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UNITED STATES REPORTS

VOLUME 151

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1893

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.
HORACE GRAY, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.
HENRY BILLINGS BROWN, Associate Justice.
GEORGE SHIRAS, Jr., Associate Justice.
HOWELL EDMONDS JACKSON, Associate Justice.
——— ——— Associate Justice.

RICHARD OLNEY, Attorney General.
LAWRENCE MAXWELL, Jr., Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1893.

ANGLE *v.* CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

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

No. 73. Argued November 8, 9, 1893. — Decided January 8, 1894.

The United States granted lands to the State of Wisconsin, to aid in the construction of railroads. The State granted a portion of these lands to a company, called in the opinion of the court The Omaha Company, for the purpose of constructing a defined railroad. It also granted another portion of them to another company, called in the opinion of the court the Portage Company, for the purpose of constructing another and different, and to some extent competing railroad. The latter grant was conditioned upon the completion of the road by the grantee within a specified period. Work was begun upon the Portage road, but in 1873 the company became embarrassed, and then broke down. In 1878 the legislature of Wisconsin extended the time for the construction of the Portage Company's road three years. In 1881 a contract was made with A. for its completion, under which work was resumed with vigor and was diligently prosecuted, with every prospect that the road would be completed within the extended time. In 1882, before the expiration of that extension, the legislature of that State passed an act revoking the grant to the Portage Company, and bestowing it upon the Omaha Company. As a result of this the work which A. was diligently performing under his contract was arrested; he was prevented through the direct and active efforts of the Omaha Company from completing his performance of it;

Syllabus.

the profits which he would have received from it were lost to him; and the land grant was wrested from the Portage Company. A. then commenced an action at law against the Portage Company, in which a judgment was recovered by his administratrix. Execution thereon being returned *nulla bona*, a bill in equity was filed in the Circuit Court of the United States by the administratrix against the Omaha Company, to reach the land grant in its hands. The bill charged that the Omaha Company had conspired with and bribed certain officials of the Portage Company, who, through circumstances named in the bill, had become sole stockholders in that company, to wrest the land grant from the Portage Company, and to prevent A. from completing his contract. It set forth sundry steps in the alleged conspiracy, and charged that the legislature of Wisconsin had been induced by the conspirators to pass the act forfeiting the land grant and bestowing it upon the Omaha Company. The defendant demurred and the demurrer was sustained by the Circuit Court. *Held:*

(1) That the demurrer admitted that A. had suffered the wrongs complained of in consequence of the interference of the Omaha Company;

(2) That it must be assumed, as conceded by the demurrer, that the officials of the Portage Company had been bribed by the Omaha Company to betray their trust, and that the legislature had been induced by false allegations to revoke the grant to the Portage Company and to bestow it upon the Omaha Company;

(3) That as the breaking down of the Portage Company and the ruin of its contractor was the natural and direct result of all this, the contractor could resort to equity to enforce against the land grant in the hands of the Omaha Company the judgment which he had obtained at law against the Portage Company;

(4) That it must be presumed that the legislature, in transferring the grant to the Omaha Company, did not intend to affect thereby the rights of the Portage Company against the Omaha Company in the courts;

(5) That as there was nothing in the words of the grant to the Omaha Company which expressly tied up the granted land, it passed to that company subject to seizure and sale in satisfaction of any of its obligations;

(6) That the Omaha Company, by reason of its conduct in this matter, became, as to the creditors of the Portage Company, a trustee *ex maleficio* in respect of this property.

If one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer.

When a man does an act which in law and fact is a wrongful act, and injury to another results from it as a natural and probable consequence, an action on the case will lie.

A sole stockholder in a corporation cannot secure the transfer to himself of

Statement of the Case.

all the property of the corporation so as to deprive a creditor of the corporation of the payment of his debt.

When an act of the legislature is challenged in a court, the inquiry by the court is limited to the question of power, and does not extend to the matter of expediency, to the motives of the legislators, or to the reasons which were spread before them to induce the passage of the act; and, on the other hand, as the courts will not interfere with the action of the legislature, so it may be presumed that the legislature never intends to interfere with the action of the courts, or to assume judicial functions to itself.

This was an appeal from a decree of the Circuit Court of the United States for the Western District of Wisconsin dismissing plaintiff's bill.

The bill was filed on the 23d of May, 1888, against the Chicago, Portage and Superior Railway Company, the Chicago, St. Paul, Minneapolis and Omaha Railway Company and the Farmers' Loan and Trust Company. The Chicago, St. Paul, Minneapolis and Omaha Railway Company was the only defendant served with process. It appeared, and, on the 28th of July, filed a demurrer to the bill which, after argument, was sustained, and on September 2, 1889, the decree of dismissal was entered. 39 Fed. Rep. 143; 39 Fed. Rep. 912.

