *Buchanan*, 8 How. 82. Custom or course of business cannot change the law, nor make a contract valid, which the statute declares void.

The "slip contracts" admitted in evidence could not and do not constitute a sufficient note or memorandum in writing to satisfy the statute of frauds of the State of New York. They do not contain in themselves the whole of the contract. *Wright* v. *Weeks*, 25 N. Y. 153; *Williams* v. *Morris*, 95 U. S. 444, 454, 456. The contract to be valid need not necessarily be contained in one writing, but when contained in more than one writing such writings cannot be connected by parol evi-

dence merely. *Wright* v. *Weeks*, 25 N. Y., *supra*; *Carter* v. *Shorter*, 57 Alabama, 253; *Carroll* v. *Powell*, 48 Alabama, 298; *Adams* v. *McMillan*, 7 Porter, (Ala.,) 73. Both parties must be named in the written contract. An agent is entitled to his commissions only on due performance of all duties of his agency. These contracts being void and not enforceable in the courts of the State where made plaintiffs are not entitled to recover from defendants.

If Allen & Co. had made these sales for Bibb in legal form, and had then paid the losses for Bibb the law would have implied a promise on Bibb's part to pay Allen & Co. But the contracts were void under the statutes of frauds of New York. Allen & Co. were not legally bound to pay the losses, hence if they paid the money it was without actual request on part of Bibb, and without any implied promise on his part to repay them.

This declaration was against Bibb and Hopkins as partners, under the style of Bibb & Company; the verdict is against Bibb alone. It is conclusively established by the verdict that there was no such contract made by the *partnership* as alleged in the complaint, hence there is no cause of action which will serve to support the recovery adjudged. *Walker* v. *Mobile Marine Dock and Ins. Co.*, 31 Alabama, 529, 531.

Mr. A. A. Wiley for defendants in error.

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

The plaintiff in error has filed nineteen assignments of error, which may be grouped under five heads or propositions, viz.: (1) that the court erred in overruling the motion to suppress the deposition of the witness Richard H. Allen; (2) that the court erred in admitting as evidence the statutes of New York, under which the New York Cotton Exchange was incorporated, and the rules and regulations of the Exchange, together with the parol testimony that the transactions in

question between the parties were conducted in accordance with those rules and regulations; (3) that the contracts for the sale of cotton for future delivery were gambling contracts within the meaning of the New York statute against wagers, bets, etc.; (4) that said contracts were invalid under the statute of frauds of the State of New York; and (5) that under the pleadings no judgment could be rendered against the defendant Bibb alone.

The questions thus presented may be properly considered in the order stated, under the facts disclosed by the bill of exceptions. The motion to suppress the deposition of the witness Richard H. Allen was based on the ground that no commission was issued out of the court, or by the clerk thereof, authorizing George H. Corey, as commissioner, to take the deposition; and, secondly, that neither of the defendants or their attorneys received any notice of the time and place of taking the deposition, or of the residence of either the witness or the commissioner by whom the deposition was taken. These objections to the deposition are clearly not well taken, for several reasons: It is shown by the record that on April 7, 1888, a notice was issued and served on the defendants that plaintiffs would take the deposition of the witness Allen, whose place of business was stated in the notice to be 31 and 33 Broad Street, New York city; and that George H. Corey, whose place of business was 60 Wall Street, in that city, would be suggested as commissioner to take such deposition; and that a copy of the interrogatories to be propounded to the witness was attached to the notice. It further appears that at that time the defendant Bibb objected to a commission being issued to take the deposition on the interrogatories to be propounded by the plaintiffs, basing his objection on the ground that the notice did not give the residence of the witness and of the commissioner, and on the further ground that no sufficient affidavit for the taking of the deposition had been filed, which objections were manifestly insufficient, inasmuch as the place of business of both the witness and the commissioner was stated, and an affidavit was filed by the attorney for the plaintiffs which showed

proper ground for taking the deposition. Without invoking the action of the court upon these objections, the defendant Bibb filed cross-interrogatories to those propounded by the plaintiffs, and on April 18, 1888, a commission was regularly issued to said George H. Corey, as commissioner, to take the deposition on the interrogatories and cross-interrogatories filed, in accordance with the terms of the notice served upon the defendants. The record further shows that the deposition was actually taken in pursuance of the commission thus issued, and was in all respects regular and in proper legal form. The clerk of the court in issuing the commission addressed it, however, to George H. Carey, Esq., 60 Wall Street, New York city, instead of to George H. Corey, but that was purely a clerical mistake in making out the commission, and in no way misled the defendant or affected his rights. He had been notified of the place of taking the deposition, and been given the true name of the commissioner, and the slight variance in the commission which issued was not material, and furnished no valid ground for the suppression of the deposition. *Keene* v. *Meade*, 3 Pet. 1, 6.

But, aside from this, the motion to suppress the deposition came too late. As already said, the commission to take the deposition of said Allen was issued April 18, 1888. The deposition was taken before the proper commissioner on May 17, 1888, and, after transmission to the clerk of the court, was by him published, under a general order of the court, May 29, 1888. The May term of the court was then in session, and continued in session until July 8, 1888. The November term commenced on the first Monday of that month. During all that time the defendant Bibb made no objection to the deposition, and gave no notice that he would move to suppress it, but waited until January 10, 1889, the day set for the trial of the cause, when, after a motion for a continuance, then made, had been overruled, he, for the first time, moved to suppress the deposition. If the deposition was in any respect open to irregularities, the motion to suppress it, under the circumstances, came too late. Such motions should be made before the case is called for trial, so as to afford opportunity to retake

the testimony or correct defects in the taking of the deposition. *Howard* v. *Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, 205, and cases cited. The same rule of practice prevails in Alabama. *De Vendal* v. *Malone*, 25 Alabama, 272, 278; *Birmingham Union Ry. Co.* v. *Alexander*, 93 Alabama, 133. This assignment of error is, therefore, without merit.

The next assignment of error relied on is in the action of the court admitting in evidence the statutes of New York under which the New York Cotton Exchange was organized, together with the rules and regulations of that body under and in pursuance of which the transactions in question were conducted. This evidence was clearly competent and relevant, because the contracts entered into between Bibb & Company and the plaintiffs contemplated that the business which the plaintiffs would transact for their principals would be under, and in accordance with, the rules and regulations of the New York Cotton Exchange. It was proper, therefore, to show that this Cotton Exchange was a lawful body, organized for lawful business purposes, and had power to make such rules and regulations as might be deemed necessary and proper to carry out the purpose of its organization. It is clearly shown that B. S. Bibb & Company knew that the plaintiffs did business as cotton factors in that Exchange, and in accordance with those rules and regulations, and that, in acting as their agents in the sale of cotton for future delivery, they would transact the business through that Exchange, and in accordance with its rules and regulations. It was, therefore, germane to the issues in the case, and was both competent and relevant to prove that the contract between the parties had been carried out on the part of the plaintiffs in the mode and according to the methods contemplated by the parties. *Peabody* v. *Speyers*, 56 N. Y. 230, 236; *Nickalls* v. *Merry*, L. R. 7 H. L. 530, 542.

It is settled by the weight of authority that where a principal sends an order to a broker engaged in an established market or trade, for a deal in that trade, he confers authority upon the broker to deal according to any well-established usage in such market or trade, especially when such usage is known

to the principal, and is fair in itself, and does not change in any essential particular the contract between the principal and agent, or involves no departure from the instructions of the principal; provided, the transaction for which the broker is employed is legal in its character, and does not violate any rule of law, good morals, or public policy. We are of opinion, therefore, that the assignment of error based upon the admission of this testimony is not well taken.

Upon the third assignment of error, which presents the question whether the transactions in which the parties were engaged were illegal, because they were wagering contracts under the New York statute against wagers, bets, etc., the evidence in the case clearly fails to make out such a defence. In entering into their arrangement, it is shown by the correspondence and by other testimony in the case that there was no agreement or understanding between the plaintiffs and defendants that the cotton sold for future delivery was not in fact to be actually delivered. In their correspondence as to the terms on which the agency was to be undertaken the plaintiffs were distinctly informed that the defendants did a large business for the best and most reliable people of their locality; that they would hold themselves personally responsible for all orders sent, and hold their correspondents responsible for all orders executed as to margins; that they handled, sometimes, from 3000 to 5000 bales of cotton a day, and that their customers dealt in orders for from 500 to 1000 bales at a time, and were entirely responsible. It was also testified by both the plaintiffs and defendant Bibb that there was no understanding or agreement, either express or implied, between them at the time of entering upon the transactions or during their progress, that the cotton sold for account of the principals was not to be delivered at the time stipulated in the contracts of sale made for their account. It is not questioned that if the transactions in which the parties are engaged are illegal, the agent cannot recover either commissions for services rendered therein, or for advances and disbursements by him for his principal, (Story on Agency, §§ 330, 344, and authorities cited,) the reason for this rule being that in such illegal trans-

actions of which the agent has knowledge he is regarded as *particeps criminis*, which precludes him from the recovery of either commissions or advances. *Irwin* v. *Williar*, 110 U. S. 499, 510.

But the facts of this case do not bring the transactions in question within the operation of that principle, for the evidence set out in the bill of exceptions fails to show that either party to the transactions intended the same as wagering or gambling speculations. On the contrary, the undisputed testimony establishes that the sales were not wagers, but that the cotton was to be actually delivered at the time agreed upon. Bibb's own statement of the transactions does not disclose the fact that they were intended, even on his part, as gambling or wagering speculations. He certainly never disclosed to the plaintiffs, as his brokers, either in their correspondence or in their verbal communications, that he did not intend to deliver the cotton sold through them for future delivery. In addition to this, it is shown that the rules and regulations of the New York Cotton Exchange recognized no contracts except for the sale and purchase of cotton to be actually delivered. These rules and regulations impose upon the seller the obligation to deliver the cotton sold, and upon the purchaser the obligation to receive it, except in certain specified cases, which have no application to the present case.

These rules, which were authorized to be made by the statute of the State of New York, under which the Exchange was incorporated, enter into and form part of the contracts of sale in this case. The defendants in one of their earliest communications to the plaintiffs informed them that they would use in their telegraphic correspondence what was known as Shepperson's code, which provided that "unless otherwise stated as agreed, it is distinctly understood that all orders sent by this chapter are to be subject in every respect to the by-laws and rules of the market where executed;" and further, that "with every telegram sent by this table the following sentence will be read as a part of the message, viz., this sale has been made subject to all the by-laws and rules of

our cotton exchange in reference to contracts for the future delivery of cotton."

It is well settled that contracts for the future delivery of merchandise or tangible property are not void, whether such property is in existence in the hands of the seller, or to be subsequently acquired. 2 Kent's Com. 468, and authorities cited in notes; Benjamin on Sales, Am. ed. §§ 81, 82. It is further well settled that the burden of proof is upon the party who seeks to impeach such transactions by showing affirmatively their illegality. *Roundtree* v. *Smith*, 108 U. S. 269; *Dykers* v. *Townsend*, 24 N. Y. 57; *Irwin* v. *Williar*, 110 U. S. 499, 507, 508. In this latter case the trial court charged the jury that "the burden of showing that the parties were carrying on a wagering business, and were not engaged in legitimate trade or speculation, rests upon the defendant. On their face these transactions are legal, and the law does not, in the absence of proof, presume that the parties are gambling. "A person may make a contract for the sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personal property which the vendor does not own or possess, but expects to obtain by purchase or otherwise, is binding if an actual transfer of property is contemplated. A transaction which on its face is legitimate cannot be held void as a wagering contract by showing that one party only so understood and meant it to be. The proof must go further, and show that this understanding was mutual—that both parties so understood the transaction. If, however, at the time of entering into a contract for a sale of personal property for future delivery it be contemplated by both parties that at the time fixed for delivery the purchaser shall merely receive or pay the difference between the contract and the market price, the transaction is a wager, and nothing more. . . . It is not sufficient for the defendant to prove that Irwin & Davis never understood that they were to deliver wheat in fulfilment of the sales made for them by the plaintiffs. The presumption is, that the plaintiffs expected Irwin & Davis to execute their contracts, expected them to

deliver the amount of grain sold, and before you can find that the sales were gambling transactions and void, you must find from the proof that the plaintiffs knew or had reason to believe that Irwin & Davis contemplated nothing but a wagering transaction, and acted for them accordingly. If the plaintiffs made sales of wheat for Irwin & Davis for future delivery, understanding that these contracts would be filled by the delivery of grain at the time agreed upon, Irwin & Davis were liable to the plaintiffs, even though they meant to gamble, and nothing more."

This court approved that charge as a correct statement of the law upon the subject of what constitutes a wagering contract. It is directly in point here, for the evidence fails to show not only that Bibb & Company intended it as a wagering contract, but it fails to show also that the plaintiffs so understood it. The testimony establishes that the plaintiffs did not, in fact, so understand it.

It further appears that in the memorandum, or "slip contracts" of sale actually made by the plaintiffs for the account of Bibb & Company, the sales were described as made "subject to the rules and regulations of the New York Cotton Exchange." Under these circumstances we are of opinion that the testimony fails to establish that the contracts in question were wagering transactions, and therefore void. The testimony is so clear to the contrary that the court below, under the settled rules of this court, was certainly justifiable in not submitting that question to the jury; for if it had been submitted, and the jury had found that the contracts were wagers, it would have been the duty of the court to set aside their verdict. There is no merit in this assignment of error.

It is next urged, on behalf of the plaintiff in error, that the contracts for the sale of the cotton were void under the statute of frauds of the State of New York, because there was no sufficient note or memorandum in writing of the transactions signed by the parties to be charged thereby. We are of opinion that this contention cannot be sustained under the facts of the case.

After agreeing upon the terms in which the business should be transacted, and the use of Shepperson's code of cipher, B. S. Bibb & Company, on November 9, 10, and 11, 1886, telegraphed orders to the plaintiffs to sell for them in the aggregate 10,000 bales of cotton for January and February delivery. These despatches were sent according to the form of Shepperson's code, and directed the sales for delivery for account of designated names such as "Albert," "Alfred," "Alexander," "Amanda," "Andrew," "Winston," etc., which names were intended, and understood, to represent the firm name of B. S. Bibb & Company. Thus, under date of November 9, 1886, B. S. Bibb & Company telegraphed to plaintiffs: "If bureau report is considered favorable to-morrow sell for January delivery 1000 bales cotton account Albert. Sell for February delivery 1000 bales account Alfred. Sell for January delivery 1000 bales account Alexander. Sell for January delivery 500 bales cotton account Andrew. Act promptly if favorable." So under date of November 10, 1886, they telegraphed: "If market opens as high or higher to-morrow sell for January delivery 1500 bales cotton account Winston. Keep us thoroughly posted."

These despatches, as well as others of a similar character of later dates, meant "sell for January or February delivery the designated number of bales on account of B. S. Bibb & Company," and had attached to them, by the express terms of Shepperson's code, the understanding and agreement, already quoted, that the orders were to be subject in every respect to the by-laws and rules of the Cotton Exchange of New York, with the additional terms read into the telegrams, and as a part thereof, the stipulation that the sales were to be subject to said by-laws and rules in reference to the future delivery of cotton.

The plaintiffs executed these orders promptly as they were received. In the execution of the orders they made what are called "slip contracts" in duplicate, one copy signed by the purchaser being delivered to the plaintiffs, and the other, signed by the plaintiffs as brokers, being given to the purchaser. There were nineteen sales of cotton to various per-

sons named in these "slip contracts," which were in the following form:

"New York, Nov. 10, 1886.
"B 10, ac. Albert.
10 " Alexander.
5 " Andrew.
Seller, —— ——.
Buyer, Zerega & White.
On contract, subject to rules and regulations of New York Cotton Exchange.
Twenty-five hundred bales cotton.
Jan. 1 delivery.
Price 8.99.
× Per Z. & White, seventy-five."

These contracts differed only in date, in the name of the purchaser, in the quantity of cotton sold, and the price thereof. As each sale was thus made, it was reported promptly by the plaintiffs to the defendants, both by letter and by telegram, giving price, and stating that the orders to sell were executed. So that the defendants were kept accurately advised of each transaction made in pursuance of their order.

In addition to the "slip contracts," in the form described above, delivered by the plaintiffs to the purchasers of the cotton sold, and received by them from the buyers of cotton, the sales were entered upon the books of the plaintiffs in conformity with such contracts. These "slip contracts" show upon their face that the purchaser named therein bought cotton, sold for account of the name adopted to represent B. S. Bibb & Company; they gave the price, and the number of bales, and the time of delivery; they were in the form prescribed by the rules and regulations of the Cotton Exchange, and constitute bought and sold notes, which, taken together, as they should be, constitute a sufficient memorandum in writing of the contract between the brokers, or their principal, and the purchasers of the cotton, to meet the re-

quirements of the statute of frauds. *Peabody* v. *Speyers*, 56 N. Y. 230, 236, 237; *Newberry* v. *Wall*, 84 N. Y. 576, 580; *Butler* v. *Thompson*, 92 U. S. 412; *Beckwith* v. *Talbot*, 95 U. S. 289; *Bayne* v. *Wiggins*, 139 U. S. 210; *Ryan* v. *United States*, 136 U. S. 68, 83.

In this latter case this court, speaking by Mr. Justice Harlan, said: "The principle is well established that a complete contract binding under the statute of frauds may be gathered from letters, writings and telegrams between the parties relating to the subject matter of the contract, and so connected with each other that they may be fairly said to constitute one paper relating to the contract." So in Benjamin on Sales, (Am. ed. § 296,) after a review of the authorities, both English and American, it is stated: "The bought and sold notes, when they correspond and state all of the terms of the bargain, are complete and sufficient evidence to satisfy the statute; even though there be no entry in the broker's book, or, what is equivalent, only an unsigned entry." *Goom* v. *Aflalo*, 6 B. &. C. 117; *Sievewright* v. *Archibald*, 17 Q. B. 104, 115; *Thompson* v. *Gardiner*, 1 C. P. D. 777. Such, too, is the rule in New York, as shown by the earlier cases of *Peltier* v. *Collins*, 3 Wend. 459; *Davis* v. *Shields*, 26 Wend. 341.

The bought and sold notes in question in this case, called "slip contracts," when read in the light of the rules and regulations of the Cotton Exchange, and considered in connection with the letters and telegrams between the parties, constitute a sufficient note or memorandum in writing of the transactions to satisfy the requirements of the statute of frauds. It is no valid objection to these "slip contracts," executed in duplicate, that the sales purported to be made on account of "Albert," "Alfred," "Alexander," "Amanda," and "Winston," etc., which names were adopted by the defendants, and which represented them and their account. Parol evidence was clearly competent to show that these fictitious names, which defendants had adopted, represented them as the parties for whose account the sales were made.

But aside from this, and independent of the question whether the bought and sold notes, called the "slip contracts," consti-

tute a compliance with the statute of frauds, the contracts were fully executed and the transactions closed before the plaintiffs commenced the present suit. It is well settled by the authorities that the defence of the statute of frauds cannot be set up against an executed contract. *Dodge* v. *Crandall*, 30 N. Y. 294, 304; *Brown* v. *Farmers' Loan and Trust Co.*, 117 N. Y. 266, 273; *Madden* v. *Floyd*, 69 Alabama, 221, 225; *Gordon, Rankin & Co.* v. *Tweedy*, 71 Alabama, 202, 214; *Huntley* v. *Huntley*, 114 U. S. 394, 400; Browne on Stat. of Frauds, § 116. This rule proceeds and rests upon the principle that there is "no rule of law which prevents a party from performing a promise which could not be legally enforced, or which will permit a party, morally but not legally bound to do a certain act or thing, upon the act or thing being done, to recall it to the prejudice of the promisee, on the plea that the promise, while still executory, could not by reason of some technical rule of law have been enforced by action." *Newman* v. *Nellis*, 97 N. Y. 285, 291.

We know of no principle on which the agent can be deprived of a right to his commissions and advances in the execution of his agency for a principal on the ground that he has not avoided a contract which was not in strict conformity with the statute of frauds, in the absence of any instruction or instructions from the principal not to comply therewith. Contracts not in conformity with the statute are only voidable and not illegal, and an agent may, therefore, execute such voidable contracts without being chargeable with either fraud, misconduct, or disregard of the principal's rights. If the statute of frauds was not complied with, in making the sale contracts in the present case, we do not see that the defendant was in a position to take advantage thereof, or that such want of compliance with the statute, after the contracts were executed, would constitute any defence to the action. The suit was not brought on these contracts of sale, which the plaintiff in error claims were voidable under the New York statute of frauds. It is an action by the agents against their principal to recover for work and labor performed, and money paid out at the principal's instance and request, and in the settle-

ment of the principal's business, in which the agent had authority to make disbursements for him. In the present case the plaintiffs had, by their contract, rendered themselves personally responsible for the losses which might, and did, occur under the contracts of sale made for account of the defendant, and as such agents they are entitled to recover against their principal the full amount expended by them for him in the transactions. If in closing out the contracts of sale, profits had been realized on the transactions, whether by reason of decline in the price of cotton, or by the purchases "to cover" the cotton sold, the brokers would, upon well-settled principles, have been liable to their principal for the same. They could not have set up or interposed as a valid defence to such liability that the contracts of sale out of which the profits were realized were not enforceable under the statute of frauds, or were voidable by the agents or the purchaser with whom they contracted. Neither can the principal interpose such an objection as against the agent's right to commission or to reimbursement for his outlays, after the execution of contracts, merely voidable for want of writing. *Coward* v. *Clanton*, 79 Cal. 23; *Morrill* v. *Colehour*, 82 Ill. 618. It is a well-established principle, which pervades the whole law of principal and agent, that the principal is bound to indemnify the agent against the consequences of all acts done by him in the execution of his agency, or in pursuance of the authority conferred upon him, when the actions or transactions are not illegal. Speaking generally, the agent has the right to be reimbursed for all his advances, expenses and disbursements incurred in the course of the agency, made on account of or for the benefit of his principal, when such advances, expenses and disbursements are reasonable, and have been properly incurred and paid without misconduct on the part of the agent. If, in obeying the instructions or orders of the principal, the agent does acts which he does not know at the time to be illegal, the principal is bound to indemnify him, not only for expenses incurred, but also for damages which he may be compelled to pay to third parties. The exception to this rule is where the transaction for which

the agent is employed is illegal, or contrary to good morals and public policy. Addison on Contracts, § 636; Story on Agency, §§ 339, 340, and cases cited in notes. Thus in *Beach* v. *Branch*, 57 Ges. 362, where an agent had sold cotton for account of another, and was obliged to refund the purchase money to the purchaser on account of false packing by the principal, he was allowed to recover the amount so paid from the principal.

It is another general proposition, in respect to the relation between principal and agent, that a request to undertake an agency or employment, the proper execution of which does or may involve the loss or expenditure of money on the part of the agent, operates as an implied request on the part of the principal, not only to incur such expenditure, but also as a promise to repay it. So that the employment of a broker to sell property for future delivery implies not only an undertaking to indemnify the broker in respect to the execution of his agency, but likewise implies a promise on the part of the principal to repay or reimburse him for such losses or expenditures as may become necessary, or may result from the performance of his agency. *Bayley* v. *Wilkins*, 7 C. B. 886; *Smith* v. *Lindo* 5 C. B. N. S. 587. Where a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms and nothing remains to be done but the payment of the price, he may sue upon the contract or in *indebitatus assumpsit* and rely upon the common counts. In either case the contract will determine the rights of the parties. *Dermott* v. *Jones*, 2 Wall. 1, 9. These general principles have a direct application to the case under consideration upon the facts disclosed by the record.

The decision in *Irwin* v. *Williar*, 110 U. S. 499, cited by plaintiff in error, is not in conflict with the views above expressed, nor does that decision properly apply to the facts in this case. The judgment of the court below in that case was reversed for error in the charge of the court upon the point that the act of one partner in buying and selling grain for future delivery was binding upon the other partner who had not authorized, sanctioned or known of the transactions;

and for the further reason that the court permitted proof of the custom of the Chicago Exchange, when there was no evidence that the defendant below had knowledge of it. In the present case it is shown that the plaintiff in error had full knowledge of the rules and regulations of the New York Cotton Exchange, and of the course of business that had to be and would be adopted by the defendants in error in executing his orders to sell. It is further shown by the testimony that it was expressly understood and agreed in writing, under date of November 3, 1886, between the parties, at the commencement of these transactions that "if a call for margins (which the plaintiff in error was to put up) is not responded to promptly there is to be no carrying on our part, (Richard H. Allen & Co.,) but that the cotton is to be closed out at our discretion." To which agreement the plaintiff in error assented. When the cotton advanced beyond the price at which it was sold for delivery, the plaintiffs below, in pursuance of the terms of the contract with Bibb & Company, called upon the latter to put up margins covering the advance in price. This Bibb & Company failed to do, and the demand was repeated on several occasions. While they were in default in putting up margins, Bibb & Company gave orders to sell about 22,000 bales of cotton for future delivery. These orders R. H. Allen & Company declined to execute until proper margins were put up on the past transactions, and on the orders to sell, and so notified Bibb & Company. That firm continued in default in putting up margins, and a member of the firm of R. H. Allen & Company, on December 29, 1886, asked the defendant below for instructions about the contracts made with his firm by the plaintiffs, but Bibb refused to give any instructions, or to put up margins. He was then informed that the plaintiffs below would close out the contracts they had made for Bibb & Company, to which he made no objection or dissent, and in pursuance of this notice, R. H. Allen & Company, on December 30, 1886, went into the market and bought cotton "to cover" that which they had sold for account of B. S. Bibb & Company, and to make good their contracts. This they were required to do, both by the terms

of their contracts with the parties to whom the cotton had been sold, and by the rules and regulations of the Exchange, of which they were members. If they had failed "to cover," or to comply with such contracts, they would have been liable to expulsion from the Exchange. The cotton which they bought "to cover" these contracts was purchased at the market price, and the difference between that price and the price of 10,000 bales previously sold for Bibb & Company amounted to $19,273.50, which, with the plaintiff's commissions of $750, constituted their claim against B. S. Bibb & Company for the recovery of which the suit was brought. Under these facts, which are uncontroverted, it is clear that the rule laid down in *Irwin* v. *Williar* has no application to this case.

In the case of *Perin* v. *Parker*, 126 Illinois, 201, 211, where the transactions were similar to those in question here, it was said by the Supreme Court of Illinois: "Parker, as agent for Perin, and acting under his orders, sold the corn for Perin, and, under the rules of the board of trade and the custom of the Chicago market, he was personally bound to the purchasers on these contracts of sale. Parker and Perin were dealing with reference to such rules and such custom, with which they were both perfectly familiar. The rules of the board of trade provided, that on time contracts purchasers should have the right to require of sellers ten per cent margins, based upon the contract price of the property bought, and further security, from time to time, to the extent of any advance in the market value above said price. The price of corn had been rapidly advancing since the date of the sales. Parker either had deposited margins upon the contracts, or was liable to be called on for the ten per cent and the additional margins by the persons to whom he had sold the corn. The evidence does not seem to disclose whether or not the purchasers had either received or called for margins. Even if they had not, yet there was an existing legal right in them to call on Parker for margins, and a legal liability upon the latter, within the next banking hour thereafter, to deposit the margins called for, and also, within that time, deposit

with the secretary of the board, or the parties calling for such deposits, duplicate certificates of deposit, signed by the treasurer of the board, or an authorized bank."

This brings us to the consideration of the last assignment of error, viz., Whether under the pleadings and proofs a judgment was properly rendered against the defendant Bibb alone, after a verdict had been given finding that Hopkins was not a partner. On this question we entertain no doubt whatever. The action was against the partnership carried on under the name of B. S. Bibb & Company, the complaint alleging that B. S. Bibb and Thomas H. Hopkins were the partners composing that firm. The proof showed, however, that Hopkins was not a partner, but only a clerk, and that the business done in the name of the firm of B. S. Bibb & Company was that of B. S. Bibb alone. In support of this objection to the judgment against him, counsel for Bibb rely upon the case of *Walker* v. *Mobile Marine Dock and Mutual Ins. Co.*, 31 Alabama, 529, 531. That was an action against three defendants as the joint owners of a steamboat. They made no objection to the complaint, but interposed a plea of the general issue. On the trial the proof showed that but two of the defendants were owners of the boat, and a verdict and judgment was accordingly rendered against those two and in favor of the other defendant. On a writ of error, the two defendants against whom the judgment was rendered sought a reversal on the ground that under the pleadings no judgment could be rendered against only two of them; and that, inasmuch as the proof disclosed a liability on the part of only two, when the complaint was made against three, the action should have been discontinued; but the Supreme Court ruled otherwise, and held, as stated in the headnote or syllabus of the case, that "where the complaint shows a substantial cause of action, and no objection was interposed to it in the primary court, a misjoinder of causes of action is not available on error." It is true that, in the opinion of the court in that case, reference is made to § 2156 of the then code of the State, which allowed plaintiff to recover against one or more defendants, and it was stated that that section should not be so construed as to au-

thorize a recovery upon a cause of action not embraced in the pleadings, or which was inconsistent with the complaint; but that authorized a judgment in favor of some of the defendants where the proof did not show the absence of a right to recover against the remaining defendants upon the pleadings.

In the present case there is no variance because of the fact that Hopkins was not a member of the firm against whom the plaintiffs below were seeking relief, especially when no objection was made to any misjoinder; and in the objection to the entry of judgment upon the verdict, which he interposed, Bibb did not state any ground on which he rested the objection. But whatever may be said of the case of *Walker* v. *Mobile Dock Co.*, which was decided in 1858, since that time new codes have been adopted, (1876 and 1886,) under the provisions of which, as construed by the later decisions of the Supreme Court of Alabama, it admits of little or no question that, in a suit, like the present, against an alleged partnership, in respect to which the liability is both joint and several, the failure to recover against one of the alleged partners cannot defeat a right to recover against the other, who did business alone in the firm name.

In the case of *Clark* v. *Jones*, 87 Alabama, 474, 482, it was said by the Supreme Court of the State: "It is further objected, that proof of demand against a partnership, of which defendant is a member, does not authorize a recovery on a complaint which counts on an account stated between plaintiffs and defendant individually, and for goods sold to him alone. This question should be regarded as *res adjudicata* in this State. Under the statute, which declares 'any one of the associates, or his legal representative, may also be sued for the obligation of all,' it has been uniformly held, that a partnership creditor may sue one of the members of the firm, for a debt contracted in the partnership name, whether by account or otherwise, and declare upon the demand as his individual liability;" citing Code of 1886, § 2605; *Duramus* v. *Harrison*, 26 Alabama, 326; *Hall* v. *Cook*, 69 Alabama, 87.

In *Smith* v. *Straub*, 41 Kansas, 7, 10, the Supreme Court of

Kansas sustained a judgment in a case almost identical with the present. That was a suit for the price of merchandise against three persons as partners under the firm name of D. I. Ross & Company. They denied the partnership on oath, and on the trial of the case it was found as a fact that there was no partnership, but that only one of the defendants was the owner of the business, that one of the others was an agent, and the other only a clerk in the store. It was contended that no judgment could be rendered in the action against the one who purchased the goods and owned the store, as it was brought against her only as a partner; but the court ruled otherwise, and said: "It may be true that, under the common law practice, in a suit against a partnership firm, no judgment could be rendered against an individual member of that firm; but our statute provides that all contracts shall be construed to be joint and several; and it also provides that in all cases of joint obligations and joint assumptions of copartners or others, suits may be brought or prosecuted against any one or more who are so liable. This action was instituted under the theory that there was a partnership; the plaintiff in error filed her answer, under oath, denying the partnership; and if the proof fixed liability on any one of the parties, a judgment could be rendered against such party individually."

In *Rutenberg* v. *Main*, 47 California, 213, it was held, in an action against several partners where the complaint averred a joint contract made by all the defendants, and the answer denied the contract but did not set up a misjoinder of parties defendant, that the plaintiff should not fail as against all of the defendants, but should have judgment against those who the proof showed had joined in the contract, while the others should have judgment in their favor. *Gillam* v. *Sigman*, 29 California, 637; *Gruhn* v. *Stanley*, 92 California, 86; Pomeroy on Remedies and Remedial Rights, §§ 433, 434.

At common law the objection for misjoinder should be made by answer or plea in a way so as to give the plaintiff a better writ; but at common law where two or more parties are sued as partners, and there is no denial of the partnership,

and no plea alleging a misjoinder, it is doubtful whether after verdict such an objection could be taken. But however that may be, under the modern codes, including that of Alabama, no such objection can be made after verdict. In this case the paintiff in error did business under the name of B. S. Bibb & Company, and he should not be heard, when sued as a partner of that firm, to say that he alone composed the firm, and was, therefore, not liable because joined with another defendant who was not a member.

The several errors assigned for reversal of the judgment below are, in our opinion, not well taken, and that judgment is accordingly

Affirmed.

PICKETT *v.* FOSTER.

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

No. 175. Argued and submitted March 24, 1893. — Decided May 15, 1893.

The Supreme Court of Louisiana having decided that under the positive law of that State, as contained in the code and statutes, nothing supplies the place of the registry of a mortgage or dispenses with it, so far as those who are not parties to it are concerned; and when ten years have elapsed from the date of inscription without reinscription the mortgage is without effect as to all third persons; and further, that the failure to reinscribe a mortgage within the statutory period is not remedied or supplied by the pendency of a suit to foreclose the same; such decisions establish a rule of property binding upon the Federal courts.

In a suit brought in December, 1873, by the heirs of P. in the name of L. the public administrator, to foreclose a mortgage on property in Carroll Parish, Louisiana, given to secure three notes dated January 1, 1866, and payable one, two and three years after date, it appeared that L. had not previously to the institution of the suit, as required by the statute, been appointed by the parish judge to administer the estate of P., F. who had been joined as a party defendant in the suit as third possessor of the land, pleaded an exception to such omission, and no action having been taken upon such pleading by the plaintiffs, in December, 1875, the suit was dismissed. Prior to such dismissal, in April, 1875, L. had ceased to

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be public administrator, and F. had been appointed in his place; *Held*, that in the absence of proof of actual fraud on the part of F. the mere fact that he had accepted the office of public administrator, did not impose upon him the duty of causing the mortgage referred to to be reinscribed, and further, the notes secured by the mortgage having become prescribed by lapse of time sixteen months before his acceptance of the office, such acceptance did not place him in any fiduciary relation to the holders of such notes.

THIS was a suit in equity, brought in the Circuit Court of the United States for the Western District of Louisiana, to foreclose a mortgage which the complainants alleged to have been given in favor of their ancestor, James C. Pickett, of the District of Columbia, upon a plantation situate in the parish of Carroll, (now East Carroll,) Louisiana, by the mediate grantors of the present occupant of the property, Mrs. Mary J. Gwyn, wife of George Foster. The bill charged that the existence of any impediments which might serve to prevent the enforcement at law of their alleged rights in the property was the result of various fraudulent acts and breaches of trust on the part of the defendants; and the defendants denied the allegations of fraud and bad faith, and said that if the mortgage was ever operative upon the property, it had become prescribed through the laches of the complainants. As the contentions of the parties are based largely upon the effect of certain litigation previous to the filing of this bill, and upon various mortgages and transfers of property, the facts in relation thereto, as they appear in the record, are stated below in chronological order.

In January, 1866, Mrs. Agnes M. Ricketts and Mrs. Narcissa J. Bell, daughters and devisees of Jonathan Morgan, late of the parish of Carroll, Louisiana, then deceased, executed to the order of James C. Pickett, of Washington, D. C., their three joint promissory notes, in the respective amounts of $5500, $6000, and $6500, dated January 1, 1866, and payable, the first in one year, the second in two years, and the third in three years from the date thereof, at the Farmers' Bank of Frankfort, Kentucky, without interest. To secure the payment of the notes they conveyed, on January 16, 1866, by an act passed before a commissioner of deeds for the State of

Louisiana, in the city of Memphis, Tennessee, the undivided two-thirds of the said plantation, being described in the deed as all their interest in the property, to Richard C. Ricketts, Sr., of Midway, Kentucky, in trust. The instrument of conveyance contained the following condition:

"Now, therefore, the condition on which the said grant is made and on and for which this trust is created is, that the said trustee shall hold the said property in trust for the payment of the said notes in whatsoever hands they may come, and in case they should all be paid at maturity of the same this deed shall be null and void and of no effect in law; otherwise it shall be and remain in full force and vigor, and the said trustee shall have the right, on request of the holder or holders of any of the dishonored paper above named, to take possession of the estate hereby conveyed and foreclose this deed of trust and the interest of the said grantors in the property aforesaid; and till default in the payment of said notes, or either or any part of them, the said grantors shall have the right to the possession of the said estate hereby conveyed; and in full payment of the said notes it is understood and agreed that the said trustee shall make such reconveyance of said estate hereby conveyed to said grantors as may be necessary under the laws of Louisiana to extinguish the lien of this instrument."

On January 25, 1867, Ferdinand M. Goodrich, of Carroll Parish, Louisiana, filed petitions in the office of the clerk of the District Court of said parish, averring that on or about April 20, 1859, he had filed in that court his account as tutor of Agnes A. Morgan and Narcissa J. Morgan, showing a balance in his hands in their favor of $1263.21, which account, after due notice, etc., had been regularly homologated, and that between April 20, 1859, and March, 1862, they had become severally indebted to him in the respective amounts of $3498.71 and $903.79. The reason given by the petitioner for the inequality of the accounts sued upon was that Agnes A. Morgan had left school earlier than Narcissa J. Morgan. He stated that within the period indicated the said devisees of Jonathan Morgan had become emancipated and had taken

possession of their property, and he prayed that the accounts might be duly homologated and judgments given in his favor for the amounts named, with interest from March 15, 1862, and that his tutorship might be determined and his sureties released. Confessions of judgment, in the amounts named in the petitions were filed by the said defendants, each confession embodying a waiver of service of the petition, and of copies of accounts and vouchers, citation, etc., and a full concurrence in the petitioner's prayer. Thereupon the clerk of the District Court of the parish entered judgments for the said amounts against Mrs. (Morgan) Ricketts and Mrs. (Morgan) Bell, dated, respectively, January 25 and January 26, 1867, approving and homologating the accounts, releasing the petitioner from his trust as tutor, and cancelling his bond. Each judgment concluded as follows: "It is further ordered, adjudicated, and decreed that . . . the legal or tacit mortgage in favor of said tutor be recognized, to date from the 3d of December, 1855."

No orders of sale under the judgments appear in the record, but on June 21, 1868, writs of *fieri facias*, under the seal of the said court, were issued, directing the sheriff of the parish of Carroll to seize and sell the property, real and personal, rights and credits, of Mrs. Agnes M. Ricketts and Mrs. Narcissa J. Bell, (then Green,) to satisfy the judgments, and under those writs their respective interests (described in the sheriff's deeds as eleven-sixteenths) in the said plantation were sold by the sheriff, at public auction, on June 21, 1868. The interest of Mrs. Ricketts was bought by the said Goodrich, at the price of $1734, and John H. Green became the purchaser of Mrs. Green's interest, at the same price. Deeds were executed by the sheriff on September 5, 1868, to the said purchasers.

December 18, 1868, Goodrich conveyed to Mrs. Ricketts the property acquired by him at the sheriff's sale for the sum of $4000, taking her notes for that amount in payment.

Written in red ink across the face of the said mortgage or deed of trust, recorded in the office of the clerk of the parish of Carroll, appears the following:

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"Erased in full, evidence the return of the sheriff in suit of Ferd. M. Goodrich, tutor, vs. Agnes M. Ricketts and Narcissa J. Bell, on file in the office of the clerk of the District Court, and the demand of Ferd. M. Goodrich that the mortgage be erased. Floyd, La., December 19th, 1868. A. G. Beldon, D'y Recorder."

December 18, 1869, the sheriff of the said parish sold, under writs of *fieri facias*, the undivided five-sixteenths of the Jonathan Morgan plantation, which had been the interest of Oliver T. Morgan in the same, to Goodrich, for the sum of $915.91, and a deed was executed to Goodrich by the sheriff on the following day. It appears by the record that the issuance of the writs was the result of suits brought against Oliver T. Morgan by the New Orleans Canal and Banking Co., and by Mrs. Rosa Cammack. On May 23, 1870, Goodrich sold to John H. Green one-half of his undivided five-sixteenths interest in about 1637 acres comprised within the said plantation, for $5000 cash.

May 23, 1870, Mrs. Agnes M. Scanlan (formerly Ricketts) mortgaged her share in the plantation, described in the conveyance as consisting of about 794 acres, to the firm of Foster & Gwyn, of New Orleans, Louisiana. It was stated in the mortgage that it was executed to secure the payment of a debt of $19,000, due by Mrs. Scanlan to the firm, that she had executed her promissory note for that amount, bearing even date with the mortgage, and that the note had been delivered by her to George Foster, a member of the firm. On the same day John H. Green executed a mortgage, in favor of Foster & Gwyn, upon his portion of the plantation, to secure, as the instrument recited, a debt of $10,000 due by him to the firm, evidenced by his promissory note for that amount, dated the same day, and delivered to Foster.

February 5, 1873, Mrs. Scanlan conveyed to Foster a portion of the said plantation, described as containing about 764 acres. It would appear by the description of the property in the deed that there had been a partition between Mrs. Scanlan and John H. Green of their interests in the plantation. Foster states in his testimony in chief in this case that such a partition

was made on May 23, 1870. The deed from Mrs. Scanlan to Foster recited that, in accordance with the terms of a contract previously entered into between them, Foster agreed to acquire and make his own a certain debt, secured by mortgage, held against Mrs. Scanlan by the firm of Foster & Gwyn, and certain judgments against her husband, held by the firm, and to transfer the judgments against her husband, to be held by her for her own use and benefit. The deed also recited that the sale was made in consideration of the sum of $36,904.94, the total amount of the said debts.

By virtue of a writ of seizure and sale issued out of the Circuit Court of the United States for the District of Louisiana, at the suit of *Ezra Wheeler & Co.* v. *John H. Green*, the United States Marshal for that district sold, on August 2, 1873, at public auction, Green's portion of the plantation, described as containing about 872 acres, to Ezra Wheeler & Co., at the price of $10,398. The marshal's deed to the purchasers, dated the same day, recited that the total amount of their mortgage on the property conveyed was $19,533.45, and that after paying the expenses of sale the purchasers retained in their hands the difference between the amount of such expenses and that of the purchase price, to apply to the mortgage debt.

December 23, 1873, B. H. Lanier, public administrator of Carroll Parish, commenced an action in the District Court of the parish to enforce the sale of the two-thirds interest in the plantation formerly held by Mrs. Scanlan and Mrs. Green, to satisfy the mortgage executed by Mrs. (Ricketts) Scanlan and Mrs. (Bell) Green to James C. Pickett, the petition alleging that the said instrument, though in the form of a deed of trust, was, according to the law of Tennessee, where the common law prevailed, a mortgage. Ezra Wheeler, Thomas Rounday, Augustus Ireland, and John V. Wheeler, composing the firm of Ezra Wheeler & Co., absentees, and C. M. Pilcher, of said parish, who had been appointed *curator ad hoc*, were cited, as were also Mrs. Agnes M. Scanlan, Mrs. Narcissa J. Green and George Foster. The defendants filed an exception, June 2, 1874, alleging that Lanier had no cause of action, as he had never legally qualified as public administrator by taking the

oath of office and giving bond, and, further, that there was never any such succession as that claimed to be represented by Lanier, as James C. Pickett had never resided in or owned property in the parish. They therefore prayed that the suit might be dismissed. It appears by a certificate of the secretary of State of Louisiana, copied into the record, that Lanier was appointed public administrator of the parish on August 30, 1871, and that on September 16, 1871, he filed in the office of the secretary of State his oath of office and his official bond.

December 10, 1874, the sheriff of Carroll Parish sold Foster's portion of the plantation (about 764 acres) for his unpaid taxes, to W. A. Gwyn, for the sum of $1505. On the same day the portion of the property purchased at the sheriff's sale of August 2, 1873, by Ezra Wheeler & Co., was sold by the sheriff for unpaid taxes due from Green, to W. A. Gwyn, at the price of $1001. Deeds were executed to the purchasers on the day of the sales.

April 29, 1875, George Foster was appointed public administrator of Carroll Parish, and on the same day he filed in the office of the secretary of State of Louisiana his official bond, in the sum of $10,000. On November 29, 1875, Lanier and Foster were called by the said district court of the parish to prosecute the said suit instituted by Lanier to enforce a sale of the property covered by the Pickett mortgage. Lanier answered, through his counsel, that he was no longer public administrator, and Foster answered that he knew of no such succession as was called to be administered. The court then ordered that the suit be dismissed. The case was again called December 4, 1875, for trial. Lanier appeared, by counsel, and gave the same answer as before, and Foster answered, by counsel, that he had never had charge of any such succession as that of James C. Pickett, and knew of no such estate in the parish; whereupon an order of the court was entered dismissing the suit.

By a decree in the case of the *Fourth National Bank of New York* v. *George Foster*, in the District Court of the parish of East Carroll, (formerly Carroll,) Louisiana, dated Octo-

ber 17, 1881, Alexander H. Foster, intervenor, obtained judgment against the defendant for the sum of $2200.

December 5, 1881, Mrs. Mary J. Gwyn, wife of George Foster, commenced an action against him in the District Court of East Carroll Parish, setting out her marriage to the defendant, and averring that the sum of $2986.76 standing to her credit in the hands of Foster, Gwyn & Co., of the city of New York, on July 1, 1872, and for which amount she held the firm's note, was due and unpaid; that her husband had received the money and used it for his own purposes, and that owing to the disorder of his affairs she feared that he would not be able to repay the amount, and that she would lose it. She, therefore, besought the court to allow the institution of the suit and cause her husband to be cited, and prayed that the community of acquets and gains subsisting between them might be dissolved; that she might be allowed to administer her own affairs free from the control of her husband; and that judgment might be rendered against her husband for the amount of the debt, with interest. The petitioner having been authorized to institute the suit, the defendant answered, admitting the marriage, but denying the other averments of the plaintiff, and prayed for the dismissal of her demand.

December 16, 1881, W. A. Gwyn conveyed the property purchased by him at the said tax sales to Foster, for the sum of $5000 cash, and on October 24, 1881, Ezra Wheeler, on behalf of the firm of Ezra Wheeler & Co., conveyed the property acquired by them at the said judicial sale thereof, retaining a vendor's lien upon the same, to Foster, for the sum of $7243, of which, as stated in the conveyance, $2243 was paid in cash, and the balance in two accepted drafts on A. H. Foster, of Evansville, Indiana. The deed from Wheeler to Foster contained a stipulation that it should not be complete, and should not be recorded, until Foster should have executed a mortgage on the property conveyed in favor of the vendors.

December 29, 1881, George Foster mortgaged the property conveyed to him by Gwyn and Wheeler & Co. to John W.

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Foster, of the District of Columbia, the instrument of mortgage reciting that on that day George Foster had executed his promissory note in favor of the said John W. Foster, in the sum of $6000, payable January 10, 1885, with interest at 8 per cent thereon after maturity, and that the mortgage was given to secure the payment of the note.

July 5, 1882, the suit brought by Mrs. Mary J. Gwyn against her husband, George Foster, was called. The case was regularly tried, judgment given for the plaintiff, and the substance of the prayer of the petition embodied in a decree of the court, dated July 6, 1882. The judgment being, on May 5, 1884, unsatisfied, the court on that day ordered that the property of George Foster be sold to satisfy the same, and under a writ of *fieri facias* the sheriff of the parish sold, at public auction, May 6, 1884, a portion of the said plantation, described as containing about 1100 acres, to Mrs. Mary J. Gwyn, for the sum of $15,414.93. The sheriff's deed, dated July 8, 1884, stated that this was the amount of the mortgages on the property, and that such amount was retained in the hands of the purchaser to pay the same.

All the above-described deeds and mortgages were duly recorded in the office of the clerk of the district court of the said parish. It does not appear in the record that any of the mortgages were ever reinscribed, except the one executed in favor of James C. Pickett, which was reinscribed in the said office on November 4, 1885.

The suit in equity now before the court was commenced in the Circuit Court of the United States for the District of Louisiana, on November 30, 1885, by Joseph Desha Pickett and Theodore John Pickett, citizens of Kentucky, against George Foster, and his wife, Mary J. Foster, citizens of Louisiana, Mrs. Agnes M. Scanlan and Mrs. Narcissa J. Green, citizens of Missouri, and Ezra Wheeler, Thomas Rounday, and Augustus Ireland, composing the firm of Ezra Wheeler & Co., citizens of New York. The plaintiffs averred in their bill that they were the heirs-at-law of James C. Pickett, who died intestate in December, 1872, and that the suit was brought to foreclose a mortgage which had been held by their ancestor upon the said planta-

tion, which had been given by Mrs. Scanlan and Mrs. Green to secure the unpaid promissory notes above described. They alleged that Foster's conduct as public administrator was fraudulent and in bad faith, in that he failed to prosecute, as it was his duty to do, the foreclosure proceedings in the action of Lanier against Wheeler & Co., and others, of which proceedings he had knowledge, having been cited as one of the defendants therein; that he sought and obtained the office of public administrator solely for the purpose of dismissing the suit, and did procure the dismissal thereof; that having so caused the suppression of that suit, for the purpose of destroying the rights of the Pickett succession, resulting from the mortgage upon the plantation, he refused to institute any other proceedings to foreclose the mortgage, and withheld from the complainants all information with regard to the enforcement of their claim; and that, while public administrator, he purposely neglected to reinscribe the mortgage, and refused to take any steps, after procuring the dismissal of the said suit, to prevent the complainants' claim from being barred by the statute of limitations. It was alleged that Foster, by virtue of his appointment as public administrator, obtained absolute control over the said claim, and occupied toward the complainants the relation of trustee; that by the laws of Louisiana his official bond operated as a legal mortgage on all the immovable property owned by him since May 6, 1875, when the bond was recorded; and that the complainants were entitled to the benefit of such mortgage for the purpose of making up any discrepancy that might exist between the amount of their debt, with interest, and the present value, namely $20,000, of the property covered with the Pickett mortgage. The complainants averred that they had no knowledge of the unlawful conduct of Foster in reference to their claim upon the property, and could get no information concerning the same, until October 31, 1885, when Joseph D. Pickett sent his son from Kentucky to East Carroll Parish, Louisiana, to examine the matter.

Other averments and allegations of the bill were substantially as follows: That Foster procured the sale of his property for his taxes, that the sale was irregular and illegal, and

Statement of the Case.

that the reconveyance from Gwyn to Foster was a part of a scheme of fraud between them, the object of which was that Gwyn should hold the title for Foster's benefit until sufficient time should elapse for the prescription of the complainants' claim, and then reconvey the property to Foster. That the title taken in the name of Ezra Wheeler & Co. was a mere show, and the result of a fraudulent effort on Foster's part to disguise the fact that he was claiming to own the property and to prevent the plantation from being subjected to sale under the said mortgage. That the mortgage executed by Foster in favor of his brother John W. Foster, and the judicial mortgage in favor of his brother Alexander H. Foster, as well as a mortgage executed on November 30, 1881, in favor of Ezra Wheeler & Co., were fraudulent and collusive, and were concocted by Foster and his brothers and Ezra Wheeler & Co. for the purpose of putting the plantation beyond the reach of the complainants' demand, and that Ezra Wheeler & Co. never pretended to be the owners of the property. That the judgment obtained by Mrs. Foster in her suit against her husband was the result of a scheme concocted by Foster and his wife, in the interest of Foster, for the purpose of screening the plantation from the operation of the said mortgage and from such demands as the complainants had against Foster on account of his fraudulent acts as public administrator. That as the sheriff's sales to Goodrich and Green in 1868 were made for a less sum than the amount of the Pickett mortgage, they were in contravention of a prohibitory law of Louisiana, and therefore nullities. That Foster had been in actual possession of the plantation, as owner of the same, since February 5, 1873.

The complainants further alleged that they had no relief at law, but in equity ought to be relieved against the frauds, collusions, and combinations of Foster, his wife, his brothers, Ezra Wheeler & Co., and his wife's brother, W. A. Gwyn. They, therefore, asked the court to decree that Foster and his wife held the property described in the Pickett mortgage subject to the same; that that mortgage was and had been a subsisting mortgage dating from January 16, 1866; that

the property be sold and the proceeds of sale be paid to the complainants, in priority over all claims of the defendants; that an account be taken of the rents and profits made, or which might have been made, by Foster since he acquired possession of the mortgaged property; that Foster, in his capacity as public administrator, be adjudged to pay of such rents and profits any balance remaining due the complainants upon their mortgage debt after the proceeds of the sale had been applied thereto; and that the complainants had a general mortgage upon the whole of the property to secure the amounts aforesaid, as provided by the laws of Louisiana in reference to the liability of public administrators upon their official bonds.

To the bill demurrers were filed by Foster and his wife, on January 30, 1886, which were dismissed on March 8, 1886, by consent of the defendants, and on April 5, 1886, they filed answers. The answer of Foster alleged that as the laws of Louisiana prohibited the creation of trust estates, the registry of the Pickett mortgage or deed of trust in the mortgage books of the parish of Carroll did not so operate upon the property therein described as to affect third persons; that the effect of the judgment in the actions brought by Goodrich, which actions and judgment were in all respects *bona fide* and regular, was to prevent the operation of all subsequent encumbrances upon the property so sold, and pass the same free and unencumbered to the purchasers. The defendant averred that the sheriff of the parish caused, as by law he was bound to do, the pretended mortgage or deed of trust to be erased from the mortgage records of the parish, and that the same was not thereafter borne upon the records as notice to third persons of the existence of any claim in favor of Pickett or the *cestui que trust* named in the instrument; that Goodrich and Green were purchasers at the said sales in good faith, and for valuable consideration, and went into possession of the property under deeds duly executed and recorded, and that the said purchasers and their subsequent vendees have had actual and adverse possession of the property since September 5, 1868. The defendant Foster pleaded, therefore, the prescription of ten years in

bar of the complainants' action to annul the effect of such possession, and the prescription of five years in bar of their action to annul the said sales by reason of the failure of the sheriff to observe any formality with relation thereto.

The answer described Foster's connection with the property as follows: At and before the time of the sale by Goodrich to Mrs. Ricketts, of the undivided portion of the property purchased by Goodrich at the sheriff's sale, Foster was a member of the firm of Foster & Gwyn, cotton factors, of New Orleans. That firm entered into business relations with Mrs. Ricketts, and, in good faith, and without any knowledge whatever of the suit by Goodrich, or of the pretended mortgage or deed of trust upon the property, advanced and loaned to her, in money and supplies to be used in the cultivation of the plantation, the sum of $19,000. In recognition of this debt Mrs. Scanlan, with the authority of her husband, executed her promissory note for the amount thereof, dated May 23, 1870, payable one year after date, with interest at six per cent, and to secure the payment of the same she executed, on the same day, a mortgage upon the property in favor of the firm. Fruitless efforts having been make by the firm, prior to February 5, 1873, to collect the debt, a compromise of the differences between the parties was entered into, by which it was agreed, among other things, that Foster should acquire the entire interest of the firm in the debt and mortgage against Mrs. Scanlan, and buy up a certain judgment and mortgage held by the firm against her husband, and release the debt held against her personally, and transfer the judgment and mortgage against her husband, to be held for her own use and benefit, in consideration of which she agreed to transfer to Foster all said property. On February 5, 1873, this agreement was carried into effect by an authentic act passed before a notary of the parish of Carroll, by which, for the said consideration, aggregating in amount $36,904.94, Mrs. Scanlan, by the authorization of her husband, transferred to Foster the property acquired by her from Goodrich. The said advances were made to Mrs. Scanlan in good faith, in the due course of business, and in the full belief that she had an unencumbered title to

the property. If Foster had been aware that there was any cloud upon her title, his firm would not have made the advances, and he would not have expended a large sum of money in the acquisition of the property. The firm of Foster & Gwyn had also been engaged in business transactions with John H. Green, who purchased at the sheriff's sale the interest of Mrs. Narcissa J. Green in the plantation. In the full faith that Green held an unencumbered title to the property, the firm made large advances to him, and he, on May 23, 1870, executed his promissory note in their favor for the amount thereof, namely, $10,000, payable twelve months after date, and to secure the payment of the same mortgaged to Foster & Gwyn, or any future holders of the note, the said property. He also executed two additional mortgages in favor of the firm, the one dated July 14, 1871, and the other March 11, 1872, to secure the payment of promissory notes for the respective amounts of $3723.60 and $3009.55. The said firm was indebted to Ezra Wheeler & Co., of the city of New York, and transferred to them the notes belonging to Foster & Gwyn as collateral security, both firms believing the notes to be secured by the said mortgages. The notes not having been paid when due, the firm of Ezra Wheeler & Co. proceeded lawfully to enforce the sale of the property under the mortgages, and at the sale thereof purchased the property for the sum of $10,398.20, which amount, less expenses, was entered as a credit upon the writ of seizure and sale. Foster & Gwyn were indebted to Ezra Wheeler & Co. in a much larger sum than that amount, and on or about October 6, 1873, Ezra Wheeler & Co. agreed with Foster that upon the payment by him of the principal and interest of the debt due them they would sell and transfer the property to him; and in order to enable him to pay the debt, they agreed that he should have the benefit of the rents and revenues of the property, such profits to be applied to the interest of the debt. On the day the agreement was made Ezra Wheeler, representing the firm of Ezra Wheeler & Co., executed a written power of attorney, under which Foster, as the agent of the firm of Ezra Wheeler & Co., was authorized to take possession of the property and

to collect the rents and revenues thereof. By virtue of this power of attorney Foster took possession of the property and occupied it until October, 1881, at which time, he having paid the debt due by Foster & Gwyn to Ezra Wheeler & Co., with the exception of $7250.43, the firm of Ezra Wheeler & Co., in consideration of that amount, sold and transferred the property to him. Part of the purchase price, namely, $2243, was paid in cash, and the balance in duly accepted drafts on A. H. Foster, secured by a vendor's lien on the property conveyed. This transaction was conducted in good faith, for the purpose of carrying out the commercial contracts and agreements between the parties thereto.

It was denied in the answer that Lanier was ever appointed administrator of the estate of James C. Pickett, or ever qualified as such; that any inventory was made, or any act done to show the existence of such estate in Louisiana; that such estate could have been legally opened in that State, for the reason that James C. Pickett was not a resident thereof, and left no property therein; that that suit was dismissed through any fraudulent design on the part of Foster to suppress the same, or to defraud the estate or heirs of James C. Pickett; that Foster concealed from the complainants any information in relation to the notes or property; that he was bound to give them any information in regard to the same; that the complainants were relying upon Foster, as public administrator, or upon any other administrator, to enforce the payment of the notes; and that Foster obtained the office of public administrator for the purposes alleged in the complainants' bill. The answer averred the facts to be that the name of Lanier, as public administrator, in the suit instituted to enforce the payment of the notes, was used by the party in possession of the notes for the purpose of bringing suit on the same without any legal authority for so doing, and that Lanier himself had no official power to act in the matter. That Foster was absent from the State at the time the suit was called out and dismissed; and that his attorney refused to prosecute the same or to make him party thereto for the reasons that no such estate as that of James C. Pickett had been opened in the parish of Carroll, that the public administrator

had not been appointed to take charge of or administer any such estate, and that the notes were not on file in the suit. That if the said notes were in the parish of Carroll at that time, they were in the possession of the owners thereof, who returned them to the persons from whom they had received them, with full information of what had been done, and the existing condition of the claim and of the property; and that the owners of the notes were advised and believed that under the laws of Louisiana the pretended mortgage was void and could not be enforced. That Foster was not aware who were the owners of the claim or of the names or residence of the complainants; and that he had no authority to prosecute the said suit for the reasons above stated. That Foster only accepted the office of public administrator of the parish of Carroll at the earnest solicitation of citizens thereof.

The charges in the bill of fraud on the part of Foster in connection with the tax sales to Gwyn were denied, as were also similiar charges with reference to the suit brought against Foster by Mrs. Mary J. Gwyn, his wife. The answer averred that that suit was instituted and defended in good faith; that Foster owed his wife the amount sued for, which fact he averred was established by competent and credible evidence; that the proceedings were fairly and legally conducted, and that the judgment was rendered in accordance with the laws of the State of Louisiana. It was denied that Foster had, since the execution of the judgment, been in possession of the property, except as the agent of his wife.

Finally the answer averred that all the allegations of the bill charging Foster's transaction with Ezra Wheeler & Co., A. H. Foster and John W. Foster, as being fraudulent, were false and untrue, and that all those transactions were conducted in good faith, without fradulent intent, and without any reference to the claim of the complainants.

The answer of Mrs. Foster averred that she was no party to the suits of Goodrich against Mrs. Ricketts and Mrs. Bell; that at the time she acquired the property at the sheriff's sale under her judgment against Foster he was, as she believed, the lawful owner thereof; that by her purchase under that

judgment she had obtained and had since held the actual possession of the property; and that the proceedings and judgment in her suit against her husband was in all respects regular and *bona fide*, and free from fraud or collusion. She alleged that she acquired her title to the property free from any latent defects therein, and that under the laws of Louisiana the mortgage or deed of trust sued upon by the plaintiffs was void and of no effect against third persons. She pleaded the prescription of five years as against the validity of the notes sued upon by the complainants, upon the ground that no suit was instituted within that time to enforce their payment, and the prescription of ten years as against the mortgage, which she averred was not reinscribed until she became the owner of the property. She also, for cause of demurrer alleged that any proceedings to avoid the sales made to Goodrich and Green of the property of Mrs. Ricketts and Mrs. Bell, were barred by the prescription of five years, as she said, would appear by the complainants' own showing. For further cause of demurrer she alleged that the good faith of Goodrich and Green in making the said purchases was not denied by the bill, and that Goodrich and Green having acquired good titles, and their vendees having had actual possession of the property for more than ten years before the institution of the complainants' suit, all actions to annul the titles of the said vendees became barred by the lapse of ten years from the date of their several purchases.

Mrs. Scanlan and Mrs. Green admitted, in the answer filed by them on April 12, 1886, that they borrowed the money, and executed the mortgage, as alleged in the bill; the legal proceedings were instituted against them to collect the notes; and that they were unable to pay that debt, as well as others. They averred that long ago they were dispossessed of the property under judicial proceedings, and they denied all manner of unlawful combination and confederacy on their part.

The case was duly heard in the said court upon bill, answer and evidence, and on October 23, 1888, the bill was dismissed; whereupon the complainants were allowed an appeal to this court.

Argument for Appellants.

Mr. Robert E. De Forest, *Mr. N. L. Jeffries* and *Mr. William E. Earle*, for appellants, submitted on their briefs.

Where a mortgage has been cancelled without authority on the books of the recorder of mortgages even on a regular but false certificate given by a notary public, the mortgage exists unimpaired, even against an innocent vendee who has bought on the faith of the certificate. *De St. Romes* v. *Blanc*, 20 La. Ann. 424, 425; *S. C.* 96 Am. Dec. 415; *McCarty* v. *Landreaux*, 8 Rob. La. 130. The erasure or cancellation of a mortgage by the recorder will not bind a mortgagee when done without his knowledge, and he may enforce his rights. *Building Ass'n* v. *Ferguson*, 29 La. Ann. 548.

The instrument under consideration in this case is unquestionably a mortgage, and as such it is to be construed by the laws of Louisiana, where the property lies. *Ricks* v. *Goodrich*, 3 La. Ann. 212. It gives the trustee named therein no authority to sell extra-judicially, and it expressly provides for a foreclosure in case of default.

The notes were payable in one, two and three years after January 1, 1866. Prescription would therefore run against them, in six, seven and eight years respectively. On February 5 and October 6, 1873, George Foster had the title of the mortgages so far as the same could be obtained under a sheriff's sale on a judgment by the clerk of the Orphans' Court. Prescription is only claimed by appellee from January 1, 1874, then not only were all of these suits, sales and conveyances before prescription, but in addition, on December 23, 1873, Lanier as public administrator had begun his suit which was not dismissed until December 4, 1875. This was interruption of the prescription, which to be a bar, must be uninterrupted, *St. Romes* v. *Cotton Press Co.*, 127 U. S. 614, 621. Mary J. Gwyn Foster pleads prescription of five and ten years, and that the mortgage "was not reinscribed within ten years after its original inscription in the mortgage records of Carroll Parish whereby the same became void and null as between the parties." Her title hangs upon a sheriff's sale under a judgment *coram non judice;* her husband's title

which she bought at this sale was obtained before any claim or contention arose that either the notes or mortgage were prescribed. This title involves a question of fraud, as to which the statute does not run until knowledge of the fraud comes home. *Kilbourn* v. *Sunderland*, 130 U. S. 505, 518.

The mortgagors themselves do not plead prescription. Conceding that more than ten years have expired since the inscription of the mortgage, this does not destroy its effect between the contracting parties in such manner as to extinguish it. *Shields* v. *Schiff*, 124 U. S. 351, 358.

The title of the Fosters being shown to rest upon a sale by the sheriff based on an invalid judgment, and to be steeped in a series of fraudulent transactions wherein George Foster was an active participant, action on the fraud was not prescribed, (even if as to fraud prescription was pleaded, and which it seems not to have been,) and the case stands now simply as an action between the mortgagors, who do not plead prescription, and as to whom prescription is unnecessary, and the complainants, who are entitled to a reversal and a decree of foreclosure.

Mr. Samuel F. Phillips, (with whom was *Mr. Frederic D. McKenney* on the brief,) for George and Mary J. Foster, appellees.

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

Upon the facts disclosed by the pleadings and evidence it is plain that the complainants are not entitled to a reversal of the decree below, dismissing their bill, unless they have sustained their allegations of fraud on the part of George Foster, as public administrator of Carroll Parish, and of such knowledge and complicity therein on the part of Mrs. Mary J. Foster as to deprive her of her alleged title as a *bona fide* purchaser of her husband's interest at a sheriff's sale.

The answer of Foster explicitly denied the charges of fraud contained in the bill, and the answer of Mary J. Foster was, in effect, a plea that she was a *bona fide* purchaser, for a valu-

able consideration, without notice. Although answers under oath were waived in the bill, and the defendants' responsive answers cannot, therefore, be treated as evidence in their favor, still, upon the issues thus raised, the burthen of proof was upon the complainants.

To sustain their side of the case the complainants put in evidence the promissory notes and the deed of trust securing them, bearing date January, 1866. They proved the death of James C. Pickett on July 10, 1872; that Joseph D. Pickett, one of said complainants, was on the 20th of May, 1873, appointed his administrator; and that said Joseph D. Pickett and Theodore John Pickett, the other complainant, were the sole heirs-at-law of James C. Pickett. Joseph D. Pickett testified that on September 27, 1873, he put the notes and deed of trust into the hands of R. M. Scanlan and J. H. Green, who were then the husbands of the makers of the notes, and entered into a written agreement with them, whereby they were authorized to employ attorneys to collect said notes, and also gave them a letter proposing to give the lawyers who should undertake the collection of the claim two-thirds of whatever they should recover, and that the Pickett estate should not be subjected to any expense whatever. Pickett further testified that he understood that R. M. Scanlan and J. H. Green, in pursuance of this arrangement, employed J. W. Montgomery, a lawyer resident in Carroll Parish, to enforce payment of the claim; that Montgomery procured Lanier, as public administrator, to bring a suit in the district court of the parish; that he, Pickett, was not kept advised of the progress of the suit, and that he never knew that said suit was dismissed until he saw the record of the court, showing such dismissal in September, 1885; that he had no personal knowledge of the history of the suit; that upon learning that the Lanier suit had been dismissed, he sent W. H. Pickett, as his attorney, to Louisiana, who received the notes and mortgage deed from Montgomery, and employed W. G. Wyly to bring the present suit. He further testified that he had never seen or known Foster till the latter called on him, at his office in Frankfort, Kentucky, on the first day of June, 1886.

Theodore John Pickett, the other complainant, testified that he had no personal knowledge of the suit brought by Lanier; that he did not know that such suit had been brought, nor did he know that the suit had been dismissed on December 4, 1875, till he was so informed by Joseph D. Pickett in September, 1885; and that he never saw George Foster.

William H. Pickett testified that he was present at the interview between Joseph D. Pickett and R. M. Scanlan and J. H. Green, when the agreement was made about the collection of the notes in September, 1873; that in November, 1885, he went, as attorney for complainants, to Louisiana, and inspected the record of the District Court of Carroll Parish, showing that a suit had been brought by B. H. Lanier, as public administrator, and that the same had been dismissed in December, 1875; that he procured the notes and mortgage from J. W. Montgomery, who had been employed by Scanlan and Green, and employed Mr. Wyly to bring the present suit. He does not profess to have any personal knowledge whatever of the facts of the case, except what he acquired by examining the record of the Lanier suit.

J. W. Montgomery testified that he had been employed by R. M. Scanlan to bring suit on the Pickett notes and mortgage; that he procured Lanier, as public administrator, to bring the suit; that when Lanier was superseded by the appointment of George Foster to be public administrator he ceased to have anything further to do with the suit; that he was not Foster's attorney, and that the first he knew of Foster's appointment was the dismissal of the suit shown by the judgment rendered by the court; and that the notes were never in the actual possession of George Foster, nor did he have any control of the suit filed on them after he became administrator.

William G. Wyly and Jesse D. Tompkins testified that they knew George Foster, and that he seemed to be and to act for years past as owner of the Morgan plantation.

In addition to this testimony complainants put in evidence the record of the oath taken by George Foster, as public administrator, and his bond, in $10,000, as such. Also the

records of the suits of one Goodrich against Mrs. Ricketts and Mrs. Bell, afterwards Scanlan and Green, and in which it appeared that Goodrich, as tutor of the said defendants, had entered judgments confessed by them in his favor, and had levied on their interests in the Morgan plantation, and sales and conveyances by the sheriff to said Goodrich of the interest of Mrs. Ricketts, and to John H. Green of the interest of Mrs. Green. Also proceedings and deeds whereby these interests finally became vested in George Foster.

Upon the facts so shown by the complainants, it is difficult to hold that charges of fraud against George Foster, and of complicity therein on the part of Mary J. Foster, can be said to be made out with sufficient clearness to warrant a court of equity in granting the relief prayed for in the bill.

The long periods of time within which the events disclosed in the evidence took place, and the open and avowed character of the several suits and conveyances whereby at last the title to the property became vested in Mary J. Foster, should be considered. Apart from the legal effects of the lapse of time, which we shall consider hereafter, there seems to have been unaccountable delay in the successive steps taken by the holders of these notes and mortgage.

No effort was made by James C. Pickett in his lifetime to collect the notes, although the notes were overdue for several years. His administrator apparently took no steps to collect the notes until visited and aroused to action by the husbands of the makers of the notes, with whom he made a contract by which he agreed to give an attorney unknown and unnamed two-thirds of the amount which might be collected. He then — although as he himself states he was not informed of what his agents and attorneys were doing — took no further action, and made no inquiries till September, 1885, a period of twelve years. He even says that he did not know into whose hands his agents, Scanlan and Green, had put the notes for collection.

It is no doubt true that the appointment of George Foster as public administrator of Carroll Parish, while there was pending a suit, in the name of Lanier, his predecessor in office,

to collect these notes, and in which he had been cited as one of the defendants, and the subsequent dismissal of that suit, are facts which, if unexplained, might warrant a suspicion that he was aiming to defeat the Pickett mortgage and notes. Still, such a suspicion or inference would not, standing alone, justify upsetting the possession of George Foster, which had existed for a period of twelve years before the filing of the bill, much less could the rights of Mary J. Foster be thereby overthrown.

Moreover, the character of complainants' claim, upon their own evidence, does not appeal to a court of equity. The fact that Joseph D. Pickett put the notes and mortgage for collection into the hands of Scanlan and Green, the husbands of the makers of the notes, and agreed to give them, or any attorney they might select, two-thirds of the amount that might be recovered, is remarkable. So, too, the fact that Foster's title to the larger part of the plantation came to him by means of a deed of conveyance, dated February 5, 1873, from Mrs. Scanlan, for an alleged consideration of $36,904.94, and the further fact that Mrs. Scanlan did not, in her answer in the present case, repudiate or deny the genuineness or good faith of such deed, suggest very serious doubts of the fairness of the plaintiffs' claim.

But whether or not the plaintiffs' bill could be regarded as sustained by their evidence, if uncontradicted, the case comes before us with a large body of evidence on behalf of the defendants.

George Foster testified that he was a member of the firm of Foster, Gwyn & Co., doing business as cotton factors and commission merchants in the city of New York, and in the firm name of Foster & Gwyn, in the city of New Orleans; that he became acquainted with Mrs. Scanlan and Mrs. Green in 1868; that the New Orleans house did business with them, and advanced them large sums of money and supplies to maintain their plantation; that these transactions commenced in 1868 and continued until some time in 1871; that at that time the plantation belonged to Mrs. Scanlan and John H. Green; that Mrs. Scanlan was indebted to Foster & Gwyn in

the sum of $19,000, for which, in 1870, she gave them her note, secured by a mortgage on her plantation; that John H. Green likewise became indebted to the firm in a sum exceeding $15,000, for which Green gave his notes, secured by a mortgage on his part of the said Morgan plantation; that at the time his firm took these mortgages from Mrs. Scanlan and J. H. Green they knew nothing about plaintiffs' claim, and thought the title to the plantation was good and unencumbered; that his firm in New York borrowed a large sum of money from Ezra Wheeler & Co., of that city, and to secure them Foster & Gwyn transferred to them the notes and mortgages of John H. Green. He further testified that on February 5, 1873, Mrs. Scanlan and her husband conveyed to him the part of the Morgan plantation that belonged to Mrs. Scanlan, for $36,904, composed in part of her indebtedness to Foster & Gwyn; and that, after Ezra Wheeler & Co. had purchased the interest of John H. Green in the Morgan plantation at a United States marshal's sale, he purchased such interest from them, paying about $2200 in cash, and giving a mortgage on the plantation to secure notes for about $5000, at one and two years. He further testified that he was never appointed by the court to be administrator of James C. Pickett; that he never knew of such an estate; that he was never asked, as public administrator, to prosecute or institute any suit for the complainants, nor did they, or any one, ever ask any information from him; that he did not know them or where they resided; that he did not consider that he had ever assumed any responsibility for the complainants; and that he was not present when the Lanier suit was called and dismissed, but was in Cincinnati, and did not know that the attorneys intended to call out the suit and have it dismissed. He testified that the first he ever knew of any deed of trust against the Morgan plantation was long after his firm had made the large advances to Mrs. Scanlan and John H. Green, and at that time the deed of trust had been erased or satisfied of record — to confirm which latter statement he put in evidence a certified copy of such erasure.

The testimony of Mary J. Foster was to the effect that she

had loaned money, received by her from her sister's estate, to the firm of Foster, Gwyn & Company, for which she took their note for $2986.76, two years prior to her marriage to George Foster. This was the debt which was the subject of the suit she brought against George Foster, whereby she became purchaser of his interest in the plantation before the bringing of the present suit.

Edward J. Delony, the judge of the eighth judicial district of Louisiana, testified on behalf of the defendants that when B. H. Lanier resigned his position as public administrator of Carroll Parish, he, the witness, interested himself to get a capable man to succeed him, and persuaded George Foster to apply for and receive the appointment. He says that it required much persuasion to induce Foster to take the office, and only upon the witness agreeing to take principal charge of the business. He appeared for Foster when the Lanier case was called, and as no one appeared the suit was dismissed; that he inquired of Lanier about the notes set up in the suit instituted by him as public administrator, and that Lanier informed him that he did not have nor had he ever seen them. This witness further testified that he never knew of any such estate as that of Pickett, and knew of no property or credits belonging to it, and that he never could find that Lanier, as public administrator, had ever offered any such succession during his term of office as public administrator.

The evidence of both parties, taken as a whole, leaves the allegations of fraud as against George Foster unproved. It is contended that those proceedings of Goodrich against his wards were part of a scheme to defeat the Pickett claims. If this were so, it is very singular that the husbands of those ladies should afterwards be employed as agents by the complainants to enforce these very notes.

Failing to find satisfactory proof of fraud on the part of George Foster, or of participation therein, if fraud there were, by Mary J. Foster, we have then to consider the legal aspects of the case, apart from the allegations of the bill on the subject of fraud.

It is contended, on behalf of the defendants, that the instru-

ment given to secure the promissory notes held by James C. Pickett was not a mortgage within the meaning of the laws of Louisiana, but was a deed of trust, and that accordingly it was not properly inscribed or recorded as a mortgage, and constituted no such lien or encumbrance upon the Morgan plantation as to affect third persons.

To sustain this contention the case of *Thibodaux* v. *Anderson*, 34 La. Ann. 797, is cited. Our reading of that case inclines us to regard it as authority for the defendants' contention, but, in the view we take of the present case, it is not necessary to so decide.

Even if it be conceded that the instrument in question was a valid mortgage, and was duly inscribed as such on March 12, 1866, yet in order to keep it alive to affect third parties the statutory law required that it should be reinscribed within ten years, but the complainants' evidence shows that it was not reinscribed until November 4, 1885. The Supreme Court of Louisiana has decided that, under the positive law of that State, as contained in the code and statutes, nothing supplies the place of registry, or dispenses with it, so far as those are concerned who are not parties to it, and that when ten years have elapsed from the date of inscription without reinscription the mortgage is without effect as to all persons whomsoever who are not parties to the mortgage. *Adams & Co.* v. *Daunis*, 29 La. Ann. 315.

The same court has held that a failure to reinscribe a mortgage within the statutory limit is not remedied or supplied by the pendency of a suit to foreclose the same. *Watson* v. *Bondurant*, 30 La. Ann. 1.

This court has held that those decisions of the Supreme Court of Louisiana establish a rule of property binding on the Federal courts, and that accordingly the Circuit Court of the United States for the District of Louisiana did not err in holding that a mortgage of lands has no effect as to third persons unless it be reinscribed within ten years from the date of its original inscription, and that the pendency of a suit to foreclose does not dispense with the necessity of so reinscribing it. *Bondurant* v. *Watson*, 103 U. S. 281.

Opinion of the Court.

As the complainants have failed in making out a case of actual or intentional fraud on the part of George Foster, we cannot hold that, because, in 1875, he accepted the office of public administrator, it became his duty to take notice of the Pickett mortgage and to cause it to be reinscribed. He testifies that he knew nothing about it, except as the record showed an erased mortgage; and, whether the erasure was or was not a proper one, he was under no official duty to inquire into its validity. The notes which the mortgage had been given to secure were all prescribed by lapse of time sixteen months before he was appointed public administrator, and we are unable to see that his acceptance of the office put him in any fiduciary relation to the holders of these notes, even if he had known there were such notes, and who were their holders — a knowledge which he disclaims. Even if the Goodrich suits and sale and the subsequent erasure of the mortgage could be viewed as a fraudulent contrivance between Goodrich and the makers of the notes, no knowledge or participation therein is brought home to Foster except by mere conjecture. Hence if he, in good faith, relied on that erasure, and dealt with Mrs. Scanlan and J. H. Green as the owners of an unencumbered plantation, he must be deemed a third party entitled to the protection of the laws requiring reinscription. Mrs. Scanlan and her husband conveyed her portion of the plantation to Foster for a large consideration on February 5, 1873, twelve years before the institution of this suit. Mrs. Green never repudiated her own act in confessing a judgment to Goodrich, on whose sale her husband became the purchaser, and whether such judgment and sale were in accordance with law or not, the proceedings must, in the circumstances of this case, be deemed as, at all events, equivalent to a conveyance, by her through the sheriff, and as a complete estoppel against her. Her vendees, or those who subsequently became owners for a valuable consideration, without notice, of her part of the plantation, are fairly to be deemed third parties, entitled to the protection of the presumptions arising from lapse of time and failure to reinscribe.

Upon the whole, we are of opinion that the decree of the court below dismissing the bill was right, and it is accordingly

Affirmed.

CADWALADER *v.* WANAMAKER.[1]

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

No. 31. Argued April 11, 12, 1893. — Decided May 15, 1893.

Imported articles, commercially known as ribbons, composed wholly or partly of silk and chiefly used for trimming hats, bonnets, or hoods, are dutiable at twenty per centum ad valorem, under Schedule N of the tariff act of March 3, 1883, 22 Stat. 488, c. 121.

The case of *Hartranft* v. *Langfeld*, 125 U. S. 128, cited and approved.

The case *Robertson* v. *Edelhoff*, 132 U. S. 614, cited, distinguished and approved.

The firm of John Wanamaker brought an action in the Court of Common Pleas of Philadelphia, State of Pennsylvania, against John Cadwalader, the collector of customs for that district, wherein it was sought to recover from the defendant moneys paid under protest by the plaintiffs to the defendant as collector of customs, as duties, in order to obtain possession of merchandise imported for the plaintiffs, which moneys were demanded and collected by defendant in excess of the amount authorized by law. This action was certified to the Circuit Court of the United States for the Eastern District of Pennsylvania, and there resulted in a verdict and judgment in favor of the plaintiffs, from which judgment the case is brought into this court by a writ of error.

The matter in controversy arose under the tariff act of March 3, 1883. 22 Stat. 488, c. 121.

The plaintiffs claimed the imported articles were dutiable under Schedule N, which was in the following terms:

"Hats, and so forth, materials for: Braids, plaits, flats, laces, trimmings, tissues, willow sheets and squares, used for making or ornamenting hats, bonnets, and hoods, composed

[1] Together with this case were argued the cases of *Walker* v. *Seeberger*, No. 151, *post*, p. 541, and *Hartranft* v. *Meyer*, No. 860, *post*, p. 544.

of straw, chip, grass, palm leaf, willow, hair, whalebone, or any other substance or material, not specially enumerated or provided for in this act, twenty per centum ad valorem." (22 Stat. 512.)

The defendant contended that he was right in having assessed the articles under Schedule L, which provided as follows:

"All goods, wares, and merchandise, not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value, fifty per centum ad valorem." (22 Stat. 510.)

In applying these respective clauses, the plaintiffs claimed that articles chiefly used to trim hats with are trimmings, dutiable at twenty per cent. The defendant claimed that articles are not materials for hat trimmings, when the imported articles bear the commercial name of ribbons, or belong to that commercial class; that, being made of silk, the imported articles in question fell within Schedule L; and, that if the jury believed that the articles belonged to the class commercially distinguished under the general name of ribbons, then the plaintiffs could not recover, even if their chief use was as trimmings for hats, as claimed by the plaintiffs.

The issues thus raised were submitted to the jury in a charge, the correctness of which is the subject of our judgment.

The essential deliverances of the court, which determined the verdict of the jury, were in these words:

"Upon the uncontroverted proofs in this case, ribbons are trimmings. The issue here is, what kind of trimmings are the particular ribbons in controversy? Are they trimmings chiefly for hats, bonnets, or hoods? This is a question of fact for the jury, which, if answered in the affirmative, entitles the plaintiff to recover. I instruct you accordingly.

"If you are satisfied under the evidence, considering the preponderating weight of it, that these kinds of ribbons, such as you have here, are commonly and usually used for the ornamentation of hats, then the character of these goods is determined.

Counsel for Defendants in Error in No. 860.

"These are the two facts that you are to consider and determine by your verdict: First, are these ribbons, of which you have samples here, trimmings within the section of the act of Congress? And, secondly, if so, are they used more largely than for any other purpose in the making and ornamentation of hats, bonnets, and hoods? These are the two facts, and as you determine them this case must be decided.

"In a case that was decided by the Supreme Court, which went up from this district, the Supreme Court has unquestionably held that articles which come within the description of this clause of the act are subject only to a duty of 20 per cent. That is, if they are trimmings, and if they are used for making and ornamenting hats, they are classifiable under this clause of the act of Congress, and are subject to a duty of only 20 per cent.

"It is immaterial to inquire whether the Supreme Court in terms has said anything about the silk clause. They have determined that articles which are of the character described here and for the use stated come within that clause, and are subject only to a duty of 20 per cent. That is incontestable. So that by that ruling of the Supreme Court we are governed, and must so expound the law in cases occurring afterwards and relating to articles of a similar character."

This case was argued with *Walker* v. *Seeberger*, No. 151, *post*, 546, and *Hartranft* v. *Meyer*, No. 860, *post*, 549. On motion of *Mr. Solicitor General* three hours were allowed each side in the argument of the cases; and, on motion of *Mr. A. H. Garland*, of counsel for plaintiff in error in No. 151, three counsel were allowed to be heard for the importers.

Mr. Solicitor General opened for the collectors and the government.

Mr. A. H. Garland followed for the plaintiff in error in No. 151.

Mr. Frank Pritchard followed for the defendants in error in No. 31 and for the defendants in error in No. 860.

Argument for the Government.

Mr. Joseph H. Choate followed for the defendants in error in No. 31 and for the defendants in error in No. 860. *Mr. Henry Edwin Tremain* and *Mr. Mason W. Tyler* were on *Mr. Choate's* brief.

Mr. Solicitor General closed for the collectors and the government. The following is a summary of his argument.

It is with no intention of questioning the high authority of this court, and with no desire to transgress the limits of proper discussion at this bar, that I assert that the construction contended for by the importers is not authorized by the language alone of the act of March 3, 1883. I, therefore, request that I may be permitted in the first instance to argue the question involved as an original one, before proceeding to discuss the two cases which it is insisted in behalf of the importers are decisive of those at bar.

The articles in question are within the silk schedule of the tariff act of March 3, 1883, and are also within the terms of the act of February 8, 1875. To classify them under the hat-material clause an inquiry has been made into the *use* of the materials, and it having been ascertained that they were used for many purposes, the inquiry was then extended to their so-called *chief* use. In behalf of the United States, it is insisted that there is a difference between an *article* and a *material;* that one is nominative, distinctive in its character, implying the idea of a completed, independent thing, while the other is general, embracing the substance from which articles are made. The words "braids, plaits, flats, laces, trimmings, tissues, willow sheets and squares," each denominate an *article* as distinguished from the materials of which it is made; this requires that to the word "trimmings" should be given its ordinary meaning, which is, an *article* used as an ornamental fitting; therefore, evidence as to the chief use of the *materials* from which trimmings are made is beyond the scope of the statute. Attention is called to the fact that no attempt was made to limit this inquiry to the date of the act of 1883, and prior thereto, (*Rossman* v. *Hedden*, 145 U. S. 561, 570,) but

in the cases decided against the government the inquiry related to the date of the trial.

The doctrine of *chief use* is not found in the statute, is impracticable in application, and renders the law uncertain.

The words "not specially enumerated as provided for in this act" limit and qualify the words "other substance or material" and not the words "braids, plaits, flats, laces, trimmings, tissues, willow sheets and squares," and therefore the articles in controversy are not entitled to classification under this clause even if it be admitted, for sake of argument, that they are "trimmings" used for making or ornamenting hats, bonnets and hoods, because they are not composed of straw, chip, grass or any other material not specially enumerated, but on the contrary are composed of silk, a substance or material which is specially provided for in the act.

The act of February 8, 1875, established a rule of classification for all goods made of silk or of which silk is the component material of chief value, with certain exceptions not embracing the articles in controversy. This act is yet in force, except as to rates of duty established by act of March 3, 1883. This latter act was only intended and declared to be a substitute for Title 33 of the Revised Statutes of the United States, of which the act of February 8, 1883, never formed a part. Repeals by implication are not favored.

In each of the cases at bar, it being conceded that the goods were made either of silk or of silk as their component material of chief value, it follows that they are within the silk clause, and therefore, so far, at least, subject to the duty at the rate of 50 per centum ad valorem. The question then arises, are they also within the hat-material paragraph, and hence also subject to the 20 per centum rate? That question was left to the jury in the *Cadwalader* and *Hartranft* cases. In the *Walker* case the jury was instructed to bring in a verdict for defendant if they found the goods were composed of silk or of silk as their component material of chief value. It being conceded that they were so composed, that instruction ended the case.

The argument then, deals with these two questions:

First. Are the goods classifiable for duty under the hat-material clause of the act of 1883?

Second. If both the hat-material clause and the silk clause of 1883 are literally applicable to the given articles, which clause prescribes the legal rate of duty?

The question of predominant or chief use is one not susceptible of proof by expert or opinion evidence. In these cases the inquiry was not what the articles were, for what they were purchased, or of what composed, nor yet to what use they were adapted, but *to what use they were the more generally put.* The witnesses, being importers or employés of importers, could have no familiar knowledge of the actions or conduct of consumers merely because they were employed in such walks of life. There is a difference between evidence of the fact that any given article has been put to a certain use, and evidence that a larger quantity of the article is consumed in the one use than in any other, especially when predicated as in these cases, of articles used for many purposes, and throughout the country, and in different quantities at different times. Herein lies the difference between guessing and expert opinion, which latter, *within the limits of personal observation* or study, is deemed a relevant fact.

The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private transactions. *Maillard* v. *Lawrence*, 16 How. 251. According to this test, even upon the testimony of plaintiffs' own witnesses, the articles in dispute are popularly known as ribbons, chinas and marcelines. This brings the cases squarely within *Schmeider* v. *Barney*, 113 U. S. 645, 647, 648.

The doctrine of chief use as applied in the *Cadwalader* and *Hartranft* cases has never received the approval of this court. In the *Langfeld* case (125 U. S. 128) where the goods in controversy were velvet ribbons, the court assures us that "there was no controversy in the evidence as to whether these velvet ribbons were or were not trimmings; all the witnesses agreed that they were." (p. 133.) In deciding that case the court meant only to hold that the ordinary habitual use of the article

should be considered, and this was not to be defeated by proof of a single or occasional use for some other purpose.

Although in the *Edelhoff* case (132 U. S. 614) it is said that the words "not specially enumerated or provided for in this act" relate to the eight articles, (braids, plaits, flats, etc.,) and not to the words "hats, bonnets, and hoods," it is submitted that they should be held to limit and modify specially the words "other substance or material" and that a "trimming," used for *making* or *ornamenting*, a hat or hood could be classified under this clause, *only* when composed of the materials specially enumerated, or of some "other substance or material" that is not specially enumerated or provided for elsewhere in the act. If the article to be classified is found to be a trimming composed of none of the substances named, but of a substance or material specially enumerated or provided for in the act, it is not within this clause of the statute, and the court should have directed a verdict for the government.

In cases at bar the goods are composed wholly or partly of silk. In Schedule L a *substance* or *material* known as "silk" is both "enumerated" and "provided for" in the act. It follows that goods composed of such substance or material cannot properly be classified under the hat-material clause, wherever else they may belong.

The word "trimmings" is properly defined as "anything used for decoration or finish; an ornamental fitting of any sort; usually in the plural: as the trimmings of a harness or of a hat. . . . Hence any accessory or accompaniment, usually in the plural." Cent. Dictionary, *sub.* "trimming." In the *Hartranft* and *Cadwalader* cases the jury were instructed that they should not give the term "trimmings" any technical or particular commercial meaning. They were substantially told that the question was whether the goods in controversy were "materials out of which trimmings for hats were made." This was a misconception of the language of the clause in question. If the court shall hold that the words "not specially enumerated or provided for" refer to and limit the words "substance or material," then, practically, all the instructions in the *Cadwalader* and *Hartranft* cases were

erroneous and the action in the *Walker* case correct; and upon such a holding there is an end to the "hat-material" controversy.

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

It will be observed that the court below was controlled in its charge by the decision of this court in the case of *Hartranft* v. *Langfeld*, 125 U. S. 128, and construed that decision as ruling that, if the imported articles were trimmings, and were more generally used for the ornamentation of hats than for any other purpose, then such articles must be regarded as coming within Schedule N of the tariff act of 1883, and subject to a duty of 20 per centum.

An examination of that case, in the light of the extended criticism bestowed upon it in the briefs filed in the present case, satisfies us that the court below did not misinterpret the decision. The case was, in all important respects, like the present one. It was an action by an importer to recover an alleged illegal excess of duties, and wherein ribbons made of silk and cotton, of which silk was the material of chief value, were the articles in question. The testimony on the part of the plaintiff tended to show that the ribbons were chiefly used in making or ornamenting hats, bonnets, and hoods, but that they might be, and sometimes were, used for trimming dresses. The testimony on the part of the defendant tended to show that they were dress trimmings equally with hat trimmings, and were commonly used as much for the one purpose as the other. In this state of the evidence the trial court charged the jury thus: "It is the use to which these articles are chiefly adapted, and for which they are used, that determines their character within the meaning of this clause of the tariff act. . . . It is the predominant use to which articles are applied that determines the character. . . . You will, therefore, determine to which use these articles in question are chiefly devoted. If they are hat trimmings, and used for making and ornamenting hats, then the rate of duty was excessive. . . .

The question is simply and purely one of fact, namely, what is the predominant use to which these articles are devoted? As you determine that question you will return your verdict." These instructions were approved by this court, and the judgment of the court below in favor of the importer was affirmed.

It is quite apparent that if the law was correctly laid down in *Hartranft* v. *Langfeld*, the court below, in the present case, did not err in its treatment of the subject. Substantially the same question came afterwards before this court in the case of *Robertson* v. *Edelhoff*, 132 U. S. 614, on error to the Circuit Court for the Southern District of New York. Again the question was as to the correct classification, under the act of March 3, 1883, of ribbons composed of silk and cotton, in which silk was the component material of chief value. The court below gave peremptory instructions to the jury to find for the plaintiff, the undisputed evidence being that the articles in question were used exclusively as trimmings for ornamenting hats and bonnets, and had a commercial value only for that purpose. And this action of the trial court was approved by this court in an elaborate opinion.

It will be noticed that the case of *Robertson* v. *Edelhoff* differs from the case of *Hartranft* v. *Langfeld*, and from the present case, in the particular that the fact was conceded that the ribbons in question were exclusively used for hat trimmings, and that question was not submitted to the jury; whereas in the other cases there was conflicting evidence as to the use made of the ribbons, and it was submitted to the jury to find what was the chief or predominant use made of the articles.

In view of these decisions of this court, it is evident that the court below, in the present case, cannot be convicted of error.

A very earnest and able effort has been made, on behalf of the government, to lead us to reconsider the doctrine of those cases.

We have read with care the elaborate briefs submitted to us by the Solicitor General, but as we are unable to accept

Counsel for Plaintiff in Error.

the conclusions there urged upon us, nothing would be gained by a minute discussion of the several arguments advanced. If the subject had come before us unembarrassed by previous decisions it would have been worthy of a more thorough discussion. As it is, we are content to abide by the views that have heretofore prevailed in this court, expressed in two unanimous decisions.

The judgment of the court below is accordingly

Affirmed.

Mr. Justice Brewer and Mr. Justice Brown concurred in the judgment for reasons stated in the dissenting opinion in *Hartranft* v. *Meyer*, No. 860, *post*, 544.

WALKER *v.* SEEBERGER.

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

No. 151. Argued April 11, 12, 1893. — Decided May 15, 1893.

Trimmings of various styles and materials, some composed entirely of silk, some chiefly of silk, some chiefly of metal, and some being a combination of both silk and metal, used exclusively or chiefly for hat or bonnet trimming, and not suitable, nor used to any appreciable extent for any other purpose, are dutiable under Schedule N, of the act of March 3, 1883, (22 Stat. 512,) at the rate of twenty per centum ad valorem and not under Schedule L at the rate of fifty per centum; as articles composed wholly of silk or of silk as their component material of chief value; or under Schedule C, at the rate of forty-five per centum, as articles composed chiefly of metal.

Whether the goods in question were trimmings used exclusively or chiefly in the making and ornamentation of hats, bonnets or hoods was a question for the determination of the jury and it was error in the trial court to instruct otherwise.

The case is stated in the opinion.

Mr. A. H. Garland for plaintiff in error.

Mr. Percy L. Shuman and *Mr. Henry E. Tremain* also filed a brief for plaintiff in error.

Mr. Solicitor General for defendant in error.[1]

Mr. Justice Shiras delivered the opinion of the court.

This was an action brought by the firm of James H. Walker & Co., in the Circuit Court of the United States for the Northern District of Illinois, to recover from the collector of that district moneys which were alleged to have been paid in excess of the legitimate duties assessable on certain imported articles.

The history of the case, as we find it in the bill of exceptions, shows that the goods in question were trimmings of various styles and materials, some being composed entirely of silk, some chiefly of silk, and some chiefly of metal, and some being a combination of both silk and metal. The evidence further tended to show that all the said trimmings were used either exclusively or chiefly for hat or bonnet trimming, and in respect to all the merchandise the use was exclusively or chiefly for the making or ornamenting of hats, bonnets, and hoods, and that the goods were not suitable for and were not used to an appreciable extent for any other purpose. A considerable portion of said goods were manufactured expressly for the plaintiffs, and upon their order, to be used, as the same were used, as trimmings in the making and ornamenting of hats, bonnets and hoods. The proof tended to show that most of the trimmings in question had more or less specific commercial names, which aided to distinguish one from another, and that "trimmings" was their general name, and not their specific one.

The importers claimed that these goods should have been assessed under Schedule N of the act of March 3, 1883, (22 Stat. 512,) at the rate of twenty per centum ad valorem. The collector assessed the duties under Schedule L, (22 Stat. 510,) at the rate of fifty per centum for the articles composed wholly or chiefly of silk, and under Schedule C at the rate of forty-five per centum for the articles composed chiefly of metal.

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[1] For the argument of Mr. Solicitor General in this case see *ante*, pp. 535–539.

Opinion of the Court.

The court below charged the jury as follows: "The collector classed these goods as a manufacture of silk and assessed a duty of fifty per cent ad valorem upon them. The proof tends to show that the goods in question are composed of chenille and silk. . . . Now it makes no difference whether these goods are used only for hats and bonnets or not. If they are specially dutiable by name or commercial description in some other clause of the statute than clause 448, then the plaintiff has failed in his case." And as to other articles the court said: "There are no samples of these goods produced, but the proof tended to show that they were used for making or ornamenting hats and bonnets. They were classed as a manufacture of silk, and if they were silk, as the proof on the part of the plaintiff tends to show, then they would be properly classed as silk goods, and not as bonnet material."

As to various other articles in question, the court instructed the jury that if they were composed wholly or chiefly of silk they were dutiable at the rate of fifty per centum ad valorem, as manufactures of silk, notwithstanding that the evidence showed that they were used only for hats and bonnets.

Under these instructions, which were duly excepted to, the jury found, as to most of the articles, a verdict in favor of the collector, and, judgment having been entered accordingly the case is before us on a writ of error.

No extended discussion is required. We have just decided in the case of *Cadwalader* v. *Wanamaker*, *ante*, p. 532, in which the facts were substantially the same with those disclosed in the present record, that goods intended for trimmings for hats, bonnets, and hoods, and found by the jury to be chiefly so used, were properly assessed for duty, under Schedule N, at twenty per centum ad valorem, notwithstanding that such goods were composed wholly or chiefly of silk. In so ruling we considered ourselves bound by our previous decisions. *Hartranft* v. *Langfeld*, 125 U. S. 128; *Robertson* v. *Edelhoff*, 132 U. S. 614.

Under the law as there laid down, the case ought to have been submitted to the jury to find whether the goods in question were trimmings used wholly or chiefly in the making

and ornamentation of hats, bonnets, or hoods, and with instructions that, if they so found, their verdict should be given in favor of the plaintiff, notwithstanding it might appear that the articles were composed wholly or chiefly of silk.

The judgment of the court below is accordingly reversed, with directions to award a new trial.

MR. JUSTICE BREWER and MR. JUSTICE BROWN concurred in the judgment for reasons stated in the dissenting opinion in *Hartranft* v. *Meyer*, No. 860, *post*, 547.

HARTRANFT *v.* MEYER.

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

No. 860. Argued April 11, 12, 1893. — Decided May 15, 1893.

Piece goods, commercially known and designated as "chinas" and "marcelines," which are chiefly used for *lining* hats and bonnets are dutiable at the rate of twenty per centum ad valorem under Schedule N of the tariff act of March 3, 1883, as materials "used for making . . . hats, bonnets, or hoods."

Mr. Solicitor General for plaintiff in error.[1]

Mr. Frank P. Prichard and *Mr. Joseph H. Choate*, (with whom were *Mr. Henry E. Tremain* and *Mr. Mason W. Tyler* on the brief,) for defendant in error.

MR. JUSTICE SHIRAS delivered the opinion of the court.

This was an action, brought by the firm of Meyer & Dickinson, in the Court of Common Pleas of Philadelphia, against

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[1] For the argument of Mr. Solicitor General in this cause see *ante*, p. 540.

the collector of customs for that district, to recover duties which they allege to have been illegally assessed against certain articles imported by them. The action was certified to and tried in the Circuit Court for the Eastern District of Pennsylvania, and resulted in a verdict and judgment in favor of the plaintiffs. The collector sued out a writ of error, which is now prosecuted in this court by his executrix.

The issues that were tried in the court below arose under the tariff act of March 3, 1883. 22 Stat. 510, 512, c. 121. The imported articles consisted of "chinas" and "marcelines," the latter being made wholly of silk, and the former of silk and cotton, silk being the component material of chief value.

The position of the government was that such articles were dutiable under Schedule L of the act, at the rate of fifty per centum ad valorem, while the plaintiffs contended that they came under Schedule N, and were chargeable with duty at the rate of twenty per centum ad valorem.

The court below regarded the case as falling within the doctrine of *Hartranft* v. *Langfeld*, 125 U. S .128, and of *Robertson* v. *Edelhoff*, 132 U. S. 614, and accordingly referred it to the jury to find, under the evidence, whether the goods in question were trimmings, and what was their chief use.

A large number of witnesses were called on both sides. There was no dispute as to the composition of the goods, but there was conflicting evidence as to the extent of their use as hat trimmings. The testimony on behalf of the government tended to show that such goods were largely, and, according to some witnesses, chiefly used for purposes other than for hat and bonnet trimmings. The plaintiffs' witnesses testified that, while they were used to a limited extent for other purposes, their chief use was for trimming and lining hats and bonnets. A verdict was found and judgment entered in favor of the plantiffs.

If this case is not distinguishable in its facts from the cases above referred to, then a like conclusion must be reached as that announced in the case of *Cadwalader* v. *Wanamaker*, just decided, *ante*, p. 532, and for the same reasons, which we need not here repeat.

An attempt is made to distinguish the facts of the cases in the particular that whereas, in the other cases the imported goods were ribbons, and thus articles naturally fitted for hat and bonnet trimmings, in this case they are piece goods, bought and sold under the commercial designation of "chinas" and "marcelines," and chiefly used for *lining* hats and bonnets.

But an examination of the record shows that the judge of the trial court did not overlook the distinction supposed to be involved in the character of the imported articles. He stated to the jury that "undoubtedly the word 'trimmings,' as used in the clause relating to hats, and so forth, material for, includes ornamental appendages. But does it include nothing more? This you will determine upon a consideration of the whole evidence, and having regard also to the terms of the particular claim of the tariff act with which we are now dealing. The language of that clause as it relates to 'trimmings' is: 'Hats, and so forth, materials for, . . . trimmings, . . . used for *making* or ornamenting hats, bonnets, and hoods.' The use is not confined to ornamentation, but by the express words of the clause is for 'making' as well as ornamenting. . . . But aside from the matter of ornamentation you are to consider whether the lining of a hat, bonnet, or hood is not part of the construction or 'making' of the article within the meaning of the clause of the tariff act."

And again: "The evidence tends to show that chinas and marcelines are particularly adapted and intended to be used, and in fact are and long have been used, as inside appendages for hats, bonnets, and hoods, to trim and finish them, and that their substantial commercial value consists in that use. Are they or are they not trimmings according to the natural meaning of that word? This you will determine, taking into consideration all the evidence on the subject and having regard to the preponderating weight of the evidence. If you should find from the evidence that the articles here in question, chinas and marcelines, were not trimmings, that of course would make an end of the plaintiffs' case; but if you should find them to be trimmings, then the only remaining inquiry will be as to what their chief use is."

Dissenting Opinion: Brewer, Brown, JJ.

We are unable to see anything objectionable in these instructions, and the charge must be deemed a sound exposition of the law, if the previous decisions of this court, whose rulings the learned judge had in view, are to stand.

Conceding there is force in the views so ably urged in behalf of the government, for the reasons given in the case of *Cadwalader* v. *Wanamaker*, *supra*, we adhere to the conclusions reached in the cited cases, and the judgment of the court below is accordingly *Affirmed.*

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

With respect to these three cases, [No. 31, *ante*, 532, No. 151, *ante*, 541, and this case,] I desire to make these observations: The questions presented in them are not constitutional, nor even of general and permanent law, but relate only to the scope and meaning of certain statutory clauses now repealed, and which were in force for only a few years. While the amounts involved may be, as counsel contend, large, yet the questions are but of temporary and passing importance. Hence, after two decisions the questions should be considered as settled, and that, notwithstanding some of the present members have come on to the bench since those decisions, and may not concur in the views therein expressed.

The end of litigation, so much to be desired, is not fully satisfied by the close of the particular law suit, but implies that the question involved therein is settled; so settled, that all parties may adjust their dealings and conduct accordingly. A change in the personnel of a court should not mean a shift in the law. *Stare decisis* is the rule, and not the exception. Whatever, therefore, is within the letter or spirit of the two cases of *Hartranft* v. *Langfeld*, 125 U. S. 128, and *Robertson* v. *Edelhoff*, 132 U. S. 614, should be considered as having passed beyond the scope of present inquiry. For these reasons, considering the course of the trial and the rulings of the court, I concur in the decisions in the first two cases.

With regard to No. 860, I think that the facts and rulings

bring out a clear distinction. The importations in that case were chinas and marcelines, so described in the invoices, imported as piece-goods, in rolls or folds of from 75 to 125 yards in length, and from 18 to 31 inches in width. Are such goods trimmings? I think by no fair construction of the word can they in that condition be called trimmings. Confessedly they must come within these words of the statute: "Trimmings . . . used for making or ornamenting hats, bonnets, and hoods." The question of use, or chief use, does not arise until it is established that the goods are trimmings. This question was really not in the cases in 125 and 132 U. S., *supra*. In the opinion in the former it was said of the goods there in question: "That they were trimmings was not a matter of controversy; all the witnesses, on both sides, spoke of them as such." And in the latter: "On the trial the undisputed evidence was that the articles in question were used exclusively for trimming hats and bonnets, and had a commercial value only for that purpose." In neither case does it appear that any question was made as to whether the articles there imported were trimmings or not. But it was in this case, and such instructions asked and refused, as compel a determination of that specific question. The instructions and comments of the court are as follows:

"'1. If you believe that in March, 1883, chinas and marcelines were commercially known as "linings," and not "trimmings," then your verdict should be for the defendant.'

"This point is refused.

"'2. If you believe that the chinas and marcelines in suit were bought, sold, and used in trade in March, 1883, under those names, and were not commercially known as "trimmings," then your verdict should be for the defendant.'

"This point is refused."

"'6. If you believe that the chinas and marcelines in suit were not in the form of trimmings at the time of their importation, you must find for the defendant, although you should believe that they were suitable and adapted by their nature and qualities to be made into hat trimmings.'

"This point is refused. This point which I have just read

and the next one embody the proposition advanced by defendant's counsel and discussed by them before the jury that the chinas and marcelines here in question cannot be regarded as within the term 'trimmings' as employed in the act of Congress, because they are imported by the piece, and before the material is actually applied to use in the making or ornamenting of hats, bonnets, and hoods the pieces have to be cut into smaller pieces and made into certain forms.

"But the court cannot accept this view as correct, and I instruct you that hat materials which are imported by the piece are 'trimmings' within the meaning of the act of Congress if they are distinctively adapted and, in fact, are chiefly used for trimming hats, bonnets, and hoods, and are not specially enumerated or provided for in the act.

"'7. The jury are instructed that there is a distinction properly to be made between "trimmings" and materials out of which to manufacture trimmings, and if the articles in suit are not trimmings in the sense of being completely fabricated as such, but required skill and labor to cut, fit, fold, sew or fashion them into trimmings, then they must find for the defendant.'

"You will understand that I am asked to instruct you in this way; this is the proposition which counsel hand me to affirm. I decline to give you that instruction, and I have given you the contrary instruction. The point is refused."

Now, I am of the opinion that these goods were, in the condition in which they were imported, not trimmings. I concede that if they had a commercial designation as such, that would be sufficient within many rulings of this court, but the testimony does not establish that fact, and the refusal of the first two instructions eliminates that matter from present consideration. That being eliminated, it does not seem to me that these goods, when and as imported, legitimately fall within the ordinary meaning of the word "trimmings." The idea of trimmings is of something cut up or prepared ready for present use in the ornamentation or making of hats, bonnets, etc. Concede that these rolls or folds of cloth were generally used for cutting up into trimmings, they

were not, while in the piece, fairly to be denominated "trimmings." Take other piece goods, bolts of linen or cotton cloth, suppose that some of them were used mainly, or even exclusively, for cutting up into handkerchiefs, napkins, or towels — would any one suppose that the terms handkerchiefs, napkins or towels when used with statutory precision, were intended to include or did include the cloth imported in bolts? Were the language cloth for handkerchiefs, etc., or material for handkerchiefs, etc., doubtless such expressions would include the cloth in bolts. So here, if the statute named cloth or material for trimmings, the conclusion would be different; but where the word is simply "trimmings," I take it to mean that which at the time of importation and in the condition in which it is imported is ready for immediate use as trimmings, and not that which is to be cut up into trimmings. Or, to carry the illustration farther, could hickory logs be called "wooden toothpicks," because when cut up into little pieces they may be used as such; or would ivory fall under the designation of piano keys, because when sawed into proper shape it is used for that purpose?

Indeed to my mind the word "trimmings" carries necessarily this idea: something in size, form, or condition fit and ready for present use in the making or ornamentation of hats, bonnets, or other such articles.

For these reasons I cannot concur in the decision in the latter case.

I am authorized to say that MR. JUSTICE BROWN concurs in this opinion.

IDE *v.* BALL ENGINE COMPANY.

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

No. 227. Argued April 21, 1893. — Decided May 10, 1893.

Letters patent No. 301,720, issued July 8, 1884, to Albert L. Ide for new and useful improvements in steam-engine governors are void for want of novelty in the invention claimed in the specification.

Statement of the Case.

THIS was a bill in equity for the infringement of letters patent No. 301,720, issued July 8, 1884, to the plaintiff Ide, for a steam-engine governor. Another patent, No. 308,498, issued to the same party, November 25, 1884, was originally embraced in the bill, but upon the trial in the court below the charge relative to this patent was not pressed, and the case was rested wholly upon No. 301,720.

"This invention," said the patentee, in his specification, "relates to that class of steam-engine governors known as 'fly-wheel governors,' and has for its primary object to provide means for holding the eccentric steadily in its proper poised position, in opposition to the tendency of certain extraneous forces which are calculated to disturb the movements of the valve as sought to be determined by the balanced forces of weights and springs when the engine is in motion."

"To this end the invention consists in the combination of a dash-pot with the governor and pulley, said dash-pot connected with a fixed and a movable part, or with two relatively or unequally movable parts — as, for example, with the extremity of a weight-lever and the pulley-hub. In this class of governors the position of the eccentric is variably determined by the opposing and self-balancing forces exerted by the centripetally-acting spring or springs and the centrifugally-acting weight or weights connected with said springs, the tendency being to hold the eccentric permanently in a certain poised position for a given speed of the wheel to which the governor is applied, and to vary the position of the eccentric exactly as the speed of said wheel is varied. There are, however, certain temporarily-acting causes of disturbance calculated to change the position of the eccentric independently of the speed of the wheel. . . . At a regular and very high speed of the governor wheel or pulley these disturbing forces operate but slightly, owing to the momentum of the weights, which serve to prevent their deflection from a regular course, but at lower speeds than that at which the apparatus is adjusted to run, and particularly in accelerating or retarding the engine, as in starting up or slowing down, these incidental disturbing forces interfere materially with the valve action and give an objec-

Counsel for Appellees.

tionable irregularity to the movements of the weights. In the case of an engine used for running a dynamo for electric lighting purpose, and subject to sudden and wide changes in requisitions of power and speed, the effects of the disturbances referred to manifest themselves also in the quality or intensity of the lights. A dash-pot constructed and attached to the apparatus in such a manner as to prevent sudden movements of the weight-levers or of the eccentric is found in practice to wholly overcome the defects indicated and to give a desirable steadiness and regularity to the movements of the movable parts of the governor as well as accuracy and reliability to the cut-off action of the valve."

After giving a description of the device by reference to the drawings, the patentee added: "The cylinder of the dash-pot is filled with glycerine or some other non-compressible liquid, preferably one that is also not congealable at a temperature to which the engine is likely to be exposed. By means of the dash-pot applied to the relatively movable and stationary parts or to the unequally-moving parts, as described, wide and sudden radial movements of the weights, E', are prevented, and as a consequence the governor will have a steady and efficient action at all speeds of the pulley or wheel to which said governor is applied. . . . The dash-pot, while preferably connected with the end of the lever E, may obviously be attached to the eccentric itself, and to a fixed or less movable part of the apparatus."

The single claim of the patent was as follows: "In a fly-wheel governor, the combination with relatively-moving parts, of a dash-pot, substantially as described."

The defendants set up in their answer the invalidity of the patent by reason of prior use, and also non-infringement. Upon a hearing in the court below upon pleadings and proofs the bill was dismissed upon the ground of want of novelty, 39 Fed. Rep. 548, and plaintiff appealed to this court.

Mr. C. K. Offield for appellant.

Mr. J. C. Sturgeon and *Mr. J. C. Gallagher*, (with whom was *Mr. J. K. Hallock* on the brief,) for appellees.

Opinion of the Court.

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

The stress of this case is upon the novelty of the invention covered by the patent of July 8, 1884, to the plaintiff Albert L. Ide.

Both the plaintiff and defendant are manufacturers and dealers in a particular type of steam engines known as "electric-lighting-engines," and used for generating and controlling the electric-lighting circuits now in common use, principally under the incandescent system.

The governors used upon these engines are not the old and familiar fly-ball governors, but consist of weights, whose centrifugal action is counterbalanced by centripetally-acting springs, attached to the lever by which the weights are suspended, the object of which is to hold the eccentric constantly in a fixed position for a given speed of the wheel, and to vary the position of the eccentric exactly as the speed of the wheel is varied. This style of governor is enclosed either within the fly-wheel or some other wheel connected and revolving with the shaft. It was found, however, that when the burden of the engine was suddenly lifted by the extinguishment of a large number of lights, there was a tendency on the part of the governor to "race," as it is termed, causing an unsteadiness and irregularity in the speed of the engine, which in its turn produced an objectionable pulsation and variation in the intensity of the lights. It was also found to operate destructively upon the carbon filaments of which the illuminants are composed. For the purpose of obviating this difficulty, and producing a perfectly isochronous movement of the engine under extreme changes of load, plaintiff attached to the governor what is called a dash-pot, a device in common use for easing the shutting of spring doors, and preventing slamming. As used upon doors, it consists simply of a closed cylinder filled with air, and a piston having a passage or leak through or around it. When used in connection with the governor of a steam engine, the cylinder is filled with glycerine or other similar fluid. A dash-pot thus constructed and at-

tached to the apparatus in such manner as to prevent sudden movement of the weight levers, or of the eccentric, is found in practice to overcome the defect indicated, and to give a desirable steadiness and regularity to the movements of the governor as well as accuracy to the cut-off action of the valve.

Mr. Ide was not, however, the first to discover the value of a dash-pot in connection with the governor of a steam engine. As early as 1880, the Buckeye Engine Company of Salem, Ohio, one of the largest manufacturers of steam engines in the country, constructed engines in which the governor consisted of a metal disk clamped upon the driving shaft, such disk being about forty inches in diameter and weighing in the neighborhood of 200 pounds. These disks were used simply as a casing to enclose the governor, which was equipped with arms arranged to swing by centrifugal force as the shaft revolved, and kept from swinging too freely by springs acting centripetally. In this connection the superintendent of the Hartford Engineering Company testified that he had a case of what is called the "racing" of a governor on a pair of engines running in the Hartford Carpet Company, in Thompsonville, Connecticut. To use his own words: "I took the foreman of the engine shop with me to the factory and attempted to correct the trouble. We were unsuccessful. We then determined to put on dash-pots filled with oil or similar fluid, as the Buckeye people had done in similar cases. Within a short time the dash-pots were made, sent to the Hartford Carpet Co., and attached to the governor by their men. Mr. Steele, the engineer-in-chief, came to the shop a few days later and reported most excellent results from the application of the dash-pots." This testimony was corroborated by that of Steele, the engineer, who swore the dash-pots were applied in 1881, had been constantly in use since, and had performed their work satisfactorily.

It also appeared that a similar dash-pot had been attached to an engine run by the Hartford Manilla Company of Burnside, Conn., and that the results there were equally satisfactory. There was also evidence of the employment of Buckeye engines at the Pacific Elevator in Brooklyn, to the

governors of which was attached a dash-pot to prevent any sudden, violent fluctuation of the governor. These governors were located upon the opposite ends of the main shaft but not in the fly-wheels. A similar dash-pot was attached to the governor of a Buckeye engine at the Syracuse Iron Works. None of these governors, however, were attached to the fly-wheels of the engine but upon a separate wheel mounted upon the shaft and revolving with it.

There was some testimony that the Buckeye engines were defective in their construction or operation, and that the dash-pots were put into the governors to prevent the engines from wrecking themselves, and to avoid suits for damages. But however this may be, the testimony is uncontradicted that the addition of the dash-pots had the desired effect of steadying the action of the governor.

As the testimony, then, demonstrates that governors *without* dash-pots had been attached indiscriminately, not only to the old fly-ball governor, but to the shaft governors, whether connected with the fly-wheel or the pulley-wheel, or a separate wheel of their own, connected with the shaft; and that a governor *with* a dash-pot had also been attached to a separate wheel revolving with the shaft, the invention of Ide consists only in removing the governor, with the dash-pot, from a separate wheel to the fly-wheel. If the dash-pot performed any new function when attached to a governor in the fly-wheel, such change in location might be the basis of a patent; but the testimony is that it was attached to the Buckeye governors for the very purpose for which Mr. Ide attached it to his governor, and that it accomplished that purpose to the entire satisfaction of the parties interested.

It is true that plaintiff claims certain advantages from locating his governor in the fly-wheel of the engine, which is very much larger than the special wheel used for the governor in the Buckeye engines, but these advantages seem to be largely fanciful — such as existed before the dash-pot was added, and, in any event, are not such as rise to the dignity of invention. They were advantages which a governor placed in a fly-wheel has over a governor placed in any other wheel,

but to which the addition of the dash-pot contributed nothing new. It is evident that plaintiff, in taking out his patent, supposed that he had first discovered the advantage of attaching a dash-pot to the class of governors known as shaft or shifting eccentric governors, and, when confronted with the Buckeye governors, sought to limit his patent to a dash-pot connected with a governor located in the fly-wheel, and to discover some special advantage to be gained by locating it there instead of in any other wheel revolving upon the shaft.

The introduction of these governors seems to have resulted in a large increase in plaintiff's business, and in the establishment of agencies in all the principal cities for selling engines containing this improvement. While this may have been occasioned by his introduction of the dash-pot, he has no right to a monopoly of this feature, since he had been anticipated in this particular by the Buckeye engines. The only novelty he has any possible right to claim is in the application of this style of governor, with the dash-pot, to an electric lighting engine, which seems to have been the thing needed to obviate the difficulty of a variable intensity of light and to secure the requisite steadiness; but this is not what is claimed in the patent. There can be no doubt that if the attachment of a dash-pot to a shaft governor had been a novelty at the time his patent was taken out, the Buckeye governors would have been an infringement. This being so, it is equally clear that, existing as they did before his patent, they are an anticipation.

The decree of the court below dismissing the bill is, therefore,

Affirmed.

BRIGHAM *v.* COFFIN.

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

No. 251. Argued and submitted April 24, 1893. — Decided May 10, 1893.

Letters patent No. 283,057, issued August 14, 1883, to Frank E. Aldrich for an improvement in rubber cloths or fabrics, are void for want of novelty.

This was a bill in equity for the infringement of letters patent No. 283,057, issued August 14, 1883, to Frank E. Aldrich, for an improvement in rubber cloths or fabrics.

The patentee stated in his specification:

"My invention relates more especially to means for ornamenting the cloth or fabric; and it consists in a rubber cloth or fabric composed wholly or in part of rubber, having one or both of its surfaces provided with useful or ornamental designs or figures printed or stamped thereon with an ink or compound of a different color or shade from the body of the fabric by means of rollers, blocks, or in any other suitable manner, the ink or compound preferably containing rubber, caoutchouc, gutta-percha, or some analogous material, as hereinafter more fully set forth and claimed.

"In carrying out my invention I take an ordinary rubber cloth, preferably gossamer rubber cloth, or any fabric composed wholly or in part of rubber, and print or stamp its finished surface or surfaces with an ink or compound of a different color or shade from the body of the goods by means of engraved rollers, blocks, types, dies, or in any other suitable manner. I deem it preferable, however, to use rollers, one or more being employed, according to the number of colors to be applied, and the cloth passed in cuts through the printing-machine after the manner of printing calico and similar goods.