The facts as stated in the bill were as follows: By two acts, of date June 3, 1856, and May 5, 1864, respectively, 11 Stat. 20, c. 43, and 13 Stat. 66, c. 80, Congress granted lands to the State of Wisconsin to aid in the construction of certain railroads, among others one "from a point on the St. Croix river or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said State, to Bayfield." These land grants were accepted by an act of the legislature, approved October 8, 1856, (Laws Wisconsin, 1856, 137,) and by a joint resolution of the legislature of the State, of date March 20, 1865, (Gen. Laws Wisconsin, 1865, 689,) and a map of definite location was duly filed and accepted by the Secretary of the Interior.

By an act of March 4, 1874, (Laws Wisconsin, 1874, 186, c. 126,) the State granted to the North Wisconsin Railway Company, whose name was subsequently changed to Chicago,

St. Paul, Minneapolis and Omaha Railway Company, and which is the defendant herein, (to be hereafter called the Omaha Company,) that portion of the land grant applicable to the construction of the road from a point on St. Croix River to Bayfield, and to the Chicago and Northern Pacific Air-Line Railway Company, whose name was subsequently, and before 1878, changed to that of the Chicago, Portage and Superior Railway Company, (hereafter called the Portage Company,) so much of said grant as was applicable to the construction of the road from the west end of Lake Superior to a junction with the line running from St. Croix River to Bayfield.

The eighth section of this act, which is the granting section to the latter company, is as follows:

"There is hereby granted to the Chicago and Northern Pacific Air-line Railway Company all the right, title, and interest which the State of Wisconsin now has, or may hereafter acquire, in or to that portion of the lands granted to said State by said two acts of Congress as is or can be made applicable to the construction of that part of the railway of said company lying between the point of intersection of the branches of said grants, as fixed by the surveys and maps on file in the Land Office at Washington, and the west end of Lake Superior. This grant is made upon the express condition that said company shall construct, complete, and put in operation that part of its said railway above mentioned as soon as a railway shall be constructed and put in operation from the city of Hudson to said point of intersection, and within five years from its acceptance of said lands as herein provided, and shall also construct and put in operation the railway of said company from Genoa northerly, at the rate of twenty miles per year."

The value of the lands thus granted was, at the time of the wrongs hereinafter described, $4,000,000.

By section 12 the company was required within sixty days to file with the secretary of State an acceptance of the grant upon the terms and conditions named therein, and also such security for the construction of the road as should be required by the governor. Both of these conditions were complied with.

Genoa, named in section 8, was the town on the southern boundary of the State of Wisconsin, at which the line of the Chicago and Northern Pacific Air-line Railway entered the State, and Hudson was the place on the St. Croix River, described in the acts of Congress as the initial point of the road to be aided.

On March 16, 1878, an act was passed by the legislature of Wisconsin, (Laws Wisconsin, 1878, 442, c. 229,) extending the time for the construction of the Portage Company's road three years.

In the panic of 1873-74 the Portage Company had broken down, under a load of debts and embarrassments, and remained inactive until 1880. At that time it secured the services of Willis Gaylord to assist in extricating it from its embarrassments, and in continuing the construction of its road. William H. Schofield, an experienced railway projector and financier, was induced to accept the office of president, and the coöperation and assistance of the New York, New England and Western Investment Company (hereafter called the Investment Company) was secured.

A new mortgage for $25,000 a mile, and a new issue of stock, was provided for. Seven hundred thousand dollars of the new bonds and one million of the new stock were to be issued in full satisfaction of all outstanding stock, bonds, and other demands. In pursuance of these arrangements, it issued certificates of stock for one million dollars, in the name of A. A. Jackson, general solicitor of the Portage Company, which, endorsed by him in blank, were deposited with the Trust Company, and it also executed its orders to the number of ninety, calling for the delivery to John C. Barnes or bearer of a designated amount of said million dollars of stock in ten per cent instalments. These orders were in the following form:

"To the Farmers' Loan and Trust Company:

"This is to certify that, for value received, Mr. John C. Barnes or bearer is entitled to have and receive —— shares of the capital stock of the Chicago, Portage and Superior Rail-

way Company, which stock has been fully paid for and placed in your keeping as a special trust for delivery upon this order, and you are hereby authorized and directed to accept or certify in the usual manner this order for the delivery of said stock, and to deliver to the bearer hereof —— shares of the said stock whenever and as often as any two hundred and fifty thousand dollars of the first mortgage bonds of the said railway company are sold or disposed of by said railway company or by its fiscal agent, or whenever and as often as any ten miles of the railroad of said railway company shall be built, as will be certified to by the president of said railway company, and in any event you are hereby directed to deliver to the bearer, on the first day of January, A.D. 1883, any of the said —— shares of capital stock then remaining undelivered upon a surrender of this order therefor.