"The ink or compound employed in printing the figures or designs on the cloth or fabric is prepared as follows: Take one-half pound of rubber or caoutchouc, four quarts of naphtha,

one-half pound of red lead, and one-eighth of an ounce of flowers of sulphur. Dissolve the gum in the naphtha, and then add and thoroughly mix the other ingredients therewith.

"I do not confine myself to the exact proportions given, as these may be varied considerably without materially changing the nature of the compound; and, instead of naphtha, some other solvent may be used for the rubber, if desired, although naphtha is deemed preferable; also, instead of the lead, litharge, pigments, shellac, ocher, lamp-black, or any other coloring matter may be employed, according to the shade or color it is desired to give the ink.

* * * * *

"As I propose to make the ink or printing compound described the subject matter of other letters patent, the same is not herein claimed when in and of itself considered."

His claims were as follows:

"1. As an improved article of manufacture, a rubber cloth or fabric composed wholly or in part of rubber, having one or both of its surfaces printed or stamped with useful or ornamental designs or figures in an ink or printing compound of a different color or shade from the body of the cloth or fabric, substantially as set forth."

The second claim was like the first, except that the ink or compound is described as being "composed in part of rubber, caoutchouc, gutta-percha, or some analogous substance, and a coloring material or materials, substantially as specified."

The third claim was like the second, except that instead of the words "and a coloring material or materials" there is substituted "and containing sulphur or an ingredient for rendering the ink vulcanizable."

The fourth claim was like the first, except that the cloth or fabric is described as "varnished."

The fifth claim was also like the first, except that the ink or printing compound is described as "analogous to the coating of the cloth or body of the fabric, and of a different color or shade therefrom."

The sixth claim was also like the first, except that the ink or compound was described as "containing rubber and sulphur,

or an ingredient for vulcanizing the rubber when subjected to heat or the sun's rays."

The seventh claim was like the sixth, except that the words "the sun's rays" were omitted.

The answer denied that Aldrich was the inventor of any material or substantial part of the thing patented, and gave notice of prior patents; denied that the Aldrich patent described anything of value or importance; averred that it was practically worthless; denied that the invention was any advance upon the art of making rubber fabrics, or that such fabrics had ever been practically manufactured as described in the patent. The answer also denied infringement.

On a hearing upon pleadings and proofs in the court below the bill was dismissed, (37 Fed. Rep. 688,) and the plaintiff appealed.

Mr. Thomas William Clarke for appellant.

Mr. J. E. Maynadier, for appellees, submitted on his brief.

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

The bill was dismissed by the court below upon the ground that there was nothing novel in an article of manufacture which consisted in printing ornamental figures upon a rubber fabric with a colored ink composed in part of rubber.

The patent in question covers as an article of manufacture:

1. A rubber cloth or fabric, which must be composed wholly or in part of rubber.

2. One or both of the surfaces of such fabric must be printed or stamped with designs in an ink or printing compound of a different color or shade from the body of the fabric.

In these particulars all the claims agree. The last six claims differ from the first only in describing the ink or compound, either as composed of rubber, caoutchouc, gutta-percha, or some analogous substance, or, in addition thereto, as contain-

ing sulphur or other substance for rendering the ink vulcanizable, when subjected to heat or the sun's rays.

At the same time, while giving the composition of the ink, the patentee expressly declares that he does not claim the same in and of itself considered, because he proposed to make such ink or printing compound the subject of another patent. The case then reduces itself to the single question whether there is any novelty in printing or stamping a rubber cloth with designs in an ink of a different color or shade. The prior patents put in evidence show very clearly that there is no novelty in printing or stamping upon a rubber fabric designs of various patterns.

In the patent of December 14, 1875, to Dunbar and Lothrop for improvement in the manufacture of floor cloths, the invention consists "of a product composed of a base or foundation of cheap compound of rubber, overlaid or inlaid with a series of strips, figures, or characters of a thin and more expensive material, which is capable of receiving any desired color or tint, these strips or figures being, in the final stage of the vulcanizing process, embedded in the foundation, so that a uniformly even surface exists over the whole." The claim of this patent is for "a floor cloth composed of a body of cheap material, with a series of parallel strips in colors or neutral tints composed of a finer quality of rubber compound, substantially as and for the purposes stated."

In the later patent of March 30, 1880, to Brigham and others, the object of the invention was stated to be "to produce a light, thin, waterproof fabric for dress and similar goods ornamented with figures and colors to resemble ordinary dress and similar goods which are not of the waterproof class." The invention consisted "of a light, thin fabric, woven or otherwise formed, covered with a waterproofing of rubber composition, or a composition in all respects equivalent thereto, printed with ornamental colors and figures (embossed or plain) to resemble ordinary dress or similar goods." The composition described in the patent "is spread upon the cloth in the manner well known in the art, and forms a basis for receiving the colors and holding them in sharp, clear lines without

running or blurring, and so as to make well-defined and ornamental figures. . . . The product is a desirable imitation of figured goods in ordinary colors, and having what may be called a 'cloth surface,' . . . and all the colors and beauty of appearance of such ordinary dress and similar goods, with the valuable quality, in addition, of capacity to resist or repel moisture." The claim was for "a waterproof fabric for dress and other goods, having a surface of the described waterproof composition, and impressed with figures and colors, as set forth."

It is difficult to see wherein the invention of Aldrich differed in any important or patentable feature from these prior devices. Aldrich may be entitled to a patent for his composition, but the patent in question is not for a rubber fabric printed or stamped with designs in any particular ink or compound, but in any ink composed in whole or in part of rubber, etc., with or without sulphur or other vulcanizing material. While the patent is for a manufacture or product, it is for a product resulting from a specified process of printing or stamping in an ink of this general description. The composition used by Brigham is described as made up of ten pounds of india-rubber in its natural condition and thirty pounds of whiting as a basis. For black goods, lamp-black is added; for white goods, two pounds of zinc-white; for a red color, vermilion is used, and for other colors, other mineral pigments. But in all cases the rubber and whiting constitute the bulk of the mass, though other known equivalents for rubber may be used, and the ingredients are ground together and then dissolved in benzine.

The ink or compound of Aldrich is composed of different ingredients, of which, however, rubber and naphtha appear to constitute the basis, and the alleged patentable feature consists in printing or stamping ornamental designs with this compound upon a rubber cloth or fabric. There does not seem to be any essential difference in the two patents, the main difference being in the composition used by Aldrich, which is not made the subject of his patent. If, as is claimed by the plaintiff, the invention of Brigham was a practical

failure and abandoned, the evidence is equally clear that Aldrich, after putting the goods upon the market for a year and a half, abandoned the business and has not resumed it. There does not seem to be much to choose between them in this particular.

This case is substantially like that of *Underwood* v. *Gerber*, *ante*, 224, decided at the present term, in which the patentee claimed a fabric coated with a composition composed of a precipitate of dye matter, in composition with oil, wax or oleaginous matter, without claiming the composition of this matter. The patent was treated as one for applying the composition to paper, and was found to be without novelty.

The decree of the court below, will, therefore, be

Affirmed.

COATS *v.* MERRICK THREAD COMPANY.

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

No. 261. Argued April 27, 28, 1893. — Decided May 10, 1893.

Irrespective of any question of trade-marks, rival manufacturers have no right, by imitative devices, to beguile the public into buying their wares under the impression that they are buying those of their rivals.

The proofs establish that there was no intention on the part of the appellees to impose their thread upon the public as that of the plaintiff in error, or to mislead the dealers who purchased of them.

When the letters patent to Hezekiah Conant, protecting "a new design for embossing the ends of sewing-thread spools" expired, the public became entitled to use them for the purpose for which the assignee of Conant used them.

THIS was a bill in equity by the firm of J. & P. Coats, of Paisley, Scotland, to enjoin the defendants, the Merrick Thread Company, a Massachusetts corporation, and Herbert F. Palmer, its managing agent in New York, from infringing plaintiffs' trade-mark, and unfairly competing with them, by simulating

certain labels and symbols used by the plaintiffs upon the ends of wooden spools upon which sewing thread is wound.

The bill set forth in substance that plaintiffs had, since 1830, been engaged in the manufacture and sale of sewing threads on spools, and since the year 1840 the thread made by them had been and still was sold largely in the United States; that since about the year 1869 said firm had also been engaged in the manufacture of thread at Pawtucket, in the State of Rhode Island; that their business was very large and valuable, and their thread was well known to the trade as "J. & P. Coats' thread;" that all the thread manufactured by plaintiffs, which is wound on spools of 200-yard lengths, had been and still was composed of six separate strands twisted together, known as "six-cord" thread, and was designated upon their labels and wrappers as "Best Six Cord." That about the year 1842, the name "J. & P. Coats," with the quantity reeled on each spool, and the words "Best Six Cord," with a designating number, were placed upon a circular black and gilt label upon the end of every spool, and had always been one of the designating trade-marks of the plaintiffs in the United States; that in 1869 they adopted the idea of embossing upon the natural wood and upon the outer edge of the heads of the spools numerals corresponding with those upon the paper labels pasted upon the centre of said spool heads, the object of such embossing being to show the number of the thread in case the paper label showing such number should be defaced or removed, and also to give a distinctive appearance to the plaintiffs' spools, and to indicate the origin and manufacture of the thread. The bill further averred that on the 9th of February, 1875, plaintiffs registered as a trade-mark at the Patent Office the central label of paper, and the peripheral band of natural wood, embossed with an ornamental design of crossed lines and central stars, with intermediate spaces, in which were embossed numerals corresponding to those in the centre of the label.

The bill further charged the defendant, the Merrick Thread Company, with being the manufacturers of both the "three-cord" thread, a thread of inferior grade, and also of "six-

Counsel for Appellees.

cord" thread on spools in length of 200 yards; that for the three-cord thread the defendants used paper labels, wholly unlike, in color or design, to any labels used by the plaintiffs, but that in selling in competition with the plaintiffs the six-cord thread, they used labels upon the spools made in colorable imitation of the plaintiffs', and intended as a counterfeit of their designs and trade-mark, the object being to so imitate the general appearance of plaintiffs' thread that the same may pass into the hands of tailors, illiterate men, and others buying at retail and using sewing thread, as the genuine thread of plaintiffs.

In their answer the defendants denied the material allegations of the bill, and that the marks, embossment and labels used by the Merrick Thread Company were a simulation or infringement upon the plaintiffs' labels and trade-marks, but, upon the contrary, averred that they had endeavored to mark their goods so that no one could mistake their origin, and that their labels were so different from those of the plaintiffs and other manufacturers that they were plainly distinguishable from them by ordinary purchasers. They further averred that the use of embossing the number of the spool thread on the wood of the spool head around the paper label was, on April 5, 1870, patented as a design to one Hezekiah Conant, which patent had long since expired, and alleged that since such expiration the defendants had the free right to use such design, including any paper label which was not in and by itself an infringement of any lawful trade-mark of the plaintiffs.

On a hearing in the court below upon pleadings and proofs the bill was dismissed, (36 Fed. Rep. 324,) on the ground that defendants were not shown to have made an unlawful use of the plaintiffs' labels. Plaintiffs thereupon appealed to this court.

Mr. Frederic H. Betts for appellants.

Mr. W. C. Witter, (with whom was *Mr. W. H. Kenyon* on the brief,) for appellees.

Opinion of the Court.

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

The gravamen of the plaintiffs' bill is contained in the allegation that the defendants have been guilty of an unlawful and unfair competition in business, in that they have been infringing the rights of plaintiffs in and to certain marks, symbols and labels, by selling in competition with the plaintiffs a spool thread of "six cords" put up on spools of 200 yards' length, which thread is not manufactured by these plaintiffs, but is put upon the market and sold among retailers and customers, as well in the city of New York as in other and distant parts of the United States, as and for the thread of the plaintiffs, by reason of the labels, marks, and devices upon the spools whereon the said thread is wound.

It will be observed in this connection that no complaint is made of the conduct of the defendants with respect to any other thread than that of six cords put up in spools of 200 yards in length, notwithstanding that both plaintiffs and defendants have been long engaged in the manufacture of thread of several different sizes and lengths. Nor is it alleged that defendants have used any other means of imposing their thread upon the public as that of the plaintiffs, except by the imitation of their device upon one end of the spool. The dissimilarity between the labels on the other end of the spool is so great that it is not and could not be claimed that any intent to imitate existed.

It is admitted, however, that six-cord spool cotton is the thread most largely used for domestic consumption, and, put up on spools of 200 yards' length, in numbers from 8 to 100, is best known and purchased by the great mass of consumers; and that it is as manufacturers of this description of thread that the plaintiffs are and have for a long time been known throughout the country.

The controversy between the two parties then is reduced to the single question whether, comparing the two designs upon the main or upper end of the spool, there is such resemblance as to indicate an intent on the part of defendants to put off

their thread upon the public as that of the plaintiffs, and thus to trade upon their reputation. There can be no question of the soundness of the plaintiffs' proposition that, irrespective of the technical question of trade-mark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and induce him to believe he is buying those of the plaintiffs. Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their enclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals. *Perry* v. *Truefitt*, 6 Beav. 66; *Croft* v. *Day*, 7 Beav. 84; *Lee* v. *Haley*, L. R. 5 Ch. 155; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Johnston* v. *Ewing*, 7 App. Cas. 219; *Thompson* v. *Montgomery*, 41 Ch. D. 35; *Taylor* v. *Carpenter*, 2 Sand. Ch. 603; *Amoskeag Mfg. Co.* v. *Spear*, 2 Sand. N. Y. 599; *McLean* v. *Fleming*, 96 U. S. 245; *Boardman* v. *Meriden Britannia Co.*, 35 Connecticut, 402; *Gilman* v. *Hunnewell*, 122 Mass. 139.

For the better understanding of the question in this case, the respective devices of the plaintiffs and defendants are here given in juxtaposition:

It will be seen that in both devices there is a paper label, circular in form, much smaller than the head of the spool, containing, in black letters upon a gilt ground, the name of the manufacturer, the number of the thread, and the words "Best Six Cord," arranged in circular form to correspond with the shape of the label. Around this label in each case is

a peripheral border of natural wood, having the number of the thread embossed upon such periphery. The differences are less conspicuous than the general resemblance between the two. At the same time they are such as could not fail to impress themselves upon a person who examined them with a view to ascertain who was the real manufacturer of the thread. Plaintiffs' label contains the words "J. & P. Coats, Best Six Cord" in a gilt band around the border, and in the centre the symbol "200 Yds." and the number of the thread. Defendants' label contains the words "Merrick Thread Co.," and the number of their thread in the gilt band upon the border, and in the centre the words "Best Six Cord," enclosing a star. The periphery of defendants' spool is also embossed with four stars, instead of the loops of the plaintiffs, as well as the number of the thread.

As bearing upon the question of fraudulent intent, the history of these labels is pertinent. Since 1830, plaintiffs have been engaged in the manufacture of thread at Paisley, Scotland, in the name of J. & P. Coats. About 1840, their thread was first put upon the market in this country, and for more than twenty-five years past they have been manufacturing thread at Pawtucket, Rhode Island, in the name of the Conant Thread Company. Prior to this time, six-cord thread was not made in this country, a kind of thread known as glacé, and composed of three cords, being the only thing made prior to 1865. At about the same time the manufacture of this thread was also begun by the Willimantic Linen Company, George A. Clark & Co. and the defendants. From the time plaintiffs' thread began to be exported to this country to the present time their spools have borne the black and gold label, represented above, and still in use. For the past thirty years they have been by far the largest manufacturers and dealers in spool thread in this country. On April 5, 1870, Mr. Conant, the treasurer of the company, obtained a design patent "for embossing the ends of sewing-thread spools," which was subsequently assigned to the plaintiffs, and which covered a "design for ornamenting the ends of the sewing-thread spools, which consists of a chain of loops, *aa*, within which loops is a

number expressive of the number of the thread wound on the spool, substantially as shown and described." The purpose of the design was stated to be "to preserve the number of the thread with which the spool is wound after the label has been destroyed by the act of setting the spool upon the spool-stand of a sewing-machine." This patent expired in 1877. In 1875, (February 9,) plaintiffs registered a trade-mark consisting of "a central label of paper formed of concentric circles of black on a light ground containing on one of the light bands the words 'J. & P. Coats,' 'Best Six Cord,' and on the central black circle the figures and letters '200 Yds.,' and a numeral, . . . On the end of the spool, surrounding the label, is a peripheral band of the natural wood embossed with an ornamental design of crossed lines and central stars, with intermediate spaces, in which are embossed numerals corresponding to that on the centre of the label." The essential features of this trade-mark were declared to be "the label of concentric rings, having in the central spot a numeral, and an embossed peripheral border of the natural wood, including among its ornamental designs the same numeral as that displayed in the centre." This trade-mark has been in use by the plaintiffs from its date to the present time.

Upon the part of the defendants, it was shown that the Merrick Thread Company was organized under that name in 1865, soon after which it began and has ever since continued to make at its mills at Holyoke, Mass., 200-yard spools of six-cord thread, and to designate it on one head of the spool with a black and gold label of concentric rings bearing thereon the name, size, and quality of the thread, following in this particular the method of designating such thread which has been in vogue for more than fifty years, and without which it is claimed to be impossible to market such thread. About the same time, plaintiffs began to manufacture at Pawtucket, Rhode Island, the same article, and to designate it with the usual black and gold label — the same label they had used abroad upon a thread marketed here. For a dozen years or more the defendants continued this method of designating their thread without objection from the plaintiffs, but, after the expiration of plain-

tiffs' design patent, and in 1878, defendants embossed this numerical design, somewhat changed, upon their own spool heads, in connection with their own label. Whereupon plaintiffs notified them of their claim to an exclusive use of this combination, and some time thereafter brought this suit, claiming that defendants were guilty of unfair competition in business.

In disproof of any intention upon their part to impose their thread upon the public as that of the plaintiffs, defendants show that their thread was expressly advertised through the country as that of the "Merrick Thread Company," or the "Star Thread," and also put in evidence the cabinets furnished by the defendants for the exhibition of their threads in the retail shops, upon which is conspicuously labelled in large gilt letters the words "Merrick's Six Cord Spool Cotton," as well as their advertising or show cards, of which several specimens were shown, which were also lettered conspicuously in the same manner. Their wrappers and boxes are also so clearly distinguishable from those of the plaintiffs that it would be hardly possible to mistake one for the other. We think the defendants have clearly disproved any intention on their part to mislead the dealers who purchase of them. Indeed, such dealers could not possibly fail to know what they were buying, and the fraud, if any, was practised on the buyer of a single or a small number of spools, who might be induced to purchase the thread of the defendants for that of the plaintiffs.

In answer to the question whether the defendants have been guilty of a fraudulent imitation of the plaintiffs' marks and symbols, it is also pertinent to consider to what extent the black and gold label, which constitutes an important feature of this device, had been used by others with their consent, and to what extent it has become recognized as a means of identifying the best six-cord thread. If the plaintiffs had been the first and only ones to make use of this label, another person seizing upon and appropriating a black and gold label of the same size, and for the same purpose, might be held guilty of infringement, when, if the plaintiffs had no exclusive right thereto, and defendants had done only what others had

done before, they would not be so considered. In this connection it appears that the Willimantic Linen Company, which now seems to be in combination with the plaintiffs, began the use of the black and gold label of concentric rings as early as 1865, as a designation of six-cord 200-yard spool thread, and that other firms, both before and after that, made use of similar labels for the same purpose, including those of Orrs & McNaught, (from 1855 to 1870,) George A. Clark, J. & J. Clark, the Williston Mills, the Semples, the firm of Kerr & Co., the Hadley Co., E. Ashworth & Sons, and others at different times from 1850 to the present, who have made use of black and gold labels bearing nearly, though, it must be admitted, not quite as close, a resemblance to plaintiffs as do those of defendants. There was also evidence that as early as 1821 the thread of John Clark, Jr., or of J. & J. Clark, was imported into this country with labels in black and gold in concentric rings, with the makers' name upon them. Indeed, the testimony indicates that the black and gold labels have become so identified with this quality of thread by immemorial usage that it would be impossible to introduce or sell a new manufacture of such thread without making use of that character of label, and that a six-cord thread attempted to be put upon the market with a label of any other general color would be suspected of being a three-cord or basting cotton, and practically unsalable as six-cord. In fact, the defendants produced testimony tending to show that in two instances attempts have been made to put a six-cord thread upon the market without a black and gold label, but in one case at least the project had to be abandoned, and the manufacturer was obliged to return to the usual black and gold label. In addition to this, it appeared that the Merrick Thread Company began to make and put upon the market 200-yard six-cord thread in the early part of 1868, and made use of a black and gold label, bearing the name of the American Thread Company, which in 1877 was changed to the Merrick Thread Company, the word "American" being placed upon the other end of the spool to preserve the identity of the thread.

Regarding it, then, as established that other manufacturers

had by long practice, and with the acquiescence of the plaintiffs, acquired the right to make use of the black and gold label, it is difficult to see how the defendants could have advertised more clearly the fact that it was their own thread, or better accentuated the distinction between its own and Coats' than it did by the alleged infringing label. Of course, a person seeking to distinguish his label from that of another labors under certain disadvantages in the fact that the shape of the head almost necessarily requires the label to be round, and the size of the spool demands that it shall be small. In the defendants' spool not only did the words "Merrick Thread Co." clearly and distinctly appear, but the number of the thread is placed conspicuously in the margin, and the centre is ornamented with a star, which does not appear upon the plaintiffs'. As already observed, the label upon the reverse end of the spool is wholly different from that of the plaintiffs. It is clear that neither the words "Best Six Cord," nor "200 Yds." are capable of exclusive appropriation, as they are descriptive, and indicative only of quality and length.

The propriety of the employment of the embossed periphery depends upon somewhat different considerations. In 1870, Hezekiah Conant, of Pawtucket, Rhode Island, the manager of plaintiffs' American manufactory, took out the design patent for this embossed periphery. This patent seems to have been respected until 1877, when it expired, shortly after which the defendants introduced upon the periphery of their spool corresponding numerals, but with stars substituted for plaintiffs' loops. Defendants were guilty of no wrong to the plaintiffs in making use of corresponding designs for their own spool heads after the expiration of plaintiffs' patent. There was no attempt to imitate the peculiar chain or loop characteristic of this design; but the embossed numerals were made use of for the same purpose for which they had been originally designed, namely, to preserve the number of the thread when the label became defaced, or lost, or destroyed by the use of the spool in the sewing machine. Indeed, the idea of stamping the numeral upon the periphery of the spool does

not seem to have been original with Conant, but appears to have been used by the defendants as early as 1867.

However this may be, plaintiffs' right to the use of the embossed periphery expired with their patent, and the public had the same right to make use of it as if it never had been patented. Without deciding whether if the embossed periphery had contained a word which was capable of being appropriated as a trade-mark, defendants could have appropriated the same upon the expiration of their patent, it is clear that no such monopoly could be claimed of mere numerals, used descriptively, and therefore not capable of exclusive appropriation because they represent the number of the thread, and are, therefore, of value as information to the public. *Amoskeag Mfg. Co.* v. *Trainer*, 101 U. S. 51. Clearly the plaintiffs cannot, as patentees, claim a monopoly of these numerals beyond the life of the patent, and it is equally clear that, where used for the purpose of imparting information, they are not susceptible of exclusive appropriation as a trade-mark, but are the common property of all mankind. The patent being, not simply for the embossed number, but for embossing the same upon the periphery of the spool head, defendants were entitled, upon the expiration of such patent, to use them for a like purpose. Neither was there anything misleading to the public in such use of them, as the testimony is clear and uncontradicted that thread is bought and sold not by its distinctive marks, but by the name of the maker.

Plaintiffs, however, claim that, being the first to use the combination of a black and gold label with an embossed periphery, they should be protected against any such imitation by others as would mislead any ordinary purchaser of thread in small quantities. A large number of witnesses were sworn upon this subject, whose testimony tended to show that they had either purchased themselves or seen others purchase defendants' thread, supposing it to be Coats'. This testimony was not, however, wholly satisfactory, and threw but little light upon the controversy.

There is no doubt a general resemblance between the heads of all spools containing a black and gold label which might

induce a careless purchaser to accept one for the other. Defendants, however, were not bound to any such degree of care as would prevent this. Having, as we have already held, the right to use the black and gold label, and the periphery embossed with the number of the thread, they were only bound to take such care as the use of such devices, and the limited space in which they were used, would allow. In short, they could do little more than place their own name conspicuously upon the label, to rearrange the number by placing it in the border instead of the centre of the label, and to omit loops of the plaintiffs' periphery, and substitute their own star between the numerals. Having done this, we think they are relieved from further responsibility. If the purchaser of such thread desires a particular make he should either call for such, in which case the dealer, if he put off on him a different make, would be guilty of fraud, for which the defendants would not be responsible, or should examine himself the lettering upon the spools. He is chargeable with knowledge of the fact that any manufacturer of six-cord thread has a right to use a black and gold label, and is bound to examine such label with sufficient care to ascertain the name of the manufacturer. Indeed, the intent to imitate plaintiffs' spool heads, if any such intent existed, is manifest rather in the label than in the periphery, but plaintiffs having submitted to this without protest for twelve years, have waived their right to relief upon this ground. *McLaughlin* v. *People's Railway Co.*, 21 Fed. Rep. 574; *Ladd* v. *Cameron*, 25 Fed. Rep. 37; *Green* v. *French*, 4 Bann. & Ard. 169; 3 Rob. on Pats. § 1194. Having already held that defendants had a right to make use of the embossed numeral in the periphery, their union of the two devices upon the same spool head, both being originally designed to be used in conjunction, cannot be made the basis of a suit.

Upon the whole, we think the plaintiffs have failed to prove a case of unfair competition, or any illegal attempt of the defendants to impose their thread upon the public as that of the plaintiffs; that with the right to use the black and gold label as other manufacturers have and continue to use it, and with the same right to use the embossed numerals which the plain-

tiffs have, we think they have taken all the precautions which they were bound to take to prevent a fraudulent imposition of their thread upon the public, and that the decree of the court below dismissing the bill should, therefore, be

Affirmed.

SHEFFIELD FURNACE COMPANY *v.* WITHEROW.

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

No. 190. Argued April 28, 1893. — Decided May 10, 1893.

A demurrer lacking the affidavit of defendant and certificate of counsel is fatally defective, and a decree *pro confesso* may be entered unless something takes place between the filing of the demurrer and the entry of the decree to take away the right.

The filing of an amended bill after a demurrer, without first obtaining an order of the court therefor, and the withdrawal of it by the complainant's solicitor in consequence, without paying to the defendant the costs occasioned thereby and furnishing him with a copy with proper references, do not take away such right.

When one party contracts to erect a building for another party on land of the latter, and a law of the State gives a mechanics' lien upon the land upon which the building stands, the parties may contract that the lien shall extend to other adjoining land of the latter party.

When the state law gives either an action at law or a remedy in equity to enforce a mechanics' lien, proceedings in a Federal court to enforce it may be had in equity.

On May 27, 1886, the appellee, plaintiff below, made a proposition to defendant to construct on its premises a blast furnace for the sum of $124,000; $80,000 to be paid on monthly estimates as the work progressed; the balance to be secured, "said security to be either a mechanics' lien or first mortgage on all the furnace company's interests in Sheffield, . . . at my option." This proposition was accepted on June 2. The work was completed and accepted on April 24, 1888. On June 27, 1888, plaintiff filed in the office of the probate court of the proper county a statement for a

Counsel for Appellant.

mechanics' lien, in conformity with the provisions of the state statute. In this statement the furnace is stated to be situated at Sheffield, Colbert County, Alabama, on a site containing about twenty acres, described as follows: "Twenty acres of land in fractional section 29, . . . contiguous to the city of Sheffield," etc. On September 5, 1888, plaintiff filed his bill in the Circuit Court of the United States for the Northern District of Alabama to foreclose this mechanics' lien. The bill averred that a contract was entered into for the construction of the furnace; that the amount due was $63,279.43; that a statement of lien had been filed; and prayed for foreclosure, and for general relief. In the bill the contract was not set out at length, but it was alleged that it was in writing, and would be produced at the hearing if necessary. Attached to the bill of complaint was the statement filed in the probate court. A subpœna was duly served upon the defendant on September 6. On October 1 the defendant applied for and received a copy of the bill. On October 3 it filed a paper which it called a demurrer, but which did not have the certificate of counsel or the affidavit of defendant, essential to a demurrer, as required by equity rule 31. On the rule day in November (November 5) a decree *pro confesso* was entered, and on December 19 a final decree was also entered, finding the amount due as claimed, the existence of a lien upon the twenty acres, and ordering a foreclosure and sale. At the final hearing the plaintiff produced the lien papers, which were filed in the office of the probate court, the contract between the parties, a certificate from the superintendent of the company defendant of compliance with the terms of the contract, and an affidavit of counsel for the plaintiff to the genuineness of these documents. At the next term, and on February 4, 1889, a motion and petition was filed by defendant in the Circuit Court to set aside the final decree, which was overruled on the 15th of February, 1889. An appeal to this court was duly perfected.

Mr. T. R. Roulhac, (with whom was *Mr. Richard W. Walker* on the brief,) and *Mr. H. C. Tompkins* for appellant.

Mr. Wayne McVeagh and *Mr. Henry B. Tompkins*, (with whom was *Mr. A. H. Wintersteen* on the brief,) for appellee.

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

Inasmuch as the so-called demurrer was fatally defective in lacking the affidavit of defendant and certificate of counsel, required by rule 31, there was no error in disregarding it, and entering a decree *pro confesso* at the November rules. Equity Rule 18; *National Bank* v. *Insurance Company*, 104 U. S. 54, 76. And such a decree after the November rules would entitle the plaintiff to a final decree as taken on December 19, Equity Rule 19; *Thomson* v. *Wooster*, 114 U. S. 104, unless something had taken place intermediate to take away such right. It appears that on the 14th day of November the plaintiff filed an amendment to the original bill, which amendment consisted substantially of allegations that the twenty-acre tract was within the limits of the city of Sheffield, and that the furnace and its appurtenances were in the middle of said tract, and occupied more than one acre of land, and required for convenience and profit the whole of the tract; upon which appears, after the endorsement of the clerk of its filing, a further endorsement, as follows:

"The filing of this amended bill is erroneous, and the same is withdrawn, no order of the court having been obtained ordering the filing thereof. Henry B. Tompkins, sol. for complainant."

This proceeding on the part of the plaintiff, it is insisted, destroyed his right to take the final decree, but this is a mistake. While under equity rule 28 the plaintiff might, after a copy of the bill had been taken out of the office by the defendant, and before plea, answer, or demurrer, amend the bill without order of the court, yet, before he could claim any benefit of such amendment, he was required to pay to the defendant the costs occasioned thereby, and without delay furnish it a copy thereof free of expense, with full reference to the places where the amendments were to be inserted. As

he had done neither of these things, he could claim no benefit from the filing of the amended bill, and when he entered upon it a withdrawal he left the case to stand as though no amendment had been attempted. Besides, the defendant, being in default, was in no position to take advantage of the plaintiff's action in withdrawing the amendment. There was, therefore, nothing erroneous in the matter of procedure — nothing which would compel the court at a subsequent term to set aside the decree.

While in this motion and petition there are stated many matters in which it is claimed there was error, on account of which the decree should be set aside, and the defendant given leave to plead, and while there is a general allegation that it has a full, perfect, and meritorious defence to the demand set up in the bill, yet it is not alleged that the contract for the building of the furnace was not made as stated, or that the statement for lien was not filed, or that the amount claimed to be due was not due and unpaid. So that the case is presented of an effort on the part of defendant to avoid or delay the payment of a just debt. Of course, it need not be said that under such circumstances a court of equity will not strain a point to assist a defendant. It is insisted in this motion to set aside the decree that the twenty acres described in the bill and decree are the absolute property of some other person or persons than the defendant. Even if that be true, we do not see how the defendant is prejudiced. If the plaintiff has made a mistake, and is attempting to sell somebody else's land, the owner is the party who has the right to complain; and the defendant, whose property is not touched, has no ground to object.

But the two principal matters are these: First. It is insisted that this mechanics' lien depends for its validity and scope on the Alabama statutes; that under those statutes the lien is limited to one acre, to be selected by the party entitled to the lien, unless the premises are within a city, town, or village, in which case it may extend to the entire lot or parcel of land upon which the improvement is situated; that the bill refers for a description of the property to the statement filed with

the probate court; that such statement describes the land as contiguous to the city of Sheffield, and does not show that it is within the limits of any city, town, or village; that, therefore, the limit to which the lien and decree could go was one acre of the tract, and that such acre was not described; that the amendment which was attempted to be made averred that this land was in the city of Sheffield, and was a single lot or piece of ground necessary for the operation of the furnace; and that only by a consideration of matters thus presented in the amendment could the decree properly extend to the twenty acres. It is a sufficient answer to this contention to say that the bill claimed a lien on the twenty acres; that nothing in the bill or statement affirmatively shows that the land was not within the limits of some city, town, or village; and that the contract which was produced stipulated for security by mechanics' lien or first mortgage on all the furnace company's interests in Sheffield. Surely parties can contract to extend the area of property to be covered by a lien. Such a stipulation is tantamount to an equitable mortgage. *Ketchum* v. *St. Louis*, 101 U. S. 306, 316, 317; 3 Pomeroy's Eq. Juris. sec. 1235; *Pinch* v. *Anthony*, 8 Allen, 536. The plaintiff under his contract was entitled to a written and express mortgage of the entire realty of the company at Sheffield, and when he demanded in his bill that the statutory lien which he had filed should be extended to the twenty acres he was only relying upon the promise made by the defendant that the lien should extend to that tract, a promise which the defendant might lawfully make, although, as to the excess of ground over one acre, the contract may be only in the nature of an equitable mortgage. This objection to the decree cannot be sustained.

But the main reliance of the defendant is on the proposition that the statutes of Alabama provide for an action at law to enforce a mechanics' lien. This lien being a statutory right, it is insisted that the remedy prescribed by the statute is the one which must be pursued even in the Federal courts, and that, as the plaintiff had therefore a right to maintain an action at law in the Circuit Court, he could not proceed by a suit in equity, which in the Federal courts can only be main-

tained when there is no adequate remedy at law. While the Alabama statutes in force at the time of this suit (Code of Alabama, 1886, section 3048) in terms authorize the foreclosure of a mechanics' lien by bill in equity, without alleging or proving any special ground of equitable jurisdiction, yet the contention is that the plaintiff cannot avail himself in the Federal court of this last statutory remedy, although he could pursue either in the state courts, because, as stated, if there be an action at law there cannot, under the settled rules of Federal procedure, be also a suit in equity. It certainly would be curious that state legislation which gives to a party the choice, in the state courts, between an action at law and a suit in equity to enforce his rights, enables him to maintain in the Federal courts only an action at law, and forbids a suit in equity, when the latter is the ordinary and appropriate method for enforcing such rights. And the foreclosure of a mechanics' lien is essentially an equitable proceeding. As said by Mr. Justice Field, speaking for the court in *Davis* v. *Alvord*, 94 U. S. 545, 546: "It is essentially a suit in equity, requiring specific directions for the sale of the property, such as are usually given upon the foreclosure of mortgages and sale of mortgaged premises." *Idaho & Oregon Land Improvement Co.* v. *Bradbury*, 132 U. S. 509. And it may well be affirmed that a State, by prescribing an action at law to enforce even statutory rights, cannot oust a Federal court, sitting in equity, of its jurisdiction to enforce such rights, provided they are of an equitable nature. In *Robinson* v. *Campbell*, (3 Wheat. 212, 222,) it was said: "A construction, therefore, that would adopt the state practice in all its extent would at once extinguish, in such States, the exercise of equitable jurisdiction. The acts of Congress have distinguished between remedies at common law and in equity, yet this construction would confound them. The court, therefore, thinks that to effectuate the purposes of the legislature the remedies in the courts of the United States are to be at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles." *Hooper*

Counsel for Defendant in Error.

v. *Scheimer*, 23 How. 235; *Sheirburn* v. *Cordova*, 24 How. 423; *Whitehead* v. *Shattuck*, 138 U. S. 146, 152; *Scott* v. *Neely*, 140 U. S. 106; *Smyth* v. *N. O. Canal & Banking Co.*, 141 U. S. 656.

But, further, the defendant contends that by the state law the lien was limited to one acre of ground. The plaintiff claims that by virtue of his contract and the filing of his statement of lien he was entitled to a decree subjecting a tract of twenty acres to the satisfaction of his debt. He, therefore, claims rights of an equitable nature arising from something more than the statute, and based partly upon his contract. Certainly such a claim as that is one of an equitable nature, and to be adjudicated only in a court of equity.

These are all the matters of importance presented. We see no substantial error in the record, and the decree is

Affirmed.

LOEBER *v.* SCHROEDER.

ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 1280. Submitted May 1, 1893. — Decided May 10, 1893.

A writ of error will not lie to review an order of the highest court of a State overruling a motion to quash a *fieri facias*. The refusal to quash a writ is not a final judgment within the contemplation of the judiciary acts of the general government.

It is settled that the attempt, for the first time, to raise a Federal question after judgment and on petition for rehearing, comes too late. The motion in this case, to quash the *fieri facias* on the ground that the order of the court directing it to issue was void, stands upon no better footing in such respect than a petition for rehearing would have done.

THE case is stated in the opinion.

On motion to dismiss or affirm.

Mr. L. P. Henninghausen and *Mr. M. R. Walter*, for defendant in error, in support of the motion.

Opinion of the Court.

Mr. William R. Colton, for plaintiff in error, opposing.

Mr. Justice Jackson delivered the opinion of the court.

This writ of error to the Court of Appeals of the State of Maryland is brought to review and reverse a judgment of that court affirming an order of Circuit Court No. 2, of Baltimore city, overruling a motion of the plaintiff in error to quash a writ of *fi. fa.* issued against him in pursuance of a decree entered in the Court of Appeals in April, 1892. The defendant in error moves to dismiss the cause for want of jurisdiction. This motion is based on two grounds, viz.: First, that a writ of error will not lie to an order overruling a motion to quash an execution, because it is not a final judgment or decree within the meaning of the Federal statutes; secondly, that no Federal question is involved in the case.

It appears from the record that the defendant in error, J. Henry Schroeder, as administrator of Catherine Loeber, deceased, on July 12, 1890, filed his bill of complaint in Circuit Court No. 2, of Baltimore city, against the plaintiff in error, John Loeber, in which it was alleged that the plaintiff's intestate in 1882 loaned to her husband the sum of $8000, being a part of her separate estate, on condition that he should pay said sum of money, on her death, to her children, and that said John Loeber, who was the husband of the intestate, agreed to take said money upon that condition as a loan from his wife. The complaint further charged that the defendant John Loeber had never repaid said sum of money, and that he denied that the same was a part of the estate of his deceased wife, and prayed for an order of the court directing and requiring that he should bring said money into court to be invested in the name of his deceased wife's children; that the same might be declared a lien upon property described in the bill which had been improved with the fund borrowed; and for such further relief as the nature of complainant's case might require.

The defendant answered this bill and denied that his wife had ever loaned him the amount stated in the bill, or any part thereof, and denied all indebtedness to the wife or her estate.

He further set up in his answer that the complainant had failed to make proper parties to his bill, and that no case was stated therein of which the court could take jurisdiction.

On the issues thus presented, proofs were taken, and upon hearing of the case May 21, 1891, Circuit Court No. 2, of Baltimore city, being of opinion that the complainant had no interest whatever in the matter in controversy, dismissed the bill without prejudice to any proceedings that proper parties might be advised to take. From this decree the complainant prosecuted an appeal to the Court of Appeals of the State, which, on January 28, 1892, reversed the decree of the Circuit Court, and entered a decree in favor of the complainant, as administrator of Mrs. Loeber, for $8000 and costs, which amount said court found from the testimony Loeber had received from his wife, and undertook to invest for her benefit in certain houses which belonged to him. The Court of Appeals, while holding that the undertaking to invest the money in certain specified property was a contract within the fourth section of the statute of frauds, and for that reason could not be specifically performed, nevertheless held that a court of equity ought to give relief by decree for the amount of money which he had received from his wife. A decree was accordingly entered against Loeber for the sum of $8000. Subsequently, after entry of that decree Loeber moved the Court of Appeals for a reargument of the case on the grounds that the bill alleged a loan from Mrs. Loeber to him upon the undertaking and promise to pay the same to her children, but alleged no other contract or undertaking on his part; that the complainant failed to prove the alleged contract, but did prove in the opinion of the court another contract, viz., that "John Loeber undertook to invest his wife's money for her benefit in certain houses which belonged to him," and as that contract could not be enforced, the court thereupon decreed, because of the statute of frauds, a repayment of the money received by him; and it was claimed that this latter contract, on which this decree was based, was not alleged in the bill; and that the bill stated no case within the jurisdiction of the court below, or of the Court of Appeals.

Opinion of the Court.

This motion for reargument was overruled, the Court of Appeals holding that the case was within the jurisdiction of the court below, and that whatever variance there may have been between the allegations of the bill and the proof in the case the Court of Appeals was authorized under the statutes and decisions of the State (which were specially cited and referred to) to enter a decree according to the testimony, without regard to the special averments of the bill. The Court of Appeals rested its action and decision mainly upon the fifth section of the act of 1832, forming the thirty-fourth section of Article V of the code, which provides that "on an appeal from a court of equity no objection to the competency of a witness, or to the admissibility of evidence, or to the sufficiency of the bill or petition, or to any account stated or reported in said cause, shall be made in the Court of Appeals, unless it shall appear by the record that such objection was made by exceptions filed in the court from which said appeal shall have been taken." The testimony in the case was not excepted to, and the appellate court in its construction of this provision of the code held that it was bound to give effect to the testimony, the court saying: "It is no matter whether the averments of the bill cover the case proved in evidence or not. We are obliged to decree according to the matters established by the proofs. The statute (quoted) has been frequently construed, and the practice under it is well established." After citing various authorities construing said section, the court proceeds: "It is, therefore, very clear that it was our duty to consider the evidence, and make such a decree as it required, without regard to the averments of the bill." The court further held that the administrator succeeded to the right of action on personal contracts made with his intestate, and had the right to sue upon the one in question before Circuit Court No. 2, of Baltimore city.

The Court of Appeals having denied for these reasons a rehearing, on April 28, 1892, issued its order for a *fieri facias* against Loeber for the amount decreed returnable to Circuit Court No. 2. On April 29, 1892, Loeber entered a motion before said Circuit Court to quash this writ for the following

reasons: Because the decree on which the writ issued and the writ were void, because said writ would deprive the defendant of his property without due process of law, and because it was issued in violation of the Constitution of the United States and amendments thereto; because section 34 of Article V of the Code of Public General Laws, in so far as it requires the Court of Appeals to make their decision on the evidence without regard to the bill or averments of the complaint, was contrary to the Constitution of the United States and amendments thereto, and laws passed in pursuance thereof, and was therefore void.

The Circuit Court No. 2, on May 21, 1892, dismissed this motion and the petition of the defendant to quash the writ of *fieri facias*. From this order of dismissal Loeber prosecuted an appeal to the Court of Appeals, which, in November, 1892, affirmed the order of the Circuit Court, holding that section 34 of Article V of the Code of Public General Laws, under and by virtue of which the Court of Appeals had made a decision on the evidence in the case and had awarded the writ of *fi. fa.*, was not in conflict with the Constitution or laws of the United States. From the judgment of the Court of Appeals affirming the order of the lower court, Loeber has prosecuted the present writ of error, and assigned substantially as the grounds thereof that section 34 of Article V of the Code of Public General Laws of the State of Maryland is repugnant to the XIVth Amendment of the Constitution of the United States, which declares that no State shall deprive any person of his property without due process of law; and secondly, because said section 34, Article V of the Code of Public General Laws is repugnant to the XIVth Amendment of the Constitution, which declares that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

It is well settled that a writ of error will not lie except to review a final judgment or decree of the highest court of the State, and that it will not lie to an order overruling a motion to quash an execution, because a decision upon the rule or motion is not such a final judgment or decree in any suit, as

is contemplated by the judiciary acts of the general government. Refusal to quash a writ is not a final judgment. *Boyle* v. *Zacharie*, 6 Pet. 635, 657; *McCargo* v. *Chapman*, 20 How. 555; *Early* v. *Rogers*, 16 How. 599; *Amis* v. *Smith*, 16 Pet. 303, 314; *Evans* v. *Gee*, 14 Pet. 1.

It is also well settled by the decisions of this court that the attempt to raise for the first time a Federal question, in a petition for rehearing, after judgment, comes too late. *Texas and Pacific Railway Co.* v. *Southern Pacific Railroad Co.*, 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; and *Bushnell et al.* v. *Crooke Mining and Smelting Co.*, 148 U. S. 682.

The motion to quash the *fi. fa.* in this case on the grounds that the order of the Court of Appeals, which directed it to be issued, was void for the reasons assigned, stood upon no better footing than a petition for rehearing would have done, and suggested Federal questions for the first time, which, if they existed at all, should have been set up and interposed when the decree of the Court of Appeals was rendered on January 28, 1892.

If any Federal question existed in the case the attempt to raise it came too late, but we are of opinion that no Federal question really exists in the case. The provisions of the statute complained of by the plaintiff in error are manifestly not in conflict with any provision of the Constitution of the United States, or of any law of Congress passed in pursuance thereof. The said statute relates to a matter of state practice alone, and the proper construction of that statute, upon well-settled principles, rested with the state courts. The question as to whether the plaintiff's remedy was at law or in equity was a matter dependent entirely upon local law, and involved no Federal right whatever.

We are, therefore, of opinion that the motion to dismiss for want of jurisdiction should be sustained, and it is accordingly so ordered.

Dismissed.

HOLLENDER *v.* MAGONE.

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

No. 172. Argued April 10, 1893. — Decided May 10, 1893.

The word "liquors" is frequently, if not generally, used to define spirits or distilled beverages, in contradistinction to those that are fermented. It is so used in Schedule H of the tariff act of March 3, 1883, 22 Stat. 505, c. 121.

The word "liquors" as used in that section is obviously the result of misspelling, "liqueurs" being intended.

The multitude of articles upon which duty was imposed by the tariff act of 1883, are grouped in that act under fourteen schedules, each with a different title, and all that was intended by those titles was a general suggestion as to the character of the articles within the particular schedule, and not any technically accurate definition of them.

Generally speaking, a "sound price" implies a sound article. It appearing that the cost of the beer in question at the place of export, was equivalent to $17\frac{70}{100}$ cents per gallon, and that upon being examined in New York much of it was thrown into the streets as worthless, that but little of it was sold, and that for three cents per gallon, it may be assumed that it was a sound article when shipped at the place of export.

THE facts in this case are these: On October 19, 1886, the plaintiffs imported and entered at New York 226 casks, aggregating 2861 gallons of beer, on which the defendant, as collector of the port, exacted duty at twenty cents a gallon. This was paid by the plaintiffs under protest, they insisting that the beer had become sour and worthless on the voyage of importation. They applied on October 26 for a rebate on account, and to the extent, of this damage, under Rev. Stat. § 2927, which is as follows:

"SEC. 2927. In respect to articles that have been damaged during the voyage, whether subject to a duty ad valorem, or chargeable with a specific duty, either by number, weight, or measure, the appraisers shall ascertain and certify to what rate or percentage the merchandise is damaged, and the rate of percentage of damage, so ascertained and certified, shall be deducted from the original amount, subject to a duty ad

valorem, or from the actual or original number, weight or measure, on which specific duties would have been computed."

But this application was refused on the ground that such an allowance was prohibited by a proviso in Schedule H, act of March 3, 1883, 22 Stat. 505, c. 121, which says "there shall be no allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits." Thereafter this suit was brought, and on the trial thereof the court instructed the jury to find for the defendant. 38 Fed. Rep. 912. Judgment having been entered on such verdict, plaintiffs sued out a writ of error from this court.

Mr. Edwin B. Smith for plaintiffs in error.

Mr. Assistant Attorney General Maury for defendant in error.

There is no evidence that the price of $17\frac{70}{100}$ cents per gallon, paid for the beer in Germany, was a "sound price." Because the statute authorizes the invoice to be taken at the custom-house as evidence of dutiable value does it follow that it may be used as evidence by the plaintiff in a personal action against the collector? The invoice here is not invoked to prove market value generally, ("Clicquot's Champagne," 3 Wall. 141, 148,) but to prove that the particular merchandise here in question was in good condition when shipped at the place of export. The invoice as well as the bill of lading, is, as to the collector, sued here for an abuse of official power, *res inter alios acta.*

"Liquors" is not a term of trade and commerce and cannot be filched from the general vocabulary by any presumption that it was used in a commercial sense. The attempt here is the same in character as was made in *Maillard* v. *Lawrence*, 16 How. 251, and in *Arnold* v. *United States*, 147 U. S. 494.

The effect of the provision of the act of March 3, 1883, denying the right to damage allowance on liquors under section 2927 of the Revised Statutes is to restrict the operation of a law in *derogation of the revenue*, and, therefore, the provision should be liberally interpreted. There is no natural

equity on the side of the importer to be exempt from paying duty on the invoice value of merchandise damaged on the voyage. He takes such risks and has no right to exemptions unless clearly given by the law. The labored attempt to *invent* a restrictive meaning for the repealing clause, and the invitation to this court to go to the unheard of length of narrowing the sense of that clause by substituting the French word "liqueurs" for the English "liquors" seem to reverse an established canon of interpretation. It will be a long time before this court will be found exercising its ingenuity for the purpose of extending the operation of exemptions from taxation.

For the true meaning of "liquors" see *People* v. *Crilley*, 20 Barb. 246, 248.

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

The principal question in this case is, whether beer is within the term "liquors," as found in the proviso quoted. The arguments in favor of such a conclusion are these: First. The word "liquors" is properly and often used in a generic sense, as including all intoxicating beverages, and it ought, therefore, to be construed as having that general meaning in this clause, for if Congress had intended only a certain kind of liquor it would have coupled some word of limitation with it. Second. Schedule H, in which is found this proviso, and which in its various paragraphs specifically mentions different kinds of liquors, and among them beer, is entitled "Liquors." And the schedule being thus, as it were, introduced by this term, used obviously in its generic sense, it must be presumed that wherever the word is found within the schedule, it is also used in the same sense. Third. Unless "liquors" is given a meaning broad enough to include beer, it is superfluous, for "wines, cordials, and distilled spirits" are ample to cover all intoxicating beverages other than malt liquors, such as ale and beer. Granting that there is force in these arguments, we are constrained to hold that they are not so persuasive and convincing

as those tending to show that the word is here used in a narrower sense, and so as to exclude beer.

In the first place, the word "liquors" is frequently, if not generally, used to define spirits or distilled beverages, in contradistinction to those that are fermented. Thus, in the Century Dictionary, one of its definitions is: "An intoxicating beverage, especially a spirituous or distilled drink, as distinguished from fermented beverages, as wine and beer." See also *State* v. *Brittain*, 89 N. C. 574, 576, in which case the court said: "The proof was that the defendant sold liquors, and it must be taken that he sold spirituous liquors. Most generally the term liquors implies spirituous liquors." The context indicates that it is here used in this narrower sense. The proviso names wines, liquors, cordials, and distilled spirits. If "liquors" is here used in its generic sense, the other terms are superfluous. That they are present emphasizes the fact that the word is not so used.

Again: In one paragraph in this section we find this combination: "Cordials, liquors, arrack, absinthe, kirschwasser, ratafia, and other similar spirituous beverages or bitters, containing spirits." Obviously the word "liquors" here means liqueurs, that being the name of the kind of drinks of the same general nature as those specially mentioned. This is obvious not alone because of the rule *noscitur a sociis*, but by a reference to the language found in prior tariff acts. Thus, in that of 1842, is this language: "On cordials and liqueurs of all kinds, sixty cents per gallon; on arrack, absynthe, Kirschen wasser, ratafia, and other similar spirituous beverages, not otherwise specified, sixty cents per gallon." 5 Stat. 560. In 1846, we find this: "Brandy and other spirits distilled from grain or other materials; cordials, absynthe, arrack, curacoa, kirschenwasser, liqueurs, maraschino, ratafia, and all other spirituous beverages of a similar character." 9 Stat. 44. In 1861, this is the language: "On cordials and liquors of all kinds, fifty cents per gallon; on arrack, absynthe, kirschenwasser, ratafia, and other similar spirituous beverages." 12 Stat. 180. In 1862, the following: "On cordials, and liqueurs of all kinds, and arrack, absynthe, kirschenwasser, ratafia, and

other similar spirituous beverages, not otherwise provided for, twenty-five cents per gallon." Id. 544. While in 1870, this is the description: "On cordials, liqueurs, arrack, absynthe, kirschenwasser, vermuth, ratafia, and other similar spirituous beverages, or bitters containing spirits, and not otherwise provided for, two dollars per proof gallon." 16 Stat. 263. And this language, omitting vermuth, was carried into the Revised Statutes. p. 464.

This retrospect of past legislation, as well as the character of the other beverages named in combination, indicates the meaning of the word "liquors" as found in this paragraph of the statute of 1883. It is simply a case of misspelling, and "liqueurs" was intended. The use of the word in one part of the body of the statute in conjunction with the term cordials and obviously misspelled, and as obviously meant for "liqueurs," is very persuasive that, when found in another part of this same schedule in like conjunction with the word "cordials," there is another case of misspelling, and "liqueurs" is also there intended.

But, further, the whole arrangement of Schedule H points to the fact that beer was not in the contemplation of Congress in this proviso. The schedule is composed of eleven separate paragraphs. The first treats of champagnes, and all other sparkling wines, and names the duty thereon; the second provides for duties on still wines, and them alone. In that paragraph are two provisos: First, "Provided, that any wines imported, containing more than twenty-four per centum of alcohol, shall be forfeited to the United States," and, second, the proviso in question. The third names vermuth alone. The fourth requires that "wines, brandy and other spirituous liquors imported in bottles shall be packed in packages containing not less than one dozen bottles in each package," and provides for an additional duty on each bottle. The fifth imposes a duty on "brandy and other spirits manufactured or distilled from grain or other materials, and not specially enumerated or provided for in this act," and declares the standard for determining the proof of brandy and other spirits or liquors. The sixth on all compounds or preparations of which distilled

spirits are a component part of chief value, not specially enumerated, &c. The seventh is that heretofore mentioned in reference to cordials, liquors, &c. The eighth provides that no lower rate of duty shall be collected or paid on brandy, spirits and other spirituous beverages, than that fixed by law for the description of first proof, but it shall be increased, &c. The ninth imposes a duty on bay rum, or bay water, whether distilled or compounded. The tenth on ale, porter, and beer. And the eleventh on ginger ale or ginger beer.

The facts that ginger ale and ginger beer are not intoxicating, and that bay rum and bay water would scarcely be called beverages, show that there is little significance to be given to the use of the word "liquors" in the title of this schedule. The multitude of articles upon which duty was imposed by the tariff of 1883 are grouped in that act under fourteen schedules, each with a different title, and all that was intended by those titles was a general suggestion as to the character of the articles within the particular schedule, and not any technically accurate definition of them. It evidently seemed to Congress unnecessary to create and entitle a separate schedule for the matters named in these last three paragraphs, and they fall more naturally under the descriptive title "liquors," than any other used in the act. This takes away largely the force of any argument that can be drawn from the word in the title.

Again the proviso is found in the second paragraph. The natural limitation of a proviso is to those things that have been previously mentioned. Before the proviso, there are named only wines — sparkling and still; so any word of general description used therein would, in the absence of satisfactory reasons to the contrary, be taken to refer to those articles, to wit, wines. But "wines" being used in this proviso, the subsequent terms, liquors, cordials and distilled spirits, must mean something else. As there are several words of description, apparently beverages of different character were intended by each. If, for instance, in any clause we should find the two terms "wines" and "distilled spirits," we should believe that some different article was intended by each term. So, if we should find the phrase "wines and liquors," or "wines or

liquors," is it not a proper inference that some other kind of beverage than wine was intended by the word "liquors"? Obviously, as it seems to us, the word is used here in a special, rather than a general sense; and when so used in a special sense, it is almost invariably used to define spirituous rather than malt liquors. Seldom is it used alone to define malt liquors, as contradistinguished from those that are spirituous and distilled.

In short, we think it may be laid down as a general proposition, that where the term "liquors" is used in a special sense, spirituous and distilled beverages are intended, in contradistinction to fermented ones; that the use of the four words in this proviso, in the order in which they are arranged and in the place in which the proviso is found in the schedule, indicates that "liquors" is used in a special rather than in a general sense; and the conjunction of the words "liquors" and "cordials," as found in another paragraph, and as interpreted by the past history of that particular part of the tariff legislation, shows that "liqueurs" was intended by "liquors" in this clause.

But it is further objected by counsel for the government that there was no proof that the beer was sound when purchased. Generally speaking, it may be said that a sound price implies a sound article. The bill of exceptions shows that "it further appeared from the invoices and the testimony of the liquidating clerk that the cost of this beer in Germany, the place of export, was equivalent to $17\frac{70}{100}$ cents per gallon in the money of account of the United States." How the invoices read, and what was the testimony given by the liquidating clerk, is not shown; the result only is stated when it said that it appeared that the cost of this beer was $17\frac{70}{100}$ cents per gallon. As most of the beer on its arrival in New York was thrown into the street as worthless, and only a little of it sold, and that at three cents per gallon, it may be assumed that that was a sound article for which the much greater price was paid at the place of export. Evidently the testimony in all these respects was considered sufficient, for the Circuit Judge, as appears from the report in the Federal

Reporter, 38 Fed. Rep. 916, disposed of the case by saying, "As this case turns upon the construction of the term liquors in the proviso of Schedule H, paragraph 308, I shall direct a verdict for the defendant."

The judgment will be reversed, and the case remanded for a new trial.

HILL *v.* UNITED STATES.

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

No. 108. Argued and submitted January 6, 1893. — Decided May 10, 1893.

A claim by a person asserting title in land under tide water, for damages for the use and occupation thereof by the United States for the erection and maintenance of a light-house, without his consent and without compensation to him, but not showing that the United States have acknowledged any right of property in him as against them, is a case sounding in tort of which the Circuit Court of the United States has no jurisdiction under the act of March 3, 1887, c. 359.

THE case is stated in the opinion.

Mr. J. Alexander Preston and *Mr. Alexander Preston*, for plaintiff in error, submitted on their brief.

Mr. Attorney General for defendants in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a suit, brought November 1, 1888, in the Circuit Court of the United States for the District of Maryland, under the act of March 3, 1887, c. 359, by Nicholas S. Hill, a citizen of Maryland, against the United States, for the use and occupation of land for a light-house.

The petition alleged that the plaintiff, since February 14, 1873, had been seized and possessed in fee simple of certain

tracts of land in Baltimore County in the State of Maryland, fronting upon Chesapeake Bay, (as shown upon a plat, and specifically described in a deed of that date to him from Thomas Donaldson, copies of both of which were annexed to the petition,) "with all the riparian rights attached thereto under the law of this State;" that, since his acquisition of said land and rights, "a valuable part thereof has been used and occupied by the United States government" for "the erection and maintenance of a light-house, known generally as the Miller's Island light-house," "without any compensation to your petitioner for such use and occupation, and without the consent thereto of your petitioner or his predecessors in title;" and that "by the use and occupancy by the government as aforesaid of his property he has been prevented from using the same within the limits above mentioned, and from erecting buildings thereupon, and using the same for fishing and gunning purposes." The plaintiff "claims, as damages for the use and occupation of his said property as aforesaid, the sum of $9999 from November 1, 1885, until November 1, 1888, and prays the judgment and decree of this honorable court thereupon on the facts and the law."

The United States pleaded three pleas:

1. A former judgment. The plaintiff replied that there was no such judgment; and the United States joined issue on the replication.

2. "That the land referred to and described in the petition filed in this cause is submerged land and part of the bottom of the Chesapeake Bay, one of the navigable waters of the United States, and that the said defendant, under the law, for the purposes of a light-house, has a paramount right to its use as against the plaintiff or any other person." To this plea the plaintiff demurred.

3. "That the defendant did not commit the wrongs alleged." The plaintiff joined issue on this plea.

On June 22, 1889, the Circuit Court overruled the demurrer to the second plea, and gave judgment thereon for the United States, with costs, and filed a written opinion, which is published in 39 Fed. Rep. 172.

Opinion of the Court.

On June 27, 1889, the Circuit Judge filed findings of facts and conclusions of law, which are copied in the margin.[1]

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[1] FINDINGS OF FACTS.

1. I find that copies of the plaintiff's petition were, in compliance with the requirements of the act of March 3, 1887, c. 359, duly served on the United States district attorney and the Attorney General of the United States, and said law in all respects complied with.

2. I find that the plaintiff, since February 14, 1873, has been seized and possessed in fee simple of the tract of land described in these proceedings, and known as Miller's Island, and of all the riparian rights attached thereto under the laws of the State of Maryland.

3. I find that no part of the fast land included in the deed of the plaintiff has been used or occupied by the United States; but that a site for the rear range light of Craighill channel, situated about two hundred yards from the shore line of the plaintiff's land, has been occupied and used by the United States; that the said site is submerged land in the Chesapeake Bay, one of the public navigable waters of the United States, and within the ebb and flow of the tide, and in water about two feet deep at low tide.

4. I find that Craighill channel is a channel in Chesapeake Bay, constructed by the United States, and used by ocean vessels in their approach to the port of Baltimore; and that the light-house constructed by the United States in the year 1874 on the site in question is an important and necessary aid to the navigation of said channel.

5. I find that the United States took possession of said site for the purpose of building the light-house in question, without condemnation, or the payment of any compensation to the plaintiff or any other person, in the year 1874.

6. I find that the land of Miller's Island, belonging to the plaintiff, was heretofore used and is chiefly valuable on account of the gunning for geese, swan and ducks, and for the fishing privileges with nets; and that since the erection of the light-house adjoining the shore the value of the land has decreased greatly, and that the plaintiff's testimony tended to show that said decrease is due to the erection of said light-house, and that the island formerly rented for $3000 per annum, but since the erection of the light-house the rent has decreased to $500 per annum.

CONCLUSIONS OF LAW.

That the legal title to the site of the light-house in question is in the State of Maryland, subject to the riparian rights of the plaintiff under the act of 1862, c. 129, of the laws of Maryland.

That under article 1, section 8, of the Constitution of the United States, which provides that Congress shall have the power "to regulate commerce with foreign nations and among the several States and with the Indian tribes," both the title of the State of Maryland and the riparian rights of the plaintiff are subject to the paramount right of the United States to use

The act of March 3, 1887, c. 359, § 7, provides that " it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts." 24 Stat. 506. But, in the case at bar, the only judgment entered, and upon which this writ of error was sued out, appears to have been given for the United States on the plaintiff's demurrer to the second plea, which presented an issue of law only, upon which the findings of fact can have no possible bearing or effect. It would seem to follow that the findings of facts cannot be taken into consideration by this court upon this record. But this is comparatively unimportant, because those findings do but state in greater detail the facts alleged and admitted by the petition, the second plea and the demurrer to that plea.

The land in question, upon which the United States have built and maintain a light-house, is below low water mark, and under the tide waters of Chesapeake Bay. Both parties assume that by the common law of England, which was the common law of Maryland, the title in land below high water mark of tide waters was in the King, and upon the Declaration of Independence passed to the State of Maryland, and remained in the State after the adoption of the Constitution of the United States, except so far as any right in such land was surrendered to the United States by virtue of the grant to Congress of the power to regulate commerce with foreign nations and among the several States, including as a necessary

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and occupy the site in question for the purposes of commerce, which includes navigation, without condemnation or compensation, the submerged land forming the site of the light-house being, as to such a use by the United States, public and not private property.

I therefore overrule the demurrer of the plaintiff to the second plea of the United States, and I do give judgment under said plea for the United States, with costs, to include what has been actually incurred for witnesses and for summoning the same, and fees paid to the clerk of the court.

incident the exclusive right to regulate and control the building and maintenance of light-houses for the protection of navigation; and except, also, so far as any right on such lands has been lawfully granted by the State of Maryland to private persons.

By the statute of Maryland of 1862, c. 129, article 54 of the Public General Laws of the State was amended by adding the followings sections:

SEC. 37. "The proprietor of land bounding on any of the navigable waters of this State is hereby declared to be entitled to all accretions to said land by the recession of said water, whether heretofore or hereafter formed or made, by natural causes or otherwise, in like manner and to like extent as such right may or can be claimed by the proprietor of land bounding on water not navigable."

SEC. 38. "The proprietor of land bounding on any of the navigable waters of this State is hereby declared to be entitled to the exclusive right of making improvements into the waters in front of his said land; such improvements, and other accretions as above provided for, shall pass to the successive owners of the land to which they are attached, as incident to their respective estates. But no such improvement shall be so made as to interfere with the navigation of the stream of water into which the said improvement is made."

SEC. 39. "No patent hereafter issued out of the land office shall impair or affect the rights of riparian proprietors, as explained and declared in the two sections next preceding this section, and no patent shall hereafter issue for land covered by navigable waters."

The plaintiff contends that the entire title in the land below high tide, with the right to improve and build upon the same, remained in the State after the adoption of the Constitution; that, by the statute of 1862, the title to such land, at the place in question, or at least the exclusive right of building thereon, was vested in the plaintiff; and that the title or right so acquired by him was his private property, which, by the Fifth Amendment of the Constitution, could not be taken by the United States for the erection and maintenance of a light-house for the public use, without just compensation.

The United States, on the other hand, assert, and the court below has held, that the United States upon the adoption of the Constitution acquired the paramount right to the use of this submerged land for a light-house, without making any compensation therefor; and that any title or right conferred on the plaintiff by the subsequent statute of the State was necessarily subject to this paramount right of the United States.

The question thus presented is of such importance to the United States, as well as to owners of lands bounding on tide waters, that it becomes this court, before expressing any opinion upon it, to inquire whether the courts have jurisdiction to determine the question in this form of proceeding against the United States.

The whole effect of the act of March 3, 1887, c. 359, under which this suit was brought, was to give the Circuit and District Courts of the United States jurisdiction, concurrently with the Court of Claims, of suits to recover damages against the United States, in cases not sounding in tort. *United States* v. *Jones*, 131 U. S. 1, 16, 18.

The United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the claim as upon an implied contract. *Gibbons* v. *United States*, 8 Wall. 269, 274; *Langford* v. *United States*, 101 U. S. 341, 346; *United States* v. *Jones*, above cited.

An action in the nature of assumpsit for the use and occupation of real estate will never lie where there has been no relation of contract between the parties, and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious and makes the defendant a trespasser. *Lloyd* v. *Hough*, 1 How. 153,159; *Carpenter* v. *United States*, 17 Wall. 489, 493.

In *Langford* v. *United States*, it was accordingly adjudged that, when an officer of the United States took and held possession of land of a private citizen, under a claim that it be-

longed to the government, the United States could not be charged upon an implied obligation to pay for its use and occupation.

It has since been held that if the United States appropriate to a public use land which they admit to be private property, they may be held, as upon an implied contract, to pay its value to the owner. *United States* v. *Great Falls Manuf. Co.*, 112 U. S. 645, and 124 U. S. 581. It has likewise been held that the United States may be sued in the Court of Claims for the use of a patent for an invention, the plaintiff's right in which they have acknowledged. *Hollister* v. *Benedict Manuf. Co.*, 113 U. S. 59; *United States* v. *Palmer*, 128 U. S. 262. But in each of these cases the title of the plaintiff was admitted, and in none of them was any doubt thrown upon the correctness of the decision in *Langford's case.* See *Schillinger* v. *United States*, 24 C. Cl. 278.

The case at bar is governed by *Langford's case.* It was not alleged in this petition, nor admitted in the plea, that the United States had ever in any way acknowledged any right of property in the plaintiff as against the United States. The plaintiff asserted a title in the land in question, with the exclusive right of building thereon, and claimed damages of the United States for the use and occupation of the land for a light-house. The United States positively and precisely pleaded that the land was submerged under the waters of Chesapeake Bay, one of the navigable waters of the United States, and that the United States, "under the law, for the purpose of a light-house, has a paramount right to its use as against the plaintiff or any other person"; and the plaintiff demurred to this plea. The Circuit Court, instead of rendering judgment for the United States upon the demurrer, should have dismissed the suit for want of jurisdiction.

Judgment reversed, and case remanded to the Circuit Court with directions to dismiss it for want of jurisdiction.

Mr. Justice Jackson, not having been a member of the court when this case was argued, took no part in its decision.

MR. JUSTICE SHIRAS dissenting.

When the Fifth Amendment of the Constitution of the United States declares that "private property shall not be taken for public use without just compensation," a compact or contract of the highest degree of obligation is thereby established between the American people of the one part and each and every citizen of the other part. In and by that constitutional provision every citizen agrees that his property may be taken for public use whenever the nation, through its legislative department, demands it; and the United States agree that, when the property of the citizen is so taken, just compensation shall be made.

Whenever a case arises, in which that constitutional provision is invoked, two questions present themselves: first, is the property dealt with the private property of the party claiming it? and, secondly, has it been taken by the United States for public use?

If the property to be affected is not that of the claimant, of course his appeal to the constitutional protection will be vain. But it is equally plain that the question of title is not one to be decided by the party claimant, or by the legislative or executive departments of the United States. That is a judicial question. Accordingly, if in a given case it is either admitted, or proposed to be shown, that the property concerned belongs to a party before a court having jurisdiction to deal with the subject, then the only question that remains is whether such property has been taken by the United States for public use. In such a case the United States cannot, by a plea denying the plaintiff's title, make it the duty of the court to dismiss the plaintiff's suit. Such a denial cannot be treated, in face of the constitutional compact, as an exercise of sovereign power, whereby the right of the citizen to assert his property rights is forbidden, but it merely raises a judicial issue, to be determined by the court.

If the court shall determine that the property in question is the private property of the claimant, then the second question comes up, whether the United States have taken it for public use.

If it shall appear that, in point of fact, the United States have not taken the plaintiff's property for public use, and that all that the plaintiff has to complain of is that some persons, known or unknown, but claiming to be officers or agents of the United States, have committed a trespass upon his property, and it does not appear that the acts complained of were in pursuance of any law of the United States, or that they have been ratified by the United States, by taking possession of and occupying the property for public use, then the plaintiff's case will fall within the doctrine of *Langford* v. *United States*, 101 U. S. 341, and must be treated as an attempt, under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officers, those acts being themselves torts.

But if it shall be shown, or be admitted, that the United States, by law, either authorized their agents to appropriate the property of the plaintiff, or have ratified the action of their agents by taking possession of the property and subjecting it to public use, then the constitutional duty of the court is to pronounce judgment for the plaintiff, and to award him just compensation.

These views do not overlook the well-settled doctrine that unless and until Congress shall, by adequate legislation, provide a legal remedy, private rights against the government may be in abeyance. But when Congress, in obedience to the behest of the Constitution, has provided such a remedy, then there is no legal obstacle to the plaintiff's recovery. That Congress has provided such a remedy is seen in the act of March 3, 1887, c. 359, whereby it is enacted that the Court of Claims, and, concurrently, the District and Circuit Courts of the United States, "shall have jurisdiction to hear and determine *all claims founded upon the Constitution of the United States* or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a

court of law, equity, or admiralty if the United States were suable."

This legislation perhaps originated in the regret expressed by this court in *Langford's case*, that "Congress has made no provision by general law for ascertaining and paying this just compensation." That was a suit brought in the Court of Claims, under section 1059 of the Revised Statutes, in which there is no remedy provided for claims founded upon the Constitution of the United States, and was, in the language of the court, the case of "an unequivocal tort."

The later case of *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645, 656, is, in some respects, like the present one. It was there held that it was clear "that these property rights have been held and used by the agents of the United States, under the sanction of legislative enactments by Congress; for the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's Island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the government to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water. The making of the improvements necessarily involves the taking of the property, and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution — upon which question we express no opinion — there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the government as a taking under its sovereign right of ancient domain, demand just compensation. In that view we are of opinion that the United States, having by their agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation imposed by the Constitution to make compensation. The law will imply a promise to make the required compensation

where property, to which the government asserts no title, is taken pursuant to an act of Congress, as private property to be applied for public use. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the government of the United States.'"

Having distinguished the case from that of *Langford* the court proceeded to say: "In such a case it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an act of Congress is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose. If the claimant makes no objection to the particular mode in which the property has been taken, but substantially denies it, by asserting, as is done in the petition in this case, that the government took the property for the public uses designated, we do not perceive that the court is under any duty to make the objection in order to relieve the United States from the obligation to make just compensation."

It will be noticed that this decision, in terms so applicable to the present case, was made before the act of March 3, 1887, in which, for the first time, an express remedy was given for "all claims founded upon the Constitution of the United States," and in "respect to claims for which the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable."

In the present case, although no express proceedings have been instituted by the United States to condemn the property for public use, yet it is admitted in the pleas that the United States have taken possession of it for a public use or purpose, and by various acts of Congress, of which we can take judicial notice, large sums of money have been granted to construct and maintain the light-house on the site in question.

The opinion of the court seeks to withdraw the case from

the operation of the Constitution and the act of 1887, and to bring it within the decision of the *Langford case*, by contending that, because the United States by their pleas deny the plaintiff's right to recover, the acts complained of are thereby shown to have been sheer torts, and therefore expressly exempted from judicial cognizance. I am unable to see the force of this reasoning. The statute having provided that all claims founded upon provisions of the Constitution shall be enforceable, surely a district attorney of the United States cannot by a mere plea, not denying the plaintiff's title to his land, but claiming that the land is legally subject to a servitude in favor of the United States, which exonerates them from making compensation, deprive the plaintiff of his right under the statute to have his claim adjudicated. Can it be possible that after Congress, in recognition of the constitutional provision and of the repeated suggestions of this court, has provided a legal remedy, that a subordinate legal functionary can by a plea, either of matter of fact or of law, defeat the beneficent purpose of Congress, deprive the plaintiff of his remedy, and convert the United States against their will, as expressed in the Constitution and the act of Congress, into a wrongdoer? I cannot accept the proposition that, by a plea putting the plaintiff upon proof of his claim, the United States thereby escape from their constitutional covenant and nullify the statute which provides a remedy.

The question presented by the second plea in the court below is, no doubt, one of difficulty and importance, which, if and when it comes before this court, will demand serious consideration, but that question is waived by the opinion of the court, and any discussion of it in this opinion would be out of place.

I, therefore, have a right to assume that the property of the plaintiff below, though held subject to the right of eminent domain, is entitled to the protection of the Constitution; that there is no kind of private property, whatever may be its nature or origin, that can be taken for public use without just compensation being made.

Hence it follows that the court below erred in overruling

the demurrer to the second plea. I think the judgment of the court below should be reversed, and the cause be remanded to the Circuit Court to proceed therein in exercise of the jurisdiction conferred upon it, in such ample terms, by the act of March 3, 1887.

EVANS *v.* STETTNISCH.

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

No. 279. Submitted April 27, 1893. — Decided May 10, 1893.

An affidavit made by one of plaintiff's attorneys, he having been represented in the progress of the case by two, for use on a motion for a new trial setting forth that an order of continuance had been vacated and the case set down for trial in his absence and without notice either to plaintiff or affiant, whereby plaintiff was prevented from presenting his evidence to the jury and deprived of a fair trial, cannot be considered in this court on writ of error, because: (1) Such affidavit is no portion of the record, — it not having been incorporated in a bill of exceptions; (2) There is nothing to show that it was the only affidavit bearing upon the point in the files of the case; (3) Even if it were shown to have been the only affidavit it would not be sufficient to overthrow the recitals of the record that the parties appeared by their attorneys.

THE facts in this case are these: On November 10, 1884, plaintiff, now plaintiff in error, filed in the Circuit Court of the United States for the District of Nebraska an "amended and reformed petition." Nothing seems to have been done thereafter until 1887, when at the May term, and on the second day of May, the case was "ordered continued." On August 18, 1887, the record recites:

"On motion of defendants, leave is granted by the court to answer herein in ten days. Plaintiff is ruled to reply in twenty days, and it is ordered by the court that the continuance heretofore entered herein be, and the same is hereby, set aside and this cause stand for trial at the adjourned term of this court."

An answer was filed on August 20, 1887, and a reply on the

22d of September. On the 4th day of November appears an entry of a trial, with a verdict for the defendants, and judgment thereon. This entry opens with this recital: "Now come the parties herein, by their attorneys; and also come the following-named persons as jurors, to wit." On November 12 the plaintiff filed a motion to set aside the judgment, and for a new trial, on the ground that after the case had been continued the order of continuance had been vacated in the absence of his counsel, and without notice; and because he had no notice or information that the cause stood for trial at that term, and had thus been prevented from presenting his evidence to the jury. In support of this motion the affidavit of one of plaintiff's counsel was filed, which, after stating the fact of the continuance, and the order setting it aside, continued as follows:

"Said order was so obtained during the absence of plaintiff's counsel and without notice to plaintiff or to affiant that application would be made to the court for the vacation of said order of continuance, and no notice or information whatever was served upon or communicated to said plaintiff that said cause stood for trial at this term until on the 11th day of November, 1887, and after judgment had been entered therein."

The motion having been overruled, plaintiff sued out a writ of error from this court.

Mr. John S. Gregory for plaintiff in error.

No appearance for defendants in error.

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

The record of the trial shows that the parties appeared by their attorneys; discloses no application for a postponement, no objection to proceeding at the time, and no error in the course of the trial. As against this, there is an affidavit which, as certified by the clerk, is among the files in the case. For several reasons this is insufficient:

Opinion of the Court.

In the first place, only errors apparent on the record can be considered, and an affidavit filed for use on a motion is not part of the record, any more than the deposition of a witness used on the trial, and only becomes a part of the record by being incorporated in a bill of exceptions. *Stewart* v. *Wyoming Ranche Co.*, 128 U. S. 383; *Backus* v. *Clark*, 1 Kansas, 303; *Altschiel* v. *Smith*, 9 Kansas, 90; *Jenks* v. *School District*, 18 Kansas, 356; *Tiffin* v. *Forrester*, 8 Missouri, 642; *McDonald* v. *Arnout*, 14 Illinois, 58; *Smith* v. *Wilson*, 26 Illinois, 186.

In the second place, there is nothing to show that this was the only affidavit. The certificate of the clerk is simply "that the foregoing folios, from 1 to 13, contain true and faithful transcripts from the records and files of said court in the case of *Moses Evans* v. *Anna Stettnisch et al.*" This certificate may be true, and yet a dozen affidavits contradicting the statements in this have been filed and used on the motion.

In the third place, if it were affirmatively shown that there was only the one affidavit, that is not sufficient to overthrow the recital in the record. The record imports absolute verity; an affidavit of a witness does not; and when the court, which, in addition, may be supposed to have personal knowledge of the fact, sustains the recital in the record as against the statement in the affidavit, its ruling cannot on review be adjudged erroneous.

In the fourth place, the statements in the affidavit are not necessarily a denial of the truth of the recital in the journal entry of the trial. The plaintiff was represented, as shown by the pleadings, by two counsel. This affidavit is by one only, and it is that no notice was given to plaintiff or affiant. The other counsel may have had notice and appeared, and consented to everything that was done. If so, plaintiff has no semblance of a cause for complaint.

The judgment is affirmed.

BYERS *v.* McAULEY.

McAULEY *v.* McAULEY.

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

Nos. 124, 130. Argued and submitted February 2, 1893. — Decided May 10, 1893.

It is a rule of general application, that where property is in the actual possession of a court of competent jurisdiction, such possession cannot be disturbed by process issued out of another court.

An administrator appointed by a state court is an officer of that court; his possession of the decedent's property is the possession of that court; and as such it cannot be disturbed by process issued out of a Federal court.

The jurisdiction of the Federal courts is a limited jurisdiction, depending either upon the existence of a Federal question or the diverse citizenships of the parties; and where these elements of jurisdiction are wanting, it cannot proceed, even with the consent of the parties.

Federal courts have no original jurisdiction in respect to the administration of decedents' estates, and they cannot by entertaining jurisdiction of a suit against the administrator, which they have the power to do in certain cases, draw to themselves the full possession of the *res*, or invest themselves with the authority of determining all claims against it.

A citizen of another State may proceed in the Federal courts to establish a debt against the estate, but the debt thus established must take its place and share in the estate as administered by the probate court; it cannot be enforced by direct process against the estate itself.

Therefore a distributee, citizen of another State, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally or his sureties, or against other persons liable therefor, or proceed in any way which does not disturb the actual possession of the property by the state court.

In this case it was reversible error for the Circuit Court to take any action or make any decree looking to the mere administration of the estate, or to attempt to adjudicate as between themselves the rights of the litigants who were citizens of the State of Pennsylvania, the *res* being in the possession of a court of that State.

The case of *Payne* v. *Hook*, 7 Wall. 425, explained and distinguished.

James McAuley, who died on the 9th day of January, 1871, by his will, dated November 26, 1870, made large bequests to

Statement of the Case.

his sisters Margaret and Mary, and also devised to them a house and lot on Duquesne Way, in the city of Pittsburgh. Margaret died intestate in 1871, a few months after her brother, and her interest passed to her sister Mary, who died January 6, 1886, seized of said real estate, and leaving also a large personal estate. As respects the latter, she died intestate, but she left an instrument in writing signed by her, the body thereof being also in her handwriting, of which the following is a copy:

"By request of my dear brother, my house on Duquesne Way is to be sold at my death, and the proceeds to be divided between the 'Home of the Friendless' and the 'Home for Protestant Destitute Women.'

"MARY McAULEY."

On January 12, 1886, this instrument was admitted to probate by the register of Allegheny County, Pa., as the will of Mary McAuley, and letters of administration *cum testamento annexo* upon her estate were issued to Alexander M. Byers.

Byers proceeded with the administration of the estate, and on January 29, 1887, he filed in the register's office an account showing his receipts and expenditures, and what balance he had in his hands for distribution, amounting to the sum of $212,235.61.

The account of Byers, as administrator with the will annexed, was examined and allowed by the register, and was presented for approval to the orphans' court of Allegheny County, and was by that court, on March 7, 1887, approved and confirmed *nisi*, and, no exceptions thereto having been filed, the confirmation became absolute.

Thereupon, in pursuance of statutory directions, this confirmed account was put upon the audit list of the orphans' court for distribution of the balance shown to be in the administrator's hands, and the court fixed March 29, 1887, as the day to hear the case.

On March 28, 1887, the day before the hearing thus fixed, a bill in equity was filed in the Circuit Court of the United States for the Western District of Pennsylvania, by Henry B.

Shields, a resident and citizen of the State of Ohio, assignee of James McAuley, a citizen of the State of Kansas, and Henry B. Shields, in right of his wife, Melissa M. Shields, also a resident and citizen of Ohio, against the administrator Byers, and other parties claiming to be interested in the estate, among them the two corporations named in the instrument above quoted. The bill set forth the death of Mary McAuley; that there were two classes of claimants to the estate, to wit, the first and second cousins of the decedent; that the so-called will was null and void; and that there was a large amount of personal estate in the hands of defendant Byers, administrator, etc. The prayer was that the will and the probate be declared void and of no effect; that the administrator be enjoined from disposing of the real estate, and from collecting the rents therefrom, and that some suitable person be appointed to take charge of it until partition; that a partition of it be had and made to and among the various parties in interest, and that the defendant Byers be ordered and directed to make a full, just, and true account of all assets in his hands; that an account be taken of the testator's debts and funeral expenses, and the surplus be distributed among the plaintiff and all other parties legally entitled thereto; and for general relief. To this bill the administrator Byers filed a plea, setting up the proceedings in the orphans' court. This plea was, after argument, overruled by the Circuit Court.

The cause was then put at issue by answer and replication. On May 20, 1888, an interlocutory decree was entered, directing that said A. M. Byers, administrator of Mary McAuley, deceased, should file an account of the personal estate before a master who was then appointed, and the master was directed to take testimony as to the parties interested in the distribution of the balance in the hands of said administrator, and to report the testimony, with a schedule of distribution, to the court. The administrator stated before the master an account, which was identical with the account theretofore confirmed by the orphans' court. The master further took testimony as to who were the distributees, and reported the same to the court with a schedule of distribution.

Counsel for Appellee in No. 124.

On January 5, 1889, a final decree was made by the Circuit Court as follows:

"And now, to wit, January 5, 1889, this cause came on to be heard on bill, answers, replication, testimony, and the report of the master with exceptions thereto, and was argued by counsel; whereupon, upon consideration thereof by the court, it is ordered, adjudged, and decreed that the proceeds of the sale of the real estate that was of Mary McAuley, deceased, situate on Duquesne Way, in the city of Pittsburgh, after deducting expenses attending the same, shall be distributed equally between the 'Home for the Friendless' and the 'Home for Aged Protestant Women.'

"And it is further ordered, adjudged, and decreed that the exceptions to the master's report be overruled and the said report confirmed, and that the personal estate of said decedent be distributed among the thirteen first cousins of said decedent to the exclusion of her second cousins in conformity with said master's report, and that unless an appeal be duly entered from this decree within sixty days from this date the administrator is ordered to transfer the stocks and pay out the cash of said decedent's personal estate in accordance with the schedule of distribution reported by the said master, adding the sum of nine dollars and sixty-one cents ($9.61) to the cash share of each of said thirteen distributees to cover the duplicate credit of one hundred and twenty-five dollars ($125) for examiner's fees inadvertently allowed in said master's report."

From this decree several appeals were taken to this court, two of which remain for consideration, to wit, the appeal of the administrator, and that of Dora McAuley and others, second cousins of the deceased, with their husbands.

Mr. D. T. Watson, for appellant in No. 124, submitted on his brief.

Mr. S. Schoyer, Jr., *Mr. Walter Lyon* and *Mr. M. M. Watson*, for appellants, in No. 130, submitted on their brief.

Mr. Thomas Patterson, for the Pittsburgh and Allegheny Home for the Friendless, appellee in No. 124, and *Mr. George*

C. Burgwin, for the Home for Aged Protestant Women appellee, in No. 124, submitted on their respective briefs.

Mr. D. F. Patterson, for Sarah Thompson and another, appellees in No. 124. *Mr. John W. Donnan* and *Mr. J. M. McBurney* were with him on his brief. *Mr. E. P. Jones* and *Mr. C. W. Jones*, for Robert F. McAuley and other appellees, were also on *Mr. D. F. Patterson's* brief.

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

It is obvious from the decree which was entered that the Circuit Court of the United States assumed full control of the administration of the estate. That decree disposed of and distributed the entire estate among all the persons interested therein, citizens and non-citizens of the State. It did not stop with an adjudication of the claims of citizens of other States against the estate, but assumed to determine controversies between citizens of the same State, for the two corporations named in the first paragraph were both citizens of Pennsylvania, and yet the decree determined their rights as against the estate, as well as between themselves. Not only that, of both the first and second cousins, between whom, as shown by the last paragraph, distribution was made, some were citizens of the State of Pennsylvania and some of other States, and yet all their claims, as between themselves and as against the estate, were disposed of by this decree.

Indeed, the decree as a whole cannot be sustained, unless upon the theory that the Federal court had the power on the filing of this bill to take bodily the administration of the estate out of the hands of the state court, and transfer it to its own forum. It was not a judgment against the estate, but a decree, binding personally the administrator, and compelling him, subject to the penalties of disobedience of a decree of a court of chancery, to administer the estate according to the orders of the Federal rather than those of the state court which had appointed him. If we look back of the decree to the proceed-

ings which were had in the Circuit Court, intermediate the filing of the bill and the decree, it will be perceived that that court proceeded as though the entire administration of the estate had been transferred to it from the state court. Thus, on December 3, 1887, the administrator filed in the Circuit Court a petition, commencing as follows: "The petition of A. M. Byers, administrator of all and singular the goods and chattels of Mary McAuley, late of the county of Allegheny, deceased, respectfully shows: That this honorable court has taken jurisdiction of your petitioner as administrator and of the assets of the decedent, which your petitioner has in his hands," setting forth the ownership of 250 shares of railway stock, and praying for an order as to its disposal. Upon the filing of such petition the court directed that notice be given to all counsel of record, and on December 10, made an order for the disposition of the stock. So, on December 24, 1888, the administrator having filed a petition for leave to sell the real estate, the Circuit Court made an order directing the sale, "report of such sale to be made to this court for confirmation, and the proceeds to be held subject to the decree of this court." It is true that the administrator presented like applications to the state court, and obtained like orders, except that in the order for the sale of the real estate there was in terms no command to report the sale for confirmation and hold the proceeds subject to the decree of that court. Evidently the administrator did not know which court had the power to control in these matters the actual administration of the estate; and so, for prudential reasons, applied to and obtained similar orders from both. So both by the terms of the final decree, and by the proceedings in the Circuit Court preliminary thereto, it is clear that the question is fairly presented to us as to the power of the Circuit Court of the United States to interfere with the administration of an estate in a state court. Such a question is of importance. No officer appointed by any court should be placed under the stress which rested upon this administrator, and compelled for his own protection to seek orders from two courts in respect to the administration of the same estate.

In order to pave the way to a clear understanding of this question, it may be well to state some general propositions which have become fully settled by the decisions of this court; and, first, it is a rule of general application, that where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court. The doctrine has been affirmed again and again by this court. *Hagan* v. *Lucas*, 10 Pet. 400; *Taylor* v. *Carryl*, 20 How. 583; *Peck* v. *Jenness*, 7 How. 612, 625; *Freeman* v. *Howe*, 24 How. 450; *Ellis* v. *Davis*, 109 U. S. 485, 498; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Covell* v. *Heyman*, 111 U. S. 176; *Borer* v. *Chapman*, 119 U. S. 587, 600. In *Covell* v. *Heyman*, *supra*, the matter was fully discussed, and in the opinion by Mr. Justice Matthews, on p. 179, the rule is stated at length: "The point of the decision in *Freeman* v. *Howe*, *supra*, is that, when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of that court, but that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds, from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or federal, having jurisdiction over the parties and the subject matter. And *vice versa*, the same principle protects the possession of the property while thus held, by process issuing from state courts, against any disturbance under process of the courts of the United States;

excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States."

Secondly. An administrator appointed by a state court is an officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court; it is the possession of the court, and it is a possession which cannot be disturbed by any other court. Upon this proposition we have direct decisions of this court. In *Williams* v. *Benedict*, 8 How. 107, 112, it is said: "As, therefore, the judgment obtained by the plaintiffs in the court below did not entitle them to a prior lien, or a right of satisfaction in preference to the other creditors of the insolvent estate, they have no right to take in execution the property of the deceased which the probate court has ordered to be sold for the purpose of an equal distribution among all creditors. The jurisdiction of that court has attached to the assets; they are *in gremio legis*. And if the marshal were permitted to seize them under an execution, it would not only cause manifest injustice to be done to the rights of others, but be the occasion of an unpleasant conflict between courts of separate and independent jurisdiction." And in *Yonley* v. *Lavender*, 21 Wall. 276, it was held that where the statute of a State places the whole estate, real and personal, of the decedent within the custody of the probate court of a county, a non-resident creditor may get a judgment in the Federal court against the resident executor or administrator, and come in under the law of the State for such payment as that law marshalling the rights of creditors awards to creditors of his class; but he cannot, because he has obtained a judgment in the Federal court, issue execution, and take precedence of other creditors who have no right to sue in the Federal courts; and if he do issue execution and sell the lands, the sale is void. And in the course of the opinion, on p. 280, it was observed: "The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal courts in the enforcement of individual rights. These laws, on the death of DuBose and the appointment of his ad-

ministrator, withdrew the estate from the operation of the execution laws of the State and placed it in the hands of a trustee for the benefit of creditors and distributees. It was thereafter in contemplation of law in the custody of the probate court, of which the administrator was an officer, and during the progress of administration was not subject to seizure and sale by any one. The recovery of judgment gave no prior lien on the property, but simply fixed the status of the party and compelled the administrator to recognize it in the payment of debts. It would be out of his power to perform the duties with which he was charged by law if the property entrusted to him by a court of competent jurisdiction could be taken from him and appropriated to the payment of a single creditor to the injury of all others. How can he account for the assets of the estate to the court from which he derived his authority if another court can interfere and take them out of his hands?" See also *Vaughn* v. *Northup*, 15 Pet. 1; *Peale* v. *Phipps*, 14 How. 367.

There is nothing in any decision of this court, controverting the proposition thus stated, that the administrator is the officer of the state court appointing him, and that property placed in his possession by order of that court is in the custody of the court. One of the cases specially relied on by counsel for appellees is *Payne* v. *Hook*, 7 Wall. 425. The opinion in that case was written by Mr. Justice Davis, who wrote the opinion in the case last quoted from, and in the latter opinion he said that there was nothing in *Payne* v. *Hook* to conflict with the views therein expressed; and, indeed, there was not. *Payne* v. *Hook* was the case of a bill filed by one of the distributees of an estate against the administrator and the sureties on his official bond, to obtain her distributive share in the estate of the decedent. Plaintiff was a citizen of Virginia, and the defendant a citizen of Missouri, and an administrator appointed by the probate court of one of its counties. Suit was brought in the Circuit Court of the United States for the District of Missouri. The charge in the bill was gross misconduct on the part of the administrator, and false settlement with the probate court; and that he had, by fraudulent misrepresentations,

obtained a settlement with plaintiff for a sum less than she was entitled to. A demurrer to the bill was sustained in the court below, but this court held that the bill was sufficient, and that the demurrer was improperly sustained. In other words, the ruling was that plaintiff, a citizen of another State, could apply to the Federal courts to enforce her claim against an administrator arising out of his wrongful administration of the estate. To the objection that the other distributees were not made parties, the court replied that it was unnecessary, that it was a proceeding alone against the administrator and his sureties. In the opinion, on p. 431, it is said: "The bill under review has this object, and nothing more. It seeks to compel the defendant, Hook, to account and pay over to Mrs. Payne her rightful share in the estate of her brother; and in case he should not do it, to fix the liability of the sureties on his bond." There was no suggestion in the bill that the Federal court take possession of the estate and remove it from the custody of the administrator appointed by the state court; no attempt to settle the claims of citizens of the State, as between themselves; no attempt to take the administration of the estate, but simply to establish and enforce, in behalf of a citizen of another State, her claim to a share of the estate. That this is the true interpretation of that case is also evident from these quotations from subsequent opinions. Thus in *Ellis* v. *Davis*, 109 U. S. 485, 498, it was said: "In *Payne* v. *Hook*, 7 Wall. 425, it was decided that the jurisdiction of the Circuit Court of the United States, in a case for equitable relief, was not excluded because, by the laws of the State, the matter was within the exclusive jurisdiction of its probate courts; but, as in all other cases of conflict between jurisdictions of independent and concurrent authority, that which has first acquired possession of the *res*, which is the subject of the litigation, is entitled to administer it. *Williams* v. *Benedict*, 8 How. 107; *Bank of Tennessee* v. *Horn*, 17 How. 157; *Yonley* v. *Lavender*, 21 Wall. 276; *Taylor* v. *Carryl*, 20 How. 583; *Freeman* v. *Howe*, 24 How. 150." And in *Borer* v. *Chapman*, 119 U. S. 587, 600, after a quotation from the opinion in *Payne* v. *Hook*, it is added: "The only quali-

fication in the application of this principle is, that the courts of the United States, in the exercise of their jurisdiction over the parties, cannot seize or control property while in the custody of a court of the State." The distinction between that case and this is like that which exists between the cases of *Freeman* v. *Howe*, 24 How. 450, and *Buck* v. *Colbath*, 3 Wall. 334. In the former of these cases this court held that when property was in the custody of a United States marshal, under process from a Federal court, it could not be taken from him by any process out of a state court; that the possession of the marshal was the possession of the court, and no other court could disturb it; while, in the latter case, it held that an action of trespass could be maintained in a state court against a marshal of the Federal court for goods improperly taken possession of, because such an action in no way interfered with the custody of property by the Federal court. So, here, *Payne* v. *Hook* established that a citizen of another State could recover from an administrator the share of an estate wrongfully withheld by him, and enforce that recovery by a decree over against the sureties of the administrator's bond; while the opinion of the court below, in the present case, gives to the Federal court power to take possession of property in the hands of an administrator appointed by the state court, and thus dispossess that court of its custody.

Thirdly. The jurisdiction of the Federal courts is a limited one, depending upon either the existence of a Federal question or diverse citizenship of the parties. Where these elements of jurisdiction are wanting, it cannot proceed, even with the consent of the parties. There is in the controversies growing out of the settlement of this estate no Federal question; the jurisdiction, therefore, must depend upon diverse citizenship, and can go no further than that diverse citizenship extends. The fact that other parties may be interested in the question involved is no reason for the Federal courts taking jurisdiction of the controversy between such parties.

It is true that when the Federal court takes property into its custody, as it does sometimes by a receiver, it may entertain jurisdiction of claims against that property in favor of citizens

of the same State as the receiver, or either of the parties. But that is an ancillary jurisdiction; it is in aid of that which it has acquired by virtue of the seizure of the property, and in order, it having possession, that it may make final disposition of the property. Possession of the *res* draws to the court having possession all controversies concerning the *res*. If original jurisdiction of the administration of the estates of deceased persons were in the Federal court, it might by instituting such an administration and taking possession of the estate, through an administrator appointed by it, draw to itself all controversies affecting that estate, irrespective of the citizenship of the respective parties. But it has no original jurisdiction in respect to the administration of a deceased person. It did not in this case assume to take possession of the estate in the first instance, and it cannot, by entertaining jurisdiction of a suit against the administrator, draw to itself the full possession of the estate, or the power of determining all claims against or to it.

Under the present law of Congress, a receiver appointed by a Federal court and in possession of property may be subjected to suits in the courts of the State without leave obtained in the first instance from the Federal court. 25 Stat. 436, c. 866. Would it be tolerated for a moment that the commencement of such a suit in the state court against a receiver enabled the state court to draw to itself the entire administration of the receivership, and oust the Federal court from the possession and custody of the property? The mere statement of the question carries its own answer. While the validity of a claim against the receiver may be established in the state court, the administration of the property in the hands of the receiver remains with the Federal court whose officer he is, and the amount the claimant will receive from the proceeds of the property in the hands of the receiver is not settled by the state court, which only determines the validity and extent of the demand, but rests upon the result of the administration, as ordered by the Federal court. The fact that the Federal court entertaining the suit of one claimant against an estate may entertain a different view of the law controlling the

rights of that claimant, from that entertained by the court of the State in a suit brought by a claimant, citizen of the State, holding a like character of claim, is no ground for enlarging the jurisdiction of the Federal court beyond that given to it by the Constitution of the United States.

A citizen of another State may establish a debt against the estate. *Yonley* v. *Lavender*, 21 Wall. 276; *Hess* v. *Reynolds*, 113 U. S. 73. But the debt thus established must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent. *Yonley* v. *Lavender*, *supra*. In like manner a distributee, citizen of another State, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties, *Payne* v. *Hook*, *supra;* or against any other parties subject to liability, *Borer* v. *Chapman*, *supra;* or in any other way which does not disturb the possession of the property by the state court. See the many cases heretofore cited.

Our conclusion, therefore, is, that the Federal court erred in taking any action or making any decree looking to the mere administration of the estate, or in attempting to adjudicate the rights of citizens of the State, as between themselves. The state court had proceeded so far as the administration of the estate carries it forward to the time when distribution may be had. In other words, the debts of the estate had been paid, and the estate was ready for distribution, but no adjudication had been made as to the distributees, and in that exigency the Circuit Court might entertain jurisdiction in favor of all citizens of other States, to determine and award their shares in the estate. Further than that, it was not at liberty to go. In that determination it made two rulings, in respect to both of which we think the court was correct. First, in holding that the distributees had no interest in the real estate specially described in the first paragraph of the decree. Indeed, the ruling of the court in this respect is not seriously challenged. It is true that there is an assignment of error, in the first appeal, to the action of the court below in treating the provision in the will of Mary McAuley, that the proceeds of sale

of the real estate on Duquesne Way should be divided between the "Home for the Friendless" and the "Home for Aged Protestant Women," as a valid declaration of a trust, and in decreeing accordingly. But this assignment seems to have been abandoned, or, at all events, is not contended for in the appellants' brief. We content ourselves, therefore, with saying that we see no error in the judgment of the court below in that particular. It needs no argument to show that a written instrument, though inefficacious as a will, from a want of compliance with statutory requisitions, may yet operate as a declaration of a trust. 1 Perry on Trusts, § 91.

The other ruling was, that the first cousins were entitled to take the estate to the exclusion of the second cousins. In this the Circuit Court of the United States had to deal with a question of local law. The state statutes prescribed the scheme of distribution, and, if the meaning of those statutes was disputable, the construction put upon them by the state courts was binding upon the Circuit Court.

Our inquiry is, therefore, restricted to the question whether the Circuit Court correctly applied the statute law of Pennsylvania as interpreted by the courts of that State.

The Supreme Court of Pennsylvania, in *Brenneman's Appeal*, 40 Penn. St. 115, construed the statute law, as it then stood, as preferring first cousins to the entire exclusion of second cousins; and this case was approved in the subsequent case of *Hayes' Appeal*, 89 Penn. St. 256. Some statutory changes were made in the law, but, in the recent case of *Rogers' Appeal*, 131 Penn. St. 382, where the opposite view of the case was presented by the same counsel who represents the appellants in the present appeal, in an argument termed by that court ingenious and able, it was held that *Brenneman's Appeal* should not be overruled or even modified.

The court below, therefore, in sustaining the claim of the first, to the exclusion of the second, cousins, followed the law as construed by the state Supreme Court.

The decree of the Circuit Court must be reversed, and the case remanded with instructions to enter a decree in favor of those citizens of other States than Pennsylvania, who

have petitioned the Circuit Court for relief, and who are first cousins of the decedent, for their shares of the estate other than the real estate described in the declaration of trust, the amount of such shares being determined by the fact that first cousins only inherit; and an order that they recover from the administrator such sums thus found to be due. No decree will be entered in favor of the two corporations named in the first paragraph, and none in favor of the parties to the suit who are citizens of the State of Pennsylvania.

MR. JUSTICE SHIRAS, with whom concurred THE CHIEF JUSTICE, dissenting.

I am unable to concur in the judgment of the court, or in the reasoning used to support it.

If it be true, as is argued in the opinion, that, in the case of an administration of the estate of a decedent by proceedings in the probate court of a State, the possession of the assets by the administrator is the possession of the court, and such assets, as to custody and control, are to be deemed to be *in gremio legis*, so as to bring the case within the doctrine of *Covell* v. *Heyman*, 111 U. S. 176, and kindred cases, then it would follow, as I think, that the plea of the administrator, wherein he set up the pendency of the proceedings in the orphans' court of the State as a bar to the bill of complaint, ought to have been sustained. Between the granting of the letters of administration, and the final distribution of the fund realized by the administration there is no point of time when the jurisdiction and possession of the state court change their character, and hence, if it be the law that the possession and control of the administrator is that of the court appointing him, within the meaning of the cases cited by the majority, there can be no point of time or stage of the proceedings between their inception and conclusion when the process of another court can be legitimately invoked to take from the state court its power of control and decision.

In this view of the case, citizens of States other than that having possession and control of the estate through its officer

must, like the home residents, assert their claims in the state court; and if their claims have a Federal character, and if the state courts should disregard that feature of their rights, the remedy would he found in an ultimate appeal to the Supreme Court of the United States.

But it is certain that such a view of this question cannot prevail without reversing a long line of decisions, of which *Payne* v. *Hook*, 7 Wall. 425, may be cited as an early, and *Borer* v. *Chapman*, 119 U. S. 587, as a recent case and in which this court has held that the jurisdiction conferred on the Federal court by the Constitution and laws of the United States extends to controversies arising in the distribution of estates of decedents, where such jurisdiction is invoked by citizens of other States than that of the domicile, notwithstanding the peculiar structure of the local probate system.

The logic of the opinion of the majority, as I understand it, seems to require a reversal of the action of the court below in overruling the administrator's plea, setting up that he was an officer of the state court, proceeding in the due and regular performance of his duties as such officer.

As, however, the opinion refrains from accepting this conclusion, though apparently rendered necessary by its own reasoning, the next questions that arise are as to those particulars in which the opinion reverses the decree of the court below.

Having conceded that the jurisdiction of the Circuit Court had duly attached under a bill in equity, brought by citizens of another State, alleging legitimate matters of controversy arising out of the distribution of the decedent's estate, the opinion of the majority proceeds to consider the propriety of the action of the court below in the exercise of that jurisdiction.

The matters of controversy which formed the subject of the bill of complaint were two. The first was as to the legal effect of that provision of the will of the decedent which devised the proceeds of certain real estate, situated in the city of Pittsburgh, in equal shares to the "Home of the Friendless" and the "Home for Aged Protestant Destitute

Women," two charitable institutions organized under the laws of the State of Pennsylvania. As the decedent left no husband, children, brothers, or sisters, but certain first cousins and second cousins, a dispute arose whether both these classes were entitled to share in the distribution of the estate, and this formed the second subject matter of the bill.

In respect to the first matter, the court below held that, while the will of the decedent could not operate as a testamentary disposition of the real estate in question, because such will had not been executed in conformity with certain statutory requirements, yet that it constituted a valid declaration of a trust, under which the two charitable institutions were entitled to the proceeds of the real estate.

The controversy between the two classes of cousins the court resolved in favor of the first cousins, following, in so doing, the construction put upon the Pennsylvania intestate laws by the Supreme Court of that State.

This disposition by the court below of the two questions before it is approved by this court, but, in the opinion of the majority, the court below erred in including in the scope of its final decree all the parties before it, and in not restricting its decree to an adjudication of the case so far as the citizens of States other than Pennsylvania were concerned.

Be it observed that all the parties concerned in the matters in controversy were before the Circuit Court. The administrator, the two charitable institutions, and all the individuals constituting both classes of cousins were parties plaintiff and defendant in the suit, and none of them, either in the court below or in this court, objected to the jurisdiction of the Circuit Court, except the administrator, and his plea to the jurisdiction had been rightfully, as is admitted by the majority opinion, overruled.

In such a state of facts, why was not the action of the court fully warranted in awarding a decree finally establishing the rights of the parties before it?

There is force and logical consistency in the position that the settlement of a decedent's estate is not a suit at law or in

equity, but that such an estate constitutes a *res*, as to which the jurisdiction of the probate court, when it once attaches, is exclusive.

The position of the court below in exercising its jurisdiction to the extent of final determination and enforcement is likewise consistent with reason, and, as I think, with the doctrine of our previous cases.

But the conclusion of the majority in the present case, requiring the court below to shorten its arm and to dismiss parties who were before it, assenting to its jurisdiction, is one that I cannot accept.

Let us see to what consequences such a doctrine will lead; and no better case than the one in hand is needed to illustrate its possible consequences.

The Federal court having held that the will of the decedent was efficacious as an acknowledgment of a valid trust, of course the real estate, which formed the subject of the trust, was withdrawn from the operation of the intestate law, and was declared to be the property of the *cestuis que trustent*. From this it follows that the rest of the estate is to be equally divided among the first cousins, who are held to be entitled to it. Here we have a consistent decree that binds all the world, for all concerned were before the court, and their contentions were all heard and considered. The administrator had no official or personal concern in the questions mooted. The suggestion that he would not be protected by obeying the decree of the Circuit Court from his responsibility to the orphans' court, which had appointed him, has no force. If the decree of the Circuit Court were declared valid by this court, of course that decision would, involving as it does a question of the jurisdiction of the Federal courts, be obligatory upon the state court, and a perfect protection to the administrator in carrying it into effect. There may be some foundation for criticism in the action of the court below in going behind the account that the administrator had filed in the orphans' court, and in subjecting him to verify his account before a master, but if this were error it did not affect the final decree, inasmuch as the account of the admin-

istrator, as filed in the orphans' court, was approved and confirmed without change by the master.

But out of the decree recommended by the majority opinion all kinds of confusion and uncertainty may arise. The state courts may take a different view of the will of the decedent, and decline to find in it a valid declaration of a trust. In that event the amount of the estate would be increased by the proceeds of the sale of the real estate thus added to the fund for distribution. The citizens of States other than Pennsylvania, the extent of whose rights to participate in the fund had already been determined, and, perhaps satisfied, under the decree of the Circuit Court, could not avail themselves of such action of the state courts. Consequently the first cousins resident in Pennsylvania would receive larger shares of the estate than those received by the first cousins in other States, and thus inequality would arise.

Again, if the state courts should happen to change their views as to the proper construction of the intestate law, and hold that second cousins were entitled to participate equally with first cousins, then the second cousins who were citizens of other States would, under the decree of the Federal court binding upon them, receive nothing, while the second cousins living in Pennsylvania would participate. So, too, it is entirely possible, under the division of jurisdiction recommended by the majority opinion, that all of the first cousins might be citizens of other States, and second cousins only be residents of Pennsylvania. Then, as the decree of the Circuit Court gave the estate only to first cousins, and as such decree would be forthwith enforceable, it might result that, when the state court reached an adjudication in favor of the second cousins, there would be nothing left in which they could participate. Many other absurd consequences, not far fetched, but likely to occur, could be readily suggested, if the novel proposition of dividing jurisdiction should prevail.

I submit that the error in the reasoning of the majority opinion is found in the latent assumption that the citizens of Pennsylvania have no rights in the Federal courts in Pennsylvania. The latter are treated as if they were courts only

intended for the advantage of citizens of other States. Yet we know that, admittedly, citizens of Pennsylvania have the right to resort, as parties complainant, to the Federal courts to enforce important rights and interests — such as arise, for instance, out of the patent laws. So, too, as I understand it, when citizens of Pennsylvania have been brought into the Circuit Court of the United States, as parties defendant to a suit by citizens of another State, they have a right and interest in the decree of the court in their favor. The right of the foreign citizens is not to have the Federal court decide in their favor, but merely to have the controversy heard and determined by the Federal tribunal. The citizens of Pennsylvania who have been brought into the Federal court have a right and interest in the decision, which, as it would have been conclusive if against them, so it must be conclusive if in their favor. The "Home for the Friendless" and the "Home for Aged Protestant Women" should not, after a decision has been made in their favor, in a suit where all concerned were parties, be turned out of the Federal court to wage, in another tribunal, with the same parties, the same question. Nor should the second cousins, resident in Pennsylvania, after having consented to submit their claims to adjudication in the Circuit Court, be permitted, as against the same parties, to try a second fall in the state court.

The apprehension is expressed in the opinion of the majority that the principles upon which the court below proceeded, in adjudicating finally upon the parties and questions before it, would lead to a conflict between the courts, Federal and state, and subject the administrator to a divided duty.

If the previous reasoning is not altogether wrong, it will be readily seen that, on the contrary, a conflict between the State and Federal courts will be brought about by an attempt to divide between them the jurisdiction and decision of the same subjects of litigation, and that the "divided duty" which will perplex the administrator will be that of having to obey two courts instead of one.

To conclude: either the plea of the administrator, setting up the jurisdiction of the orphans' court, as having already

attached, and as being, therefore, exclusive, ought to have been sustained, or the course of the court below, in dealing with the subjects and parties before it, by a final decree, not to be interfered with or thwarted, as between the same parties, by any other court, should be affirmed.

Jurisdiction has been defined by this court, in *United States* v. *Arredondo*, 6 Pet. 691, 709, to be "the power to hear and determine a cause." In *Ober* v. *Gallagher*, 93 U. S. 199, 206, it was said that a Circuit Court "having obtained rightful jurisdiction of the parties and the subject matter of the action for one purpose, the court will make its jurisdiction effectual for complete relief."

"*Jurisdictio est potestas de publico introducta cum necessitate jurisdicendi.*" 10 Rep. 73. Jurisdiction is the power introduced for the public good, with the necessity of expounding the law.

"*Juris effectus in executione consistit.*" Co. Litt. 289. The effect of law consists in execution.

I am unable to give my adhesion to a doctrine under which, in the distribution of the estate of a decedent, parties bearing the same relation to it shall or may receive different treatment as they may happen to be citizens of one State or another in our Federal Union. The rights of all parties should be measured by the same yard stick. And when, as in the present case, all persons concerned in the distribution of an estate have been duly made parties to a suit in equity in the Circuit Court of the United States by a bill bringing into adjudication all the questions between such persons, and their several contentions have been heard and considered, the decree of such court ought to operate as a decision final between the parties and as to the matters in controversy.

I think the decree of the court below ought to be affirmed, and am authorized to say that the Chief Justice concurs in that conclusion, and in this dissent.

Mr. Justice Jackson, not having heard the argument, did not take part in the decision.

McCOMB *v.* FRINK.

FRINK *v.* McCOMB.

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

Nos. 215, 216. Argued April 25, 26, 1893. — Decided May 15, 1893.

M. subscribed to the capital stock of a company about to be formed a large sum on his own account, and $60,000 as trustee. B., who was the *cestui que trust*, subsequently asked him to acknowledge that he held it in trust for S. who had purchased it of B. M. thereupon wrote under date of November 22, 1869, "To whom it may concern: I hereby acknowledge to hold in the Southern Railroad Association as trustee for S. under an arrangement with B. an original subscription of $60,000, on which 70 per cent has been paid. This motion is in conformity with an arrangement made some two months ago between B., S. and myself. (Signed) M." In 1875 S. commenced an action at law against M. in a state court of Massachusetts to recover on an alleged contract by M. to invest for S. the sum of $45,000 then in M.'s hands, in the stock of that association, and such proceedings were had that it was finally determined there that no such contract as charged existed, or if it existed, was broken. Subsequently facts were disclosed which showed a breach of trust by M., his administrator and administratrix filed this bill. *Held,*

(1) That the paper given by M. to S. in 1869 was an absolute and unqualified declaration of trust, for the amount of the subscription so far as it had been paid;

(2) That one essential to an estoppel by judgment is identity of cause of action, and that an examination of the pleadings and proceedings in the case in Massachusetts showed that the cause of action there was not identical with the cause of action here;

(3) That in view of the fact that M. when called as a witness in the action at law testified that the stock stood as it always had stood, and of the further fact that no breach of trust was discovered until just before the commencement of this suit, the plaintiffs had not been guilty of laches;

(4) That in view of the circumstances detailed in the opinion of the court the decree of the court below awarding a return of the amount for which M. acknowledged himself as trustee with interest reached, as nearly as possible, what justice demanded.

On June 30, 1868, the Southern Railroad Association, an unincorporated association, was organized by certain parties

for the purpose of leasing and operating the Mississippi Central Railroad, of which Henry S. McComb had previously obtained a lease for himself and his associates. The capital of this association was $1,500,000, of which Henry S. McComb subscribed $415,000 personally, and also $60,000 as trustee; Josiah Bardwell, $100,000; the balance being taken by ten associates. On January 14, 1869, this association became incorporated, under a special act of the legislature of Tennessee, and to this corporation the voluntary association, on January 22, 1869, transferred its property. On January 21, 1869, such action was taken by this incorporated company that the capital stock named in its charter, to wit, $2,000,000, was issued to the subscribers of the original unincorporated association in proportion to the amounts of their subscriptions. In this way the subscription in the name of Henry S. McComb, trustee, was enlarged from $60,000 to $80,000, and represented 800 shares of stock, for which eight certificates of one hundred shares each, and numbered from 157 to 164, inclusive, were formally issued by the incorporated company on October 6, 1870, to Henry S. McComb, trustee, and so remained on the books of the company at the time of his death, December 30, 1881. It is undisputed that the subscription was taken originally by McComb as trustee for Josiah Bardwell. In the fall of 1869 this correspondence took place between Bardwell and McComb:

"My Dear McComb: Will you please acknowledge that you hold in 'the Southern Ass'n,' as trustee for (the benefit) or rather for C. B. Snyder, that am't of stock wh. you held as for me, Mr. Snyder having two months since pd. me its costs and interest.

"Yours, truly, J. Bardwell.

"Boston, Nov. 12, 1869."

"Office of H. S. McComb,
"Wilmington, Del., *Nov.* 22, 1869.

"Josiah Bardwell, Esq., care of F. Skinner & Co., Boston.

"Dear Sir: I send this (acknowledgment as trustee) the first leisure moment after the receipt of your letter, and if it

is not in conformity with your wishes in any manner please return it to me, with such instructions to be carried out as you shall be disposed to make.

"Yours truly, H. S. McComb, M."

The following is a copy of the paper enclosed in McComb's letter:

"To whom it may concern:

"I hereby acknowledge to hold in the Southern Railroad Association, as trustee for C. B. Snyder, under an arrangement with Josiah Bardwell, an original subscription of sixty thousand dollars, on which seventy per cent has been paid. This notice is in conformity with an arrangement made some two months ago between Josiah Bardwell, C. B. Snyder, and myself.

"H. S. McComb, *Trustee.*"

On this acknowledgment is a memorandum in Bardwell's handwriting:

"Received Nov. 23, 1869."

At the time of his death, on July 18, 1882, Snyder was still the beneficiary under this trust, and on January 30, 1883, the plaintiffs, as administrator and administratrix, commenced this suit against defendant, as executrix, etc., of Henry S. McComb, the purpose of which was to establish the trust, and compel an accounting. The pleadings having been perfected, proofs were taken, and the case submitted for final hearing, which resulted in a decree on July 3, 1889, for the sum of $42,000 principal, and $49,420 as interest, making in the aggregate $91,420. 39 Fed. Rep. 292. Both parties appealed to this court.

Mr. William G. Wilson, for Frink and another, administrator and administratrix of Snyder, deceased.

Mr. Wayne MacVeagh and *Mr. George H. Bates*, (with whom was *Mr. Francis S. Bangs* on the brief,) for McComb, executrix.

Argument for McComb.

I. No such trust was established in McComb in favor of the complainants' decedent as entitled the complainants to the relief prayed for in the bill, or to the relief granted in the decree.

II. The matters in controversy have already been passed upon by a court of competent jurisdiction in the suit brought by Bardwell against McComb in the Supreme Judicial Court of Massachusetts, which, begun in Boston in 1875, and terminated in 1878 in a verdict and judgment for the defendant, raised the same questions and was decided upon practically the same facts as belong in this controversy. The case is therefore *res judicata*. *Smith* v. *Whiting*, 11 Mass. 445.

The claim of a trust in McComb for Snyder was raised in the Boston case and settled there. The discovery of new evidence, even if pertinent, does not affect the former adjudication. *Kilheffer* v. *Hess*, 17 S. & R. 319; *S. C.* 17 Am. Dec. 658. And further, this new matter is wholly without value as strengthening the plaintiffs' equities. *Lawrence* v. *Vernon*, 3 Sumner, 22; *Steam Packet Co.* v. *Bradley*, 5 Cranch C. C. 393; *Block* v. *Commissioners*, 99 U. S. 686; *Packet Co.* v. *Sickles*, 5 Wall. 580; *Ballance* v. *Forsyth*, 24 How. 183; *Coit* v. *Tracy*, 8 Connecticut, 268; *S. C.* 22 Am. Dec. 110; *Phillips* v. *Berick*, 16 Johns. 136; *Betts* v. *Starr*, 5 Connecticut, 550; *S. C.* 13 Am. Dec. 94; *Cist* v. *Zeigler*, 16 S. & R. 282; *S. C.* 16 Am. Dec. 573; *Canaan* v. *Greenwoods Turnpike Co.*, 1 Connecticut, 1; *Price* v. *Dewey*, 6 Sawyer, 493; *S. C.* 11 Fed. Rep. 104.

III. The complainants are chargeable with laches. *Wagner* v. *Baird*, 7 How. 234; *Bowman* v. *Wathen*, 1 How. 189; *Hayward* v. *National Bank*, 96 U. S. 711; *Jenkins* v. *Pye*, 12 Pet. 240; *Brown* v. *Buena Vista County*, 95 U. S. 157; *Godden* v. *Kimmell*, 99 U. S. 201; *Richards* v. *Mackall*, 124 U. S. 183; *Preston* v. *Preston*, 95 U. S. 200; *Speidel* v. *Henrici*, 120 U. S 377; *Redfield* v. *Ystalifera Iron Co.*, 110 U. S. 174.

IV. McComb, even if a trustee for the complainants' decedent, committed no act, and neglected no duty to his *cestui que trust* in respect to the shares of stock in suit, such as makes

his estate liable for their original cost, with interest, or for any other sum of money. The Circuit Court, in holding that the amount of the recovery is to be governed by the alleged cost of the stock instead of by what it was worth, violated a thoroughly well established and reasonable principle. *Galigher* v. *Jones*, 129 U. S. 193; *Smith* v. *Bolles*, 132 U. S. 125.

Mr. George Gray closed for Frink and another, administrator and administratrix of Snyder, deceased.

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

That some kind of a trust was created by this declaration of McComb appears on the face of the paper itself, and from its language, taken in connection with the correspondence which induced and accompanied it, it is also clear that it was an absolute, unqualified, unconditional trust which was declared by McComb. Whatever of doubt might from the mere language of the declaration arise as to whether this trust was limited or qualified by some arrangement with Josiah Bardwell, and whatever suggestiveness there might be in such language, of a foundation for the claim now put forward, that this subscription and stock was by arrangement with Bardwell held primarily as security for advances made or to be made by McComb to him, and for the benefit of Snyder, as *cestui que trust* only thereafter, and subject to this primary burden, is clearly displaced by the two letters which called for and accompanied the declaration. Bardwell's letter to McComb is a request that he acknowledge the holding to be in trust for Snyder, and because Snyder had paid therefor its cost and interest. That clearly is a request for an absolute and unqualified declaration of trust, and because the property had been fully paid for by Snyder to the original *cestui que trust.* That McComb intended and supposed by this declaration that he was giving the absolute declaration of trust requested is evident from the letter which he wrote accompanying it, for in that he says "if it is not in conformity with your wishes in any manner, please return it to me with such instructions

to be carried out as you shall be disposed to make." In other words, the transaction is this: Bardwell writes asking for an absolute declaration of trust in behalf of Snyder; McComb sends this declaration, accompanying it with a letter saying that if this does not comply with your wishes, send it back with such changes as you desire. Evidently the reference to an arrangement in the declaration was for the purpose of identifying the stock and subscription; and that there might not arise any pretence that any part of the subscription and stock standing in his own name was held in trust for Snyder. He simply meant to identify the trust property as that which all along had stood in his name as trustee, and to guard against the assertion of a trust in some other portion of the stock. If we go outside of the papers themselves, the testimony tends strongly to uphold the claim of plaintiffs that this was an absolute and unconditional trust. Bardwell did get from Snyder $45,000, as shown in this way: On April 22, 1869, Bardwell drew three drafts on Strang & Snyder, in favor of McComb, for $15,000 each. On the same day this receipt was given by McComb:

"Received, Boston, April 22, 1869, of J. Bardwell his three drafts of $15,000 each, 30, 40, and 50 days' date, on Strang & Snyder, New York, being in payment for one-fourth interest in 10,000-share transaction in the stock of the Chicago and Rock Island Railroad Co., to be managed by John F. Tracy, as agreed between myself and said Tracy, through Smith, Randolph & Co., of New York, as brokers, for the account of myself and Bardwell.

"H. S. McComb."

This was found among the papers of Mr. Snyder, with the following minute attached to it, signed by Mr. Snyder:

"The three drafts mentioned in the foregoing receipt were paid by Strang & Snyder, and by them charged to my account on their books after the transaction in Chicago and Rock Island Railroad Company's stock was closed. The whole or no part of the money or interest was returned to me, but

$42,000 was applied to the subscription to stock in the Southern Railroad Association, for which amount I hold H. S. McComb's receipt, as trustee, dated November 23, 1869.

"Boston, January 23, 1870. C. B. SNYDER."

McComb received and discounted these drafts, and sent the proceeds to Smith, Randolph & Co., which, by their letter of May 6, amounted to $44,709.38. On August 4, 1869, McComb gave Bardwell a draft on Smith, Randolph & Co. for $44,709, the exact amount of the deposit on May 6, the cents omitted; and on August 6 a check on the Bank of North America for $2500; and on the 15th of September wrote to Bardwell, stating, among other things, as follows:

"The net of your account is.....$36,719 80
From which deduct payment of..... 2,500 00
Leaving due you and subject to call.....$34,219 89

"Shall I pay your trustee call S. R. R. A. due the 20th inst.?

"Ever yours, H. S. McCOMB."

These transactions, including the letters, show that Snyder (or the firm of Strang & Snyder) advanced to Bardwell $45,000, and there is no testimony that it was ever repaid to Snyder, other than in this trust matter. The letter of September 15 also shows that McComb held money to the amount of $34,000 and over, subject to Bardwell's call. It appears also that Bardwell was very much embarrassed in October, and that this embarrassment was known to McComb.

The following is one letter that passed between them:

"(Personal.) BOSTON, *Oct.* 5, 1869.

"MY DEAR FRIEND McCOMB: I am in trouble, and first to you I write. I left here Saturday night for New York, and returned Sunday; since Sunday I have not closed my eyes. I have been duped and swindled by that man Barry, and it is my own fault that makes the matter so much the worse. I had his honor pledged to me, and was credulous enough to

believe. Since Sept. 23 I have paid $260,000 for him. From a sick bed he came to see me in New York Sunday when my worst fears were realized, and he owned that he had lost $120,000 in stocks. After talking with him six hours I left, feeling disgusted and tired. I only fear now that I do not know the worst, he owes me $700,000 and I fear he has misapplied or used some $150,000 of acceptances, he said he had them on hand unused, but I have reason to think otherwise, when he told me that there were no more drafts on us, and that as it stood Friday, so it was and no more. I came home to find his drafts for $350,000 drawn on Saturday, these of mine have gone back. The sufferings of hell cannot compare but unfavorably with mine, but I won't write more.

"Yours always, J. BARDWELL.

"Don't say a word about this to any one."

With knowledge of Bardwell's condition, as shown by this letter, as well as otherwise, McComb gave this declaration of trust. Can it be believed that it would have been issued in that form, and sent in a letter accompanied with an implied promise to put it in any other form that might be desired, if at the time the stock was held by McComb as security for advances made, and to be made, to a man so financially embarrassed?

Further, so far as appears from the testimony, McComb never suggested to Snyder, or, for that matter, to any one else, that this was other than an absolute and unqualified declaration of trust, until July 21, 1874, and then in this way. On June 3, 1874, Snyder wrote to McComb:

"I have unexpectedly been called on to pay $40,000, a debt of F. Skinner & Co. and myself, which I supposed was paid long since. Not owing anything, my means are all invested in a way that I cannot reach them at present. I can get along with $30,000. What I want is for you to let me have in some way the above amount, ($30,000,) so that I can use it at once, and then you can reimburse yourself from the sale of consolidated bonds when they are issued."

To which, on June 15, McComb replied as follows:

"I do not know how I can help you. I will do anything I can consistently with the obligations that are already on me, and hope to be able, at the meeting on Monday next, at New York, to suggest something that will relieve you, and not hurt me. You can depend upon my doing everything I can reasonably be expected to do in the matter."

On July 16, Snyder wrote again, and urgently, saying:

"I trust you will do me this favor, because I am really in a tight place and am borrowing the money from day to day, from my friends. I would not ask you for the favor if I could possibly get along without it. Will you help me? Please let me know when you will be in N. Y. or where I can see you next week."

In replying to this, on July 21, McComb said:

"I can send you the $30,000 Southern R. R. Ass'n paper, and will do it if you will return me the paper I signed, giving you so much of the benefits of the stock which was in my name as trustee for Mr. Bardwell, and which I held, by agreement from him, as collateral for advances made to him and F. Skinner & Co., which advances more than cover all this stock."

And this is the first intimation that the trust was not wholly for the benefit of Snyder. In addition, there is the testimony of Charles Marsh, that in the year 1873 he was in the office of the Southern Railroad Association, in the city of New York, at a day on which there was to be a meeting of the directors, and that while there McComb came in, and after saying good morning and passing the time of day, said: "Now, gentlemen, to-day I am prepared to offer you cost and interest of your stock. I had to guarantee Mr. Snyder that before he would take his at all; but this isn't anything you want to sell, this stock." And again, the testimony of Francis C. Cross that in June, 1874, he was present at a conversation between Snyder and McComb, which was substantially as follows:

"Mr. Snyder asked Mr. McComb to perform his agreement in regard to the Southern Railroad Association stock. Mr.

McComb replied to Mr. Snyder that he had better keep it and do as the other gentlemen were about to do, put in some more money; that it was a good thing and was worth two for one. Mr. Snyder told him that he wished the money, as he desired to foster other interests that were pressing him. Mr. McComb said that he had no money, but he would let him have some notes to the extent of $30,000, and Mr. Snyder replied that he would. If the notes were good he would use them and would carry the balance for a time. No time was stated, however. Mr. McComb told Mr. Snyder to come down to a meeting that was to be held — as to the time of the meeting I have no recollection — if he would come there he would fix it up with him."

Further than that, on October 25, 1873, Edmund F. Cutter wrote to McComb:

"Are the interests of F. S. & C. in the Southern R. R'd Association, on which you advanced 60 M dollars, still intact, and are they worth the loan and principal? How does the 60 M of Mr. Snyder's stand affected?"

To which McComb replied as follows:

"Wilmington, Del., *October* 27, 1873.

"E. F. Cutter, Esq., Boston, Mass.

"Dear Sir: The South'n R. R. Association stands all right, and everybody's interest stands upright and square.

"Yours truly, H. S. McComb, *Pres.*"

In June, 1875, Snyder began an action against McComb, in the city of New York. It was an action at law to recover $75,000 on account of the alleged conversion by McComb of this trust property to his own use. Mr. McComb's testimony was taken as follows:

"Q. What has become of the original subscription mentioned in this letter? A. It is still in my possession or under my control.

"Q. In what shape is it now? A. Stock of the company, as it was then.

"Q. In what name does it stand? A. H. S. McComb, trustee.

"Q. Has it stood so ever since this paper was written? Q. Continuously? A. Yes, sir.

"Q. I ask you how that subscription was paid? A. I presume it was paid by Mr. Bardwell to the company."

Subsequently the action was voluntarily dismissed by plaintiff.

Putting all these things together, there can be no reasonable doubt as to the nature of the transaction. There was an absolute and unqualified declaration of trust given by McComb to Snyder for the amount of this subscription so far as it had been paid, and the Circuit Court did not err in so finding.

Again, it is insisted that the matters in dispute between the parties have been once determined by a court of competent jurisdiction, and the principle of *res judicata* is invoked as a defence to this action. It appears that, after the voluntary dismissal of the action in the New York court, Snyder, in October, 1875, commenced a like action at law in the Supreme Judicial Court of Massachusetts, which was tried without a jury, and resulted in a judgment in favor of the defendant, on December 23, 1878. The original declaration was in five counts. To this the defendant filed an answer denying "each and every allegation in each and every count of the plaintiff's declaration," and specifically denying any indebtedness; and, for a further defence, he demurred to the first four counts. Thereafter, by leave of the court, these first four counts were stricken out, and two substituted in their place. To this amended declaration the defendant filed an answer denying the allegations in the first two counts — the new portions of the declaration; and also, as a further defence, a demurrer to the third count — that being the fifth count in the original declaration. This amended declaration, in substance, alleged that the defendant, on July 16, 1869, had in his possession $45,000 belonging to the plaintiff; that in consideration of plaintiff permitting such sum to remain in his (defendant's) hand, he would purchase for plaintiff stock in the Southern Railroad Association; and, further, that he would, if re-

quested, take the said shares of stock from plaintiff and pay him $45,000, with interest; that, relying upon such promise and agreement, the plaintiff left the sum of $45,000 with defendant, but that he failed to purchase stock in the association; and that he, plaintiff, thereupon demanded payment of the sum of $45,000 and interest, which was refused. The second count was "for money had and received," the bill of particulars attached being as follows:

"*Bill of Particulars.*

(1) To cash retained by you to be applied to purchase of stock in the Southern Railroad Association	$45,000 00
(2) To interest on same, July 15, 1869, to October 29, 1875	16,978 50
	$61,978 50"

The third count, being the fifth in the original declaration, was an allegation of the conversion of six hundred shares of stock, and in these words:

"And the plaintiff further says that the defendant has converted to his own use six hundred shares of the capital stock of the Southern Railroad Association, a corporation duly established by the laws of the States of Mississippi and Tennessee, the property of the plaintiff."

The record of the proceedings in the Supreme Court of Massachusetts fails to show any ruling of the court on the demurrer to this third count, and one of the counsel for the plaintiff in that action testified that by mutual consent this third count was abandoned, testimony which seems to be supported by an extract from the brief of the defendant's counsel, in which it is stated "the count in tort has been abandoned." On the trial of that case the plaintiff made application to amend his declaration into a bill in equity, a bill founded upon this trust, but such application was denied by the court, such denial being, within the statutes of Massachusetts as well as the general practice, a matter of discretion.

So that the case, as finally determined, was simply one at law for breach of a contract to invest in the stock of the Southern Railroad Association.

This mere recital of the facts concerning that action at law seems sufficient answer to the plea of *res judicata*, for among the essentials of an estoppel by judgment is identity of the cause of action. *Atchison, Topeka &c. Railroad* v. *Jefferson County*, 12 Kansas, 127; 2 Bouv. Law Dic. title "Res Judicata." When an action at law for breach of a contract to invest in stocks fails because the testimony develops that the investment was made and a declaration of trust given in respect to the stock so purchased, it would seem strange to hold that such judgment is a bar to a suit in equity for a breach of the trust, especially when it appears from the records in the law case that an application to change the declaration into a bill in equity in respect to the trust was denied. As was said in *Cromwell* v. *County of Sac*, 94 U. S. 351, 353: "In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been litigated and determined. Only upon such matters is the judgment conclusive in another action." What might have been determined in the Massachusetts court if the amendment of the declaration had been permitted can only be conjectured; what was determined was that no such contract as charged existed, or, if it existed, was broken. Copious extracts were in evidence in this case from the brief of the defendant's counsel in the Massachusetts case, which show that the defence relied upon was that no action at law could be maintained in consequence of the disclosure of the trust receipt. It is enough to quote these, which are but samples of others:

"It is, of course, unnecessary to give any consideration to the 'trust receipt,' except as it disproves the agreement alleged, because —

"(1.) It is not the contract alleged and declared on and for breach of which money is sought.

"(2.) Because its only scope and effect is to create a trust, for the enforcement of which no action of law can be brought, but only a remedy sought in equity."

* * * * *

"It becomes wholly unnecessary, as it is entirely impracticable, to inquire, consider, or determine what anybody's rights may be under the trust created or declared on in this transaction

"When, if ever, a bill in equity shall be brought, and all parties in interest brought into court, that may be an interesting as it will be a necessary question. Till then it is enough that the trust created and acted upon for more than six years by all parties clearly negatives any other agreement concerning this original subscription, and necessitates a judgment for the defendant in this suit."

Properly, therefore, the Circuit Court held against this claim of *res judicata.*

It is suggested that the plaintiffs have been guilty of laches; but in view of the fact that defendant, when called as a witness in the first law action, testified that the stock stood as it always had stood, and of the further fact that no breach of the trust was discovered until just before the commencement of this suit, this defence is also without merit.

The final question is as to the measure of damages. The court charged the defendant with the amount invested by plaintiff, and recognized by the declaration of trust, to wit, $42,000, and interest. Both parties challenge the question of correctness of this amount. The plaintiffs insist that McComb sold his own stock for $125 a share, and that, therefore, in the accounting he should be charged for the 800 shares held by him in trust for Snyder at that price per share, for which sum, together with interest to date, a decree should be passed. The defendant claims that McComb never did anything with this trust stock, other than in the fair discharge of his duties as trustee; that, owing to causes over which he had no control, and for which he was not responsible, the stock finally ceased to be of any value, and, therefore, that his estate should not be called upon to account for anything. It becomes necessary

to see exactly what McComb did with this stock. The Southern Railroad Association was the lessee of the Mississippi Central Railroad Company, and was incorporated for the purpose of taking a lease of and operating said road. This road extended from Jackson, Tennessee, to Canton, Mississippi; there it connected with the New Orleans, Jackson and Great Northern railroad, running from that place to New Orleans, Louisiana. McComb was a large holder of stock in that company. On November 8, 1871, he made an arrangement by which he sold to the Pennsylvania Company 14,000 shares in the New Orleans, Jackson and Great Northern Railroad Company, at $50 per share, and 5000 shares in the Southern Railroad Association at $125 a share. At the same time he transferred to the Pennsylvania Company an additional 14,000 shares in the New Orleans, Jackson and Great Northern railroad, and 5000 shares in the Southern Railroad Association. Included in this last 5000 shares was the 800 shares standing in the name of McComb as trustee, which were transferred by an endorsement on the certificates, vesting apparently an absolute title in the Pennsylvania Company.

The stock which he sold was his own, and the whole cash payment, $1,325,000, passed to him, and, so far as appears, was appropriated to his own uses. By means of this transfer the Pennsylvania Company obtained control of the Southern Railroad Association, as well as of the New Orleans, Jackson and Great Northern Railroad Company. The transaction between McComb and the Pennsylvania Company is evidenced by three documents, executed on November 8, 1871, but though evidenced by these separate instruments, there was manifestly but a single transaction by which McComb transferred to the Pennsylvania Company the control of these two corporations, accomplishing this vesting of control by the sale of his own stock, at a large price, and a transfer of this trustee and other stock, without receiving a dollar. Obviously it was the use of this latter stock that enabled him to sell his own. If this were all, the obligation to account would unquestionably reach to $125 per share; but the purchase of McComb's stock was subject to an obligation to repurchase at the end of

two years, at the same price and thirty per cent advance, less dividends received by the company. This condition may well be deemed to have entered largely into the fixing of the price, and prevents that price from being a fair test of the value. Neither should one or two extravagant statements made by McComb, apparently to quiet any fears on the part of Snyder as to his investment and to continue his confidence therein, be considered sufficient to justify placing any such valuation on the stock. On the other hand, it is quite clear that the stock was worth at least what it had cost at the time of the trust declaration. Indeed, we do not think this is seriously questioned by the defendant. Little need be said with respect to the contention of defendant, that McComb did no more with this stock than a trustee might rightfully do, and that he used it simply to induce the Pennsylvania Company to take hold of this association, and manage it for the best interests of all the stockholders. On the contrary, it is more correct to say that he used this stock to induce the Pennsylvania Company to buy his own, or at least to increase the price at which it bought. Evidently the Pennsylvania Company wanted the control, and for that end a majority of the shares. It might not have been willing to pay $125 a share if it had been compelled to buy the 10,000 shares; but would naturally be willing to pay a larger price for half if the other half could be placed in its hands without cost, and thus the control obtained. Very likely the *cestui que trust* would have preferred $125 in cash to the promise of even the Pennsylvania Company to manage the interests of the association for the benefit of all stockholders.

We think, taking all the circumstances into consideration, that the Circuit Court reached as nearly as possible what justice demands when it awarded a return of the amount for which McComb acknowledged himself a trustee and interest. The decree will, therefore, be

Affirmed. The costs of this court will be equally divided between the parties.

McNULTY *v.* CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 1253. Submitted May 1, 1893.— Decided May 15, 1893.

The decision of the Supreme Court of California that McNulty should be punished under the law as it existed at the time of his conviction, involved no Federal question.

It was settled in *Hurtado* v. *California*, 110 U. S. 516, that the words "due process of law" in the Fourteenth Amendment do not necessarily require an indictment by a grand jury in a prosecution by a State for murder, whose constitution authorizes such prosecution by information.

When the record in a case brought by writ of error from a state court fails to show that a right, privilege or immunity claimed under the Constitution or a treaty or statute of the United States was set up or claimed, and was denied in the state court, this court is without jurisdiction to review the judgment of the state court in that respect.

THIS was a motion to dismiss. The case is stated in the opinion.

Mr. William H. H. Hart, Attorney General of the State of California, for the motion.

Mr. Carroll Cook opposing.

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

Plaintiff in error was tried for the murder of one Collins on March 25, 1888, convicted and sentenced to be hanged. From the judgment of conviction he prosecuted an appeal to the Supreme Court of the State of California, which on May 1, 1891, affirmed the judgment of the court below. On May 27, the Supreme Court, of its own motion set aside the judgment of affirmance solely on the ground, as shown by the record, that the cause might "be argued upon the question of effect and operation of the recent amendment to the penal

code respecting the execution of a sentence of death." The cause having been reargued, the judgment below was again affirmed on December 12, 1891. On December 31, a petition for a rehearing was filed, and on January 11, 1892, a rehearing was granted, and thereafter the cause was again argued. On February 20, 1892, the judgment appealed from was again affirmed, and plaintiff in error applied to the Supreme Court of California to allow a writ of error from this court, which application was denied. Subsequently a writ of error was allowed by one of the Justices of this court and a motion is now made to dismiss that writ or affirm the judgment.

At the time of the commission of the alleged crime, the conviction, and the judgment, the laws of California prescribed the penalty of death for such crime, and that execution should be had not less than thirty nor more than sixty days after judgment, by the sheriff, within the walls or yard of a jail, or some convenient private place in the county. Pending the appeal to the Supreme Court a statute was passed amending the penal code so as to provide that the judgment should be executed in not less than sixty nor more than ninety days from the time of judgment, by the warden of one of the state prisons, within the walls thereof, and that the defendant should be delivered to such warden within ten days from the judgment. (Stat. Cal. 1891, 272.)

As is stated in the majority opinion of the Supreme Court of the State, 93 California, 427, the case when first heard in that court was determined without reference to the amendment of the law concerning the execution of the death penalty.

Upon a suggestion of a difficulty arising in view of the amendments, which had been enacted after McNulty was convicted and sentenced, a reargument was ordered, and a majority of the court reached the conclusion that the amendments were, under the rule laid down in *Medley's case*, 134 U. S. 160, unconstitutional *in toto*, and that, therefore, the former law was not thereby repealed. On that argument it was assumed, and the opinion of the court proceeded upon the assumption, that the amendments stood entirely without a

saving clause, either in the amendments themselves or in the general statutory law. Subsequently the attention of the court was called to section 329 of the Political Code as constituting a saving clause fully covering the amendments, and the court held that such was the effect of that section. The section read as follows: "The repeal of any law creating a criminal offence does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment, is expressly declared in the repealing act."

It was, therefore, concluded that McNulty was to be punished under the law as it existed at the time of the commission of the crime of which he was convicted, and that under this view the act of 1891 was constitutional, because not intended to apply to past offences, but to be prospective only in its operation, and the judgment was accordingly affirmed.

It is clear that this writ of error cannot be sustained. If the affirmance based upon the conclusion reached by the court on the first reargument had stood, a writ of error could not have issued, since that decision of the court did not sustain the validity of the act of 1891, but on the contrary held it to be wholly void as in contravention of the Constitution of the United States. The final affirmance of the judgment reached upon the second reargument rested upon the conclusion that a saving clause existed in the statutes of California which retained the prior law in force, and justified the execution of the sentence thereunder.

The contention of counsel is that the execution of plaintiff in error as ordered would be without due process, because the amendments of 1891 repealed the former law, and left no law under which he could be executed, since the amendments could not be enforced because of their being in violation of the Constitution. But this argument amounts to no more than the assertion that the Supreme Court of the State erred as to the proper construction of the statutes of California, an inquiry it is not within our province to enter upon, or that that court committed an error so gross as to amount in law to

a denial by the State of due process of law or of some right secured to the plaintiff in error by the Constitution of the United States, a proposition not open to discussion upon the record before us. In our judgment, the decision of the Supreme Court of California, that he should be punished under the law as it existed at the time of the commission of the crime of which he was convicted, involved no Federal question whatever.

It may be added that McNulty was proceeded against by information, and by three of the twenty-two assignments of error the legality of so proceeding is questioned, and it is also claimed that the judgment was erroneous because it did not appear from the record that McNulty had had a legal or any examination before the filing of the information, or had been lawfully or at all committed by any magistrate.

It was settled in *Hurtado* v. *California*, 110 U. S. 516, that the words "due process of law" in the Fourteenth Amendment do not necessarily require an indictment by a grand jury in a prosecution by a State for murder, whose constitution authorizes such prosecution by information, and no point appears to have been made or decided in the state court as to the previous examination and commitment. So far as the record shows, no right, privilege, or immunity in respect of these matters was set up or claimed and denied, as required by section 709 of the Revised Statutes. *Spies* v. *Illinois*, 123 U. S. 131.

We perceive no ground upon which this writ of error can be sustained. *In re Kemmler*, 136 U. S. 436; *Caldwell* v. *Texas*, 137 U. S. 692; *Leeper* v. *Texas*, 139 U. S. 462.

Writ of error dismissed.

VINCENT *v.* CALIFORNIA. Error to the Supreme Court of the State of California. No. 1316. Submitted May 1, 1893. Decided May 15, 1893. This case, which will be found reported in 95 California, 425, differs in no essential respect from that of McNulty, just considered. For the reasons given in the foregoing opinion, the writ of error must be *Dismissed.*

Mr. William H. H. Hart, Attorney General of the State of California, for the motion to dismiss.

Mr. Carroll Cook opposing.

SHUTE *v.* KEYSER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 1187. Submitted May 1, 1893. — Decided May 15, 1893.

An appeal or writ of error lies to this court from the judgments or decrees of the Supreme Courts of the Territories, except in cases where the judgments of the Circuit Courts of Appeal are made final.

THIS was a motion to dismiss. The case is stated in the opinion.

Mr. R. F. Brent for the motion.

Mr. William Allen Butler and *Mr. John Notman* opposing.

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

This was an action brought in the district court of Gila County, Arizona, by William Keyser against George E. Shute, sheriff of that county, and certain judgment creditors of the Old Dominion Copper Mining Company, to enjoin the threatened sale, under an execution against that company, of mining property of which Keyser claimed to be the owner, which resulted in a decree in favor of Keyser according to the prayer of the complaint. The case was carried by appeal to the Supreme Court of the Territory and the judgment affirmed, whereupon an appeal to this court was allowed, and the case

having been duly docketed, now comes before us on motion to dismiss.

The citation was signed March 12, 1892, and made returnable on the first day of the ensuing October term; and one of the two grounds relied on in support of the motion is that the citation should have been returnable within sixty days from the signing of the same, under section five of rule eight, and section four of rule nine, of this court. It is true that the rules so provide, but as the purpose of the citation is notice so that the appellant may appear and be heard, any defect in that regard is not jurisdictional and a new citation might be taken out if necessary, which, however, it is not, as the appellees have appeared generally.

The second ground of the motion is, that by reason of the provisions of the judiciary act of March 3, 1891, the appeal was improperly allowed and cannot be maintained.

By section 702 of the Revised Statutes and the act of March 3, 1885, 23 Stat. 443, c. 355, the final judgments and decrees of the Supreme Court of the Territories, where the matter in dispute, exclusive of costs, exceeded the sum of $5000, might be reviewed or reversed or affirmed in this court upon a writ of error or appeal in the same manner and under the same regulations as the final judgments and decrees of a Circuit Court. By the fifth section of the judiciary act of March 3, 1891, 26 Stat. 826, 828, c. 517, it was provided that appeals or writs of error might be taken directly to the Supreme Court from the District and Circuit Courts in six classes of cases therein enumerated, neither of which classes includes the pending case. By the sixth section the Circuit Courts of Appeals, established by the act, were to exercise appellate jurisdiction to review by appeal or writ of error final decisions of the District and Circuit Courts in all cases other than those provided for in the fifth section, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeals were made final in all cases in which the jurisdiction was dependent entirely upon the opposite parties to the suit being aliens and citizens of the United States, or citizens of different States; in all cases arising under the patent laws; the revenue

laws; the criminal laws; and in admiralty cases. The case at bar falls under none of these heads.

By the fifteenth section it was provided that the Circuit Courts of Appeals in cases in which the judgments or decrees of those courts were made final by the act, should have the same appellate jurisdiction by writ of error or appeal to review the judgments, orders, and decrees of the Supreme Courts of the several Territories, as by the act they might have to review the judgments, orders, and decrees of the District and Circuit Courts. This section does not apply to this case because it is not one of the cases in which the judgments or decrees of the Circuit Courts of Appeals are made final by the act.

By the fourteenth section, section 691 of the Revised Statutes, and section three of the act of February 16, 1875, 18 Stat. 315, c. 77, were expressly repealed, and also "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."

There was no provision for appeals or writs of error in cases not made final by section six from the Supreme Courts of the Territories to the Circuit Courts of Appeals, and there was no express repeal of the provisions of the prior acts regulating appeals or writs of error in such other cases from those courts to this. There is nothing to indicate an intention that the judgments and decrees of the Supreme Courts of the Territories should not be susceptible of review in the class of cases in which there was no appeal or writ of error to the Circuit Courts of Appeals.

The result is that, as the acts regulating appeals or writs of error from or to the Supreme Courts of the Territories to or from this court were not repealed, except to the extent specified, an appeal or writ of error lies to this court from the judgments or decrees of those courts, except in cases where the judgments of the Circuit Courts of Appeals are made final.

The motion to dismiss the appeal will therefore be denied.

CARR *v.* QUIGLEY.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Argued April 26, 27, 1893. — Decided May 15, 1893.

Lands within the exterior limits of a Mexican grant, *sub judice* at the date of the definite location of the Central Pacific within that location, and not required to satisfy the quantity granted by Mexico as determined by the United States, were not reserved, but inured to the road as a portion of its land grant and were properly patented to it as such.

Newhall v. *Sanger*, 92 U. S. 761, explained. *United States* v. *McLaughlin*, 127 U. S. 428, approved.

This was an action of ejectment brought by W. B. Carr against John Quigley for the possession of one hundred and sixty acres of land situated in the county of Alameda, State of California. The land is a portion of an unnumbered odd section granted to the Central Pacific Railroad Company of California by the act of Congress of July 1, 1862, as amended by the act of July 2, 1864, and which, by the consolidation of the Western Pacific Railroad Company with the Central Pacific Railroad Company, under the laws of California, in June, 1870, inured to the latter company, and to it a patent of the United States for the land mentioned was issued bearing date on the 17th day of May, 1874.

The plaintiff claimed title to the demanded premises under a conveyance to him by the Central Pacific Railroad Company on the 10th day of June, 1871.

The complaint alleges that the plaintiff was the owner in fee and entitled to the possession of the premises on the 22d of December, 1877, and that on that day the defendant, without right or title, against the will of the plaintiff, entered upon the premises and ejected the plaintiff therefrom, and has ever since withheld the possession from him, to his damage of one thousand dollars; and that the value of the annual rent of the premises is three hundred and twenty dollars. He therefore prays judgment for the restitution of the premises, for the damages sustained, and for the rents and profits.

Statement of the Case.

The defendant in his amended answer, in addition to a general denial of the allegations of the complaint, sets up 1st, that at the date of the patent to the railroad company the land patented was not subject to the disposal of Congress, but was land reserved to answer the calls for land of a grant from the Mexican government to José Noriega and Robert Livermore, bearing date the 10th of April, 1839, and that by reason of such reservation the patent was issued without authority of law, and consequently was void; that, since October, 1877, the defendant has been in rightful possession of the land as a preëmptor under the laws of the United States; and, 2d, that the land was not sold by the grantee, the railroad company, within three years after the completion of its road.

A demurrer to this last defence was sustained by the court and its ruling was acquiesced in.

It was agreed that the annual value of the rents and profits of the land was fifty dollars.

The case was tried twice. On the first trial in the District Court of Alameda County, the plaintiff put in evidence the patent of the United States of the land to the Central Pacific railroad, and a conveyance of the same by that company to the plaintiff. The defendant then offered to prove that the land was within the exterior boundaries of the Mexican grant mentioned, and, therefore, reserved from the Congressional grant to the railroad company. The plaintiff objected to the offered proof on the ground that the land was not subject to preëmption when the defendant entered upon it, the patent of the United States having been previously issued, which was conclusive in an action of ejectment. The objection was sustained, to which the defendant excepted, and judgment was rendered for the plaintiff. Thereupon an appeal was taken by the defendant to the Supreme Court of California, and in January, 1881, the judgment was reversed, and the cause remanded for a new trial. In April, 1883, the case again came on for trial in the Superior Court of Alameda County, the successor to the District Court of that county, under the new constitution of California, which went into operation on the 1st of January, 1880. On that trial the evidence offered

by the defendant, which was excluded on the previous trial, was admitted, and new testimony given bearing upon the question of the reservation of the land in controversy. The defendant obtained a judgment, the court holding that the land was claimed as a part of the Mexican grant mentioned, and was reserved for its satisfaction. A motion for a new trial was denied. An appeal was then taken from the order denying the motion, and also from the judgment, to the Supreme Court of the State, which affirmed both the order denying a new trial and the judgment for the defendant; and for a review of the judgment the case was brought here on writ of error.

Mr. A. B. Browne, (with whom were *Mr. A. T. Britton* and *Mr. F. H. Waterman* on the brief,) for plaintiff in error.

Mr. Michael Mullany for defendant in error.

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

The defence upon which the defendant below relied on both trials, was that the land patented to the railroad company was within the boundaries of a Mexican grant, the validity of which was at the time under consideration by the Federal tribunals and was, therefore, reserved from sale when the patent was issued. Evidence to establish this fact was offered on the first trial, but rejected by the court, and for this alleged error the judgment recovered by the plaintiff was reversed.

On the second trial the evidence rejected on the first trial was received, and it was shown that the land patented to the railroad company was within the exterior bounds of the Mexican grant, and that its validity was then under consideration by the tribunals of the United States; and the court held that it was, for that reason, reserved from sale and that the patent therefor was unauthorized and void. The defendant having taken up a preëmption claim on the land, judgment was rendered in his favor.

Opinion of the Court.

The Supreme Court of the State sustained this view of the reservation of the land from sale and consequent appropriation to the satisfaction of the Congressional grant to the railroad company. The question for our determination is whether, at the time of the issue of the patent, the land was thus reserved.

The act of July 1, 1862, 12 Stat. 489, c. 120, provided for the incorporation of the Union Pacific Railroad Company, and made a grant of land to that company to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean. Its provisions apply in terms to that company, but the construction of other railroads is included within the objects contemplated by the act, and the clauses relating to the Union Pacific Railroad Company are made applicable to them. The ninth section authorizes the Central Pacific Railroad Company, a corporation of California, to construct a railroad and telegraph line from the Pacific Coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of the State, upon the same terms and conditions which were provided for the construction of the railroad and telegraph line of the Union Pacific. A similar grant of land, of the same extent and upon like conditions, was made to the Central Pacific, and the rights and obligations of the company were determined by the same law.

By the provisions of the third section, thus applied, there was granted to that company, to aid in the construction of its road and telegraph line, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of its road on the line thereof and within the limits of ten miles on each side "not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached at the time the line of the road is definitely fixed:" *Provided*, That all mineral lands were excepted from the operation of the act, but where they contained timber, that timber was granted to the company.

By the fourth section of the act, as amended by section six of the act of 1864, it was provided: "That whenever said

company shall have completed not less than *twenty* consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that not less than *twenty* consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each *twenty* miles of said railroad and telegraph line are completed, upon certificate of said commissioners."

The definite location of the road was fixed in January, 1865, and the road was completed in all respects as required by the act of Congress and accepted by the President prior to the 1st of June, 1869. The Mexican grant to José Noriega and Robert Livermore was known by the name of "Las Pocitas," and as confirmed was described and bounded as follows, viz.: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don José Dolores Pacheco, containing in all two square leagues, a little more or less. The confirmation was of that quantity if contained within the boundaries named; and if less than that quantity was found to be contained therein, then the confirmation was for the less quantity, and for all of the described tract.

The grantees in February, 1852, petitioned the board of land commissioners, created by the act of Congress of March 3, 1851, for a confirmation of the grant, and in February,

1854, it was confirmed with the description and condition mentioned.

On appeal the decree was affirmed by the United States District Court for the Northern District of California in February, 1859, to the same extent and for the same quantity and under the same condition. On appeal the decree of the District Court was affirmed by the Supreme Court of the United States in January, 1861, and its mandate was filed in the District Court in February, 1865, upon which an order was entered in that court that the claimants, the grantees named, have leave to proceed upon the decree of the District Court as a final decree.

Two official surveys were made of the land confirmed, one in 1865 by the deputy United States surveyor-general of the district. This survey, as appears on the maps, embraced within the exterior boundaries nearly ten square leagues. It was disapproved by the Secretary of the Interior, because it embraced more than two square leagues, and he directed that a new survey be made. A new survey was accordingly made, which was approved by the surveyor-general and the Commissioner of the Land Office, and, on the 6th of June, 1871, by the Secretary of the Interior. On the 20th of August, 1872, a patent of the United States for the land, the survey of which was thus approved, was issued to the grantees. The land in controversy in this case is not included in the land thus surveyed and patented.

In *Newhall* v. *Sanger*, 92 U. S. 761, it was held that land within the boundaries of a Mexican grant, while proceedings were pending in the tribunals of the United States to determine its validity, was exempt from sale and preëmption, and, therefore, of appropriation under the land grant acts of the United States in aid of the construction of railroads and telegraph lines. Those acts declared that the sections of land granted were to be of public lands of the United States, and by public lands were meant lands of the United States which were open for sale and preëmption; and that of these public lands there should be excepted such portions as had been sold or reserved from sale or otherwise disposed of by the United

States, or to which a preëmption or homestead right had attached at the time of the definite location of the roads.

For some years after the decision in *Newhall* v. *Sanger* it was supposed that the reservation from such appropriation was extended to all lands within the outboundaries of a Mexican grant without reference to the actual quantity granted. The interpretation given to the term "boundaries" used in the opinion in that case led to this conclusion.

But the case of *United States* v. *McLaughlin*, 127 U. S. 428, where it was attempted to extend the reservation from sale to lands nearly one hundred miles square upon the ground that that amount was within the exterior boundaries designated, although the amount intended to be granted was only eleven leagues, led to a consideration of the facts in *Newhall* v. *Sanger*, and to a better understanding of the import of its decision. It then appeared that there was no allegation in the pleadings of that case that the boundaries of the grant designated exceeded the actual amount intended to be granted. As appeared by them, it was a grant of a specific quantity within boundaries which embraced no greater amount. The language used with reference to the exemption of a grant of that character evidently presented a different question from that of a grant with boundaries embracing an area exceeding many times the quantity actually granted. So in *United States* v. *McLaughlin*, the court considered the different kinds of grants of the Mexican government, which were: 1, grants by specific boundaries, where the donee was entitled to the whole tract; 2, grants of quantity, as of one or more leagues within a larger tract described by what was called outboundaries, where the donee was entitled to the quantity specified, and no more; 3, grants of a certain place or rancho by name, where the donee was entitled to the whole tract, according to the boundaries given, or, if not given, according to its extent as shown by previous possession. In the second class, where the grant was of quantity within boundaries embracing a much larger quantity, the grant was a float, to be located by the action of the government before it could attach to any specific tract, like the land warrants, as the court said, of the United States.

The grant in the McLaughlin case was a float, and, according to the different interpretations of the outside boundaries, the region embraced within them was fifty square leagues in the one case and over eighty in the other, and the court pertinently asked whether such an extensive region could be under an interdict, as reserved land, absolutely exempt from disposition even by Congress, during the whole period covered by the litigation respecting the validity of the grant, which, if found valid, was only for the quantity of eleven square leagues.

In that particular case the grant was found to be a wretched fraud, but the court said: "Laying all this aside, however, and looking at the claim as one fairly *sub judice*, we may repeat our question, whether it can be possible that so great a region of country was to be regarded as reserved from alienation for so small a cause — an ordinary eleven-league grant."

The grant of eleven square leagues out of a country seventy or eighty miles in length, and from six to ten in width, containing over eighty square leagues, was, upon the theory of reservation advanced, deemed to have the effect of retiring from the supposed public domain the whole eighty leagues and more for a period of years, no one could state how long.

The court did not consider that this view of the reservation intended was reasonable, and observed that it was at the "option of the government, not of the grantee, to locate the quantity granted; and, of course, a grant by the government of any part of the territory contained within the outside limits of the grant only reduces by so much the area within which the original grantee's proper quantity may be located. If the government," added the court, "has the right to say where it shall be located, it certainly has the right to say where it shall not be located; and if it sells land to a third person at a place within the general territory of the original grant, it is equivalent to saying that the quantity due to the original grantee is not to be located there. In other words, if the territory comprehended in the outside limits and bounds of a Mexican grant contains eighty leagues, and the quantity granted is only ten leagues, the government may dispose of seventy leagues without doing any wrong to the original grantee." It ob-

served, it is true, that it was the practice in administering the public lands to allow the original grantee to make his own selection of the place where he will have the quantity located, provided it could be located in one tract, but that was a matter of favor and not of right.

In illustrating the serious, if not absurd, results which would follow from a different view, the court referred to the grant made by the Mexican government to President Yturbide in 1822 of twenty leagues square, or four hundred square leagues of land, to be located in Texas. In 1835 the Mexican Congress authorized his heirs to locate the land in New Mexico or in Upper or Lower California. In 1841 it was decreed that it should be located in Upper California — that is, the present State of California. And the claim was actually presented to the board of land commissioners and appealed to the District Court, and thence to the Supreme Court. So, observed the court, "according to the contention of the complainant in the present case, all California was interdicted territory during the pendency of that claim before the board and in the courts." "We can well understand," the court added, "that Indian reservations and reservations for military and other public purposes of the government should be considered as absolutely reserved and withdrawn from that portion of the public lands which are disposable to purchasers and settlers, for, in those cases, the use to which they are devoted, and for which they are deemed to be reserved, extends to every foot of the reservation. The same reason applies to Mexican grants of specific tracts, such as a grant for all the land within certain definite boundaries named, or all the land comprised in a certain rancho or estate. But this reason does not apply to grants of a certain quantity of land, within a territory named or described, containing a much larger area than the amount granted, and where, as in the present case, the right of location within the larger territory is in the government, and not in the grantee. In such case, the use does not attach to the whole territory, but only to a part of it, and to such part as the government chooses to designate, provided the requisite quantity be appropriated."

So the court held that where a Mexican grant was for a specific quantity within an area containing a much larger quantity it was only the quantity actually granted which was reserved from disposition by the government during the examination of the validity of the grant; the remainder was at its disposal as a part of the public domain. And in considering *Newhall* v. *Sanger* the court said that "the opinion in that case took no notice of the fact (which did not appear in the record) that the grant was one of that class in which the quantity granted was but a small part of the territory embraced within the boundaries named. It proceeded throughout as it would have done on the supposition that the grant covered and filled up the whole territory described. It simply dealt with and affirmed the general proposition that a Mexican grant, while under judicial investigation, was not public land open for disposal and sale, but was reserved territory within the meaning of the law — a proposition not seriously disputed."

So, in the present case, there was only reserved from sale and appropriation by the government within the exterior boundaries of the Mexican grant to José Noriega and Robert Livermore so much land as would satisfy the quantity actually granted to them, which was two leagues, and it was competent for the government to grant the remainder of the land within the exterior boundaries to whomsoever it might choose. It was land open to sale by the government and could have been appropriated to the railroad company; and its patent to that company passed the land.

The Supreme Court of California acted upon the theory that the exemption from sale extended to all lands within the exterior boundaries of the grant instead of merely to the amount specifically granted, but as we have shown this was an erroneous view to be taken of the case after the decision of *United States* v. *McLaughlin*. And *Doolan* v. *Carr*, 125 U. S., at page 632, recognizes the doctrine of that decision. If, therefore, the Mexican grant in this case was valid, and it has been so adjudged, there was reserved from sale only two leagues to be selected under the direction and control of the

government out of any lands within those boundaries. It was for the government itself to prescribe the limits from which the quantity granted by the Mexican government should be selected, and having reserved sufficient from the exterior boundaries to satisfy that amount it was perfectly competent for it to grant any surplus remaining; and it appears from the actual survey of the specific quantity granted by Mexico that the Congressional grant to the railroad company was outside of any of the land thus appropriated.

It follows that the judgment of the Supreme Court must be

Reversed and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

CURTNER *v.* UNITED STATES.

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

No. 258. Argued April 24, 25, 1893. — Decided May 15, 1893.

When, in a suit in equity brought by the United States to set aside and cancel patents of public land issued by the Land Department, no fraud being charged, it appears that the suit is brought for the benefit of private persons and that the government has no interest in the result, the United States are barred from bringing the suit if the persons for whose benefit the suit is brought would be barred.

When a land-grant railroad company conveys a part of its grant without having received a patent from the United States, and it appears that the United States had issued a patent of the tract to a State, as part of a land grant to the State, and the State parts with its title to an individual, the relative rights of the parties can be determined by proceedings in the courts on behalf of the grantees of the company, against the grantees of the State.

THIS was a bill in equity filed by the United States in the Circuit Court of the United States for the Northern District of California, July 23, 1883, against Henry Curtner and others,

patentees of the State of California, for the purpose of having certain listings of indemnity school lands, situated in that State in township three south, range three east, and in township two south, range one east, set aside and cancelled and the lands decreed to be held subject to the grant made for the purpose of aiding the construction of the Pacific Railroad, as provided in the acts of Congress of July 1, 1862, and July 2, 1864.

The bill was demurred to and amended, and to the amended bill a demurrer was interposed, which was overruled, Judge Sawyer delivering an opinion. 11 Sawyer, 411.

The bill averred that on July 1, 1862, Congress passed an act by which the Union Pacific Railroad Company was incorporated for the purpose of constructing a railroad and telegraph line from the Missouri River to the Pacific Ocean, and by which it was provided that "there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad . . . every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed. . . . And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company," 12 Stat. 489, 492, c. 120; that the Central Pacific Railroad Company of California was, by the act, declared entitled to the benefit of this land grant, on the same terms and conditions as the Union Pacific Railroad Company; that on October 31, 1864, the Central Pacific Railroad Company of California assigned to the Western Pacific Railroad Company the right to earn the land grant along and through the location where the land in controversy is situated; and that this assignment

was ratified by act of Congress of March 3, 1865. 13 Stat. 504, c. 89.

It was further alleged that, by the act of July 1, 1862, the railroad company seeking the benefit of the grant therein provided for, was required, within two years after its passage, to file a map of its general route in the Department of the Interior, and thereupon the Secretary of that department should cause the lands within fifteen miles of such general route to be withdrawn from preëmption, private entry, and sale; that when any portion of said route was finally located, the Secretary of the Interior should cause the said lands so granted to be surveyed and set off as fast as might be necessary for the purposes therein named, 12 Stat. 493; and that, by the act of July 2, 1864, the time for filing the general route map was extended to July 1, 1865. 13 Stat. 356, c. 216. By this act the fifteen-mile limit was enlarged to twenty-five and the five alternate sections to ten, and by its fourth section it was provided that "any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any preëmption, homestead, swamp land, or other lawful claim."

That a map of the general route of the road was filed in the Department of the Interior on December 8, 1864, and that the Secretary of that department, on January 30, 1865, caused the lands within twenty-five miles of such general route to be withdrawn from preëmption, private entry, and sale; that the land in controversy was within those limits; that on February 1, 1870, the map of the line of the road, as definitely fixed, was filed with the Secretary of the Interior; and on that day the line of the road was definitely fixed; that on December 29, 1869, the road was completed in all respects as contemplated by said act of Congress, and the Western Pacific Railroad Company was entitled to have and receive patents from the United States for the land in controversy, the same being within ten miles of the road so completed, and not sold, reserved, or otherwise disposed of by the United States.

And also that the Western Pacific Railroad Company and

the Central Pacific Railroad Company of California became consolidated on June 22, 1870, under the name of the Central Pacific Railroad Company, and that the said Western Pacific and its successor, the Central Pacific, did, within three years of the completion of the said road, sell and dispose of the land in controversy to persons other than the defendants.

The bill then averred that "the Commissioner of the General Land Office did, at the various and respective times hereinafter stated, without right and through error, inadvertence, and mistake, wrongfully list, by certified lists thereof, to the State of California, the said above described lands," and then follow four lists covering the lands in controversy, dated September 8, 1870; March 11, 1871; November 15, 1871; and March 24, 1873.

That on May 12, 1874, the railroad company by its deputy land agent presented to the register and receiver of the local land office a selection of lands claimed by it under its grant, numbered thirteen, including these lands; that the "mistake, error, and inadvertence of the said Commissioner of the General Land Office in listing by certified lists said land to the State of California was not discovered by complainants or its officers of the said Land Department or by said Central Pacific Railroad Company or its grantees until the 12th of May, 1874, nor could the same by reasonable diligence have been discovered sooner; that thereupon said register and receiver wrongfully and in violation of their duty refused to certify said list as aforesaid requested and refused to certify the same in any manner whatever."

It was further alleged "that the State of California did, at various times subsequent to said eighth (8th) day of September, A.D. 1870, by its land patents purport to convey said lands mentioned in said list to divers and sundry persons other than 'the Western Pacific Railroad Company' or its successors, the Central Pacific Railroad Company, and against the will and without the consent of the said companies or either of them, as follows, to wit:" and then follow the dates of the patents, the lands patented, and the names of the patentees, the dates being February 3, 1871; April 3, 1871; November 29, 1871;

May 18, 1872; and March 4, 1878, respectively; and that the patentees subsequently to the issue of the patents by the State to them, respectively, and prior to the commencement of this action, "did by valid mesne conveyances, duly executed and acknowledged, convey all their right, title, and interest in and to said lands to the defendants herein."

The bill further averred that the lands so patented by the State were on July 1, 1862, November 30, 1862, July 2, 1864, October 5, 1864, January 30, 1865, and December 29, 1869, alternate sections of the public lands of the United States, and were within the limits of the railroad grant, and had not been sold, or reserved, or otherwise disposed of by the United States, and that no preëmption or homestead claim had attached thereto at the time the line of the road was definitely fixed; that the President of the United States refused to issue patents to the railroad company for said lands, "not because the said Western Pacific Railroad Company and its successor had not complied with the said acts of Congress, nor because it was not the kind and description of land granted, but solely because said land had previously been by mistake, wrongfully and inadvertently listed to the State of California as hereinbefore set forth;" and that the defendants and their grantors at the time mentioned in the bill "had actual notice of the said grant of said lands to said company, the said withdrawal thereof, the said erroneous and unlawful listing thereof by the said error, inadvertence, and mistake of the said Commissioner, and of each and all of the matters and things hereinbefore set forth."

The bill then set forth various steps taken by the railroad company to procure patents from the Interior Department notwithstanding the listings to the State, and among other things that on March 18, 1879, the register and receiver at San Francisco reported that in accordance with instructions of January 24, 1878, they had, on February 25, 1878, made demand on the State of California for the surrender of the certification of the lands hereinbefore described, and that no surrender had been made; that they also reported on the same day that in accordance with instructions of March 9,

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1878, they furnished the State surveyor general, on March 26, 1878, with a copy of said instructions and made demand on the State of California to surrender her title and listing of said lands, but that up to that date she had failed to surrender as requested; that on April 2, 1879, the reports were submitted to the Secretary of the Interior, and on the 26th of June the Secretary affirmed the Commissioner's decision of March 9, 1878, awarding the land to said company, but refusing to issue patents for the reason that said land had been wrongfully listed to the State of California. On December 8, 1879, the Secretary of the Interior transmitted to the Commissioner a letter from the attorney general of California, dated April 1, 1878, refusing to relinquish the certification and listings of said lands theretofore listed and certified to the State by the Commissioner; that afterwards a petition was filed in the General Land Office for a reconsideration of so much of the Secretary's decision of June 26, 1879, as declined to issue to the railroad company patents for the lands that by mistake were wrongfully listed and certified to the State of California, and thereafterwards the papers were sent to the Secretary, who on July 1, 1882, requested the opinion of the Attorney General of the United States whether patents could then be issued for the lands, or whether the certification to the State must be first judicially vacated; that on October 18, 1882, the Secretary of the Interior wrote to the Commissioner of the General Land Office, enclosing a copy of the Attorney General's opinion, and directing the papers to be prepared for a suit to set aside the listing and certification to the State, and thereafterwards, on December 6, 1882, the Secretary requested the Attorney General to commence suit in the proper court.

The bill then charged that a demand was duly made by the United States upon the State, February 25, 1878, and refused, and that the United States were bound in equity and good faith to hold the Central Pacific Railroad Company, its grantees and assigns, harmless from the consequences of errors and mistakes, and particularly those relating to the mistake and inadvertence of the Commissioner of the General

Land Office. The bill further averred that proceedings had been continuously pending before the Land Department for the purpose of correcting the error and mistake, and had been prosecuted with due diligence and in accordance with the usages of the department in relation to such matters. It was further stated that prior to December 6, 1882, it had been the practice of the department to issue second patents to claimants of land whenever it was made to appear that the first patent had been wrongfully issued.

The prayer was that "the said listings of said lands to the State of California as aforesaid be set aside, recalled, cancelled, and annulled, and that all the defendants herein be forever estopped and forbidden from asserting any right or title to said lands, and that the same in said decree be declared to be public lands of the United States of America, subject to said rights of the Central Pacific Railroad Company, its grantees and assigns, as hereinbefore set forth;" and for general relief.

Answers having been put in, evidence taken, and hearing had, a decree was rendered, which annulled the listings and certifications to the State, adjudged the patents issued to the State to be void, and enjoined the defendants from asserting any title under them.

Mr. E. R. Taylor and *Mr. Michael Mullany* for appellants. *Mr. Henry F. Crane* was on *Mr. Taylor's* brief.

Mr. A. B. Browne for appellees. *Mr. F. H. Waterman*, *Mr. A. T. Britton* and *Mr. Solicitor General* were on his brief.

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

The lands in question were odd sections lying within the twenty-mile limit of the grant of lands made to the Central Pacific Railroad Company to aid in the construction of its road, and situated partly in township three south, range three

east, Mount Diablo base and meridian, and partly in township two south, range one east.

It is stated in the opinion of the Circuit Court, rendered on the final hearing, and reported, 38 Fed. Rep. 1, that "between May 15, 1863, and May 16, 1864, after actual survey in the field, but before the survey had been officially adopted or recognized by the Secretary of the Interior, and before it had been approved by the surveyor general and filed in the district land office, the State of California, by its locating agent, made selections and locations of all the lands now in controversy in township three, range three, in part satisfaction of the grant to the State of lands in lieu of sections 16 and 36, under the act of March 3, 1853, 10 Stat. 244, 246, c. 145. Between February 17, 1864, and February 9, 1866, the State had issued its certificates of purchase to the several purchasers thereof, the first payments of the purchase money having been made. The selections, apparently at their respective dates, were by the register of the land office entered in his office. A portion of these lands was certified over to the State by the Land Department at Washington, approved by the Secretary of the Interior on November 15, 1871, and the remainder on March 24, 1873, and they were afterwards patented to the purchasers by the State. The lands in controversy, situate in said township two, range one, were selected in advance of any survey in the field by the United States surveyor general, upon surveys made by the county surveyors of the State, between July 28, 1862, and July 20, 1863. Certificates of sale were issued to purchasers by the State for a part between March 2, 1863, and January 25, 1864, and for the remainder between February 20 and March 14, 1865. These selections were entered by the register of the land office on June 12, 1865. A part was certified over to the State by the Secretary of the Interior on September 8, 1870, and the rest on March 11, 1871. These lands were also afterwards patented to the purchasers by the State." In the view which we take of the case, this summary of the evidence in the particulars mentioned may for convenience be accepted without restatement.

The map of the general route of the railroad company was

filed in the General Land Office, December 8, 1864, and the order of withdrawal issued January 30, 1865. The road was completed December 29, 1869, and the map of definite location filed February 1, 1870. The selections of the railroad company embracing these lands were made May 12, 1874. The bill alleges, and the record shows, that patents for all but three hundred and twenty acres of the lands were issued to persons mentioned in the bill, from November 9, 1870, up to and including April 5, 1873, and that the three hundred and twenty acres were patented by the State to one of such persons March 4, 1878. The purchasers from the State and their grantees entered into actual occupation of the lands in controversy under their certificates of purchase, and from that time on had continued in the possession of the same. This suit was commenced July 23, 1883, over twelve years and eight months after the first patent issued, and over five years and four months after the issue of the last-named patent.

The Circuit Court held that lands are not surveyed lands by the United States until a certified copy of the official plat of survey has been filed in the local land office; that this had not been done in respect of these lands, or, if done, that the filing was too late; that they were therefore unsurveyed, and that the selections, being made on unsurveyed lands, were "utterly void." These premises were denied by appellants, both as to the law and the fact.

The Circuit Court also held that the state selections were void for the reason that the act of 1853, under which they were made, excepted from selection by the State, in lieu of school sections lost, "lands reserved by competent authority," and "lands claimed under any foreign grant or title," and "mineral lands;" and that these lands, were excepted because at the time of their selection, location and sale by the State they were claimed under a Mexican grant known as "Las Pocitas." Appellants contended that this conclusion was based on a mistaken construction of the act of 1853, and an erroneous application of the act, if properly so construed, under the facts in the case.

Opinion of the Court.

Among the points raised upon the demurrer and necessarily presented upon the final hearing, were these: first, whether the United States had such an interest in the subject matter of the controversy as warranted their filing the bill; second, whether the claim set up was not barred by laches and limitations.

The bill averred that the United States had granted the land to the railroad company; that the railroad company was entitled to a patent; that the lands had been wrongfully listed to the State, and for that reason the United States refused to grant a patent for the same; and therefore the bill was filed to enable the government to issue the patent. But it was also alleged that the Western Pacific Railroad Company and its successor, the Central Pacific Railroad Company, did within three years of the completion of the road, sell and dispose of the land hereinbefore described to persons other than defendants. The road was completed December 29, 1869, so that the sale of the land by the railroad company to others than the defendants must have been before January, 1873, or nine and one-half years before the original bill was filed.

The rule in relation to the institution of suit by the Attorney General of the United States to vacate a patent is thus stated by Mr. Justice Miller in *United States* v. *San Jacinto Tin Company*, 125 U. S. 273, 285:

"But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property, a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is

apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances.

"In all the decisions to which we have just referred it is either expressed or implied that this interest or duty of the United States must exist as the foundation of the right of action. Of course this interest must be made to appear in the progress of the proceedings, either by pleading or evidence, and if there is a want of it, and the fact is manifest that the suit has actually been brought for the benefit of some third person, and that no obligation to the general public exists which requires the United States to bring it, then the suit must fail. In the case before us the bill itself leaves a fair implication that if this patent is set aside the title to the property will revert to the United States, together with the beneficial interest in it."

And in *United States* v. *Beebe*, 127 U. S. 338, 342, it was said by Mr. Justice Lamar, delivering the opinion of the court: "If a patent is wrongfully issued to one individual which should have been issued to another, or if two patents for the same land have been issued to two different individuals, it may properly be left to the individuals to settle, by personal litigation, the question of right in which they alone are interested. But if it should come to the knowledge of the government that a patent has been fraudently obtained, and that such fraudulent patent, if allowed to stand, would work prejudice to the interests or rights of the United States, or would prevent the government from fulfilling an obligation incurred by it, either to the public or to an individual, which personal litigation could not remedy, there would be an occasion which would make it the duty of the government to institute judicial proceedings to vacate such patent."

In the case before us, the State of California and its grantees

claimed title under the United States, as did the railroad company and its grantees. Either the grantees of the State or the grantees of the railroad had, when the bill was filed, the title to the land. No fraud or imposition or wrong as against the United States was charged, and no case made upon which the United States sought relief for themselves. Nor was the case one of mistake, in the sense that the action of the United States and the State would not have been what it was but for ignorance of particular facts or of the law. If the State acquired the legal title by the listings, that legal title passed to its grantees, and if the railroad company and its grantees acquired an equitable title, no reason is perceived why the real parties in interest could not litigate their claims as between each other. And this was equally true if the State's selections and the listings were wholly void. No wrong was chargeable to the State, and if the State and railroad company each claimed the land in good faith upon mere questions of law and fact, without any element of wrong or fraud, it does not appear to us that the bill should be regarded as accomplishing anything more than raising a controversy between the parties actually in interest.

Under the railroad grant acts themselves, nothing contained therein was to impair or defeat any valid claim existing at the time the line of the road was definitely fixed; and upon the face of this record there can be no question that the claim of the State of California, based upon its making selections of the lands and presenting the same for approval, was a claim in good faith, and the obligation of the United States to the State was as much to be considered as the obligation to the railroad company, and its liability to make good the loss was to that one of the parties upon whom the loss might finally fall.

We are of opinion that upon the case made, the same principles must be applied as if the litigation were between private parties.

In this regard, the case of *United States* v. *Beebe*, 127 U. S. 338, is exactly in point and of controlling weight. There a *bona fide* claimant had made a location under a New

Madrid certificate, perfected his claim, and received a certificate upon which he had become entitled to a patent for the land. Afterwards, and while the matter was pending, Beebe and others, as was alleged, by some imposition or fraud procured a patent to be issued to them for the same land. Suit was permitted to be brought in the name of the United States to cancel the Beebe patent, and the defences relied on in the court below were (1) the want of authority in the Attorney General to file a bill for an annulment of a patent in a case like that; (2) that the claim was barred by the statute of limitations; (3) that the claim sued on was stale; (4) that the complainant had no equity to maintain the suit. It was held by this court that the United States could properly proceed by bill in equity to have a judicial decree of annulment and an order of cancellation of a patent issued by mistake, or procured by fraud, where the government had a direct interest or was under an obligation respecting the relief sought; but that, in the language of Mr. Justice Lamar, "when the government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the government designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other party; nor stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants. These principles, so far as they relate to general statutes of limitation, the laches of a party, and the lapse of time, have been rendered familiar to the legal mind by the oft-repeated enunciation and enforcement of them in the decisions of this court. According to these decisions, courts of equity in gen-

eral recognize and give effect to the statute of limitations as a defence to an equitable right, when at law it would have been properly pleaded as a bar to a legal right."

The decision of the Circuit Court in that case dismissing the bill on the ground of laches was sustained, because, although Beebe had procured his patent by fraud and imposition upon the government or its officers, and the superior right to the land was originally in others, yet it was apparent that the suit was prosecuted in the name of the United States only on behalf of private persons, and therefore should be barred if they were.

Tested by this rule, it is clear that the claim of the railroad company and its grantees cannot be sustained.

The grant was *in præsenti*, and attached upon the filing of a map of definite location. When the identification of a granted section became so far complete as to authorize the grantee to take possession, the legal title of the granted land passed, and an action for possession could be maintained by the company or its grantees before the issue of a patent. The patent would have been evidence that the land named was granted, that the grantee had complied with the conditions of the grant, and that the grant was to that extent relieved from the possibility of forfeiture for breach of its conditions, but was not essential to transfer the legal right. *Deseret Salt Company* v. *Tarpey*, 142 U. S. 241; *Sioux City Company* v. *Griffey*, 143 U. S. 32.

The company had, on February 1, 1870, whatever title it could obtain, and whatever rights belonged to it, and its cause of action then accrued. The land had already been certified to the State by the Commissioner of the General Land Office and the Secretary of the Interior, and their action in that regard was in law the same as if patents had been issued to the State. *Frasher* v. *O'Connor*, 115 U. S. 102.

If that action was wholly void, then it was open to collateral attack, and the railroad company and its grantees could have brought suit to test the legal title at once. *Doolan* v. *Carr*, 125 U. S. 618.

If that action was not void, but the Interior Department had taken mistaken views of the law, or drawn erroneous con-

clusions from the evidence, and the railroad company and its grantees possessed such equities as would control the legal title vested in the State and its grantees, then resort could have been had to a court of equity for relief. *Smelting Co.* v. *Kemp*, 104 U. S. 636.

In either aspect, the rights of the parties could have been determined by proceedings on behalf of the company or its grantees against the patentees of the State or their grantees; but instead of instituting such proceedings, the railroad company besieged the principal officers of the Land Department to ignore the action of their predecessors in office, and to exercise a power that had become *functus officio*. *Noble* v. *Union River Logging Railroad*, 147 U. S. 175. If patents had been issued to the railroad company, then the case would have been presented of two patents for the same land issued to two different parties, and, as pointed out in *United States* v. *Beebe*, the matter might properly be left to those parties to settle by personal litigation.

This bill was not filed until more than thirteen years after the cause of action had accrued, and twelve years after the first patent, and over five years after the last patent, was issued, by the State, while the selections and purchases thereunder were made long before.

Under the laws of California, an action may be brought by any person against another, who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim; but no action can be brought for the recovery of real property or for possession thereof, or arising out of the title thereto, unless such action is commenced within five years after the cause of action shall have accrued; and an action for relief not otherwise provided for must be commenced within four years. (Code Civ. Proc. Cal. §§ 318, 319, 343, 738.)

Whether the statute be applied directly or by analogy, or the rule in equity founded upon lapse of time and staleness of claim, the delay and laches here are fatal to the maintenance of the suit.

The ineffectual pressure of the company on the Land De-

partment furnished no excuse as between the real parties to this litigation, and the United States occupied no such relation to the case as to be entitled to the exemption from limitation and laches accorded to governments proceeding in their own right.

If through erroneous action of its officers, the bounty of the government in the particular instance has not reached those for whom it was intended, but has reached beneficiaries who were not intended to have these particular lands, the government may be relied on to effectuate its own designs, and to make good any moral obligation that rests upon it; but it had not such pecuniary or other interest in this litigation as entitled it to ask the suspension of the beneficent rules applied by the courts in the administration of justice between individuals.

The decree is reversed and the cause remanded with a direction to dismiss the bill.

Mr. Justice Field dissenting:

I am not able to agree with the majority of the court in their decision of this case. The lands in controversy fall within the limits of the grant to the Central Pacific Railroad Company; but by mistake and inadvertence of the Land Department they were listed to the State of California. Discovering its mistake, the department refused to issue to the company a patent for the lands to which it was entitled, until the erroneous listing to the State was set aside and annulled. The present bill was filed by the Attorney General for that purpose — and because of this proceeding and the delay of the company in waiting on its issue — instead of taking steps to enforce its rights at law for the land, this court now holds that it has lost the right to them; and that as the United States have no interest in the property, except to clear it of the cloud of the listings wrongly made, they cannot maintain the suit. The result, which produces simple injustice to the railroad company without wrong on its part, ought not in my judgment to be upheld.

In *United States* v. *Hughes*, 11 How. 568, a patent had been issued by mistake to Hughes in disregard of the prior rights of one Goodbee and of parties deriving title under him. The United States filed an information in the nature of a bill in equity against Hughes for the repeal and surrender of his patent, on the ground that its existence impaired the ability of the government to fulfil its engagements to Goodbee. The case was before this court originally on demurrer, and it was held that the court had jurisdiction to annul the patent thus improvidently issued. When here a second time (4 Wall. 232) the court, reaffirming its first decision, said: "When this case was here on demurrer the patent was considered by the court to be a valid instrument, conveying the fee of the United States, and, until annulled, as rendering them incapable of complying with their engagement to Goodbee or his alienees. Whether regarded in that aspect, or as a void instrument, issued without authority, it *prima facie* passed the title, and, therefore, it was the plain duty of the United States to seek to vacate and annul the instrument, to the end that their previous engagement might be fulfilled by the transfer of a clear title, the only one intended for the purchaser by the act of Congress. The power of a court of equity, by its decree to vacate and annul the patent, under the circumstances of this case, is undoubted. Relief, when deeds or other instruments are executed by mistake or inadvertence of agents, as well as upon false suggestions, is a common head of equity jurisprudence."

Upon this doctrine the court below proceeded in this case, in order that the government might discharge its obligation to the railroad company. It is a case where the government admits the error of its officers of the Land Department, acknowledges its obligation to correct it, and seeks to remove from its records the inadvertent and erroneous certification to the State of the lands, so that it may be able to issue a clear title to the railroad company, the right of that company having been finally determined, and thus carry out the pledge of its grant.

There was at no time an admission by the railroad company

of the correctness of the original action of the Land Department, or any acquiescence therein, but, insisting always upon the error of its proceedings, the company urged upon the department to correct them and issue to it the patent which the law authorized.

The case is not, in my judgment, within the doctrine of *United States* v. *Beebe*, 127 U. S. 338, which would exclude the interference of the United States, but is within the doctrine which there recognizes and upholds it. In that case the original claimant had rested on the action of the Land Department, and sought the assistance of the United States only after the lapse of nearly half a century, and it was held that the interference of the government, after such a lapse of time, was simply a proceeding to avoid the laches of the claimant and to give to him the benefit of its exemption from them. But it declared that a suit of the United States would lie to set aside a patent where the government was under an obligation respecting the relief invoked. In this case the railroad company has not remained inactive, but upon a decision in its favor by the department, asked for its promised patent, which was only withheld because of the previous inadvertent and mistaken action of the government's officers in issuing a certificate to the State. In such circumstances the government, it seems to me, ought not to be debarred the right to correct the mistake of its officers, by which alone the intention of the law was defeated. I think the decree below should be affirmed.

UNION PACIFIC RAILWAY COMPANY *v.* GOODRIDGE.

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

No. 211. Argued April 14, 17, 1893. — Decided May 15, 1893.

It is no proper business of a railway company as common carrier to foster particular enterprises or to build up new industries; but, deriving its franchises from the legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality.

It is no defence to an action against a railway company under the statute of Colorado of 1885 to recover triple damages for an unjust discrimination in freights, to set up a contract for a rebate in case of furnishing a certain amount for transportation, without also alleging and showing that such an amount was furnished.

An unexplained, indefinite and unadjusted claim for damages arising from a tort, which though put forward had never been pressed, is no defence in such an action.

Sundry objections to testimony are held to be without merit.

THIS was an action at law by the firm of Goodridge & Marfell, coal merchants, carrying on the business of mining coal at Erie, Colorado, and of selling the same at Denver, against the Union Pacific Railway Company, to recover triple damages, under a statute of Colorado, for an alleged unjust discrimination in freights upon coal from Erie to Denver.

The statute which was the basis of this action, together with a corresponding clause of the state constitution of Colorado, so far as the same are material to this case, are set forth in the margin.[1]

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[1] Constitution, Art. XV, Sec. 6: "All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or

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The amended complaint alleged the defendant to be a common carrier, chartered by an act of Congress, and operating a line of railroad from Erie and Marshall, at both of which were located certain coal mines, about thirty-five miles, to Denver; that, if there were any difference in distance, it was in favor of Erie by about two miles, and that the published

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passengers within the State, and no railroad company, nor any lessee, manager, or employé thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power."

Session Laws of Colorado, 1885, page 309: "Sec. 7. (Unjust discrimination.) No railroad corporation, shall, without the written approval of said commissioner, charge, demand or receive from any person, company or corporation, for the transportation of persons or property, or for any other service, a greater sum than it shall, while operating under the classification and schedule then in force, charge, demand or receive from any other person, company or corporation for a like service from the same place, or upon like conditions and under similar circumstances, and all concessions of rates, drawbacks and contracts for special rates shall be open to, and allowed all persons, companies and corporations alike, at the same rate per ton per mile, upon like conditions and under similar circumstances, except in special cases designed to promote the development of the resources of this State, when the approval of said commissioner shall be obtained in writing," &c.

"Sec. 8. (Extortion.) No railroad corporation shall charge, demand or receive from any person, company or corporation an unreasonable price for the transportation of persons or property, or for the handling or storing of freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad corporation and not specified in the classification and schedule prepared and published by such railroad corporation. The superintendent or other chief executive officer of each railroad in this State, shall cause to be kept posted up, in a conspicuous place in the passenger depot in each station where passenger tickets are kept for sale, a printed copy of the classification and schedule of rates of freight charges then in force on each railroad, for the use of the patrons of the road. Any railroad company violating any of the provisions of this section shall be deemed guilty of extortion, and be subject to the penalties hereinafter described."

"Sec. 9. (Penalty.) Any railroad corporation that shall violate any of the provisions of this act as to loading points, freight cars, unjust discrimination or extortion, shall forfeit, in every such case, to the person, company or corporation aggrieved thereby, three times the actual damage sustained or overcharges paid by the party aggrieved, which triple damages shall be adjudged to be paid, together with the costs of suit and a reasonable attorney's fee, to be fixed by the court and taxed with the costs."

schedule of freights for coal was the same, namely, one dollar per ton from each place; that plaintiffs, while operating their coal mines from Erie, between October 31, 1885, and August 12, 1887, shipped to Denver 12,960 tons and 1625 pounds of coal, for which they paid defendant $12,960, and a fraction, being at the rate of one dollar a ton, believing that such was the regular schedule rate charged the general public and all parties similarly situated for such service, there being no difference or discrimination between such rates as between Erie and Marshall to Denver; that the Marshall Consolidated Coal Mining Company at the same time operated coal mines at Marshall, and was engaged in shipping coal over defendant's road to Denver under the same circumstances as the plaintiffs, except as to rates, and was a competitor with the plaintiffs; that the amount of such shipments was about 145,833 tons, the defendant charging such company sixty cents per ton, and allowing a rebate of forty cents from its schedule rates; that plaintiffs are informed such rebates amounted to upwards of $58,000, and that the defendant in this manner, without the approval of the railroad commissioner, demanded and received from the plaintiffs the sum of $5184.30 more than it received from the Marshall Consolidated Coal Mining Company, (hereinafter called the Marshall Company,) for like services, upon like conditions and under similar circumstances, without the knowledge or consent of the plaintiffs; that the defendant in this manner and to this extent allowed the Marshall Company drawbacks or rebates for carrying its coal which were not open to and allowed all companies and corporations alike, at the same rate per ton per mile; that these rebates were made secretly and clandestinely in favor of the Marshall Company, with the design to deceive and mislead the plaintiffs and fraudulently conceal from them the facts relating to such rebates, and did so conceal them until about August 12, 1887; and that the plaintiffs were mislead and deceived by these devices and practices, and remained in ignorance of the same until such date.

The plaintiffs further alleged that defendant had granted other parties similarly situated the same rebates for the

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carrying of coal over its road from Marshall, and further charged that all the coal shipped by the plaintiffs and the Marshall Company was about the same quality, and cost the defendant the same amount to handle and ship over its lines, and that the charges made by the defendant were unreasonable, unjust, and extortionate; that plaintiffs had demanded of defendant reimbursement of the overcharges which had been refused, by reason of which they asked judgment in the sum of $15,552.90, being three times the amount alleged to have been extorted, at the rate of forty cents per ton on all coal shipped by them.

The answer set up a general denial of each and every material allegation in the complaint, and special denials that defendant had allowed the Marshall Company a rebate of forty cents per ton, or that it had charged plaintiffs more than it had charged the Marshall Company for like services. For a second defence, the defendant alleged that in January, 1880, the Denver, Western and Pacific Railway Company, a Colorado corporation, was engaged in building a railroad from Denver to Boulder, and in so doing passed over certain coal lands belonging to one Langford and others, known as the Marshall coal mine; that in constructing its line it negligently broke into the mine, in consequence of which it was claimed the mine took fire and destroyed large amounts of coal, and continued to burn for several months, to recover which damages suits were instituted by the owners of the mine against the railroad company, which were litigated for several years; that, in addition to such damages, the company had failed to obtain a right of way across the mining lands; that in January, 1882, a judgment was also obtained against the company in the sum of $64,000 upon a mechanics' lien, of which judgment the Union Pacific subsequently became the owner, as well as of a large number of the bonds of the said company; that the road was subsequently sold and came into the hands of the Union Pacific, and, in 1885, a corporation was formed under the name of Denver, Marshall and Boulder Railway Company, which was owned and controlled by the Union Pacific, and which proceeded to construct its road from

Denver to Boulder, and that the claim against the Denver, Western and Pacific had become and still remained a lien upon the property in the hands of the Denver, Marshall and Boulder Company. That, in 1885, the said Langford and others sold the Marshall coal mine to the Marshall Company, which thus became the owner of the mine, and also, by assignment, the owner of the claim for damages done to it by the Denver, Western and Pacific Railway Company; that, in 1885, the Union Pacific was the owner of a certain coal mine at or near Louisville, Boulder County; that, in addition to the liens above stated, there was also a bonded indebtedness of about one million dollars upon the Denver, Western and Pacific, secured by a mortgage, which was foreclosed in 1883, and upon such foreclosure the owners of the Marshall coal mine answered, setting up their claim for damages to the extent of $81,000. That the property was subsequently put up and sold at master's sale under decree of foreclosure, the rights of Langford and others not being adjudicated at that time, and that upon such sale the title was acquired by parties acting in behalf of the Union Pacific, which had become the owner of a large number of the mortgage bonds. That for some time prior to October 13, 1885, defendant was receiving coal for its locomotives from the Union Coal Mining Company, which was the owner or lessee of certain coal mines at Erie and at Louisville, and had been engaged in working the mines and furnishing the defendant with coal; that about the same time the Marshall Company had become the owner of the coal lands formerly owned by Langford and others, and that on account of complaints that had been made by the owners of other mines, the defendant concluded that it was for its best interest to discontinue its connection with the Union Coal Company, and for that purpose it entered into negotiations with the Marshall Company for the purpose of inducing this company to take off its hands the mines of the Union Coal Company. That it was further induced to enter into this contract by the fact that the Marshall Company had succeeded to the rights of the former owners of the Marshall coal mines, and to their claim for damages against the Denver,

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Western and Pacific, and for the purpose of getting rid of the operation of the Union coal mines, and of settling this claim for damages, it entered into a contract with the Marshall Company on the 13th day of October, 1885, in which it was recited that, it being for the interest of the Union Pacific to discontinue the working of the Union coal mine, and to contract with the Marshall Company for all the coal needed for its own consumption on its road and branches, not to exceed fifty thousand tons for the first year and one hundred thousand tons for every year thereafter, therefore, in consideration of the Union Coal Company going out of the coal business, and the purchase from the Marshall Company by the defendant of the coal used for its own consumption, at the rate mentioned therein, and in consideration of the rates for the transportation of coal therein agreed upon, the coal company agreed to furnish from the Marshall mine all coal ordered by the railway company for its own use and consumption, and the use of its branches, not exceeding fifty thousand tons the first year and one hundred thousand tons per annum thereafter, and to deliver all coal on board of the cars of the Union Pacific at the mouth of the mine, at a price not to exceed $1.25 per ton, delivered and loaded on the cars, and if such cost was less than $1.25 per ton, then at actual cost.

It was further agreed that the defendant should give to the Marshall Company for the transportation of its coal the regular tariff rate, not exceeding one dollar per ton, unless two hundred thousand tons should be mined and furnished for transportation yearly, in which case a rate of sixty cents per ton should be paid for all coal transported over defendant's line to Denver, and if the rate were reduced below one dollar, then the sixty cent rate should be reduced in the same proportion. It was also provided that, if the railway company should order coal in excess of the amounts of fifty thousand and one hundred thousand tons per annum, then the railroad company should pay the cost of mining and putting such coal on the cars plus fifty cents per ton, except that in no case should the price for mining and loading such coal exceed $1.40 per ton ; and it was further agreed that, as

part consideration of the contract, the majority of the capital stock of such coal company should for two years be held in case the company desired to sell it, and should first be offered to the Union Pacific in preference to any other purchaser. This contract was to remain in force for five years.

It was further alleged that, from the fact that Mr. Adams, the president of the defendant company, was not intimately acquainted with the claim for damages made by the former owners of the Marshall mines, the contract failed to mention anything about the settlement of said claim, but that the contract was sent to the general attorney of the defendant, with instructions to look it over, and if anything further was needed to settle the controversy that might grow out of anything theretofore existing it should be provided for in a separate instrument, and thereupon the attorney prepared a bond of indemnity for execution by the coal company, reciting the claim for damages against the Denver, Western and Pacific, and agreeing to indemnify the railway company against any damages which might accrue to it by reason of such claim, and upon the execution of such bond, and as part of the transaction, the contract was delivered to the Marshall Company, and afterwards the former owners of said Marshall mines executed and delivered a receipt in full, discharging the defendant from all suits and causes of action existing by reason of any matter or thing pertaining to the construction of the Denver, Western and Pacific Railway Company. The answer further alleged that the defendant was informed and believed that it cost the Marshall Company, and would have cost the defendant if it had continued to operate through the Union Coal Company, at least $1.60 per ton to mine their coal, and that, on account of the settlement of the aforesaid claims, and of the coal necessarily used by it, the Marshall Company has paid the defendant a higher rate as a matter of fact than one dollar per ton, although it was not intended that the rate should exceed the schedule price.

To this second defence, which was elaborately set forth in the answer, a demurrer was interposed by the plaintiffs,

and sustained by the court, (37 Fed. Rep. 182,) to which the defendant duly excepted. Defendant thereupon for a third defence pleaded the statute of limitations, plaintiffs replied, and the case went to trial before a jury, which returned a verdict for the plaintiffs in the sum of $5184.30, for which amount judgment was entered, and defendant sued out this writ of error.

Mr. John F. Dillon, (with whom were *Mr. Harry Hubbard*, *Mr. Willard Teller*, *Mr. H. M. Orahood* and *Mr. E. B. Morgan* on the briefs,) and *Mr. J. M. Wilson* for plaintiff in error.

Mr. C. S. Thomas, (with whom was *Mr. W. H. Bryant* on the brief,) for defendants in error.

Mr. Byron Millett and *Mr. A. J. Sampson* filed a brief for defendants in error.

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

This case involves the construction of an act of the legislature of Colorado passed in 1885, prohibiting railroads from charging one person or corporation a greater sum than it charges any other, for a like service upon like conditions and under similar circumstances. The statute is of the same nature as the Interstate Commerce Act, and like that was designed to prevent unjust discrimination and extortion in rates for the carriage of persons and property.

1. The first assignment of error is taken to the ruling of the court sustaining the demurrer to the second answer of the defendant, in which it set up certain contracts with the Marshall Consolidated Coal Company, which were claimed to justify the rebate of forty cents per ton allowed to that company from the regular schedule rates, which the plaintiffs were compelled to pay. This defence set forth a very complicated series of facts, which, however, are susceptible of a condensed statement. It seems that the defendant, the Union

Pacific, was the owner of a large part of the capital stock of the Union Coal Company, and had been for some time receiving from it coal for consumption upon its locomotives, when, on account of certain complaints made by the owners of other mines, it concluded that it was for its best interests to discontinue its connection with this company, and to enter into negotiations with the Marshall Company for its supply of coal. These negotiations resulted in the contract of October 13, 1885, wherein the coal company agreed on its part, *first*, to furnish the railroad with all coal needed for its consumption, not exceeding fifty thousand tons the first year and one hundred thousand tons yearly thereafter, and to deliver the same on its cars at the mouth of the mine at cost, but in no case to exceed $1.25 per ton; *second*, that, in case the railroad should order in excess of the above amount, the same should be furnished at cost, plus fifty cents per ton, but in no case should such cost exceed $1.40 per ton; *third*, that the railroad company should have the option for two years of taking a majority of the capital stock of the coal company in preference to any other purchaser, should the coal company desire to sell the same.

The railway company, upon its part, agreed to go out of the business of mining coal, and to give the coal company the regular tariff rate to Denver of $1 per ton, *unless two hundred thousand tons were furnished for transportation each year*, in which case a rebate of forty cents should be given, with a corresponding reduction in case the regular tariff was reduced below $1.

There were other subordinate covenants upon both sides, but they are not material to the consideration of this case. This contract was to remain in force for five years.

It is a sufficient reply to the whole defence set up in this part of the answer to say that the coal company was only to be allowed a rebate of forty cents per ton in case it furnished the railroad company two hundred thousand tons per year for transportation, and there is no allegation in the answer that it ever did furnish this amount, or ever became entitled to the rebate. The want of such allegation is fatal to the contract

as a defence, and the court for this reason, if for no other, was right in sustaining the demurrer.

But we think the answer must be held insufficient for another reason. It is further stated that an additional consideration existed for this rebate in certain unliquidated claims for damages which the former owners of the Marshall mines had against the Denver, Western and Pacific Railway Company, the original constructors of the road, by reason of their negligently breaking into the mine during the construction of the road, setting it on fire, and thereby consuming a large amount of coal and personal property, for which claim suits were instituted against the railway company and litigated at great expense for several years, and were still undetermined. There was also another claim for a right of way for one mile across their lands. These claims, Langford and others, who then owned the mine, sold and assigned to the Marshall Company with the property. The Denver, Western and Pacific Railway, which had done the injury for which the damages were claimed, was itself sold under foreclosure of its mortgage, and bought in by parties acting in the interest of the Union Pacific, who organized a new corporation, called the Denver, Marshall and Boulder Railway, leaving the claim of the Marshall Coal Company unadjusted and unpaid, and a lien upon the property. How this claim for unliquidated damages for the negligence of the railroad company became a lien upon the property of the company, and how such lien took precedence of the mortgage and survived the foreclosure and sale of the property, and became a lien upon the road in the hands of the Denver, Marshall and Boulder Company, does not clearly appear, but admitting it to be still valid and outstanding, as alleged in the answer, the question still remains whether the defendant company can set up an unliquidated claim of this kind in defence of a rebate of forty cents per ton allowed the coal company over every other shipper on its road.

It will be observed in this connection that not only was the amount of the damages suffered by the coal company never fixed, agreed upon, or adjusted, but the amount of coal which

the Marshall Company was at liberty to deliver to the railroad company for transportation was left equally indefinite, save only that it must exceed two hundred thousand tons per year to entitle it to the rebate. This contract was to remain in force five years; but upon the theory of the defendant there was nothing to prevent it being continued indefinitely, provided the defendant company was willing to accede to any amount of damages which the coal company might see fit to claim. While we do not undertake to say that a railroad company may not justify a fixed rebate in favor of a particular shipper by showing a liquidated indebtedness to such shipper, which the allowance of the rebate was intended to settle, it would practically emasculate the law of its most healthful feature, to permit an unexplained, indefinite, and unadjusted claim for damages arising from a tort, which, though litigated for some time, never seems to have been prosecuted to a final determination in the courts, to be put forward as an excuse for a clear discrimination in rates. This act was intended to apply to intrastate traffic the same wholesome rules and regulations which Congress two years thereafter applied to commerce between the States, and to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality, saving only a power, not in the railroad company itself, but in the railroad commissioner, to except "special cases designed to promote the development of the resources of this State," and not to prevent the commissioner "from making a lower rate per ton per mile, in carload lots, than shall govern shipments in less quantities than carload lots, and from making lower rates for lots of less than five carloads than for single carload lots." The statute recognizes the fact that it is no proper business of a common carrier to foster particular enterprises or to build up new industries, but, deriving its franchise from the legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its

patrons upon an absolute equality. *Scofield* v. *Railway*, 43 Ohio St. 571; *Sanford* v. *Railroad*, 24 Penn. St. 378; *Messenger* v. *Pennsylvania Railroad*, 7 Vroom, (36 N. J. Law,) 407; *McDuffie* v. *Portland &c. Railroad*, 52 N. H. 430. So opposed is the policy of the act to secret rebates of this description, that it requires a printed copy of the classification and schedule of rates to be posted conspicuously in each passenger station for the use of the patrons of the road, that every one may be apprised, not only of what the company will exact of him for a particular service, but what it exacts of every one else for the same service, so that in fixing his own prices he may know precisely with what he has to compete. To hold a defence thus pleaded to be valid would open the door to the grossest frauds upon the law, and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient, and to agree with the favored customer upon some fabricated claim for damages, which it would be difficult, if not impossible, to disprove. For instance, under the defence made by this company, there is nothing to prevent a customer of the road, who has received a personal injury, from making a claim against the road for any amount he chooses, and in consideration thereof, and of shipping all his goods by that road, receiving a rebate for all goods he may ship over the road for an indefinite time in the future. It is almost needless to say that such a contract could not be supported.

There is no doubt of the general proposition that the release of an unliquidated claim for damages is a good consideration for a promise, as between the parties, and if no one else were interested in the transaction, that rule might apply here; but the legislature, upon grounds of public policy, and for the protection of third parties, has made certain requirements with regard to equality of rates, which in their practical application would be rendered nugatory, if this rule were given full effect. For this reason we think the railroad company is in error in its assumption that "if, in the honest judgment of the officers of the defendant company, who made the contract, the considerations which entered into it, and upon which alone it was

made, were sufficient to warrant the company to pay back to the Marshall Company forty cents per ton for each ton it shipped for five years, that is enough." This is but a restatement in different language of a comment made by the court below in its opinion, that "the whole answer amounts only to this: That the Marshall Company is allowed less rates than other shippers are required to pay upon considerations which are satisfactory to defendant; and it is obvious that this is no answer to a complaint of unlawful discrimination." If reasons of public policy dictate that the schedule rates shall be posted conspicuously in each railway station, it is no less important that the customers of the road should have the means of ascertaining whether any departure from such rates in favor of a particular shipper is justified by the facts. Such a method is contemplated by the act, in providing that no discrimination of this kind shall be made without the written approval of the railway commissioner. It was evidently designed to put it in the power of the commissioner to permit such discrimination to be made, possibly in a case like the present one, if, in his opinion, the circumstances seem to warrant it.

2. The second assignment of error is taken to the admission of certain letters of Taggart and Kimball.

Upon the trial of the case before a jury, the plaintiffs gave evidence tending to show that the Jackson Coal Company was operating mines at Canfield, thirty-six miles from Denver, and was charged by defendant $1 per ton for transportation, and that another railroad company, which ran across the mine, charged the same rate. There was also testimony showing the amount shipped by plaintiffs over defendant's road to have been 12,961 tons, for which they paid $1 per ton. Plaintiffs thereupon called E. R. Taggart, who resided in Denver, and had been engaged in the coal trade for several years, selling the product of the Fox Coal Company, which shipped its coal at the same station as the Marshall Company, and was charged $1, and who testified that upon information received by him of the rebate allowed to the Marshall Company through the proceedings of a commission appointed to

investigate the affair, he wrote to the president of the defendant, and also to T. L. Kimball, the general traffic manager and official head of the defendant company. The letter to Kimball, with the reply, was objected to upon the ground that the demurrer to the second answer having been sustained, any statement of the way in which the defendant acted relating to that defence was immaterial, irrelevant, and incompetent, which objection was overruled, and defendant excepted. The letter from Kimball to the witness Taggart purported to be a reply to a letter from Taggart to the president of the road, and stated generally that the contract with the Marshall Company was made under circumstances entirely dissimilar to those existing between the Fox Company and the Union Pacific, and in consideration of the company's furnishing the railroad coal for its own use at not exceeding $1.25 per ton, and also in compromise and settlement of a claim against the company for some sixty-odd thousand dollars. Taggart's reply thereto, dated August 20, 1887, stated the claim from his standpoint, and that he had been advised by the very highest legal sources that the contract was without warrant and clearly in violation of law, and further insisted upon his claim for the repayment of forty cents per ton. If there were any objection to the admission of Kimball's letter upon the ground that the letter to which it was a reply was not produced, that objection was met by the production of that letter upon cross-examination — a letter which appears to have been written July 25, 1887, to Mr. Adams, president of the road, at Boston. The witness stood in the same position as the plaintiffs with respect to defendant, and had also brought suit against it to recover the same rebate which had been allowed to the Marshall Company, and which plaintiffs were suing to recover in this case. Assuming the correspondence to have been between different parties, and therefore irrelevant, it is not easy to perceive how it could have prejudiced the defendant, as Kimball's letter was a mere iteration of the defence set up in the answer, and put forward at the trial, and Taggart's reply thereto, if irrelevant, was not improper or prejudicial to the defendant. If the witness had had an oral

conversation with Mr. Kimball, the manager of the defendant company, there can be no doubt that such conversation, and the whole of it, would have been admissible, as both Taggart's claim and defendant's stood precisely upon the same footing, and if this demand and refusal, instead of being oral, was by correspondence, it would seem equally admissible. As Kimball's letter stated clearly the position of the defendant with regard to both these claims, it is difficult to see how it could be prejudiced by its production.

3. The third, fourth, and fifth assignments of error are taken upon the same ground to the action of the court in refusing to allow the witnesses Taggart and Rubridge to testify as to what it cost to get out coal and put in on the cars at the Marshall mine, and in ruling out testimony showing that by reason of such cost the Marshall Company actually paid at least $1 per ton for coal carried by defendant.

At the time witness Taggart was asked this question, the case stood in this position: A demurrer to the second answer of the defendant setting up its excuses for the rebate had been sustained, and the case set for trial upon the complaint and the denials — in other words, upon the general issue. Plaintiffs had shown that they, as well as the Jackson and Fox Coal Company, had paid $1 per ton, and had shown the rebate paid to the Marshall Company, but the contract had not been put in evidence, though the witness Taggart had sworn that he knew "that defendant set up in bar of plaintiffs' claim a contract they had with the Marshall Company in consideration of the Marshall Company supplying them with coal at a given price — much below the price at which they could mine it or get it out of the mines — and, further, in settlement of an old law suit they had;" and the record then states in a very blind way that "the witness gave further testimony showing that Kimball's testimony as to its own uses and not exceeding $1.25 per ton, which was then costing plaintiffs and others about $1.50 to mine, and commercial coal at not exceeding $1.40 per ton, at a time when other producers asked $1.60 per ton — that was making a difference of from twenty to twenty-five cents per ton on

every ton of coal than what it cost." Defendant's counsel here asked: "As a matter of fact, do you know what it did cost to get out a ton of coal and put it on cars at the Marshall or Fox mine?" This was clearly immaterial, as it was no excuse for a rebate that the coal cost more or less. The right of a railroad to charge a certain sum for freight does not depend at all upon the fact whether its customers are making or losing by their business.

The next witness, Robert H. Rubridge, who had been the treasurer and assistant secretary of the Marshall Company, testified that from November 1, 1885, to August 1, 1887, there was shipped from the Marshall mine to Denver 67,863 tons, upon which a rebate of forty cents per ton was allowed. Upon cross-examination he testified that that rebate was allowed in consideration "of our giving an indemnity bond. Our company gave an indemnity bond protecting the Union Pacific from all claims on account of a damage suit against them, amounting to about $65,000, for which they had attachments on some of the rolling stock and ties and half a mile of track of the Denver, Western and Pacific. . . . We were to give them coal at cost for the company's use, but not to exceed at any time $1.25 per ton, and also to give them coal for commercial use at not exceeding $1.40 per ton, that is, for Kansas but not for Denver." This oral testimony with regard to the contract was objected to by plaintiffs' counsel on the ground that the written contract should be produced, an objection which was overruled by the court. There was evidently an attempt here to obtain from the witness a statement of so much of the contract as was favorable to the defendant, and at the same time not to put it in evidence, since the contract would show on its face that the coal company was not entitled to any rebate, unless it furnished the railroad company two hundred thousand tons per annum for transportation, a far larger amount than it did actually furnish. It further appeared that the contract, establishing the price of the coal, was not lived up to, as the railroad company was paying anywhere from $1.25 to $1.75 per ton. The witness was then asked how much it cost to get

out coal, and to put it on the cars for the use of the Union Pacific in its engines, and also for its commercial use in Kansas.

The answer to this question, as well as the proposal of the defendant to show by the witness that the cost of getting out the coal, which they were obliged to furnish the Union Pacific under the contract, was largely in excess of what they got, was properly ruled out. The relations between the defendant and the Marshall Company were fixed by their written contract, and under that contract the railway company was entitled to a certain amount of coal at $1.25 per ton regardless of cost, and the Marshall Company was not entitled to a rebate unless they furnished 200,000 tons per annum for shipment. This testimony could only have been offered to show that the company was losing money in furnishing the coal at $1.25 per ton, and, therefore, that the discrimination in their favor by the railroad company was not unjust. But the court, having sustained the demurrer to the answer setting up this contract upon the ground that it constituted no defence, could not consistently have permitted the defendant to introduce oral testimony of such contract for the purpose of enabling it to rely upon such stipulations as were thought to be favorable to itself. The witness had stated, in answer to the question why the rebate of 40 cents per ton was allowed, that the consideration for doing this was in writing. Plaintiffs' counsel thereupon objected to the proposed oral evidence of the contract as incompetent, and while this objection, though it seems to us to have been well taken, was not sustained, and the witness was permitted to give certain of its stipulations, the court was at liberty at any time to put a stop to this character of testimony, or to rule out any further questions based upon it. The whole case virtually turned upon the demurrer to that portion of the answer setting up this contract. This demurrer having been sustained, the defendant should not have been allowed in this indirect way to obtain the advantage of certain stipulations included in the contract.

4. The sixth assignment, that the court erred in refusing to

receive in evidence the release of the Marshall Company to the defendant company, cannot be sustained for the same reason. This release, a copy of which is given in the record, was given by the Marshall Coal Mining Company, and by Langford and Marshall, the previous owners of the mine, to the defendant railway company, releasing it from "all actions and causes of action, suits, controversies, claims, and demands whatsoever for or by reason of any cause, matter, or thing arising out of the construction of any railroad across the property of either of us in Boulder and Jefferson Counties, Colorado." It is obvious, upon the principles hereinbefore stated, that this release was altogether too vague and general to serve as a basis for making the rebate to the Marshall Company.

After some other testimony as to prices paid by other companies, and of unsuccessful efforts made to ascertain why the Marshall Company was given lower rates than its competitors, the plaintiffs rested. The defendant put in no testimony, and the case was committed to the jury, who returned a verdict for $5481.34.

5. The seventh and last assignment of error was to the action of the court in refusing to grant a new trial, and in entering a judgment on the verdict, because there was no sufficient evidence to support the verdict, and especially to sustain it as to the amount of damages. Plaintiffs' evidence had shown that the Marshall Company had been receiving a rebate upon all coal transported by it to Denver, which was not allowed to its competitors in business, and the damages sustained by the plaintiffs were measured by the amount of such rebate, which should have been allowed to them. The question whether they lost profits upon the sale of their coal by reason of the non-allowance of such rebates was too remote to be made an element of their damages. They were entitled to the same terms which the Marshall Company would have received, and damages to the exact extent to which the Marshall Company was given a preference.

There was no error in the action of the court below, and its judgment is, therefore,

Affirmed.

Syllabus.

UNION PACIFIC RAILWAY COMPANY *v.* TAGGART. Error to the Circuit Court of the United States for the District of Colorado. No. 212. Argued with 211.

This case depends upon the same facts as the one previously decided, and is controlled by the decision of that case, and the judgment of the court below is, therefore,

Affirmed.

FONG YUE TING *v.* UNITED STATES.

WONG QUAN *v.* UNITED STATES.

LEE JOE *v.* UNITED STATES.

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

Nos. 1345, 1346, 1347. Argued May 10, 1893. — Decided May 15, 1893.

The right to exclude or to expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation.

In the United States, the power to exclude or to expel aliens is vested in the political departments of the national government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department is authorized by treaty or by statute, or is required by the Constitution, to intervene.

The power of Congress to expel, like the power to exclude, aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to remain in the country has been made by Congress to depend.

Congress has the right to provide a system of registration and identification of any class of aliens within the country, and to take all proper means to carry out that system.

The provisions of an act of Congress, passed in the exercise of its constitutional authority, must, if clear and explicit, be upheld by the courts, even in contravention of stipulations in an earlier treaty.

Section 6 of the act of May 5, 1892, c. 60, requiring all Chinese laborers

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within the United States at the time of its passage, "and who are entitled to remain in the United States," to apply within a year to a collector of internal revenue for a certificate of residence; and providing that any one who does not do so, or is afterwards found in the United States without such a certificate, "shall be deemed and adjudged to be unlawfully in the United States," and may be arrested by any officer of the customs, or collector of internal revenue, or marshal, or deputy of either, and taken before a United States judge, who shall order him to be deported from the United States to his own country, unless he shall clearly establish to the satisfaction of the judge that by reason of accident, sickness, or other unavoidable cause, he was unable to procure his certificate, and "by at least one credible white witness" that he was a resident of the United States at the time of the passage of the act; is constitutional and valid.

THESE were three writs of *habeas corpus*, granted by the Circuit Court of the United States for the Southern District of New York, upon petitions of Chinese laborers, arrested and held by the marshal of the district for not having certificates of residence, under section 6 of the act of May 5, 1892, c. 60, which is copied in the margin.[1]

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[1] An act to prohibit the coming of Chinese persons into the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all laws now in force, prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent, are hereby continued in force for a period of ten years from the passage of this act.

SEC. 2. That any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge or commissioner before whom he or they are tried, that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: Provided, that in any case where such other country, of which such Chinese person shall claim to be a citizen or subject, shall demand any tax as a condition of the removal of such person to that country, he or she shall be removed to China.

SEC. 3. That any Chinese person, or person of Chinese descent, arrested under the provisions of this act or the acts hereby extended, shall be adjudged to be unlawfully within the United States, unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States.

The rules and regulations made and promulgated by the Secretary of the Treasury under section 7 of that act prescribe

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SEC. 4. That any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States, as hereinbefore provided.

SEC. 5. That after the passage of this act, on an application to any judge or court of the United States in the first instance for a writ of *habeas corpus*, by a Chinese person seeking to land in the United States, to whom that privilege has been denied, no bail shall be allowed, and such application shall be heard and determined promptly without unnecessary delay.

SEC. 6. And it shall be the duty of all Chinese laborers, within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence; and any Chinese laborer, within the limits of the United States, who shall neglect, fail or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States as hereinbefore provided, unless he shall establish clearly, to the satisfaction of said judge, that by reason of accident, sickness, or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if upon the hearing it shall appear that he is so entitled to a certificate, it shall be granted, upon his paying the cost. Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it; and in such cases the cost of said arrest and trial shall be in the discretion of the court. And any Chinese person other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right, may apply for and receive the same without charge.

SEC. 7. That immediately after the passage of this act the Secretary of the Treasury shall make such rules and regulations as may be necessary for the efficient execution of this act, and shall prescribe the necessary forms and furnish the necessary blanks to enable collectors of internal revenue to issue the certificates required hereby, and make such provisions

forms for applications for certificates of residence, for affidavits in support thereof, and for the certificates themselves; contain the provisions copied in the margin;[1] and also provide

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that certificates may be procured in localities convenient to the applicants; such certificates shall be issued without charge to the applicant, and shall contain the name, age, local residence and occupation of the applicant, and such other description of the applicant as shall be prescribed by the Secretary of the Treasury; and a duplicate thereof shall be filed in the office of the collector of internal revenue for the district within which such Chinaman makes application.

SEC. 8. That any person who shall knowingly and falsely alter or substitute any name for the name written in such certificate, or forge such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in such certificate, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars, or imprisoned in the penitentiary for a term of not more than five years.

SEC. 9. The Secretary of the Treasury may authorize the payment of such compensation in the nature of fees to the collectors of internal revenue, for services performed under the provisions of this act, in addition to salaries now allowed by law, as he shall deem necessary, not exceeding the sum of one dollar for each certificate issued.

[1] Collectors of internal revenue will receive applications on the following form, at their own offices, from such Chinese as are conveniently located thereto, and will cause their deputies to proceed to the towns or cities in their respective divisions where any considerable number of Chinese are residing, for the purpose of receiving applications. No application will be received later than May 5, 1893.

Collectors and deputies will give such notice, through leading Chinese, or by notices posted in the Chinese quarter of the various localities, as will be sufficient to apprise all Chinese residing in their districts of their readiness to receive applications and the time and place where they may be made. All applications received by deputies must be forwarded to the collector's office, from whose office all certificates of residence will be issued, and sent to the deputy for delivery.

The affidavit of at least one credible witness of good character to the fact of residence and lawful status within the United States must be furnished with every application. If the applicant is unable to furnish such witness satisfactory to the collector or his deputy, his application will be rejected, unless he shall furnish other proof of his right to remain in the United States, in which case the application, with the proofs presented, shall be forwarded to the commissioner of internal revenue for his decision. The witness must appear before the collector or his deputy, and be fully questioned in regard to his testimony before being sworn.

for recording duplicates of the certificates in the office of the collector of internal revenue.

The first petition alleged that the petitioner was a person of the Chinese race, born in China, and not a naturalized citizen of the United States; that in or before 1879 he came to the United States, with the intention of remaining and taking up his residence therein, and with no definite intention of returning to China, and had ever since been a permanent resident of the United States, and for more than a year last past had resided in the city, county and State of New York, and within the second district for the collection of internal revenue in that State; that he had not, since the passage of the act of 1892, applied to the collector of internal revenue of that district for a certificate of residence, as required by section 6, and was and always had been without such certificate of residence; and that he was arrested by the marshal, claiming authority to do so under that section, without any writ or warrant. The return of the marshal stated that the petitioner was found by him within the jurisdiction of the United States, and in the Southern District of New York, without the certificate of residence required by that section; that he had therefore arrested him with the purpose and intention of taking him before a United States judge within that district; and that the petitioner admitted to the marshal, in reply to questions put through an interpreter, that he was a Chinese laborer, and was without the required certificate of residence.

The second petition contained similar allegations, and further alleged that the petitioner was taken by the marshal before the District Judge for the Southern District of New York, and that "the said United States Judge, without any hearing of any kind, thereupon ordered that your petitioner be

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In all cases of loss or destruction of original certificates of residence, where it can be established to the satisfaction of the collector of the district in which the certificate was issued that such loss or destruction was accidental, and without fault or negligence on the part of the applicant, a duplicate of the original may be issued under the same conditions that governed the original issue.

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remanded to the custody of the marshal in and for the Southern District of New York, and deported forthwith from the United States, as is provided in said act of May 5, 1892, all of which more fully appears by said order, a copy of which is hereto annexed and made a part hereof," and which is copied in the margin;[1] and that he was detained by virtue of the marshal's claim of authority and the judge's order. The marshal returned that he held the petitioner under that order.

In the third case the petition alleged, and the judge's order showed, the following state of facts: On April 11, 1893, the petitioner applied to the collector of internal revenue for a certificate of residence; the collector refused to give him a certificate, on the ground that the witnesses whom he produced to prove that he was entitled to the certificate were persons of the Chinese race and not credible witnesses, and required of him to produce a witness other than a Chinaman to prove that he was entitled to the certificate, which he was unable to do, because there was no person other than one of

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[1] In the matter of the arrest and deportation of Wong Quan, a Chinese laborer.

Wong Quan, a Chinese laborer, having been arrested in the city of New York on the 6th day of May, 1893, and brought before me, a United States Judge, by John W. Jacobus, the marshal of the United States in and for the Southern District of New York, as being a Chinese laborer found within the jurisdiction of the United States after the expiration of one year from the passage of the act of Congress, approved on the 5th day of May, 1892, and entitled "An act to prohibit the coming of Chinese persons into the United States," without having the certificate of residence required by said act; and the said Wong Quan having failed to clearly establish to my satisfaction that by reason of accident, sickness or other unavoidable cause, he had been unable to procure the said certificate, or that he had procured such certificate and that the same had been lost or destroyed: Now, on motion of Edward Mitchell, the United States attorney in and for the Southern District of New York, it is Ordered, that the said Wong Quan be, and he hereby is, remanded to the custody of the said John W. Jacobus, the United States marshal in and for the Southern District of New York; and it is further Ordered, that the said Wong Quan be deported from the United States of America in accordance with the provisions of said act of Congress, approved on the 5th day of May, 1892.

Dated New York, May 6, 1893. ADDISON BROWN,

United States District Judge for the Southern District of New York.

the Chinese race who knew and could truthfully swear that he was lawfully within the United States on May 5, 1892, and then entitled to remain therein; and because of such unavoidable cause he was unable to produce a certificate of residence, and was now without one. The petitioner was arrested by the marshal, and taken before the judge; and clearly established, to the satisfaction of the judge, that he was unable to procure a certificate of residence, by reason of the unavoidable cause aforesaid; and also established, to the judge's satisfaction, by the testimony of a Chinese resident of New York, that the petitioner was a resident of the United States at the time of the passage of the act; but having failed to establish this fact clearly to the satisfaction of the court by at least one credible white witness, as required by the statute, the judge ordered the petitioner to be remanded to the custody of the marshal, and to be deported from the United States, as provided in the act.

Each petition alleged that the petitioner was arrested and detained without due process of law, and that section 6 of the act of May 5, 1892, was unconstitutional and void.

In each case, the Circuit Court, after a hearing upon the writ of *habeas corpus* and the return of the marshal, dismissed the writ of *habeas corpus*, and allowed an appeal of the petitioner to this court, and admitted him to bail pending the appeal. All the proceedings, from the arrest to the appeal, took place on May 6.

Mr. Joseph H. Choate and *Mr. J. Hubley Ashton* for appellants.

Mr. Maxwell Evarts was on Mr. Choate's brief.

Mr. Solicitor General for appellees.

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

The general principles of public law which lie at the foundation of these cases are clearly established by previous judg-

ments of this court, and by the authorities therein referred to.

In the recent case of *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659, the court, in sustaining the action of the executive department, putting in force an act of Congress for the exclusion of aliens, said: "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress."

The same views were more fully expounded in the earlier case of *Chae Chan Ping* v. *United States*, 130 U. S. 581, in which the validity of a former act of Congress, excluding Chinese laborers from the United States, under the circumstances therein stated, was affirmed.

In the elaborate opinion delivered by Mr. Justice Field, in behalf of the court, it was said: "Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power." "The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." 130 U. S. 603, 604.

It was also said, repeating the language of Mr. Justice

Bradley in *Knox* v. *Lee*, 12 Wall. 457, 555: "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments." 130 U. S. 605. And it was added: "For local interests the several States of the Union exist; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." 130 U. S. 606.

The court then went on to say: "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, is necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases, its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the

executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy. The power of the government to exclude foreigners from the country, whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments." 130 U. S. 606, 607. This statement was supported by many citations from the diplomatic correspondence of successive Secretaries of State, collected in Wharton's International Law Digest, § 206.

The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.

This is clearly affirmed in dispatches referred to by the court in *Chae Chan Ping's case.* In 1856, Mr. Marcy wrote: "Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war. A memorable example of the exercise of this power in time of peace was the passage of the alien law of the United States in the year 1798." In 1869, Mr. Fish wrote: "The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested." Wharton's International Law Digest, § 206; 130 U. S. 607.

The statements of leading commentators on the law of nations are to the same effect.

Vattel says: "Every nation has the right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing it a manifest injury. What it owes to itself, the care of its own safety, gives it this right; and in virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner." "Thus, also, it has a right to send them elsewhere, if it has just cause to

fear that they will corrupt the manners of the citizens; that they will create religious disturbances, or occasion any other disorder, contrary to the public safety. In a word, it has a right, and is even obliged, in this respect, to follow the rules which prudence dictates." Vattel's Law of Nations, lib. 1, c. 19, §§ 230, 231.

Ortolan says: "The government of each state has always the right to compel foreigners who are found within its territory to go away, by having them taken to the frontier. This right is based on the fact that, the foreigner not making part of the nation, his individual reception into the territory is matter of pure permission, of simple tolerance, and creates no obligation. The exercise of this right may be subjected, doubtless, to certain forms by the domestic laws of each country; but the right exists none the less, universally recognized and put in force. In France, no special form is now prescribed in this matter; the exercise of this right of expulsion is wholly left to the executive power." Ortolan, Diplomatie de la Mer, lib. 2, c. 14, (4th ed.) p. 297.

Phillimore says: "It is a received maxim of international law, that the government of a state may prohibit the entrance of strangers into the country, and may therefore regulate the conditions under which they shall be allowed to remain in it, or may require and compel their departure from it." 1 Phillimore's International Law, (3d ed.) c. 10, § 220.

Bar says: "Banishment and extradition must not be confounded. The former is simply a question of expediency and humanity, since no state is bound to receive all foreigners, although, perhaps, to exclude all would be to say good-bye to the international union of all civilized states; and although in some states, such as England, strangers can only be expelled by means of special acts of the legislative power, no state has renounced its right to expel them, as is shown by the alien bills which the government of England has at times used to invest itself with the right of expulsion." "Banishment is regulated by rules of expediency and humanity, and is a matter for the police of the state. No doubt the police can apprehend any foreigner who refuses to quit the country in

spite of authoritative orders to do so, and convey him to the frontier." Bar's International Law, (Gillespie's ed. 1883) 708 note, 711.

In the passages just quoted from Gillespie's translation of Bar, "banishment" is evidently used in the sense of expulsion or deportation by the political authority on the ground of expediency, and not in the sense of transportation or exile by way of punishment for crime. Strictly speaking, "transportation," "extradition" and "deportation," although each has the effect of removing a person from the country, are different things, and have different purposes. "Transportation" is by way of punishment of one convicted of an offence against the laws of the country. "Extradition" is the surrender to another country of one accused of an offence against its laws, there to be tried, and, if found guilty, punished. "Deportation" is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken.

In England, the only question that has ever been made in regard to the power to expel aliens has been whether it could be exercised by the King without the consent of Parliament. It was formerly exercised by the King, but in later times by Parliament, which passed several acts on the subject between 1793 and 1848. 2 Inst. 57; 1 Chalmers Opinions, 26; 1 Bl. Com. 260; Chitty on the Prerogative, 49; 1 Phillimore, c. 10, § 220 and note; 30 Parl. Hist. 157, 167, 188, 217, 229; 34 Hansard Parl. Deb. (1st series) 441, 445, 471, 1065–1071; 6 Law Quart. Rev. 27.

Eminent English judges, sitting in the Judicial Committee of the Privy Council, have gone very far in supporting the exclusion or expulsion, by the executive authority of a colony, of aliens having no absolute right to enter its territory or to remain therein.

In 1837, in a case arising in the Island of Mauritius, which had been conquered by Great Britain from France in 1810, and in which the law of France continued in force, Lord

Lyndhurst, Lord Brougham and Justices Bosanquet and Erskine, although considering it a case of great hardship, sustained the validity of an order of the English governor, deporting a friendly alien who had long resided and carried on business in the island, and had enjoyed the privileges and exercised the rights of a person duly domiciled, but who had not, as required by the French law, obtained from the colonial government formal and express authority to establish a domicil there. *In re Adam*, 1 Moore P. C. 460.

In a recent appeal from a judgment of the Supreme Court of the Colony of Victoria, a collector of customs, sued by a Chinese immigrant for preventing him from landing in the colony, had pleaded a justification under the order of a colonial minister claiming to exercise an alleged prerogative of the Crown to exclude alien friends, and denied the right of a court of law to examine his action, on the ground that what he had done was an act of state; and the plaintiff had demurred to the plea. Lord Chancellor Halsbury, speaking for himself, for Lord Herschell (now Lord Chancellor) and for other lords, after deciding against the plaintiff on a question of statutory construction, took occasion to observe: "The facts appearing on the record raise, quite apart from the statutes referred to, a grave question as to the plaintiff's right to maintain the action. He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native; but it is quite another thing to assert that an alien, excluded from any part of her Majesty's dominions by the executive government there, can maintain an action in a British court, and raise such questions as were argued before their lordships on the present appeal — whether the proper officer for giving or refusing access to the country has been duly authorized by his own colonial government, whether the colonial government has received sufficient delegated authority

from the Crown to exercise the authority which the Crown had a right to exercise through the colonial government if properly communicated to it, and whether the Crown has the right without parliamentary authority to exclude an alien. Their lordships cannot assent to the proposition that an alien refused permission to enter British territory can, in an action in a British court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of this country to her self-governing colonies. When once it is admitted that there is no absolute and unqualified right of action on behalf of an alien refused admission to British territory, their lordships are of opinion that it would be impossible, upon the facts which the demurrer admits, for an alien to maintain an action." *Musgrove* v. *Chun Teeong Toy*, App. Cas. (1891) 272, 282, 283.

The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare, the question now before the court is whether the manner in which Congress has exercised this right in sections 6 and 7 of the act of 1892 is consistent with the Constitution.

The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective. The only government of this country, which other nations recognize or treat with, is the government of the Union; and the only American flag known throughout the world is the flag of the United States.

The Constitution of the United States speaks with no uncertain sound upon this subject. That instrument, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the commander-in-chief of the army and navy; has authorized him, by and with the consent of the

Senate, to make treaties, and to appoint ambassadors, public ministers and consuls; and has made it his duty to take care that the laws be faithfully executed. The Constitution has granted to Congress the power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces; and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. And the several States are expressly forbidden to enter into any treaty, alliance or confederation; to grant letters of marque and reprisal; to enter into any agreement or compact with another State, or with a foreign power; or to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

In exercising the great power which the people of the United States, by establishing a written Constitution as the supreme and paramount law, have vested in this court, of determining, whenever the question is properly brought before it, whether the acts of the legislature or of the executive are consistent with the Constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government.

As long ago said by Chief Justice Marshall, and since constantly maintained by this court: "The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the

manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." "Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, 423; *Juilliard* v. *Greenman*, 110 U. S. 421, 440, 450; *Ex parte Yarbrough*, 110 U. S. 651, 658; *In re Rapier*, 143 U. S. 110, 134; *Logan* v. *United States*, 144 U. S. 263, 283.

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

In *Nishimura Ekiu's case*, it was adjudged that, although Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet Congress might intrust the final determination of those facts to an executive officer, and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reëxamine the evidence on which he acted, or to controvert its sufficiency. 142 U. S. 660.

The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.

The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the

country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend.

Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides.

It is no new thing for the law-making power, acting either through treaties made by the President and Senate, or by the more common method of acts of Congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.

For instance, the surrender, pursuant to treaty stipulations, of persons residing or found in this country, and charged with crime in another, may be made by the executive authority of the President alone, when no provision has been made by treaty or by statute for an examination of the case by a judge or magistrate. Such was the case of Jonathan Robbins, under article 27 of the Treaty with Great Britain of 1794, in which the President's power in this regard was demonstrated in the masterly and conclusive argument of John Marshall in the House of Representatives. 8 Stat. 129; Wharton's State Trials, 392; Bee, 286; 5 Wheat. appx. 3. But provision may be made, as it has been by later acts of Congress, for a preliminary examination before a judge or commissioner; and in such case the sufficiency of the evidence on which he acts cannot be reviewed by any other tribunal, except as permitted by statute. Act of August 12, 1848, c. 167, 9 Stat. 302; Rev. Stat. §§ 5270–5274; *Ex parte Metzger*, 5 How. 176; *Benson* v. *McMahon*, 127 U. S. 457; *In re Oteiza*, 136 U. S. 330.

So claims to recover back duties illegally exacted on imports may, if Congress so provides, be finally determined by the

Secretary of the Treasury. *Cary* v. *Curtis*, 3 How. 236; *Curtis* v. *Fiedler*, 2 Black, 461, 478, 479; *Arnson* v. *Murphy*, 109 U. S. 238, 240. But Congress may, as it did for long periods, permit them to be tried by suit against the collector of customs. Or it may, as by the existing statutes, provide for their determination by a board of general appraisers, and allow the decisions of that board to be reviewed by the courts in such particulars only as may be prescribed by law. Act of June 10, 1890, c. 407, §§ 14, 15, 25, 26 Stat. 137, 138, 141; *In re Fassett*, 142 U. S. 479, 486, 487; *Passavant* v. *United States*, 148 U. S. 214.

To repeat the careful and weighty words uttered by Mr. Justice Curtis, in delivering a unanimous judgment of this court upon the question what is due process of law: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time, there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Murray* v. *Hoboken Co.*, 18 How. 272, 284.

Before examining in detail the provisions of the act of 1892 now in question, it will be convenient to refer to the previous statutes, treaties and decisions upon this subject.

The act of Congress of July 27, 1868, c. 249, (reënacted in sections 1999–2001 of the Revised Statutes,) began with these recitals: "Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship." It then declared that

any order or decision of any officer of the United States to the contrary was inconsistent with the fundamental principles of this government; enacted that "all naturalized citizens of the United States, while in foreign states, shall be entitled to and shall receive from this government the same protection of persons and property that is accorded to native-born citizens in like situations and circumstances;" and made it the duty of the President to take measures to protect the rights in that respect of "any citizen of the United States." 15 Stat. 223, 224.

That act, like any other, is subject to alteration by Congress whenever the public welfare requires it. The right of protection which it confers is limited to citizens of the United States. Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws. Rev. Stat. (2d ed.) §§ 2165, 2169; Acts of April 14, 1802, c. 28, 2 Stat. 153; May 26, 1824, c. 186, 4 Stat. 69; July 14, 1870, c. 254, § 7, 16 Stat. 256; February 18, 1875, c. 80, 18 Stat. 318; *In re Ah Yup*, 5 Sawyer, 155; Act of May 6, 1882, c. 126, § 14, 22 Stat. 61.

The treaty made between the United States and China on July 28, 1868, contained the following stipulations:

"Article V. The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from one country to the other, for purposes of curiosity, of trade, or as permanent residents."

"Article VI. Citizens of the United States visiting or residing in China," "and reciprocally, Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities and exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States."

After some years' experience under that treaty, the government of the United States was brought to the opinion that the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests; and therefore requested and obtained from China a modification of the treaty. *Chew Heong* v. *United States*, 112 U. S. 536, 542, 543; *Chae Chan Ping* v. *United States*, 130 U. S. 581, 595, 596.

On November 17, 1880, a supplemental treaty was accordingly concluded between the two countries, which contained the following preamble and stipulations:

"Whereas the government of the United States, because of the constantly increasing immigration of Chinese laborers to the territory of the United States, and the embarrassments consequent upon such immigration, now desires to negotiate a modification of the existing treaties which shall not be in direct contravention of their spirit:"

"Article I. Whenever, in the opinion of the government of the United States, the coming of the Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

"Article II. Chinese subjects, whether proceeding to the

United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation.

"ARTICLE III. If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the government of the United States will exert all its power to devise measures for their protection, and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty." 22 Stat. 826, 827.

The act of May 6, 1882, c. 126, entitled "An act to execute certain treaty stipulations relating to Chinese," and amended by the act of July 5, 1884, c. 220, began with the recital that, "in the opinion of the government of the United States, the coming of Chinese laborers to this country endangers the good order of certain localities within the territories thereof;" and, in section 1, suspended their coming for ten years, and enacted that it should "not be lawful for any Chinese laborer to come from any foreign port or place, or, having so come, to remain within the United States;" in section 3, that this provision should not apply to Chinese laborers who were in the United States on November 17, 1880, or who came here within ninety days after the passage of the act of 1882, and who should produce evidence of that fact, as afterwards required by the act, to the master of the vessel and to the collector of the port; and, in section 4, that "for the purpose of properly identifying Chinese laborers who were in the United States" at such time, "and in order to furnish them with the proper evidence of their right to go from and come to the United States," as provided by that act and by the treaty of November 17, 1880, the collector of customs of the district, from which any Chinese laborers should depart from

the United States by sea, should go on board the vessel, and make and register a list of them, with all facts necessary for their identity, and should give to each a corresponding certificate, which should entitle him "to return to and reënter the United States, upon producing and delivering the same to the collector of customs," to be cancelled. The form of certificate prescribed by the act of 1884 differed in some particulars from that prescribed by the act of 1882; and the act of 1884 added that "said certificate shall be the only evidence to establish his right of reëntry." Each act further enacted, in section 5, that any such Chinese laborer, being in the United States and desiring to depart by land, should be entitled to a like certificate of identity; and in section 12, that no Chinese person should be permitted to enter the United States by land, without producing such a certificate, and that "any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge or commissioner of a court of the United States, and found to be one not lawfully entitled to be or remain in the United States." The act of 1884 further enacted, in section 16, that a violation of any of the provisions of the act, the punishment of which was not therein otherwise provided for, should be deemed a misdemeanor, and be punishable by fine not exceeding $1000, or by imprisonment for not more than one year, or by both such fine and imprisonment. 22 Stat. 58–60; 23 Stat. 115–118.

Under those acts, this court held, in *Chew Heong* v. *United States*, 112 U. S. 536, that the clause of section 4 of the act of 1884, making the certificate of identity the only evidence to establish a right to reënter the United States, was not applicable to a Chinese laborer who resided in the United States at the date of the treaty of 1880, departed by sea before the passage of the act of 1882, remained out of the United States until after the passage of the act of 1884, and then returned by sea; and in *United States* v. *Yung Ah Lung*, 124 U. S. 621, that a Chinese laborer, who resided in the United

States at the date of the treaty of 1880, and until 1883, when he left San Francisco for China, taking with him a certificate of identity from the collector of the port in the form provided by the act of 1882, which was stolen from him in China, was entitled to land again in the United States in 1885, on proving by other evidence these facts, and his identity with the person described in the register kept by the collector of customs as the one to whom that certificate was issued.

Both those decisions proceeded upon a consideration of the various provisions of the acts of 1882 and 1884, giving weight to the presumption that they should not, unless unavoidably, be construed as operating retrospectively, or as contravening the stipulations of the treaty. In the first of those cases Justices Field and Bradley, and in the second case Justices Field, Harlan and Lamar, dissented from the judgment, being of opinion that the necessary construction of those acts was against the Chinese laborer. And in none of the opinions in either case was it suggested that the acts in question, if construed as contended by the United States, and so as to contravene the treaty, would be unconstitutional or inoperative.

In our jurisprudence, it is well settled that the provisions of an act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty. As was said by this court in *Chae Chan Ping's case*, following previous decisions: "The treaties were of no greater legal obligation than the act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modi-

fied at the pleasure of Congress. In either case, the last expression of the sovereign will must control." "So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal." 130 U. S. 600. See also *Foster* v. *Neilson*, 2 Pet. 253, 314; *Edye* v. *Robertson*, 112 U. S. 580, 597–599; *Whitney* v. *Robertson*, 124 U. S. 190.

By the supplementary act of October 1, 1888, c. 1064, it was enacted, in section 1, that "from and after the passage of this act, it shall be unlawful for any Chinese laborer, who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed or shall depart therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States;" and in section 2, that "no certificates of identity, provided for in the fourth and fifth sections of the act to which this is a supplement, shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States." 25 Stat. 504.

In the case of *Chae Chan Ping*, already often referred to, a Chinese laborer, who had resided in San Francisco from 1875 until June 2, 1887, when he left that port for China, having in his possession a certificate issued to him on that day by the collector of customs, according to the act of 1884, and in terms entitling him to return to the United States, returned to the same port on October 8, 1888, and was refused by the collector permission to land, because of the provisions of the act of October 1, 1888, above cited. It was strongly contended in his behalf, that by his residence in the United States for twelve years preceding June 2, 1887, in accordance with the fifth article of the treaty of 1868, he had now a lawful right to be in the United States, and had a vested right to return to the United States, which could not be taken from him by any exercise of mere legislative power by Con-

gress; that he had acquired such a right by contract between him and the United States, by virtue of his acceptance of the offer, contained in the acts of 1882 and 1884, to every Chinese person then here, if he should leave the country, complying with specified conditions, to permit him to return; that, as applied to him, the act of 1888 was unconstitutional, as being a bill of attainder and an *ex post facto* law; and that the depriving him of his right to return was punishment, which could not be inflicted except by judicial sentence. The contention was thus summed up at the beginning of the opinion: "The validity of the act is assailed as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of Congress." 130 U. S. 584–589.

Yet the court unanimously held that the statute of 1888 was constitutional, and that the action of the collector in refusing him permission to land was lawful; and, after the passages already quoted, said: "The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure." "The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other

disposition, not such as are personal and untransferable in their character." "But far different is this case, where a continued suspension of the exercise of a governmental power is insisted upon as a right, because, by the favor and consent of the government, it has not heretofore been exerted with respect to the appellant or to the class to which he belongs. Between property rights not affected by the termination or abrogation of a treaty, and expectations of benefits from the continuance of existing legislation, there is as wide a difference as between realization and hopes." 130 U. S. 609, 610.

It thus appears that in that case it was directly adjudged, upon full argument and consideration, that a Chinese laborer, who had been admitted into the United States while the treaty of 1868 was in force, by which the United States and China "cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from one country to the other," not only for the purpose of curiosity or of trade, but "as permanent residents;" and who had continued to reside here for twelve years, and who had then gone back to China, after receiving a certificate, in the form provided by act of Congress, entitling him to return to the United States; might be refused re-admission into the United States, without judicial trial or hearing, and simply by reason of another act of Congress, passed during his absence, and declaring all such certificates to be void, and prohibiting all Chinese laborers who had at any time been residents in the United States, and had departed therefrom and not returned before the passage of this act, from coming into the United States.

In view of that decision, which, as before observed, was a unanimous judgment of the court, and which had the concurrence of all the justices who had delivered opinions in the cases arising under the acts of 1882 and 1884, it appears to be impossible to hold that a Chinese laborer acquired, under any of the treaties or acts of Congress, any right, as a denizen or otherwise, to be and remain in this country, except by the license, permission and sufferance of Congress, to be with-

drawn whenever, in its opinion, the public welfare might require it.

By the law of nations, doubtless, aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicil there; and, while they are permitted by the nation to retain such a residence and domicil, are subject to its laws, and may invoke its protection against other nations. This is recognized by those publicists who, as has been seen, maintain in the strongest terms the right of the nation to expel any or all aliens at its pleasure. Vattel, lib. 1, c. 19, § 213; 1 Phillimore, c. 18, § 321; Mr. Marcy, in *Koszta's case*, Wharton's International Law Digest, § 198. See also *Lau Ow Bew* v. *United States*, 144 U. S. 47, 62; Merlin, Repertoire de Jurisprudence, Domicile, § 13, quoted in the case, above cited, of *In re Adam*, 1 Moore P. C. 460, 472, 473.

Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest.

Nothing inconsistent with these views was decided or suggested by the court in *Chy Lung* v. *Freeman*, 92 U. S. 275, or in *Yick Wo* v. *Hopkins*, 118 U. S. 356, cited for the appellants.

In *Chy Lung* v. *Freeman*, a statute of the State of California, restricting the immigration of Chinese persons, was held to be unconstitutional and void, because it contravened the grant in the Constitution to Congress of the power to regulate commerce with foreign nations.

In *Yick Wo* v. *Hopkins*, the point decided was that the Fourteenth Amendment of the Constitution of the United States, forbidding any State to deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, was violated by a municipal ordinance of San Francisco, which conferred upon the board of supervisors arbitrary power, without regard to competency of persons or to fitness of places, to grant or refuse licenses to carry on public laundries, and which was executed by the supervisors by refusing licenses to all Chinese residents, and granting them to other persons under like circumstances. The question there was of the power of a State over aliens continuing to reside within its jurisdiction, not of the power of the United States to put an end to their residence in the country.

The act of May 5, 1892, c. 60, is entitled "An act to prohibit the coming of Chinese persons into the United States"; and provides, in section 1, that "all laws now in force, prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent, are hereby continued in force for a period of ten years from the passage of this act."

The rest of the act (laying aside, as immaterial, section 5, relating to an application for a writ of *habeas corpus* "by a Chinese person seeking to land in the United States, to whom that privilege has been denied,") deals with two classes of Chinese persons, first, those "not lawfully entitled to be or remain in the United States," and second, those "entitled to remain in the United States." These words of description neither confer nor take away any right; but simply designate the Chinese persons who were not, or who were, authorized or permitted to remain in the United States under the laws and treaties existing at the time of the passage of this act, but subject, nevertheless, to the power of the United States, absolutely or conditionally, to withdraw the permission and to terminate the authority to remain.

Sections 2–4 concern Chinese "not lawfully entitled to be or remain in the United States;" and provide that, after trial

before a justice, judge or commissioner, a "Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States," shall be imprisoned at hard labor for not more than a year, and be afterwards removed to China or other country of which he appears to be a citizen or subject.

The subsequent sections relate to Chinese laborers "entitled to remain in the United States" under previous laws. Sections 6 and 7 are the only sections which have any bearing on the cases before us, and the only ones, therefore, the construction or effect of which need now be considered.

The manifest objects of these sections are to provide a system of registration and identification of such Chinese laborers, to require them to obtain certificates of residence, and, if they do not do so within a year, to have them deported from the United States.

Section 6, in the first place, provides that "it shall be the duty of all Chinese laborers, within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence." This provision, by making it the duty of the Chinese laborer to apply to the collector of internal revenue of the district for a certificate, necessarily implies a correlative duty of the collector to grant him a certificate, upon due proof of the requisite facts. What this proof shall be is not defined in the statute, but is committed to the supervision of the Secretary of the Treasury by section 7, which directs him to make such rules and regulations as may be necessary for the efficient execution of the act, to prescribe the necessary forms, and to make such provisions that certificates may be procured in localities convenient to the applicants, and without charge to them; and the Secretary of the Treasury has, by such rules and regulations, provided that the fact of residence shall be proved by "at least one credible witness of good character," or, in case of necessity, by other proof. The statute and the regulations, in order to make sure that every such Chinese

laborer may have a certificate, in the nature of a passport, with which he may go into any part of the United States, and that the United States may preserve a record of all such certificates issued, direct that a duplicate of each certificate shall be recorded in the office of the collector who granted it, and may be issued to the laborer upon proof of loss or destruction of his original certificate. There can be no doubt of the validity of these provisions and regulations, unless they are invalidated by the other provisions of section 6.

This section proceeds to enact that any Chinese laborer within the limits of the United States, who shall neglect, fail or refuse to apply for a certificate of residence within the year, or who shall afterwards be found within the jurisdiction of the United States without such a certificate, "shall be deemed and adjudged to be unlawfully within the United States." The meaning of this clause, as shown by those which follow, is not that this fact shall thereupon be held to be conclusively established against him, but only that the want of a certificate shall be *prima facie* evidence that he is not entitled to remain in the United States; for the section goes on to direct that he "may be arrested by any customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge;" and that it shall thereupon be the duty of the judge to order that the laborer "be deported from the United States" to China, (or to any other country which he is a citizen or subject of, and which does not demand any tax as a condition of his removal to it,) "unless he shall establish clearly, to the satisfaction of said judge, that by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if, upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost. Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the

officer granting it; and in such cases the cost of said arrest and trial shall be in the discretion of the court."

For the reasons stated in the earlier part of this opinion, Congress, under the power to exclude or expel aliens, might have directed any Chinese laborer, found in the United States without a certificate of residence, to be removed out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country. But Congress has not undertaken to do this.

The effect of the provisions of section 6 of the act of 1892 is that, if a Chinese laborer, after the opportunity afforded him to obtain a certificate of residence within a year, at a convenient place, and without cost, is found without such a certificate, he shall be so far presumed to be not entitled to remain within the United States, that an officer of the customs, or a collector of internal revenue, or a marshal, or a deputy of either, may arrest him, not with a view to imprisonment or punishment, or to his immediate deportation without further inquiry, but in order to take him before a judge, for the purpose of a judicial hearing and determination of the only facts which, under the act of Congress, can have a material bearing upon the question whether he shall be sent out of the country, or be permitted to remain.

The powers and duties of the executive officers named being ordinarily limited to their own districts, the reasonable inference is that they must take him before a judge within the same judicial district; and such was the course pursued in the cases before us.

The designation of the judge, in general terms, as "a United States judge," is an apt and sufficient description of a judge of a court of the United States, and is equivalent to or synonymous with the designation, in other statutes, of the judges authorized to issue writs of *habeas corpus*, or warrants to arrest persons accused of crime. Rev. Stat. §§ 752, 1014.

When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and

the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case — a complainant, a defendant and a judge — *actor, reus et judex.* 3 Bl. Com. 25; *Osborn* v. *Bank of United States*, 9 Wheat. 738, 819. No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge, or the validity of the statute.

If no evidence is offered by the Chinaman, the judge makes the order of deportation, as upon a default. If he produces competent evidence to explain the fact of his not having a certificate, it must be considered by the judge; and if he thereupon appears to be entitled to a certificate, it is to be granted to him. If he proves that the collector of internal revenue has unlawfully refused to give him a certificate, he proves an "unavoidable cause," within the meaning of the act, for not procuring one. If he proves that he had procured a certificate which has been lost or destroyed, he is to be allowed a reasonable time to procure a duplicate thereof.

The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof, "by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act," is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. *Odgen* v. *Saunders*, 12 Wheat. 213, 262, 349; *Pillow* v. *Roberts*, 13 How. 472, 476; *Cliquot's Champagne*, 3 Wall. 114, 143; *Ex parte Fisk*, 113 U. S. 713, 721; *Holmes* v. *Hunt*, 122 Mass. 505, 516–519. The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of Congress, which Congress may at its discretion modify or repeal. Rev. Stat. §§ 858, 1977. The reason for requiring a Chinese alien, claiming the privilege of remaining in the United States, to prove the fact of his residence here, at the time of the passage of the act, "by at least one credible white witness," may have been the experience of Congress, as

mentioned by Mr. Justice Field in *Chae Chan Ping's case*, that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, "was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath." 130 U. S. 598. And this requirement, not allowing such a fact to be proved solely by the testimony of aliens in a like situation, or of the same race, is quite analogous to the provision, which has existed for seventy-seven years in the naturalization laws, by which aliens applying for naturalization must prove their residence within the limits and under the jurisdiction of the United States, for five years next preceding, "by the oath or affirmation of citizens of the United States." Acts of March 22, 1816, c. 32, § 2, 3 Stat. 259; May 24, 1828, c. 116, § 2, 4 Stat. 311; Rev. Stat. § 2165, cl. 6; 2 Kent Com. 65.

The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offence. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.

The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.

The three cases now before us do not differ from one another in any material particular.

In the first case, the petitioner had wholly neglected, failed and refused to apply to the collector of internal revenue for a certificate of residence, and, being found without such a certificate after a year from the passage of the act of 1892, was arrested by the United States marshal, with the purpose, as the return states, of taking him before a United States judge within the district; and thereupon, before any further proceeding, sued out a writ of *habeas corpus*.

In the second case, the petitioner had likewise neglected, failed and refused to apply to the collector of internal revenue for a certificate of residence, and, being found without one, was arrested by the marshal and taken before the District Judge of the United States, who ordered him to be remanded to the custody of the marshal, and to be deported from the United States, in accordance with the provisions of the act. The allegation in the petition, that the judge's order was made "without any hearing of any kind," is shown to be untrue by the recital in the order itself, (a copy of which is annexed to and made part of the petition,) that he had failed to clearly establish to the judge's satisfaction that by reason of accident, sickness or other unavoidable cause, he had been unable to procure a certificate, or that he had procured one and it had been lost or destroyed.

In the third case, the petitioner had, within the year, applied to a collector of internal revenue for a certificate of residence, and had been refused it, because he produced and could produce none but Chinese witnesses to prove the residence necessary to entitle him to a certificate. Being found without a certificate of residence, he was arrested by the

marshal, and taken before the United States District Judge, and established to the satisfaction of the judge, that, because of the collector's refusal to give him a certificate of residence he was without one by unavoidable cause; and also proved, by a Chinese witness only, that he was a resident of the United States at the time of the passage of the act of 1892. Thereupon the judge ordered him to be remanded to the custody of the marshal, and to be deported from the United States, as provided in that act.

It would seem that the collector of internal revenue, when applied to for a certificate, might properly decline to find the requisite fact of residence upon testimony which, by an express provision of the act, would be insufficient to prove that fact at a hearing before the judge. But if the collector might have received and acted upon such testimony, and did, upon any ground, unjustifiably refuse a certificate of residence, the only remedy of the applicant was to prove by competent and sufficient evidence at the hearing before the judge the facts requisite to entitle him to a certificate. To one of those facts, that of residence, the statute, which, for the reasons already stated, appears to us to be within the constitutional authority of Congress to enact, peremptorily requires at that hearing the testimony of a credible white witness. And it was because no such testimony was produced, that the order of deportation was made.

Upon careful consideration of the subject, the only conclusion which appears to us to be consistent with the principles of international law, with the Constitution and laws of the United States, and with the previous decisions of this court, is that in each of these cases the judgment of the Circuit Court, dismissing the writ of *habeas corpus*, is right and must be

Affirmed.

Mr. Justice Brewer dissenting.

I dissent from the opinion and judgment of the court in these cases, and the questions being of importance, I deem it not improper to briefly state my reasons therefor.

Dissenting Opinion: Brewer, J.

I rest my dissent on three propositions: First, that the persons against whom the penalties of section 6 of the act of 1892 are directed are persons lawfully residing within the United States; secondly, that as such they are within the protection of the Constitution, and secured by its guarantees against oppression and wrong; and, third, that section 6 deprives them of liberty and imposes punishment without due process of law, and in disregard of constitutional guarantees, especially those found in the Fourth, Fifth, Sixth, and Eighth Articles of the Amendments.

And, first, these persons are lawfully residing within the limits of the United States. By the treaty of July 28, 1868, 16 Stat. 739, 740, commonly known as the "Burlingame Treaty," it was provided, article 5: "The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade, or as permanent residents." And article 6: "Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation." At that time we sought Chinese emigration. The subsequent treaty of November 17, 1880, 22 Stat. 826, which looked to a restriction of Chinese emigration, nevertheless contained in article 2 this provision:

"Article II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities,

and exemptions which are accorded to the citizens and subjects of the most favored nation."

While subsequently to this treaty, Congress passed several acts — May 6, 1882, 22 Stat. 58, c. 126; July 5, 1884, 23 Stat. 115, c. 220; October 1, 1888, 25 Stat. 504, c. 1064 — to restrict the entrance into this country of Chinese laborers, and while the validity of this restriction was sustained in the *Chinese Exclusion case*, 130 U. S. 581, yet no act has been passed denying the right of those laborers who had once lawfully entered the country to remain, and they are here not as travellers or only temporarily. We must take judicial notice of that which is disclosed by the census, and which is also a matter of common knowledge. There are 100,000 and more of these persons living in this country, making their homes here, and striving by their labor to earn a livelihood. They are not travellers, but resident aliens.

But, further, this section six recognizes the fact of a lawful residence, and only applies to those who have such; for the parties named in the section, and to be reached by its provisions, are "Chinese laborers within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States." These appellants, therefore, are lawfully within the United States, and are here as residents, and not as travellers. They have lived in this country, respectively, since 1879, 1877, and 1874 — almost as long a time as some of those who were members of the Congress that passed this act of punishment and expulsion.

That those who have become domiciled in a country are entitled to a more distinct and larger measure of protection than those who are simply passing through, or temporarily in it, has long been recognized by the law of nations. It was said by this court, in the case of *The Venus*, 8 Cranch, 253, 278: "The writers upon the law of nations distinguish between a temporary residence in a foreign country, for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode. The latter is styled by Vattel, *domicil*, which he defines to be 'a habitation fixed in any place, with an intention of always staying there.' Such

a person, says this author, becomes a member of the new society, at least as a permanent inhabitant, and is a kind of citizen of an inferior order from the native citizens; but is, nevertheless, united and subject to the society, without participating in all its advantages. This right of domicil, he continues, is not established, unless the person makes sufficiently known his intention of fixing there, either tacitly or by an express declaration. (Vatt. pp. 92, 93.) Grotius nowhere uses the word *domicil*, but he also distinguishes between those who stay in a foreign country by the necessity of their affairs, or from any other temporary cause, and those who reside there from a permanent cause. The former he denominates strangers, and the latter subjects." The rule is thus laid down by Sir Robert Phillimore: "It has been said that these rules of law are applicable to naturalized as well as native citizens. But there is a class of persons which cannot be, strictly speaking, included under either of these denominations, namely, the class of those who have ceased to reside in their native country, and have taken up a permanent abode . . . in another. These are domiciled inhabitants; they have not put on a new citizenship through some formal mode enjoined by the law of the new country. They are *de facto* though not *de jure* citizens of the country of their domicil." 1 Phillimore, International Law, Chap. XVIII, p. 347.

In the *Koszta case* it was said by Secretary Marcy: "This right to protect persons having a domicil, though not native-born or naturalized citizens, rests on the firm foundation of justice, and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard. Such domiciled citizen pays the same price for his protection as native-born or naturalized citizens pay for theirs. He is under the bonds of allegiance to the country of his residence, and if he breaks them incurs the same penalties; he owes the same obedience to the civil laws . . .; his property is in the same way and to the same extent as theirs liable to contribute to the support of the government. . . . In nearly all respects his and their condition as to the duties and burdens of government are undistinguishable." 2 Wharton Int. Law Digest, § 198.

And in *Lau Ow Bew* v. *United States*, 144 U. S. 47, 61, this court declared that "by general international law, foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction on the footing upon which such persons stand by reason of their domicil, . . . is to be presumed."

Indeed, there is force in the contention of counsel for appellants, that these persons are "denizens" within the true meaning and spirit of that word as used in the common law. The old definition was this:

"A denizen of England by letters patent for life, in tayl or in fee, whereby he becomes a subject in regard of his person." *Craw* v. *Ramsey*, Vaughan's Reports, 278.

And again:

"A denizen is an alien born, but who has obtained *ex donatione regis* letters patent to make him an English subject, . . . A denizen is in a kind of middle state, between an alien and a natural-born subject, and partakes of both of them." 1 Bl. Com. 374.

In respect to this, after quoting from some of the early constitutions of the States, in which the word "denizen" is found, counsel say: "It is claimed that the appellants in this case come completely within the definition quoted above. They are alien born, but they have obtained the same thing as letters patent from this country. They occupy a middle state between an alien and a native. They partake of both of them. They cannot vote, or, as it is stated in Bacon's Abridgment, they have no 'power of making laws,' as a native-born subject can, nor are they here as ordinary aliens. An ordinary alien within this country has come here under no prohibition, and no invitation, but the appellants have come under the direct request and invitation and under the 'patent' of the Federal government. They have been guaranteed 'the same privileges, immunities, and exemptions in respect to . . . residence' (Burlingame Treaty concluded July 28, 1868) as that enjoyed in the United States by the citizens and

subjects of the most favored nation. They have been told that if they would come here they would be treated just the same as we treat an Englishman, an Irishman, or a Frenchman. They have been invited here, and their position is much stronger than that of an alien, in regard to whom there is no guarantee from the government, and who has come not in response to any invitation, but has simply drifted here because there is no prohibition to keep him out. They certainly come within the meaning of 'denizen' as used in the constitutions of the States."

But whatever rights a resident alien might have in any other nation, here he is within the express protection of the Constitution, especially in respect to those guarantees which are declared in the original amendments. It has been repeated so often as to become axiomatic, that this government is one of enumerated and delegated powers, and, as declared in Article 10 of the amendments, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It is said that the power here asserted is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practices of other nations to ascertain the limits? The governments of other nations have elastic powers — ours is fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this Constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish. Banishment may be resorted to as punishment for crime; but

among the powers reserved to the people and not delegated to the government is that of determining whether whole classes in our midst shall, for no crime but that of their race and birthplace, be driven from our territory.

Whatever may be true as to exclusion, and as to that see *Chinese Exclusion case*, 130 U. S. 581, and *Nishimura Ekiu* v. *United States*, 142 U. S. 651, I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens. What, it may be asked, is the reason for any difference? The answer is obvious. The Constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions. And it may be that the national government, having full control of all matters relating to other nations, has the power to build, as it were, a Chinese wall around our borders and absolutely forbid aliens to enter. But the Constitution has potency everywhere within the limits of our territory, and the powers which the national government may exercise within such limits are those, and only those, given to it by that instrument. Now, the power to remove resident aliens is, confessedly, not expressed. Even if it be among the powers implied, yet still it can be exercised only in subordination to the limitations and restrictions imposed by the Constitution. In the case of *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 336, it was said: "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." And if that be true of the powers expressly granted, it must as certainly be true of those that are only granted by implication.

When the first ten amendments were presented for adoption

they were preceded by a preamble stating that the conventions of many States had at the time of their adopting the Constitution expressed a desire, "in order to prevent misconception or abuse of its powers, that further declaratory and restrictive clauses should be added." It is worthy of notice that in them the word "citizen" is not found. In some of them the descriptive word is "people," but in the Fifth it is broader, and the word is "person," and in the Sixth it is the "accused," while in the Third, Seventh, and Eighth there is no limitation as to the beneficiaries suggested by any descriptive word.

In the case of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, it was said: "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: '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.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." The matter considered in that case was of a local nature, a municipal ordinance for regulating the carrying on of public laundries, something fairly within the police power of a State; and yet because its provisions conflicted with the guarantees of the Fourteenth Amendment, the ordinance was declared void.

If the use of the word "person" in the Fourteenth Amendment protects all individuals lawfully within the State, the use of the same word "person" in the Fifth must be equally comprehensive, and secures to all persons lawfully within the territory of the United States the protection named therein; and a like conclusion must follow as to the Sixth.

I pass, therefore, to the consideration of my third proposition: Section 6 deprives of "life, liberty, and property without due process of law." It imposes punishment without a trial, and punishment cruel and severe. It places the liberty of one individual subject to the unrestrained control of

another. Notice its provisions: It first commands all to register. He who does not register violates that law, and may be punished; and so the section goes on to say that one who has not complied with its requirements, and has no certificate of residence, "shall be deemed and adjudged to be unlawfully within the United States," and then it imposes as a penalty his deportation from the country. Deportation is punishment. It involves first an arrest, a deprival of liberty; and, second, a removal from home, from family, from business, from property. In Rapalje & Lawrence's Law Dictionary, (vol. 1, page 109,) "banishment" is thus defined: "A punishment by forced exile, either for years or for life; inflicted principally upon political offenders, 'transportation' being the word used to express a similar punishment of ordinary criminals." In 4 Bl. Com. 377, it is said: "Some punishments consist in exile or banishment, by abjuration of the realm, or transportation." In Vattel we find that "banishment is only applied to condemnation in due course of law." Note to § 228, Book 1, c. 19, in 1 Vattel.

But it needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that oftentimes most severe and cruel. Apt and just are the words of one of the framers of this Constitution, President Madison, when he says (4 Elliot's Debates, 555): "If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness — a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for; . . . if, moreover, in the execution of the sentence against him he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war and of unusual licentiousness on

that element, and possibly to vindictive purposes, which his immigration itself may have provoked — if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."

But punishment implies a trial: "No person shall be deprived of life, liberty, or property, without due process of law." Due process requires that a man be heard before he is condemned, and both heard and condemned in the due and orderly procedure of a trial as recognized by the common law from time immemorial. It was said by this court in *Hagar* v. *Reclamation District*, 111 U. S. 701, 708, "undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard." And by Mr. Justice Bradley, in defining "due process of law" in *Davidson* v. *New Orleans*, 96 U. S. 97, 107, "if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'" And no person who has once come within the protection of the Constitution can be punished without a trial. It may be summary, as for petty offences and in cases of contempt, but still a trial, as known to the common law. It is said that a person may be extradited without a previous trial, but extradition is simply one step in the process of arresting and securing for trial. He may be removed by extradition from California to New York, or from this country to another, but such proceeding is not oppressive or unjust, but suitable and necessary, and, therefore, due process of law. But here, the Chinese are not arrested and extradited for trial, but arrested and, without a trial, punished by banishment.

Again, it is absolutely within the discretion of the collector to give or refuse a certificate to one who applies therefor. Nowhere is it provided what evidence shall be furnished to the collector, and nowhere is it made mandatory upon him to grant a certificate on the production of such evidence. It can-

not be due process of law to impose punishment on any person for failing to have that in his possession, the possession of which he can obtain only at the arbitrary and unregulated discretion of any official. It will not do to say that the presumption is that the official will act reasonably and not arbitrarily. When the right to liberty and residence is involved, some other protection than the mere discretion of any official is required. Well was it said by Mr. Justice Matthews, in the case of *Yick Wo* v. *Hopkins*, *supra*, on page 369: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

Again, a person found without such certificate may be taken before a United States Judge. What judge? A judge in the district in which the party resides or is found? There is no limitation in this respect. A Chinese laborer in San Francisco may be arrested by a deputy United States marshal, and taken before a judge in Oregon; and when so taken before that judge, it is made his duty to deport such laborer unless he proves his innocence of any violation of the law, and that, too, by at least one credible white witness. And how shall he obtain that witness? No provision is made in the statute therefor. Will it be said that Article 6 of the amendments gives to the accused a right to have a compulsory process for obtaining witnesses in his favor? The reply is, that if he is entitled to one part of that article, he is entitled to all; and among them is the right to a speedy and public trial by an impartial jury of the State and district. The only theory upon which this proceeding can be sustained is that he has no right to any benefits of this Article 6; and if he has no right thereto, and the statute has made no provision for securing his witnesses or limiting the proceeding to a judge of the district where he resides, the result follows inevitably, as stated, that he may be arrested by any one of the numerous officials named in the statute, and carried before any judge in

the United States that such official may select, and, then, unless he proves that which he is given no means of proving, be punished by removal from home, friends, family, property, business, to another country.

It is said that these Chinese are entitled, while they remain, to the safeguards of the Constitution and to the protection of the laws in regard to their rights of person and of property; but that they continue to be aliens, subject to the absolute power of Congress to forcibly remove them. In other words, the guarantees of "life, liberty, and property," named in the Constitution, are theirs by sufferance and not of right. Of what avail are such guarantees?

Once more: Supposing a Chinaman from San Francisco, having obtained a certificate, should go to New York or other place in pursuit of work, and on the way his certificate be lost or destroyed. He is subject to arrest and detention, the cost of which is in the discretion of the court, and judgment of deportation will be suspended a reasonable time to enable him to obtain a duplicate from the officer granting it. In other words, he cannot move about in safety without carrying with him this certificate. The situation was well described by Senator Sherman in the debate in the Senate: "They are here ticket-of-leave men; precisely as, under the Australian law, a convict is allowed to go at large upon a ticket-of-leave, these people are to be allowed to go at large and earn their livelihood, but they must have their tickets-of-leave in their possession." And he added: "This inaugurates in our system of government a new departure; one, I believe, never before practised, although it was suggested in conference that some such rules had been adopted in slavery times to secure the peace of society."

It is true this statute is directed only against the obnoxious Chinese; but if the power exists, who shall say it will not be exercised to-morrow against other classes and other people? If the guarantees of these amendments can be thus ignored in order to get rid of this distasteful class, what security have others that a like disregard of its provisions may not be resorted to? Profound and wise were the

observations of Mr. Justice Bradley, speaking for the court in *Boyd* v. *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 the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

In the *Yick Wo case*, in which was presented a municipal ordinance, fair on its face, but contrived to work oppression to a few engaged in a single occupation, this court saw no difficulty in finding a constitutional barrier to such injustice. But this greater wrong, by which a hundred thousand people are subject to arrest and forcible deportation from the country, is beyond the reach of the protecting power of the Constitution. Its grievous wrong suggests this declaration of wisdom, coming from the dawn of English history: "Verily he who dooms a worse doom to the friendless and the comer from afar than to his fellow, injures himself." (The Laws of King Cnut, 1 Thorpe's Ancient Laws and Institutes of England, p. 397.)

In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius fairly ask, Why do they send missionaries here?

Mr. Justice Field dissenting.[1]

I also wish to say a few words upon these cases and upon the extraordinary doctrines announced in support of the orders of the court below.

[1] Mr. Justice Field's dissenting opinion bears the titles of the three cases, Nos. 1345, 1346, and 1347, and is further generally entitled "Chinese Deportation Cases."

Dissenting Opinion: Field, J.

With the treaties between the United States and China, and the subsequent legislation adopted by Congress to prevent the immigration of Chinese laborers into this country, resulting in the Exclusion Act of October 1, 1888, the court is familiar. They have often been before us and have been considered in almost every phase. The act of 1888 declared that after its passage it should be unlawful for any Chinese laborer — who might then or thereafter be a resident of the United States, who should depart therefrom and not return before the passage of the act — to return or remain in the United States. The validity of this act was sustained by this court. 130 U. S. 581. In the opinion announcing the decision we considered the treaties with China, and also the legislation of Congress and the causes which led to its enactment. The court cited numerous instances in which statesmen and jurists of eminence had held that it was the undoubted right of every independent nation to exclude foreigners from its limits whenever in its judgment the public interests demanded such exclusion.

"The power of exclusion of foreigners," said the court, "being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time at its pleasure. Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to

persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground of complaint on the part of China it must be made to the political department of our government, which is alone competent to act upon the subject." p. 609.

I had the honor to be the organ of the court in announcing this opinion and judgment. I still adhere to the views there expressed in all particulars; but between legislation for the exclusion of Chinese persons — that is, to prevent them from entering the country — and legislation for the deportation of those who have acquired a residence in the country under a treaty with China, there is a wide and essential difference. The power of the government to exclude foreigners from this country, that is, to prevent them from entering it, whenever the public interests in its judgment require such exclusion, has been repeatedly asserted by the legislative and executive departments of our government and never denied; but its power to deport from the country persons lawfully domiciled therein by its consent, and engaged in the ordinary pursuits of life, has never been asserted by the legislative or executive departments except for crime, or as an act of war in view of existing or anticipated hostilities, unless the alien act of June 25, 1798, can be considered as recognizing that doctrine. 1 Stat. 570, c. 58. That act vested in the President power to order all such aliens as he should adjudge dangerous to the peace and safety of the United States, or should have reasonable grounds to suspect were concerned in any treasonable or secret machinations against the government, to depart out of the territory of the United States within such time as should be expressed in his order. And in case any alien when thus ordered to depart should be found at large within the United States after the term limited in the order, not having obtained a license from the President to reside therein, or having obtained such license should not have conformed thereto, he should on conviction thereof be imprisoned for a term not exceeding three years, and should never afterwards be admitted to become a citizen of the United States; with a proviso that if the alien thus ordered to depart should prove to the satis-

faction of the President, by evidence to be taken before such person or persons as he should direct, that no injury or danger to the United States would arise from suffering him to reside therein, the President might grant a license to him to remain within the United States for such time as he should judge proper and at such place as he should designate. The act also provided that the President might require such alien to enter into a bond to the United States in such penal sum as he might direct, with one or more sureties to the satisfaction of the person authorized by the President to take the same, conditioned for his good behavior during his residence in the United States, and not to violate his license, which the President might revoke whenever he should think proper. The act also provided that it should be lawful for the President, whenever he deemed it necessary for the public safety, to order to be removed out of the territory of the United States any alien in prison in pursuance of the act, and to cause to be arrested and sent out of the United States such aliens as may have been ordered to depart, and had not obtained a license, in all cases where, in the opinion of the President, the public safety required a speedy removal. And that if any alien thus removed or sent out of the United States should voluntarily return, unless by permission of the President, such alien, being convicted thereof, should be imprisoned so long as in the opinion of the President the public safety might require.

The passage of this act produced great excitement throughout the country and was severely denounced by many of its ablest statesmen and jurists as unconstitutional and barbarous, and among them may be mentioned the great names of Jefferson and Madison, who are throughout our country honored and revered for their lifelong devotion to principles of constitutional liberty. It was defended by its advocates as a war measure. John Adams, the President of the United States at the time, who approved the bill and against whom the responsibility for its passage was charged, states in his correspondence that the bill was intended as a measure of that character. 9 John Adams's Works, 291. The State of Virginia denounced it in severe terms. Its general assembly

passed resolutions upon the act and another act of the same session of Congress known as the "sedition act." Upon the first — the alien act — one of the resolutions declared that it exercised a power nowhere delegated to the Federal government, and which, by uniting legislative and judicial powers to those of executive, subverted the general principles of free government as well as the particular organization and positive provisions of the Federal Constitution. 4 Elliot's Deb. 528. The resolutions upon both acts were transmitted to the legislatures of different States, and their communications in answer to them were referred to a committee of the general assembly of Virginia, of which Mr. Madison was a member, and upon them his celebrated report was made. With reference to the alien act, after observing that it was incumbent in this, as in every other exercise of power by the Federal government, to prove from the Constitution that it granted the particular power exercised; and also that much confusion and fallacy had been thrown into the question to be considered by blending the two cases of aliens, *members of a hostile nation, and aliens, members of friendly nations,* he said: "With respect to alien enemies, no doubt has been intimated as to the Federal authority over them; the Constitution having expressly delegated to Congress the power to declare war against any nation, and, of course, to treat it and all its members as enemies. With respect to aliens who are not enemies, but members of nations in peace and amity with the United States, the power assumed by the act of Congress is denied to be constitutional; and it is accordingly against this act that the protest of the general assembly is expressly and exclusively directed." 4 Elliot's Deb. 554.

"Were it admitted, as is contended, that the 'act concerning aliens' has for its object, not a *penal*, but a *preventive* justice, it would still remain to be proved that it comes within the constitutional power of the Federal legislature; and, if within its power, that the legislature has exercised it in a constitutional manner. . . . It can never be admitted that the removal of aliens, authorized by the act, is to be considered, not as punishment for an offence, but as a measure of

precaution and prevention. If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness — a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty, than he can elsewhere hope for; . . . if a banishment of this sort be not a punishment, and among the severest of punishments, it would be difficult to imagine a doom to which the name can be applied. And, if it be a punishment, it will remain to be inquired whether it can be constitutionally inflicted, on mere suspicion, by the single will of the executive magistrate, on persons convicted of no personal offence against the laws of the land, nor involved in any offence against the law of nations, charged on the foreign state of which they are members." 4 Elliot's Deb. 554, 555. . . . It does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.

If aliens had no rights under the Constitution, they might not only be banished, but even capitally punished without a jury or the other incidents to a fair trial. But, so far has a contrary principle been carried, in every part of the United States, that, except on charges of treason, an alien has, besides all the common privileges, the special one of being tried by a jury of which one-half may be also aliens.

"It is said, further, that, by the law and practice of nations, aliens may be removed, at discretion, for offences against the law of nations; that Congress is authorized to define and punish such offences; and that to be dangerous to the peace of society is, in aliens, one of those offences.

"The distinction between alien enemies and alien friends is

a clear and conclusive answer to this argument. Alien enemies are under the law of nations, and liable to be punished for offences against it. Alien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to that law only." 4 Elliot's Deb. 556. Massachusetts, evidently considering the alien act as a war measure, adopted in anticipation of probable hostilities, said, in answer to the resolutions of Virginia, among other things, that "the removal of aliens is the usual preliminary of hostility, and is justified by the invariable usages of nations. Actual hostility had, unhappily, been long experienced, and a formal declaration of it the government had reason daily to expect." 4 Elliot's Deb. 535.

The duration of the act was limited to two years, and it has ever since been the subject of universal condemnation. In no other instance, until the law before us was passed, has any public man had the boldness to advocate the deportation of friendly aliens in time of peace. I repeat the statement, that in no other instance has the deportation of friendly aliens been advocated as a lawful measure by any department of our government. And it will surprise most people to learn that any such dangerous and despotic power lies in our government — a power which will authorize it to expel at pleasure, in time of peace, the whole body of friendly foreigners of any country domiciled herein by its permission, a power which can be brought into exercise whenever it may suit the pleasure of Congress, and be enforced without regard to the guarantees of the Constitution intended for the protection of the rights of all persons in their liberty and property. Is it possible that Congress can, at its pleasure, in disregard of the guarantees of the Constitution, expel at any time the Irish, German, French, and English who may have taken up their residence here on the invitation of the government, while we are at peace with the countries from which they came, simply on the ground that they have not been naturalized?

Notwithstanding the activity of the public authorities in enforcing the exclusion act of 1888, it was constantly evaded.

Chinese laborers came into the country by water and by land; they came through the open ports and by rivers reaching the seas, and they came by way of the Canadas and Mexico. New means of ingress were discovered, and in spite of the vigilance of the police and customs officers great numbers clandestinely found their way into the country. Their resemblance to each other rendered it difficult, and often impossible, to prevent this evasion of the laws. It was under these circumstances that the act of May 5, 1892, c. 60, was passed. It had two objects in view. There were two classes of Chinese persons in the country, those who had evaded the laws excluding them and entered clandestinely, and those who had entered lawfully and resided therein under the treaty with China.

The act of 1892 extended, for the period of ten years from its passage, all laws then in force prohibiting and regulating the coming into the country of Chinese persons, or persons of Chinese descent; and it provided that any person, when convicted or adjudged under any of those laws of not legally being or remaining in the United States, should be removed therefrom to China, or to such other country as it might appear he was a subject of, unless such other country should demand a tax as a condition of his removal thereto, in which case he should be removed to China. The act also provided that a Chinese person arrested under its provisions, or the provisions of the acts extended, should be adjudged to be unlawfully within the United States, unless he should establish by affirmative proof his lawful right to remain within the United States; and that any Chinese person, or person of Chinese descent, "convicted and adjudged not lawfully entitled to be or remain in the United States, should be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States." With this class of Chinese, and with the provisions of law applicable to them, we have no concern in the present case. We have only to consider the provisions of the act applicable to the second class of Chinese persons, those who had a lawful right to remain in the United States. By the additional articles to the

treaty of 1858, adopted in 1868, generally called the Burlingame treaty, the governments of the two countries recognized "the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of free migration and emigration of their citizens and subjects, respectively, from the one country to the other for purposes of curiosity, of trade, or as permanent residence;" and accordingly the treaty in the additional articles provided that citizens of the United States visiting or residing in China, and Chinese subjects visiting or residing in the United States, should reciprocally enjoy the same privileges, immunities, and exemptions in respect to travel or residence as should be enjoyed by citizens or subjects of the most favored nation, in the country in which they should, respectively, be visiting or residing. 16 Stat. 739, 740. The supplemental treaty of November 17, 1880, providing for the limitation or suspension of the emigration of Chinese laborers, declared that "the limitation or suspension shall be reasonable and apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitation," and that "Chinese subjects, whether residing in the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who were then in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all rights, privileges, immunities, and exemptions, which are accorded to the citizens and subjects of the most favored nation."

There are many thousands of Chinese laborers who came to the country and resided in it under the additional articles of the treaty adopted in 1868, and were in the country at the time of the adoption of the supplemental treaty of November, 1880. To these laborers thus lawfully within the limits of the United States section six of the act of May 5, 1892, relates. That section, so far as applicable to the present cases, is as follows:

"SEC. 6. And it shall be the duty of all Chinese laborers within the limits of the United States at the time of the passage of this act and *who are entitled to remain in the*

United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence, and any Chinese laborer within the United States, who shall neglect, fail or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States, as hereinbefore provided, unless he shall establish clearly to the satisfaction of the said judge that by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if upon the hearing it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost. Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it, and in such cases the cost of said arrest and trial shall be in the discretion of the court."

The purpose of this section was to secure the means of readily identifying the Chinese laborers present in the country and entitled to remain, from those who may have clandestinely entered the country in violation of its laws. Those entitled to remain, by having a certificate of their identification, would enable the officers of the government to readily discover and bring to punishment those not entitled to enter but who are excluded. To procure such a certificate was not a hardship to the laborers, but a means to secure full protection to them, and at the same time prevent an evasion of the law.

This object being constitutional, the only question for our

consideration is the lawfulness of the procedure provided for its accomplishment, and this must be tested by the provisions of the Constitution and laws intended for the protection of all persons against encroachment upon their rights. Aliens from countries at peace with us, domiciled within our country by its consent, are entitled to all the guaranties for the protection of their persons and property which are secured to native-born citizens. The moment any human being from a country at peace with us comes within the jurisdiction of the United States, with their consent — and such consent will always be implied when not expressly withheld, and in the case of the Chinese laborers before us was in terms given by the treaty referred to — he becomes subject to all their laws, is amenable to their punishment and entitled to their protection. Arbitrary and despotic power can no more be exercised over them with reference to their persons and property, than over the persons and property of native-born citizens. They differ only from citizens in that they cannot vote or hold any public office. As men having our common humanity, they are protected by all the guaranties of the Constitution. To hold that they are subject to any different law or are less protected in any particular than other persons, is in my judgment to ignore the teachings of our history, the practice of our government, and the language of our Constitution. Let us test this doctrine by an illustration. If a foreigner who resides in the country by its consent commits a public offence, is he subject to be cut down, maltreated, imprisoned, or put to death by violence, without accusation made, trial had, and judgment of an established tribunal following the regular forms of judicial procedure? If any rule in the administration of justice is to be omitted or discarded in his case, what rule is it to be? If one rule may lawfully be laid aside in his case, another rule may also be laid aside, and all rules may be discarded. In such instances a rule of evidence may be set aside in one case, a rule of pleading in another; the testimony of eye-witnesses may be rejected and hearsay adopted, or no evidence at all may be received, but simply an inspection of the accused, as is often

the case in tribunals of Asiatic countries where personal caprice and not settled rules prevail. That would be to establish a pure, simple, undisguised despotism and tyranny with respect to foreigners resident in the country by its consent, and such an exercise of power is not permissible under our Constitution. Arbitrary and tyrannical power has no place in our system. As said by this court, speaking by Mr. Justice Matthews, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369: "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and view the history of their development, we are constrained to conclude they do not mean to leave room for the play and action of purely personal and arbitrary power. . . . The fundamental rights to life, liberty, and the pursuit of happiness as individual possessions are secured by those maxims of constitutional law which are the monuments, showing the victorious progress of the race in securing to man the blessings of civilization under the reign of just and equal laws." What once I had occasion to say of the protection afforded by our government I repeat: "It is certainly something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction; and that every blow aimed at any of them, however humble, come from what quarter it may, is 'caught upon the broad shield of our blessed Constitution and our equal laws.'" *Ho Ah Kow* v. *Nunan*, 5 Sawyer, 552, 563.

I utterly dissent from and reject the doctrine expressed in the opinion of the majority, that "Congress, under the power to exclude or expel aliens, might have directed any Chinese laborer found in the United States without a certificate of residence to be removed out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country." An arrest in that way for that purpose would not be a reasonable seizure of the person within the meaning of the Fourth Article of the amendments to the Constitution. It would be brutal and oppressive. The

existence of the power thus stated is only consistent with the admission that the government is one of unlimited and despotic power so far as aliens domiciled in the country are concerned. According to its theory, Congress might have ordered executive officers to take the Chinese laborers to the ocean and put them into a boat and set them adrift; or to take them to the borders of Mexico and turn them loose there; and in both cases without any means of support; indeed, it might have sanctioned towards these laborers the most shocking brutality conceivable. I utterly repudiate all such notions, and reply that brutality, inhumanity, and cruelty cannot be made elements in any procedure for the enforcement of the laws of the United States.

The majority of the court have, in their opinion, made numerous citations from the courts and the utterances of individuals upon the power of the government of an independent nation to exclude foreigners from entering its limits, but none, beyond a few loose observations, as to its power to expel and deport from the country those who are domiciled therein by its consent. The citation from the opinion in the recent case of *Nishimura Ekiu* v. *United States*, (the Japanese case,) 142 U. S. 651; the citation from the opinion in *Chae Chan Ping* v. *United States*, (the Chinese Exclusion case,) 130 U. S. 581, 604, 606; the citation in the case before the judiciary committee of the Privy Council — all have reference to the exclusion of foreigners from entering the country. They do not touch upon the question of deporting them from the country after they have been domiciled within it by the consent of its government, which is the real question in the case. The citation from Vattel is only as to the power of exclusion, that is, from coming to the country. The citation from Phillimore is to the same effect. As there stated, the government allowing the introduction of aliens may prescribe the conditions on which they shall be allowed to remain, the conditions being imposed whenever they enter the country. There is no dispute about the power of Congress to prevent the landing of aliens in the country; the question is as to the power of Congress to deport them with-

out regard to the guaranties of the Constitution. The statement that in England the power to expel aliens has always been recognized and often exercised, and the only question that has ever been as to this power is whether it could be exercised by the King without the consent of Parliament, is, I think, not strictly accurate. The citations given by Mr. Choate in his brief show conclusively, it seems to me, that deportation from the realm has not been exercised in England since Magna Charta, except in punishment for crime, or as a measure in view of existing or anticipated hostilities. But even if that power were exercised by every government of Europe, it would have no bearing in these cases. It may be admitted that the power has been exercised by the various governments of Europe. Spain expelled the Moors; England, in the reign of Edward I, banished fifteen thousand Jews;[1] and Louis XIV, in 1685, by revoking the Edict of Nantes, which gave religious liberty to Protestants in France, drove out the Huguenots. Nor does such severity of European governments belong only to the distant past. Within three years Russia has banished many thousands of Jews, and apparently intends the expulsion of the whole race — an act of barbarity which has aroused the indignation of all Christendom. Such was the feeling in this country that, friendly as our relations with Russia had always been, President Harrison felt compelled to call the attention of Congress to it in his message in 1891 as a fit subject for national remonstrance. Indeed, all the instances mentioned have been condemned for their barbarity and cruelty, and no power to perpetrate such barbarity is to be implied from the nature of our government, and certainly is not found in any delegated powers under the Constitution.

The government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments, nor does it take any power by any supposed inherent sovereignty. There is a great deal of confusion in the use of the word "sovereignty"

[1] The Jews during his reign were cruelly despoiled, and in 1290 ordered, under penalty of death, to quit England forever before a certain day. — American Encyclopædia, vol. 6, p. 434.

by law writers. Sovereignty or supreme power is in this country vested in the people, and only in the people. By them certain sovereign powers have been delegated to the government of the United States and other sovereign powers reserved to the States or to themselves. This is not a matter of inference and argument, but is the express declaration of the Tenth Amendment to the Constitution, passed to avoid any misinterpretation of the powers of the general government. That amendment declares that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." When, therefore, power is exercised by Congress, authority for it must be found in express terms in the Constitution, or in the means necessary or proper for the execution of the power expressed. If it cannot be thus found, it does not exist.

It will be seen by its provisions that the sixth section recognizes the right of certain Chinese laborers to remain in the United States, but to render null that right it declares that if within one year after the passage of the act any Chinese laborer shall have neglected, failed, or refused to comply with the provisions of the act to obtain a certificate of residence, or shall be found within the jurisdiction of the United States without a certificate of residence, he shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, a United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States, unless he shall establish clearly to the satisfaction of the judge that by reason of accident, sickness, or other unavoidable cause he has been unable to secure his certificate, and to the satisfaction of the judge by at least one credible white witness that he was a resident of the United States at the time of the passage of the act. His deportation is thus imposed for neglect to obtain a certificate of residence, from which he can only escape by showing his inability to secure it from one of the causes named. That is the punishment

for his neglect, and that being of an infamous character can only be imposed after indictment, trial, and conviction. If applied to a citizen, none of the justices of this court would hesitate a moment to pronounce it illegal. Had the punishment been a fine, or anything else than of an infamous character, it might have been imposed without indictment; but not so now, unless we hold that a foreigner from a country at peace with us, though domiciled by the consent of our government, is withdrawn from all the guaranties of due process of law prescribed by the Constitution, when charged with an offence to which the grave punishment designated is affixed.

The punishment is beyond all reason in its severity. It is out of all proportion to the alleged offence. It is cruel and unusual. As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted. The laborer may be seized at a distance from his home, his family and his business, and taken before the judge for his condemnation, without permission to visit his home, see his family, or complete any unfinished business. Mr. Madison well pictures its character in his powerful denunciation of the alien law of 1798 in his celebrated report upon the resolutions, from which we have cited, and concludes, as we have seen, that *if a banishment of the sort described be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.*

Again, when taken before a United States judge, he is required, in order to avoid the doom declared, to establish clearly to the satisfaction of the judge that by reason of accident, sickness, or other unavoidable cause, he was unable to secure his certificate, and that he was a resident of the United States at the time, *by at least one credible white witness.* Here the government undertakes to exact of the party arrested the testimony of a witness of a particular color, though conclusive and incontestible testimony from others may be adduced. The law might as well have said, that unless the laborer

should also present a particular person as a witness who could not be produced, from sickness, absence, or other cause, such as the archbishop of the State, to establish the fact of residence, he should be held to be unlawfully within the United States.

There are numerous other objections to the provisions of the act under consideration. Every step in the procedure provided, as truly said by counsel, tramples upon some constitutional right. Grossly it violates the Fourth Amendment, which declares that: "The right of the people to be secure in their persons, . . . against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the . . . persons . . . to be seized."

The act provides for the seizure of the person without oath or affirmation or warrant, and without showing any probable cause by the officials mentioned. The arrest, as observed by counsel, involves a search of his person for the certificate which he is required to have always with him. Who will have the hardihood and effrontery to say this is not an "unreasonable search and seizure of the person"? Until now it has never been asserted by any court or judge of high authority that foreigners domiciled in this country by the consent of our government could be deprived of the securities of this amendment; that their persons could be subjected to unreasonable searches and seizures, and that they could be arrested without warrant upon probable cause supported by oath or affirmation.

I will not pursue the subject further. The decision of the court and the sanction it would give to legislation depriving resident aliens of the guaranties of the Constitution fills me with apprehensions. Those guaranties are of priceless value to every one resident in the country, whether citizen or alien. I cannot but regard the decision as a blow against constitutional liberty, when it declares that Congress has the right to disregard the guaranties of the Constitution intended for the protection of all men, domiciled in the country with the consent of the government, in their rights of person and property.

How far will its legislation go? The unnaturalized resident feels it to-day, but if Congress can disregard the guaranties with respect to any one domiciled in this country with its consent, it may disregard the guaranties with respect to naturalized citizens. What assurance have we that it may not declare that naturalized citizens of a particular country cannot remain in the United States after a certain day, unless they have in their possession a certificate that they are of good moral character and attached to the principles of our Constitution, which certificate they must obtain from a collector of internal revenue upon the testimony of at least one competent witness of a class or nationality to be designated by the government?

What answer could the naturalized citizen in that case make to his arrest for deportation, which cannot be urged in behalf of the Chinese laborers of to-day?

I am of the opinion that the orders of the court below should be reversed, and the petitioners should be discharged.

MR. CHIEF JUSTICE FULLER dissenting.

I also dissent from the opinion and judgment of the court in these cases.

If the protection of the Constitution extends to Chinese laborers who are lawfully within and entitled to remain in the United States under previous treaties and laws, then the question whether this act of Congress so far as it relates to them is in conflict with that instrument, is a judicial question, and its determination belongs to the judicial department.

However reluctant courts may be to pass upon the constitutionality of legislative acts, it is of the very essence of judicial duty to do so when the discharge of that duty is properly invoked.

I entertain no doubt that the provisions of the Fifth and Fourteenth Amendments, which forbid that any person shall be deprived of life, liberty, or property without due process of law, are in the language of Mr. Justice Matthews, already quoted by my brother Brewer, "universal in their application to all persons within the territorial jurisdiction, without

regard to any differences of race, of color, or of nationality," and although in *Yick Wo's case* only the validity of a municipal ordinance was involved, the rule laid down as much applies to Congress under the Fifth Amendment as to the States under the Fourteenth. The right to remain in the United States, in the enjoyment of all the rights, privileges, immunities, and exemptions accorded to the citizens and subjects of the most favored nation, is a valuable right, and certainly a right which cannot be taken away without taking away the liberty of its possessor. This cannot be done by mere legislation.

The argument is that friendly aliens, who have lawfully acquired a domicil in this country, are entitled to avail themselves of the safeguards of the Constitution only while permitted to remain, and that the power to expel them and the manner of its exercise are unaffected by that instrument. It is difficult to see how this can be so in view of the operation of the power upon the existing rights of individuals; and to say that the residence of the alien, when invited and secured by treaties and laws, is held in subordination to the exertion against him, as an alien, of the absolute and unqualified power asserted, is to import a condition not recognized by the fundamental law. Conceding that the exercise of the power to exclude is committed to the political department, and that the denial of entrance is not necessarily the subject of judicial cognizance, the exercise of the power to expel, the manner in which the right to remain may be terminated, rest on different ground, since limitations exist or are imposed upon the deprivation of that which has been lawfully acquired. And while the general government is invested, in respect of foreign countries and their subjects or citizens, with the powers necessary to the maintenance of its absolute independence and security throughout its entire territory, it cannot, in virtue of any delegated power, or power implied therefrom, or of a supposed inherent sovereignty, arbitrarily deal with persons lawfully within the peace of its dominion. But the act before us is not an act to abrogate or repeal treaties or laws in respect of Chinese laborers entitled to remain in the United States, or

to expel them from the country, and no such intent can be imputed to Congress. As to them, registration for the purpose of identification is required, and the deportation denounced for failure to do so is by way of punishment to coerce compliance with that requisition. No euphuism can disguise the character of the act in this regard. It directs the performance of a judicial function in a particular way, and inflicts punishment without a judicial trial. It is, in effect, a legislative sentence of banishment, and, as such, absolutely void. Moreover, it contains within it the germs of the assertion of an unlimited and arbitrary power, in general, incompatible with the immutable principles of justice, inconsistent with the nature of our government, and in conflict with the written Constitution by which that government was created and those principles secured.

CASES ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES AT OCTOBER TERM, 1892, NOT OTHERWISE REPORTED, INCLUDING CASES DISMISSED IN VACATION PURSUANT TO RULE 28.

No. 114. ALTENOWER *v.* CHURCHILL. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. July 14, 1892: Dismissed, pursuant to the 28th rule. *Mr. J. P. Hornor* for appellant. *Mr. J. McConnell* for appellees.

No. 15. Original. *In re* AMERICAN CONSTRUCTION COMPANY, Petitioner. Petition for writ of mandamus or certiorari. April 3, 1893: Petition dismissed, on motion of *Mr. William A. Hornblower* for the petitioner. *Mr William B. Hornblower*, *Mr. William Pennington* and *Mr. E. Stevenson* for the petitioner. *Mr. John G. Johnson*, *Mr. C. M. Cooper*, and *Mr. J. C. Cooper* and *Mr. Thomas Thacher* opposing.

No. 209. AMOSKEAG NATIONAL BANK *v.* FAIRBANKS. Appeal from the Circuit Court of the United States for the District of New Hampshire. December 20, 1892: Decree reversed, with costs, per stipulation, and cause remanded for further proceedings in conformity with law. *Mr. T. L. Livermore* and *Mr. F. P. Fish* for appellants. *Mr. H. G. Wood* for appellee.

No. 306. BACKER *v.* MEYER. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. April 11, 1893: Dismissed, per stipulation. *Mr. Morris M. Cohn* for appellant. *Mr. John S. Duffie* for appellees.

Cases not otherwise Reported.

No. 1201. BERRETT *v.* MIDDLETON. Appeal from the Supreme Court of the District of Columbia. October 11, 1892: Docketed and dismissed, with costs, on motion of *Mr. John Ridout* for the appellees. No appearance for appellants.

No. 1218. BILLINGS *v.* ASPEN MINING AND SMELTING COMPANY. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. November 28, 1892: Petition denied. *Mr. Calderon Carlisle* for petitioners. *Mr. T. A. Green* for Billings *et al.* opposing.

No. 672. BLACKBURN *v.* OSBORNE. Error to the Supreme Court of the State of Wisconsin. December 5, 1892: Dismissed, with costs, per stipulation, on motion of *Mr. A. B. Browne* for defendant in error. *Mr. Fayette Marsh* for plaintiffs in error. *Mr. A. T. Britton* and *Mr. A. B. Browne* for defendant in error.

No. 113. BOSTON SAFE DEPOSIT AND TRUST COMPANY *v.* CITY OF GRAND HAVEN. Appeal from the Circuit Court of the United States for the Western District of Michigan. January 18, 1893: Decree affirmed, with costs, by consent. *Mr. Andrew Howell* for appellant. *Mr. L. D. Norris* and *Mr. Mark Norris* for appellees.

No. 313. BRACKENRIDGE *v.* LANSING. Error to the Circuit Court of the United States for the Southern District of New York. January 17, 1893: Dismissed, with costs, on authority of counsel for the plaintiff in error. *Mr. T. G. Shearman* for plaintiff in error. No appearance for defendant in error.

No. 90. BROWN *v.* BEALE. Error to the Supreme Court of the District of Columbia. December 7, 1892: Judgment affirmed, with costs, per stipulation, on motion of *Mr. Walter*

D. Davidge for defendants in error. *Mr. Henry Wise Garnett* and *Mr. Conway Robinson, Jr.*, for plaintiffs in error. *Mr. Walter D. Davidge* for defendants in error.

No. 97. BRUNER *v.* SHANNON. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. January 3, 1893: Decree affirmed, with costs, by a divided court. *Mr. F. N. Judson* and *Mr. George H. Knight* for appellant. *Mr. U. M. Young* for appellee.

No. 86. BRUSH *v.* OWEN. Appeal from the Circuit Court of the United States for the District of Indiana. December 6, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. M. D. Leggett*, *Mr. L. L. Leggett* and *Mr. H. A. Seymour* for appellants. *Mr. R. S. Taylor* for appellees.

No. 593. BURTON *v.* WITTERS. Appeal from the Circuit Court of the United States for the District of Vermont. October 24, 1892: Dismissed, per stipulation. *Mr. Albert P. Cross* and *Mr. Kitredge Haskins* for appellant. *Mr. C. W. Witters* for appellee.

No. 808. BYERS *v.* COLEMAN. Appeal from the Circuit Court of the United States for the Southern District of New York. November 30, 1892: Dismissed, per stipulation. *Mr. James C. Carter* for appellant. *Mr. David J. Dean* for appellees.

No. 1220. CAMPBELL, Administratrix, *v.* O'NEILL, Administrator. No. 1221. SAME *v.* QUIGLEY. No. 1222. SAME *v.* HOFFMAN. No. 1223. SAME *v.* OLIVER. No. 1224. SAME *v.* BEATTIE. No. 1225. SAME *v.* SANDERS. No. 1226. SAME *v.* GRIMKE. No. 1227. SAME *v.* OLIVER. No. 1228. SAME *v.* REHKOPF. No. 1229. SAME *v.* PETERSON. No. 1230. SAME *v.* DOTHAGE. No. 1231. SAME *v.* LAFFAN. Error to the Court

of Common Pleas of Charleston County, South Carolina. November 11, 1892: Docketed and dismissed, with costs, on motion of *Mr. A. G. Riddle* for defendants in error. No appearance for plaintiffs in error.

No. 1148. CAMPBELL *v.* QUIGLEY. Error to the Court of Common Pleas of Charleston County, South Carolina. January 13, 1893: Dismissed, with costs, on motion of *Mr. William E. Earle* for the plaintiffs in error. *Mr. William E. Earle* for plaintiffs in error. *Mr Samuel W. Melton* for defendants in error.

No. 1209. CAMPBELL *v.* WHALEY. Error to the Court of Common Pleas of Charleston County, South Carolina. January 13, 1893: Dismissed, with costs, on motion of *Mr. William E. Earle* for the plaintiffs in error. *Mr. William E. Earle* for plaintiffs in error. *Mr. Samuel W. Melton* for defendant in error.

No. 165. CASADO *v.* SCHELL'S EXECUTORS. Error to the Circuit Court of the United States for the Southern District of New York. December 22, 1892: Dismissed, with costs, on motion of *Mr. Frederic D. McKenney* in behalf of counsel for the plaintiff in error. *Mr. A. W. Griswold* for plaintiff in error. *Mr. Attorney General* for defendants in error.

No. 810. CHENEY *v.* COLEMAN. Appeal from the Circuit Court of the United States for the Southern District of New York. November 30, 1892: Dismissed, per stipulation. *Mr. James C. Carter* for appellant. *Mr. David J. Dean* for appellees.

No. 266. CHICAGO CITY RAILWAY COMPANY *v.* NOYES. Error to the Circuit Court of the United States for the Northern District of Illinois. April 25, 1893: Dismissed, with costs,

pursuant to the tenth rule. *Mr. R. A. Burton* and *Mr. W. J. Hynes* for plaintiff in error. No appearance for defendant in error.

No. 69. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* MCGUIRE. Error to the Circuit Court of the United States for the District of Minnesota. August 2, 1892: Dismissed, pursuant to the 28th rule. *Mr. C. E. Flandrau* and *Mr. J. W. Cary* for plaintiff in error. *Mr. Aaron B. Jackson* for defendant in error.

No. 147. CITY OF AUGUSTA *v.* JONES. Appeal from the Circuit Court of the United States for the Southern District of New York. April 21, 1893: Dismissed, per stipulation, on motion of *Mr. Charles C. Beaman* for the appellees. *Mr. J. A. Beall* and *Mr. John W. Weed* for appellant. *Mr. Joseph H. Choate* for appellees.

No. 74. CITY OF RICHMOND *v.* FIRST NATIONAL BANK. Appeal from the Circuit Court of the United States for the Eastern District of Virginia. November 30, 1892: Dismissed, with costs, on authority of counsel for the appellants. *Mr. C. V. Meredith* for appellants. No appearance for appellee.

No. 657. CITY OF ST. LOUIS *v.* KING IRON BRIDGE AND MANUFACTURING COMPANY. Error to the Circuit Court of the United States for the Eastern District of Missouri. December 16, 1892: Dismissed, with costs, on motion of *Mr. W. C. Marshall* for the plaintiff in error. *Mr. Leverett Bell* and *Mr. W. C. Marshall* for plaintiff in error. No appearance for defendant in error.

No. 292. CLARK *v.* FARIS. Appeal from the Circuit Court of the United States for the Western District of Virginia.

January 3, 1893: Dismissed, with costs, on authority of counsel for the appellant. *Mr. Richard C. Dale* for appellant. No appearance for appellee.

No. 1216. CLARK *v.* MILLER. Appeal from the Circuit Court of the United States for the District of Connecticut. December 8, 1892: Dismissed, with costs, on authority of counsel for appellants. *Mr. W. B. Stoddard* for appellants. No appearance for appellee.

No. 249. COFFIN *v.* DAY. Appeal from the Circuit Court of the United States for the Northern District of Illinois. April 21, 1893: Dismissed, with costs, pursuant to the tenth rule. *Mr. J. M. Flower* for appellants. *Mr. H. B. Hopkins* for appellees.

No. 120. CONSOLIDATED ELECTRIC LIGHT COMPANY *v.* WOOD. No. 121. SAME *v.* SAME. Error to the Circuit Court of the United States for the Eastern District of New York. June 28, 1892: Dismissed, pursuant to the 28th rule. *Mr. C. C. Bull* for plaintiff in error. *Mr. H. G. Ward* for defendant in error.

No. 122. CONTINENTAL STEAMBOAT COMPANY *v.* BURKE. Error to the Circuit Court of the United States for the District of Rhode Island. February 6, 1893: Judgment affirmed, with costs and interest, by a divided court. *Mr. William G. Rodker* for plaintiff in error. *Mr. Martin F. Morris* for defendant in error.

No. 631. COSSITT *v.* HANCOCK. Appeal from the Circuit Court of the United States for the Western District of Tennessee. October 17, 1892: Dismissed, with costs, on motion of counsel for the appellant. *Mr. David B. Lyman* for appellant. No appearance for appellee.

Cases not otherwise Reported.

No. 12. CRAIG *v.* WARNER. Error to the Supreme Court of the District of Columbia. June 24, 1892: Dismissed, pursuant to the 28th rule. *Mr. Martin F. Morris* for plaintiffs in error. *Mr. Calderon Carlisle* for defendant in error.

No. 809. CRISSEY *v.* COLEMAN. Appeal from the Circuit Court of the United States for the Southern District of New York. November 30, 1892: Dismissed, per stipulation. *Mr. James C. Carter* for appellant. *Mr. David J. Dean* for appellees.

No. 1183. CUSHING *v.* BATELLE. Appeal from the Supreme Court of the District of Columbia. April 27, 1893: Dismissed, with costs, on authority of counsel for the appellants. *Mr. J. F. Farnsworth* for appellants. No appearance for appellee.

No. 1333. DE MARTIN *v.* PHELAN. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. May 1, 1893: Petition denied. *Mr. George D. Collins* for De Martin in support of petition. *Mr. W. A. Day* and *Mr. W. P. Montague* for Phelan *et al.*, in opposition thereto.

No. 158. DESFORGES *v.* MECHANICS' NATIONAL BANK OF PITTSBURG. Error to the Circuit Court of the United States for the Eastern District of Louisiana. June 27, 1892: Dismissed, pursuant to the 28th rule. *Mr. Charles W. Hornor* and *Mr. George A. King* for plaintiff in error. *Mr. J. D. Rouse* and *Mr. William Grant* for defendant in error.

No. 218. DICK *v.* HUBEL. Appeal from the Circuit Court of the United States for the Eastern District of New York. April 12, 1893: Dismissed, with costs, pursuant to the tenth

rule. *Mr. A. G. N. Vermilya* for appellants. No appearance for appellee.

No. 1019. DONNELLY *v.* DOUGLASS. Appeal from the Supreme Court of the District of Columbia. March 7, 1893: Dismissed, with costs, per stipulation. *Mr. West Steever* for appellant. *Mr. George C. Hazelton* and *Mr. S. T. Thomas* for appellees.

No. 65. DOWLING *v.* NATIONAL BANK OF AMERICA. Error to the Circuit Court of the United States for the Western District of Michigan. November 23, 1892: Judgment reversed, with costs, per stipulation, and cause remanded for a new trial. *Mr. Michael Brown* for plaintiff in error. *Mr. Willard Kingsley* for defendant in error.

No. 439. EASTERN TOWNSHIPS' BANK *v.* ST. JOHNSBURY AND LAKE CHAMPLAIN RAILROAD COMPANY. Error to the Circuit Court of the United States for the District of Vermont. June 13, 1892: Dismissed, pursuant to the 28th rule. *Mr. A. P. Cross* for plaintiff in error. *Mr. S. C. Shurtleff* for defendant in error.

No. 174. EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY *v.* MCKENNY. Error to the Supreme Court of the State of Tennessee. March 24, 1893: Dismissed, with costs, pursuant to the tenth rule. *Mr. E. M. Johnson* and *Mr. William M. Baxter* for plaintiff in error. *Mr. H. H. Ingersoll* for defendant in error.

No. 222. EDISON *v.* KLABER. Appeal from the Circuit Court of the United States for the Southern District of New York. October 24, 1892: Dismissed, with costs, on motion of counsel for the appellants. *Mr. Richard N. Dyer* for appellants. No appearance for appellee.

Cases not otherwise Reported.

No. 573. ERIN STAVE AND LUMBER COMPANY *v.* FALLS CITY BANK. Error to the Circuit Court of the United States for the Middle District of Tennessee. March 7, 1893: Dismissed, with costs, on authority of counsel for plaintiffs in error. *Mr. Eppa Hunton* for plaintiffs in error. No appearance for defendant in error.

No. 437. EUREKA AND PALISADE RAILROAD COMPANY *v.* UNITED STATES. Error to the Circuit Court of the United States for the District of Nevada. October 11, 1892: Dismissed, per stipulation, on motion of *Mr. Solicitor General* for the defendant in error. *Mr. Thomas Wren* for plaintiff in error. *Mr. Attorney General* for defendant in error.

No. 590. FARREL *v.* NATIONAL SHOE AND LEATHER BANK. Error to the Circuit Court of the United States for the District of Connecticut. May 15, 1893: Dismissed, per stipulation. *Mr. S. W. Kellogg* for plaintiff in error. *Mr. George C. Lay* for defendant in error.

No. 1304. FORT PAYNE COAL AND IRON COMPANY *v.* SAYLES. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. March 20, 1893: Petition denied. *Mr. J. A. W. Smith* for The Fort Payne Coal and Iron Company. *Mr. James Norfleet* for Sayles in opposition to petition.

No. 1028. FRENCH *v.* NORTH CAROLINA. Error to the Supreme Court of the State of North Carolina. April 7, 1893: Dismissed, with costs, on motion of *Mr. Samuel F. Phillips* for the plaintiffs in error. *Mr. Samuel F. Phillips* and *Mr. Frederic D. McKenney* for plaintiffs in error. *Mr. Theodore F. Davidson* for defendant in error.

Cases not otherwise Reported.

No. 1192. FULLER *v.* AMERICAN EMIGRANT COMPANY. Error to the Supreme Court of the State of Iowa. April 14, 1893. Dismissed, with costs, per stipulation, on motion of *Mr. Frederic D. McKenney* for the defendant in error. *Mr. Charles A. Clark* for plaintiff in error. *Mr. Frederic D. McKenney* for defendant in error.

No. 1340. IN THE MATTER OF THE APPLICATION TO GARDINER. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. May 10, 1893: Petition denied. *Mr. Edwin B. Smith* for Gardiner & Bro. in support of petition. No opposition.

No. 339. GARDNER *v.* PENNSYLVANIA. Error to the Supreme Court of the State of Pennsylvania. January 23, 1893: Dismissed, with costs, on authority of counsel for the plaintiffs in error. *Mr. John B. Hinkson* for plaintiffs in error. No appearance for defendant in error.

No. 146. GEORGIA INFIRMARY FOR THE RELIEF AND PROTECTION OF AGED AND AFFLICTED NEGROES *v.* JONES. Appeal from the Circuit Court of the United States for the Southern District of New York. April 21, 1893: Dismissed, per stipulation, on motion of *Mr. Charles C. Beaman* for the appellees. *Mr. J. A. Beall* and *Mr. John W. Weed* for appellant. *Mr. Joseph H. Choate* for appellees.

No. 189. GIOZZA *v.* TIERNAN. Appeal from the Circuit Court of the United States for the Eastern District of Texas. March 28, 1893: Dismissed, with costs, pursuant to the tenth rule. *Mr. J. M. Burroughs* for appellant. *Mr. J. S. Hogg* for appellee.

No. 875. GREGORY *v.* BRANSFORD. Error to the Corporation Court of Lynchburg, Virginia. January 30, 1893: Dis-

missed, with costs, by consent of counsel for the plaintiffs in error, on motion of *Mr. R. Taylor Scott* for the defendant in error. *Mr. W. W. Larkin* for plaintiffs in error. *Mr. R. Taylor Scott* for defendant in error.

No. 60. HAGEDON *v.* SEEBERGER. Error to the Circuit Court of the United States for the Northern District of Illinois. February 6, 1893: Dismissed, with costs, on motion of *Mr. Henry E. Tremain* for the plaintiff in error. *Mr. P. L. Shuman* and *Mr. Henry E. Tremain* for plaintiff in error. *Mr. Attorney General* for defendant in error.

No. 46. HANCOCK INSPIRATOR COMPANY *v.* REGESTER. Appeal form the Circuit Court of the United States for the District of Maryland. November 8, 1892: Dismissed, with costs, pursuant to the tenth rule. *Mr. Chauncey Smith* and *Mr. E. P. Howe* for appellant. *Mr. H. T. Fenton* for appellees.

No. 959. HARVEY *v.* TELEGRAPH PRINTING COMPANY. Error to the Circuit Court of the United States for the Southern District of Georgia. April 24, 1893: Dismissed, with costs, on motion of counsel for the plaintiffs in error. *Mr. Walter B. Hill* for plaintiffs in error. No appearance for defendant in error.

No. 703. HILL *v.* GORDON. Appeal from the Circuit Court of the United States for the Northern District of Florida. March 8, 1893: Dismissed, per stipulation. *Mr. John C. Cooper* and *Mr. W. W. Hampton* for appellants. *Mr. S. Y. Finley* for appellees.

No. 256. HOEFINGHOFF *v.* EDWARDS. Error to the Circuit Court of the United States for the Southern District of Ohio. January 3, 1893: Dismissed, per stipulation. *Mr. Charles H.*

Stephens and *Mr. T. D. Lincoln* for plaintiff in error. *Mr. J. W. Warrington* and *Mr. L. H. Bisbee* for defendant in error.

No. 778. HOEY *v.* COLEMAN. Appeal from the Circuit Court of the United States for the Southern District of New York. May 1, 1893: Dismissed, per stipulation, on motion of *Mr. J. Hubley Ashton* in behalf of counsel. *Mr. Clarence A. Seward* for appellants. *Mr. David J. Dean* for appellees.

No. 136. HOHENSTEIN *v.* HEDDEN. Error to the Circuit Court of the United States for the Southern District of New York. March 13, 1893. Judgment reversed, with costs, upon confession of error by *Mr. Assistant Attorney General Maury* for the defendant in error. This judgment to be entered *nunc pro tunc* as of January 3, 1893. *Mr. Edwin B. Smith*, *Mr. S. G. Clarke* and *Mr. Charles Curie* for plaintiff in error. *Mr. Attorney General* for defendant in error.

No. 267. HOWARD *v.* ROBINSON. Appeal from the Circuit Court of the United States for the District of Colorado. April 25, 1893: Dismissed, with costs, pursuant to the tenth rule. *Mr. Thomas G. Putnam* and *Mr. S. E. Browne* for appellants. *Mr. Charles S. Thomas* and *Mr. C. C. Parsons* for appellees.

No. 399. HUGHES *v.* ROBSON. Error to the Circuit Court of the United States for the Northern District of Texas. January 11, 1893: Dismissed, per stipulation. *Mr. J. W. Brown* for plaintiff in error. *Mr. J. M. McCormick* for defendant in error.

No. 141. ISAACS *v.* UNITED STATES. Error to the Circuit Court of the United States for the Eastern District of Louisiana. March 14, 1893: Dismissed, on motion of *Mr. Wickham*

Smith for plaintiff in error. *Mr. J. R. Beckwith*, *Mr. Charles Curie*, *Mr. W. Wickham Smith* and *Mr. D. Ives Mackie* for plaintiff in error. *Mr. Attorney General* for defendant in error.

No. 226. JOHNSON *v.* COWLING. Error to the Supreme Court of the District of Columbia. April 17, 1893: Dismissed, with costs, pursuant to the tenth rule. *Mr. J. D. Coughlan* for plaintiff in error. No appearance for defendants in error.

No. 220. JONES *v.* BAER, SEASONGOOD & Co. Error to the United States Court for the Indian Territory. April 17, 1893: Judgment affirmed, with costs and interest, by a divided court. *Mr. A. H. Garland* and *Mr. H. J. May* for plaintiff in error. *Mr. D. Goldsmith*, *Mr. L. P. Sandels* and *Mr. W. T. Hutchings* for defendants in error.

No. 16. JONES *v.* CUNNINGHAM. Appeal from the Circuit Court of the United States for the Southern District of Georgia. October 24, 1892: Dismissed, with costs, per stipulation. *Mr. George A. Mercer* for appellants. *Mr. R. G. Erwin* for appellees.

No. 1143. KENGLA *v.* OFFUTT. Error to the Supreme Court of the District of Columbia. May 15, 1893: Dismissed, cost of printing the record and clerk's costs in this court to be paid by defendant in error, per stipulation of counsel. *Mr. William A. Cook* for plaintiff in error. *Mr. Hugh T. Taggart* for defendant in error.

No. 204. KENTUCKY AND INDIANA BRIDGE COMPANY *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY. Appeal from the Circuit Court of the United States for the District of Kentucky. March 30, 1893: Dismissed, with costs, pursuant to

the 10th rule. *Mr. Thomas W. Bullitt* for appellant. *Mr. Ed. Baxter* for appellee.

No. 118. KNAPP *v.* GARRISON. No. 119. KNAPP *v.* GARRISON. Error to the Circuit Court of the United States for the District of Nevada. January 19, 1893: Dismissed, with costs, on authority of counsel for the plaintiffs in error. *Mr. H. F. Bartine* for plaintiffs in error. No appearance for defendants in error.

No. 268. KNEELAND *v.* SALLING. Error to the Circuit Court of the United States for the Western District of Michigan. April 25, 1893: Dismissed, with costs, pursuant to the tenth rule. *Mr. N. W. Bliss* for plaintiff in error. No appearance for defendant in error.

No. 197. LANGDON *v.* RANNEY. Appeal from the Circuit Court of the United States for the District of Minnesota. April 5, 1893: Dismissed, with costs, pursuant to 16th rule. *Mr. S. S. Burdett* for appellant. *Mr. C. W. Bunn* for appellees.

No. 848. LAPHAM-DODGE COMPANY *v.* SEVERIN. Appeal from the Circuit Court of the United States for the District of Indiana. February 6, 1893: Dismissed, with costs, on authority of counsel for the appellant. *Mr. James Lawrence* for appellant. *Mr. George H. Lothrop* for appellees.

No. 1093. LARKIN *v.* BRANSFORD. Error to the Circuit Court of Lynchburg, Virginia. January 30, 1893: Dismissed, with costs, by consent of counsel for the plaintiff in error, on motion of *Mr. R. Taylor Scott* for the defendant in error. *Mr. W. W. Larkin* for plaintiff in error. *Mr. R. Taylor Scott* for defendant in error.

No. 876. LAWSON *v.* BRANSFORD. Error to the Corporation Court of Lynchburg, Virginia. January 30, 1893: Dismissed,

with costs, by consent of counsel for the plaintiffs in error, on motion of *Mr. R. Taylor Scott* for the defendant in error. *Mr. W. W. Larkin* for plaintiffs in error. *Mr. R. Taylor Scott* for defendant in error.

No. 50. LEGG *v.* HEDDEN. Error to the Circuit Court of the United States for the Southern District of New York. November 14, 1892: Judgment reversed, with costs, and cause remanded with directions to grant a new trial, on motion of *Mr. Solicitor General*, who confessed error on behalf of the defendant in error. *Mr. S. G. Clarke*, *Mr. E. B. Smith* and *Mr. Charles Curie* for plaintiff in error. *Mr. Attorney General* for defendant in error.

No. 1127. LINCOLN RAPID TRANSIT COMPANY *v.* RUNDEL. Error to the Supreme Court of the State of Nebraska. December 8, 1892: Dismissed, with costs, per stipulation. *Mr. L. C. Burr* for plaintiff in error. *Mr. T. M. Marquett* for defendant in error.

No. 877. LITCHFORD *v.* DAY. Error to the Corporation Court of Lynchburg, Virginia. January 30, 1893: Dismissed, with costs, by consent of counsel for the plaintiffs in error, on motion of *Mr. R. Taylor Scott* for the defendant in error. *Mr. W. W. Larkin* for plaintiffs in error. *Mr. R. Taylor Scott* for defendant in error.

No. 329. LITTLE ROCK AND MEMPHIS RAILROAD COMPANY *v.* ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. March 8, 1893: Dismissed, with costs, on motion of counsel for appellant. *Mr. U. M. Rose* and *Mr. G. B. Rose* for appellant. *Mr. John. F. Dillon* and *Mr. Winslow S. Pierce* for appellee.

Cases not otherwise Reported.

No. 252. LOCKE *v.* SMITH. Appeal from the Circuit Court of the United States for the District of Massachusetts. April 24, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. J. E. Maynadier* for appellant. *Mr. John L. S. Roberts* and *Mr. T. W. Porter* for appellees.

No. 271. LOTTIMER *v.* MAXWELL. Error to the Circuit Court of the United States for the Southern District of New York. December 22, 1892: Dismissed, with costs, on motion of *Mr. Frederic D. McKenney* in behalf of counsel for the plaintiffs in error. *Mr. A. W. Griswold* for plaintiffs in error. *Mr. Attorney General* for defendants in error.

No. 709. LOUISVILLE BOARD OF TRADE *v.* LOUISVILLE. Error to the Court of Appeals of the State of Kentucky. December 19, 1892: Dismissed, with costs, on authority of counsel for the plaintiff in error. *Mr. Alexander Pope Humphrey* and *Mr. George M. Davie* for plaintiff in error. No appearance for defendants in error.

No. 205. LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* LOUISVILLE BRIDGE COMPANY. Appeal from the Circuit Court of the United States for the District of Kentucky. April 3, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. Walter Evans* for appellant. No appearance for appellee.

No. 303. MASON *v.* SPRY LUMBER COMPANY. Error to the Supreme Court of the State of Michigan. March 7, 1893: Dismissed, per stipulation. *Mr. F. H. Canfield* and *Mr. G. W. Weadock* for plaintiffs in error. *Mr. J. H. Goff* and *Mr. C. E. Kremer* for defendant in error.

No. 152. MAYER *v.* LOUISIANA NATIONAL BANK OF NEW ORLEANS. Appeal from the District Court of the United

States for the Northern District of Mississippi. August 10, 1892: Dismissed, pursuant to the 28th rule. *Mr. W. B. Walker* and *Mr. E. H. Bristow* for appellants. *Mr. E. O. Sykes* for appellee.

No. 88. McDONALD *v.* McLEAN. Appeal from the Circuit Court of the United States for the Southern District of California. December 7, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. W. W. Morrow* for appellant. *Mr. S. M. White* for appellee.

No. 164. MELETTA *v.* SCHELL. Error to the Circuit Court of the United States for the Southern District of New York. December 22, 1892: Dismissed, with costs, on motion of *Mr. Frederic D. McKenney* in behalf of counsel for the plaintiff in error. *Mr. A. W. Griswold* for plaintiff in error. *Mr. Attorney General* for defendants in error.

No. 2. METTE *v.* McGUCKIN. Error to the Supreme Court of the State of Nebraska. December 5, 1892: Judgment affirmed, with costs, by a divided court. *Mr. Jefferson Chandler* and *Mr. J. M. Woolworth* for plaintiff in error. No brief filed for defendant in error.

No. 296. MEYER *v.* BACKER. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. April 11, 1893: Dismissed, per stipulation. *Mr. John S. Duffie* for appellant. *Mr. Morris M. Cohn* for appellee.

No. 414. MOORE *v.* ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY. Error to the Circuit Court of the United States for the Western District of Arkansas. June 28, 1892: Dismissed, pursuant to the 28th rule. *Mr. Ben. T. Du Val* for

plaintiff in error. *Mr. A. T. Britton*, *Mr. A. B. Browne* and *Mr. George R. Peck* for defendant in error.

No. 1076. MULHOLLAND *v.* UNITED STATES. Appeal from the Circuit Court of the United States for the District of Kentucky. March 13, 1893: Dismissed, on authority of counsel for appellant, on motion of *Mr. Solicitor General* for appellee. *Mr. Samuel McKee* & *Mr. William Lindsay* for appellant. *Mr. Attorney General* for appellee.

No. 307. NATIONAL CABLE RAILWAY COMPANY *v.* MOUNT ADAMS & EDEN PARK INCLINED RAILWAY. Appeal from the Circuit Court of the United States for the Southern District of Ohio. March 7, 1893: Dismissed, with costs, on motion of counsel for appellant. *Mr. George Harding* for appellant. *Mr. R. H. Parkinson* for appellee.

No. 1255. NEW CHESTER WATER COMPANY *v.* HALLY MANUFACTURING COMPANY. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit. December 12, 1892: Petition denied. *Mr. Richard C. Dale* and *Mr. Samuel Dickson* for petitioners, The New Chester Water Company *et al.* *Mr. Richard L. Ashhurst* for The Hally Manufacturing Company *et al.* in opposition to petition.

No. 242. OTTAWA, OSWEGO AND FOX RIVER VALLEY RAILROAD COMPANY *v.* MASON. Appeal from the Circuit Court of the United States for the Northern District of Illinois. April 10, 1893: Dismissed, with costs, per stipulation, on motion of *Mr. George A. Sanders* for the defendant in error. *Mr. Wirt Dexter* and *Mr. John J. Herrick* for appellant. *Mr. George A. Sanders* and *Mr. T. S. McClelland* for appellee.

Cases not otherwise Reported.

No. 186. PANGBORN *v.* BRAZEL. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. March 27, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. Thomas J. Johnston* for appellant. *Mr. E. M. Marble* for appellee.

No. 126. PARKER *v.* DENNY. Appeal from the Supreme Court of the Territory of Washington. January 18, 1893: Dismissed, per stipulation, and cause remanded to the Supreme Court of the State of Washington. *Mr. John H. Mitchell* for appellant. *Mr. John B. Allen* for appellee.

No. 1314. PRICE *v.* PARKHURST. On a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. April 3, 1893: Petition denied. *Mr. Henry Wise Garnett*, *Mr. Henry M. Teller* and *Mr. H. W. Hobson* for Price in support of petition. *Mr. R. S. Morrison* for Parkhurst *et al.* in opposition thereto.

No. 17. RAILWAY REGISTER MANUFACTURING COMPANY *v.* CENTRAL PARK, NORTH AND EAST RIVER RAILROAD COMPANY, and No. 26. RAILWAY REGISTER MANUFACTURING COMPANY *v.* BROADWAY AND SEVENTH AVENUE RAILROAD COMPANY. Appeals from the Circuit Court of the United States for the Southern District of New York. October 24, 1892: Dismissed, with costs, pursuant to the 19th rule. *Mr. E. N. Dickerson* for appellant. *Mr. John Dane, Jr.*, and *Mr. John F. Dillon* for appellees.

No. 177. RAILWAY REGISTER MANUFACTURING COMPANY *v.* THIRD AVENUE RAILROAD COMPANY. Appeal from the Circuit Court of the United States for the Southern District of New York. March 24, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. E. N. Dickerson* for appellant. *Mr. Louis W. Frost* for appellees.

Cases not otherwise Reported.

No. 155. RAINEY *v.* BROWN. Appeal from the Circuit Court of the United States for the Western District of Pennsylvania. March 22, 1893: Dismissed, with costs, pursuant to the 16th rule, on motion of *Mr. A. P. Burgwin* for appellees. *Mr. John Dalzell* for appellant. *Mr. Hill Burgwin* and *Mr. George C. Burgwin* for appellees.

No. 201. RICHMOND AND DANVILLE RAILROAD COMPANY *v.* KILLIAN. Error to the Circuit Court of the United States for the Northern District of Georgia. March 30, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. Linden Kent* and *Mr. Henry Jackson* for plaintiff in error. No appearance for defendant in error.

No. 115. ROBERTSON *v.* ATTERBURY. Error to the Circuit Court of the United States for the Southern District of New York. January 6, 1893: Dismissed, with costs, on motion of *Mr. Attorney General* for the plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. William Stanley*, *Mr. S. G. Clarke* and *Mr. E. B. Smith* for defendant in error.

No. 83. ROYER *v.* COUPE. Appeal from the Circuit Court of the United States for the District of Massachusetts. December 5, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. M. A. Wheaton* for appellant. *Mr. B. F. Thurston* and *Mr. W. H. Thurston* for appellees.

No. 132. ST. LOUIS, ARKANSAS & TEXAS RAILWAY COMPANY *v.* UNION BRIDGE COMPANY. Error to the Circuit Court of the United States for the Eastern District of Arkansas. November 14, 1892: Dismissed, with costs, on authority of counsel for the plaintiff in error. *Mr. J. M. Taylor* and *Mr. Jefferson Chandler* for plaintiff in error. *Mr. U. M. Rose* and *Mr. G. B. Rose* for defendant in error.

Cases not otherwise Reported.

No. 482. ST. PAUL FIRE & MARINE INSURANCE COMPANY *v.* PELZER MANUFACTURING COMPANY. Error to the Circuit Court of the United States for the District of South Carolina. July 23, 1892: Dismissed, pursuant to the 28th rule. *Mr. W. J. Hammond* for plaintiff in error *Mr. A. T. Smythe* for defendant in error.

No. 984. SANGER *v.* FLOW. Error to the United States Circuit Court of Appeals for the Eighth Circuit. January 18, 1893: Dismissed, with costs, on motion of counsel for plaintiffs in error and case remanded to United States Court in Indian Territory. *Mr. W. O. Davis* for plaintiffs in error. No appearance for defendants in error.

No. 1219. SAVAGE *v.* UNITED STATES. Appeal from the Court of Claims. November 11, 1892: Docketed and dismissed, on motion of *Mr. Assistant Attorney General Cotton* for the appellee. *Mr. Attorney General* for the appellee. No appearance for appellant.

No. 168. SAX *v.* TAYLOR IRON WORKS. Appeal from the Circuit Court of the United States for the District of New Jersey. March 23, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. David A. Burr* for appellant. No appearance for appellee.

No. 1339. SAWYER-MAN ELECTRIC COMPANY *v.* EDISON ELECTRIC LIGHT COMPANY. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. May 15, 1893: Petition denied. *Mr. Edmund Wetmore*, *Mr. Elihu Root*, *Mr. S. A. Duncan*, *Mr. L. E. Curtis* and *Mr. B. H. Bristow* for the Sawyer-Man Company in support of the petition. *Mr. Joseph H. Choate*, *Mr. Frederic P. Fish* and *Mr. R. N. Dyer* for the Edison Companies, in opposition thereto.

Cases not otherwise Reported.

No. 1268. SCHOONER SAN DIEGO *v.* UNITED STATES. Appeal from the District Court of the United States for the District of Alaska. January 3, 1893: Docketed and dismissed, on motion of *Mr. Solicitor General* for appellee. *Mr. Attorney General* for appellee. No appearance for appellant.

No. 96. SHANNON *v.* BRUNER. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. January 3, 1893: Decree affirmed, with costs, by a divided court. *Mr. U. M. Young* for appellant. *Mr. F. N. Judson* for appellee.

No. 128. SHIELDS *v.* MCAULEY. No. 129. SHIELDS *v.* MCAULEY. Appeals from the Circuit Court of the United States for the Western District of Pennsylvania. February 2, 1893: Dismissed, with costs, on authority of counsel for the appellants. *Mr. James H. Reed* for appellants. *Mr. George C. Burgwin* for one of the appellees.

No. 67. SIMMS *v.* BAMBRICK. Appeal from the Supreme Court of the Territory of Arizona. November 23, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. William Pinkney Whyte* for appellant. No appearance for appellees.

No. 1309. SINGLEHURST *v.* LA COMPAGNIE GENERALE TRANSATLANTIQUE. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. March 27, 1893. Petition denied. *Mr. E. K. Jones* for La Compagnie Generale Transatlantique in support of the petition. *Mr. R. D. Benedict* for Singlehurst *et al.* opposing.

No. 75. SMITH *v.* THOMSON. Appeal from the Circuit Court of the United States for the Northern District of New

York. December 1, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. George E. Terry* for appellant. No appearance for appellees.

No. 1322. SPERRY *v.* LEVINS. Appeal from the Supreme Court of the Territory of Washington. April 10, 1893. Docketed and dismissed, with costs, on motion of *Mr. Fillmore Beall* for the appellee, and cause remanded to the Supreme Court of the State of Washington.

No. 441. STAYTON WATER DITCH & CANAL COMPANY *v.* SALEM CAPITAL FLOUR MILLS COMPANY. Appeal from the Circuit Court of the United States for the District of Oregon. March 21, 1893: Dismissed, with costs, on motion of *Mr. John H. Mitchell* for appellants. *Mr. John H. Mitchell* for appellants. *Mr. J. N. Dolph* for appellee.

No. 62. STEMWINDER MINING COMPANY *v.* EMMA & LAST CHANCE CONSOLIDATED MINING COMPANY. Error to the Supreme Court of the Territory of Idaho. December 19, 1892: Judgment affirmed, with costs, by a divided court, and cause remanded to the Supreme Court of the State of Idaho. *Mr. S. S. Burdett* and *Mr. Albert Hagen* for plaintiff in error. *Mr. W. B. Heyburn* for defendants in error.

No. 68. SUESSENBACH *v.* FIRST NATIONAL BANK OF DEADWOOD. Appeal from the Supreme Court of the Territory of Dakota. October 24, 1892: Dismissed, with costs, per stipulation, on motion of *Mr. S. S. Burdett* for the appellee, and cause remanded to the Supreme Court of the State of South Dakota. *Mr. Daniel McLaughlin* for appellants. *Mr. G. C. Moody* and *Mr. S. S. Burdett* for appellee.

No. 1341. SUN PRINTING & PUBLISHING ASSOCIATION *v.* SMITH. Petition for a writ of certiorari to the United States

Circuit Court of Appeals for the Second Circuit. May 10, 1893: Petition denied. *Mr. Franklin Bartlett* for the Sun Printing and Publishing Association in support of the petition. No opposition.

No. 295. SWEET *v.* LA BELLE WAGON WORKS. Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin. April 3, 1893: Dismissed, with costs, on authority of counsel for the appellant. *Mr. F. C. Winkler* for appellant. *Mr. C. E. Shepard* for appellee.

No. 1112. TEXAS & PACIFIC RAILWAY COMPANY *v.* NELSON. Error to the United States Circuit Court of Appeals for the Fifth Circuit. October 28, 1892: Dismissed, with costs, on authority of counsel for the plaintiff in error. *Mr. John F. Dillon* and *Mr. Winslow S. Pierce* for plaintiff in error. No appearance for defendant in error.

No. 73. THOMPSON *v.* CARLISLE. Error to the Circuit Court of the United States for the Northern District of Texas. November 30, 1892: Dismissed, with costs, pursuant to the 10th rule. *Mr. Sawnie Robertson* for plaintiff in error. No appearance for defendants in error.

No. 937. TODD *v.* KAUFFMAN. Appeal from the Supreme Court of the District of Columbia. June 2, 1892: Dismissed, pursuant to the 28th rule. *Mr. J. J. Johnson* for appellant. *Mr. B. F. Leighton* for appellees.

No. 250. TRAVERS *v.* BUCKLEY. Appeal from the Circuit Court of the United States for the District of Massachusetts. April 24, 1893: Dismissed, with costs, pursuant to the tenth rule. *Mr. Arthur* v. *Briesen* for appellant. *Mr. Causten Browne* for appellees.

Cases not otherwise Reported.

No. 601. ULRICH *v.* MCGOWAN. Appeal from the Circuit Court of the United States for the Western District of Missouri. May 15, 1893: Dismissed, with costs, on authority of counsel for the appellant. *Mr. Edward H. Stiles* for appellant. No appearance for appellee.

No. 1277. UNITED STATES *v.* FOWKES. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit. February 6, 1893: Petition denied. *Mr. Attorney General* and *Mr. Assistant Attorney General Maury* for petitioner. *Mr. Thomas Hart, Jr.*, for Fowkes opposing.

No. 638. UNITED STATES *v.* GILBERT. Appeal from the Court of Claims. January 3, 1893: Dismissed, on motion of *Mr. Solicitor General* for the appellant. *Mr. Attorney General* for appellant. *Mr. C. C. Lancaster* for appellee.

No. 1204. UNITED STATES *v.* STEAMSHIP ITATA. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. October 31, 1892: Petition denied, without prejudice. *Mr. Attorney General* and *Mr. Solicitor General* for petitioner. No opposition.

No. 667. UNITED STATES *v.* MARVIN. Appeal from the Circuit Court of the United States for the District of Connecticut. January 3, 1893: Dismissed, on motion of *Mr. Solicitor General* for the appellant. *Mr. Attorney General* for appellant. *Mr. C. C. Lancaster* for appellee.

No. 234. UNITED STATES *v.* MOCK. Error to the Circuit Court of the United States for the Northern District of California. April 20, 1893: Dismissed, on authority of counsel

for plaintiff in error. *Mr. Attorney General* for plaintiff in error. No appearance for defendant in error.

No. 1246. VAN GUNDEN *v.* VIRGINIA COAL & IRON COMPANY. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. December 5, 1892: Petition denied. *Mr. William C. Mayne*, *Mr. D. H. Chamberlain* and *Mr. F. S. Blair* for petitioners, Van Gunden *et al.* *Mr. Richard C. Dale*, *Mr. J. F. Bullitt* and *Mr. R. A. Ayers* for The Virginia Coal and Iron Company in opposition to petition.

No. 228. VULCAN IRON WORKS *v.* SKINNER. Appeal from the Circuit Court of the United States for the Northern District of Illinois. January 9, 1893: Dismissed, per stipulation. *Mr. Charles K. Offield* for appellants. *Mr. L. L. Coburn* for appellee.

No. 219. WALDIE *v.* HUBEL. Appeal from the Circuit Court of the United States for the Southern District of New York. April 13, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. A. G. N. Vermilya* for appellant. No appearance for appellee.

No. 169. WATSON *v.* BELFIELD. Appeal from the Circuit Court of the United States for the District of New Jersey. March 23, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. Edward A. Day* for appellant. *Mr. James Buchanan* for appellees.

No. 280. WIGHT FIRE PROOFING COMPANY *v.* CHICAGO FIRE PROOFING COMPANY. Appeal from the Circuit Court of the United States for the Northern District of Illinois. April 26, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. George L. Chapin* for appellant. No appearance for appellee.

Cases not otherwise Reported.

No. 145. WILKINS *v.* TOURTELOTT. Error to the Supreme Court of the State of Kansas. April 3, 1893: Judgment affirmed, with costs, by a divided court. *Mr. James M. Mason*, *Mr. William M. Springer* and *Mr. J. W. Day* for plaintiffs in error. *Mr. Jefferson Brumback* and *Mr. Wallace Pratt* for defendants in error.

No. 853. WILLIAMS *v.* ABEEL. Error to the Circuit Court of the United States for the Northern District of Texas. March 7, 1893: Dismissed, with costs, on motion of counsel for plaintiff in error. *Mr. Eugene Williams* for plaintiff in error. *Mr. E. H. Graham* for defendants in error.

No. 854. WILLIAMS *v.* WILCOX. Error to the Circuit Court of the United States for the Northern District of Texas. March 7, 1893: Dismissed, with costs, on motion of counsel for plaintiff in error. *Mr. Eugene Williams* for plaintiff in error. *Mr. E. H. Graham* for defendants in error.

APPENDIX.

I.

AMENDMENT TO RULES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

It is ordered that Equity Rule 67, as promulgated May 2, 1892, be, and it is hereby, amended by adding thereto the following:

"Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court, on final hearing."

(Promulgated May 15, 1893.)

II.

Summary Statement of Business of the Supreme Court of the United States for October Term, 1892.

Original Docket.

Number of cases	21
Number of cases disposed of	16
Leaving undisposed of	5

Appellate Docket.

Number of cases on the appellate docket at the close of October Term, 1891, not disposed of	1073
Number of cases docketed during October Term, 1892	275
Total	1348
Number of cases disposed of October Term, 1892	414
Number of cases remaining undisposed of, showing a reduction of 139 cases	934

INDEX.

ADMIRALTY.

1. A steam vessel, the N., backed out from her slip in Jersey City, towards the middle of the Hudson River between Jersey City and New York, preparatory to turning down to go to sea. Another steam vessel, the S., was going down, above the N., and nearer the New York shore, on her way to sea. It was customary and necessary for the N. to back out of her slip to about the middle of the river. The S. knew of such practice of the N. When the N. had reached the middle of the river she stopped her engines and the S. assumed she would go ahead, and herself proceeded without any material change of course, under slow speed, until she got near enough to observe that the N. was continuing to make sternway at considerable speed, and might bring herself in the path of the S. Then the S. stopped her engines, being about 1000 feet away from the N., and one minute after, upon observing that the N. still continued to make sternway at a speed which indicated danger of collision, put her engines at full speed astern and ported. The N., after stopping her engines, waited two minutes before putting her engines at half speed ahead, and two minutes more before putting her engines at full speed ahead. The vessels collided, the N. and the S. both of them making sternway at the time; *held*, that the N. was in fault and the S. not in fault. *The Servia*, 144.
2. The S. was justified in assuming that the N. would pursue her customary course and took timely measures to avert a collision. *Ib.*
3. The statutory steering and sailing rules had little application in the case and it was rather one of "special circumstances." *Ib.*

ALIENS.

See CONSTITUTIONAL LAW, 4 to 9.

CASES AFFIRMED.

1. This case is dismissed upon the authority of *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262. *Nash* v. *Harshman*, 263.
2. *Scott* v. *Neely*, 140 U. S. 106, affirmed and applied. *Cates* v. *Allen*, 451.

See CUSTOMS DUTIES, 8, 9; DEED, 2; JURISDICTION, A, 4; PATENT FOR INVENTION, 13; PUBLIC LAND, 8.

CASES DISTINGUISHED.

1. *Chicago, Milwaukee & St. Paul Railway* v. *Ross*, 112 U. S. 377, explained and distinguished. *Baltimore & Ohio Railroad* v. *Baugh*, 368.
2. *Holland* v. *Challen*, 110 U. S. 15, and *Whitehead* v. *Shattuck*, 138 U. S. 146, distinguished. *Cates* v. *Allen*, 451.
3. *Irwin* v. *Williar*, 110 U. S. 449, distinguished. *Bibb* v. *Allen*, 481.
4. *Payne* v. *Hook*, 7 Wall. 425, explained and distinguished. *Byers* v. *McAuley*, 608.

See CUSTOMS DUTIES, 8, 9;
DEED, 1;
PUBLIC LAND, 4, 8.

CIRCUIT COURTS OF APPEALS.

This case coming on to be heard before the Circuit Court of Appeals, consisting of the Circuit Judge and two District Judges, one of the judges was found to be disqualified to sit in it, and another was unwilling to sit, whereupon the court certified to this court questions and propositions of law concerning which it desired the instruction of this court, and directed the clerk to transmit with the certificate twenty copies of the printed record in the cause. *Held*,

(1) That the certificate was irregular, as a quorum of the court did not sit in the case;

(2) That it did not comply with rule 37 of this court, inasmuch as it did not contain a proper statement of the facts on which the questions or propositions of law arose;

(3) That the act of March 3, 1891, does not contemplate the certification of questions or propositions of law to be answered in view of the entire record in a cause; although this court may order an entire record to be brought up in order to decide, as if the case had been brought up by writ of error or appeal. *Cincinnati, Hamilton & Dayton Railroad* v. *McKeen*, 259.

COMMON CARRIER.

Where, in an action against a common carrier to recover damages for injuries to a passenger, there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them. *Richmond & Danville Railroad Co.* v. *Powers*, 43.

See RAILROAD, 7.

CONFLICT OF LAW.

1. It is a rule of general application, that where property is in the actual possession of a court of competent jurisdiction, such possession cannot

CONSTITUTIONAL LAW.

CONTRACT.

upon the assistant district attorney said: "I did not mean to refer to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf." To which counsel for defendant again excepted. Judgment being given against the defendant, and the case being brought here by writ of error; *Held*, (1) That the exceptions and the writ of error properly brought the matter before this court; (2) That the judgment below should be reversed. *Ib.*

See HABEAS CORPUS, 1, 2.

CUSTOMS DUTIES.

1. The action which § 3011 Rev. Stat., as amended by the act of February 27, 1877, 19 Stat. 240, 247, c. 69, authorizes to be brought to recover back an excess of duties paid, cannot be maintained by a stranger, suing solely in virtue of a purchase of claims from those who did not see fit to prosecute them themselves. *Hager* v. *Swayne*, 242.
2. Tomatoes are "vegetables" and not "fruit," within the meaning of the tariff act of March 3, 1883, c. 121. *Nix* v. *Hedden*, 304.
3. The language of commerce, when used in laws imposing duties on importations of goods, and particularly when employed in the denomination of articles, must be construed according to the commercial understanding of the terms employed. *Hedden* v. *Richard*, 346.
4. This rule is equally applicable where a term is confined in its meaning, not merely to commerce, but to a particular trade, and in such case, also, the presumption is that the term was used in its trade signification. *Ib.*
5. In an action against a collector to recover an excess of duties paid under protest, the defendant is entitled to show that words employed in a tariff act have a special commercial meaning in the trade, and to have it submitted to the jury whether the imported goods in question came within them. *Ib.*
6. Old india-rubber shoes, invoiced as "rubber scrap" and entered as "scrap rubber," were exempt from duty, under the similitude clause, § 2499, of Title 33 of the Revised Statutes, as enacted by § 6 of the act of March 3, 1883, (22 Stat. 491,) as being substantially crude rubber, under § 2503, they having lost their commercial value as articles composed of india-rubber, or india-rubber fabrics, or india-rubber shoes. *Cadwalader* v. *Jessup & Moore Paper Co.*, 350.
7. Imported articles, commercially known as ribbons, composed wholly or partly of silk and chiefly used for trimming hats, bonnets or hoods, are dutiable at twenty per centum ad valorem, under Schedule N of the tariff act of March 3, 1883, 22 Stat. 488. *Cadwalader* v. *Wanamaker*, 532.
8. The case of *Hartranft* v. *Langfeld*, 125 U. S. 128, cited and approved. *Ib.*

DAMAGES.

See PUBLIC LAND, 5.

DEED.

EXECUTOR AND ADMINISTRATOR.

See CONFLICT OF LAW, 2;
JURISDICTION, C, 4;
LOCAL LAW, 3, 4.

FRAUD.

By a contract in writing, A and B agreed that certain lands, for the sale and conveyance of most of which A held agreements of third persons, should be purchased for the mutual interest of A and B, and the legal title taken in A's name, and conveyed by him to B; that B should advance to A the sums required to pay the purchase money, as well as other expenses to be mutually agreed upon from time to time, and be repaid his advances, with interest, out of the net proceeds of sales; that A should attend to preparing the lands for sale, and sell them, subject to B's approval, at prices mutually agreed upon, and retain a commission of five per cent on the gross amount of sales, and, until B was reimbursed for his advances, deposit the rest of the proceeds to B's credit in a bank to be mutually agreed upon; that, when B had been so reimbursed, "then the remainder of the property shall belong sixty per cent to B and forty per cent to A"; and that the property should be prepared for sale "by A or assigns" within a certain time, unless extended by mutual agreement. A fraudulently obtained from B much larger sums of money than were needed to pay for the lands, procured conveyances of the lands to himself, and refused to convey them to B. *Held*, that, whether the contract did or did not create a partnership, (and *it seems* that it did not,) the equitable title in the lands, after reimbursing B for his advances with interest, belonged three fifths to B and two fifths to A; and that A's fraudulent misconduct, while it deprived him of the right to the stipulated commissions, did not divest him of his title in the lands. *Shaeffer* v. *Blair*, 248.

FRAUDS, STATUTES OF.

1. Under a statute of frauds which requires the consideration of a promise to answer for the debt of another to be expressed in writing, a guaranty by a third person of the payment of a negotiable promissory note need not itself express any consideration, if written upon the note before it is delivered and first takes effect as a contract; but must, if written afterwards. *Moses* v. *Lawrence County Bank*, 298.
2. The statute of frauds of a State, even as applied to commercial instruments, is a rule of decision in the courts of the United Stated. *Ib.*
3. The defence of the statute of frauds cannot be set up against an executed contract. *Bibb* v. *Allen*, 481.

See CONTRACT, 7.

FRAUDULENT CONVEYANCE.

See EQUITY, 5.

JUDICIAL NOTICE.

The court takes judicial notice of the ordinary meaning of all words in our tongue; and dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court. *Nix* v. *Hedden*, 304.

JURISDICTION.

A. Jurisdiction of the Supreme Court.

1. When the record contains special findings of fact, but no bill of exceptions, the errors of law relied upon by a plaintiff in error must be considered and determined upon the findings. *Chicago, Milwaukee & St. Paul Railway Co.* v. *Hoyt*, 1.
2. A judgment of a Circuit Court to which a writ of error had been sued out, with a supersedeas bond given, being affirmed here and remanded to the trial court in the usual way, that court, on motion, summoned in the sureties, and, although they proposed to interpose a plea of partial payment, proceeded to render judgment against them and the principal for the full amount of the original judgment with interest and costs. An appeal to the Circuit Court of Appeals having been dismissed for nonjoinder of the original defendant, they applied to this court for a writ of mandamus, commanding the court below to vacate its judgment in so far as it was rendered against the sureties, and to execute the mandate by entering judgment and ordering execution against the principal only. *Held*, that that judgment was rendered in the exercise of judicial determination, and not in the discharge of a ministerial duty, and that the petitioners' remedy, if they deemed themselves aggrieved, was by a writ of error. *In re Humes*, 192.
3. The refusal by the trial court, during the progress of the trial, of leave to file a plea on the question of the plaintiff's citizenship and to permit issue to be joined thereon is within the discretion of that court and is not reviewable here. *Mexican Central Railway Co.* v. *Pinkney*, 194.
4. On the authority of *Cameron* v. *United States*, 146 U. S. 533, this case is dismissed because it does not appear that the jurisdictional amount is involved. *Abadie* v. *United States*, 261.
5. No appeal now lies to this court from decisions of the Interstate Commerce Commission. *Interstate Commerce Commission* v. *Atchinson, Topeka & Santa Fé Railroad Co.* 264.
6. If, pending a writ of error to reverse a judgment for the defendant in an action by a State to recover sums of money for taxes, the defendant offers to the plaintiff, and deposits in a bank to its credit, the amount of those sums, with penalties, interest and costs, which by a statute of the State have the same effect as actual payment and receipt of the money, the writ of error must be dismissed. *California* v. *San Pablo and Tulaire Railroad Co.*, 308.
7. A writ of error will not lie to review an order of the highest court of a

LACHES.

See TRUST.

LIMITATION, STATUTES OF.

An assignee in bankruptcy brought a suit in equity, in September, 1886, to set aside transfers of property made by the bankrupt in 1874, in fraud of creditors, and recorded prior to June, 1875. He had been declared a bankrupt in August, 1878, and the assignment in bankruptcy had been made in February, 1879. The answers set up the statute of limitations of the State of six years, and the bankruptcy statute limitation of two years. Judgment creditors of the bankrupt, included in his schedules in bankruptcy, brought a suit in the Supreme Court of the State in July, 1875, against the present defendants to set aside as fraudulent the conveyances in question, and duly filed a *lis pendens*, in which suit the same charges were made as in the present suit. The bill alleged that a decree was made in that suit, in favor of the plaintiffs, in November, 1885, and that it was not until the assignee in bankruptcy was informed of that decree, in July, 1886, that he received knowledge or information of the transfers of the property, or of any facts or circumstances relating thereto, or tending to show, or to lead to inquiry to, any fraudulent transfer. The bill did not set forth what were the impediments to an earlier prosecution of the claim, how the plaintiff came to be so long ignorant of his rights, the means, if any, used by the defendants fraudulently to keep him in ignorance, or how and when he first obtained knowledge of the matters alleged in the bill. *Held*, that the case was a clear one in favor of the bar of limitation, both by the state statute and by the bankruptcy statute. *Pearsall* v. *Smith*, 231.

See EQUITY, 3, 4;
PUBLIC LAND, 9, 10.

LOCAL LAW.

1. A person in charge of a joint railroad warehouse in a railroad centre in Texas, the property of one of several companies which unite in bearing the expense of maintaining it and in selecting its employés and in controlling its expenses, who makes no contracts and handles no moneys on behalf of another railroad centring there, but not participating in the selection of the employés and in controlling expenses, and who is not on the pay-roll of the latter company, is not its "local agent" upon whom process may be served under the provisions of the statutes of that State (Sayles Rev. Civ. Stats. Art. 1223*a*). *Mexican Central Railway Co.* v. *Pinkney*, 194.
2. The provisions of the Texas statutes which give to a special appearance made to challenge the court's jurisdiction, the force and effect of a general appearance, so as to confer jurisdiction over the person of the

MANDATE.

MASTER AND SERVANT.

for the full amount of the face of his bonds, which was not affected by the fact that the new company acquired its rights and property, not directly from the first company, but through intervening conveyances. *Ib.*

See EQUITY, 4;
LOCAL LAW, 3, 4.

MUNICIPAL BOND.

In accordance with a previous resolution of the city counsel of Cairo, Illinois, an election was duly held there on the 28th of May, 1867, "for the purpose of voting upon the question of the city's issuing $100,000 in twenty-year bonds, drawing eight per cent interest, as a subscription to the capital stock of the Cairo and Vincennes Railroad"; and it was, by a vote of 695 to 1, "declared to be the wish of the people that the said sum of $100,000 be so subscribed." Such subscription was accordingly made. In November following the railroad company and the city further agreed that the railroad company should commence work within six months and push it with dispatch; that the city should issue its bonds to the amount of $50,000, when the road should be completed to the boundary line between Alexander and Pulaski Counties, and a like amount when it should be completed to the boundary line between Pulaski and Johnson Counties, and that each amount when issued should be delivered to the railroad company in exchange for a like amount of its stock; and that the city should, as each issue of stock was made, sell it to the railroad company for the sum of $2500 in bonds of the city. In July, 1871, an ordinance was passed authorizing this contract to be carried out; and in December, 1872, the city, by its trustee, delivered to the railroad company bonds to the amount of $100,000 the company delivered to the trustee for the city certificates of stock to the like amount and bonds of the city to the amount of $5000, and the trustee thereupon transferred the certificates of stock to the company. The mayor of the city then, on the 14th of December, 1872, reported to the auditor of the State of Illinois an issue of bonds of the city to the amount of $95,000 for subscriptions to the stock of the railroad company, and the bonds were certified by the auditor as registered pursuant to the laws of Illinois, "to fund and provide for paying the railroad debts of counties, townships, cities and towns." The bonds were sold by the company and passed into the hands of innocent holders for value. The city having failed to pay the coupons on said bonds as maturing, one of the holders brought suit to recover the same. *Held*, (1) That the executed agreement on the part of the city to subscribe for stock, and on the part of the company to receive bonds in payment therefor, was not affected by the further act of the city in parting with its stock to the company in consideration of a return of a portion of the bonds; and that whatever wrong might have been committed by the city council

PARTIES.

See PARTNERSHIP.

PARTNERSHIP.

B. and H. being sued as partners, and it appearing from the proof that H. was not a partner but merely a clerk, no objection to the misjoinder having been made by either of the defendants, judgment for the whole amount was properly entered against B., a substantial cause of action having been established. *Bibb* v. *Allen*, 481.

See FRAUD.

PATENT FOR INVENTION.

1. Claims 3, 4, 5, and 6 of reissued letters patent No. 10,806, granted February 8, 1887, to the National Meter Company, as assignee of Lewis Hallock Nash, for improvements in water-meters, on the surrender of original letters patent No. 211,582, granted to said Nash, January 21, 1879, are not infringed by water-meters constructed according to letters patent reissued to the Hersey Meter Company, No. 10,778, November 2, 1886, as assignees of James A. Tilden, and to letters patent No. 357,159, granted to James A. Tilden, February 1, 1887, and to letters patent granted to said company, as assignee of said Tilden, No. 385,970, July 10, 1888. *National Meter Co.* v. *Yonkers*, 48.
2. The Nash piston has a side-rocking movement across the centre of the cylinder, upon successive bearing points made by the contact of a projection on the piston with the recess in the cylinder, or conversely, and the piston rotates upon its own axis, so that each projection comes successively into each recess of the cylinder. But in the defendant's structure, there is no side-rocking, nor any rotary motion, and each projection in the piston always operates in connection with one particular corresponding recess in the cylinder, and never leaves that recess. *Ib.*
3. The inventions protected by letters patent No. 203,604, granted to Charles E. Dobson, May 14, 1878, or by letters patent No. 249,321, granted to Henry C. Dobson, November 8, 1881, both for improvements in banjos, exhibit patentable novelty; but they are not infringed by instruments constructed according to the specification and claims in letters patent 253,849, granted to Edwin I. Cubley, February 21, 1882. *Dobson* v. *Cubley*, 117.
4. The invention claimed in letters patent No. 262,977, issued August 22, 1882, to Morris L. Orum for an improvement in locks for furniture, in

PRINCIPAL AND AGENT.

Where a principal sends an order to a broker doing business in an established market or trade, for a deal in that trade, he thereby confers upon the broker authority to deal according to any well-settled usage in such trade or market, especially when such usage is known to the principal, and is fair in itself, and does not change any essential particular of the contract between the principal and the broker, or involve any departure from the principal's instructions; provided the transaction for which the broker is employed be lawful in character and is not violative of good morals or public policy. *Bibb* v. *Allen*, 481.

PROMISSORY NOTE.

1. A negotiable promissory note, even if not purporting to be "for value received," imports a consideration; and the endorsement of such a note is itself *prima facie* evidence of having been made for value. *Moses* v. *Lawrence County Bank*, 298.
2. A promissory note payable to the maker's own order first takes effect as a contract upon endorsement and delivery by him. *Ib.*

PUBLIC LAND.

1. Swamp lands in Michigan which were not embraced in the list of such lands, made by the Surveyor General February 12, 1853, as coming within the provisions of the grant to the State of September 28, 1850, 9 Stat. 514, c. 84, which list was approved by the Secretary of the Interior January 11, 1854, and which lands were patented to the State March 3, 1856, as so listed and approved, were not included within the said grant of September 28, 1850. *Chandler* v. *Calumet & Hecla Mining Co.*, 79.
2. These several official acts by the proper officers operated as an adjudi-

RAILROAD.

RECEIVER.