"CHICAGO, PORTAGE AND SUPERIOR
"RAILWAY COMPANY.

"[SEAL.] By ——— ———, *President.*

[On the margin:] "This order for the delivery of the bonds and stock of this company held in special trust is hereby approved and accepted.

"THE FARMERS' LOAN AND TRUST COMPANY. [SEAL.]"

These orders were all delivered to John C. Barnes in exchange for and redemption of all the theretofore outstanding stock of the Portage Company, which stock was at once cancelled, with the exception of two certificates for $25,000, which, by oversight or design on the part of Charles J. Barnes, vice-president of the Portage Company, remained in his custody uncancelled.

The situation after these arrangements were made was such that the entire outstanding stock was in the possession and control of C. J. Barnes, J. C. Barnes, and A. A. Jackson, yet held by them in trust for the company. The further stock provided for was to be issued from time to time to assist in the sale of the bonds until enough of the latter had been disposed of to construct the road. These arrangements having

been perfected, the Portage Company, through its president, sought the alliance and support of the Grand Trunk Railway Company of Canada, which had recently completed an extension of its road to Chicago.

Three contracts were entered into, of dates June 16, 1881, July 10, 1881, and September 30, 1881, by which the bonds of the company were to be disposed of and money enough advanced for the construction of the road. The bill sets out fully the nature and scope of these contracts, and copies of them are attached as exhibits. It is unnecessary here to say more than that, by them, taken in connection with the prior arrangements of the Portage Company, the latter obtained satisfactory assurances of abundant funds, and was placed in a position to fully perform its agreement with the State and construct the railroad by at least May 5, 1882 — all this, of course, upon the condition of no outside and wrongful interference.

Relying upon the sufficiency of its arrangements for money, it, on August 18, 1881, entered into a contract with Horatio G. Angle for the construction of about sixty-five miles of its railway, being that portion covered by the land grant heretofore referred to. By the terms of that contract Angle was to receive $8500 per mile in cash and $5000 per mile in the full-paid stock of the company, on condition that he completed the road on or before May 5, 1882. It also contracted for steel rails and fastenings to be delivered as the work of construction proceeded.

Angle commenced work, and had made such progress that, on the 20th of January, 1882, he had 1600 men employed along the line, and it was an assured fact that, unless interfered with, he would complete the railway, according to the terms of the contract, on or before May 5, 1882.

The bill further charges that about this time the Omaha Company conspired with other parties to wrest from the Portage Company its land grant, and to that end to prevent the completion of the contract by Angle and the construction of the road.

In the carrying out of this conspiracy, the conspirators

bribed Charles J. Barnes and A. A. Jackson, officers of the Portage Company, and who, either personally or as attorneys in fact for John C. Barnes, had the control of all the outstanding stock of the Portage Company, though holding it in trust for the benefit of the company, to betray their trust and transfer the stock to one L. J. Gage, for the benefit of the Omaha Company.

Having thus secured the control of the stock, they caused notice thereof to be given to the officers of the Grand Trunk Railway Company. These gentlemen, finding that the control of the Portage Company was passing into the hands of hostile interests, surrendered the collateral which had already been transferred to them, and declined to proceed further in the contracts which had been entered into.

Continuing the execution of this conspiracy, the Omaha Company notified the general manager of the Portage Company of the purchase of the outstanding stock, and advised and induced him to telegraph officially to the engineer-in-chief in charge of the work of construction, who had engaged in that work seven engineering corps, to forthwith call in these engineers, suspend their work, and pay them off. They also caused the general manager to notify the contractor, Angle, that the control of the company had been changed, and the English capitalists forced out, and also to telegraph to the merchants at Duluth and Superior City (who were furnishing supplies to the 1600 men at work) that the company had been sold out, advising them to protect themselves, because the company could not pay or protect them.

In consequence of these notices, the several engineering corps were broken up, the engineers left the work, all the tools, material, and other personal property belonging to the contractor and the company were attached at the suit of these merchant creditors, and the 1600 laborers dispersed and went elsewhere for work.

In further execution of this conspiracy it endeavored to bribe the president and directors of the Portage Company and the Investment Company to turn over the organization of the Portage Company at once to them. Failing in this, it caused

a bill to be filed in the Circuit Court for Cook County, Illinois, falsely charging the president and board of directors with incurring imprudent obligations and otherwise thus impairing the value of the million and twenty-five thousand of stock, purchased as heretofore set forth, and praying for a temporary injunction which, on February 11, 1882, was granted without hearing or notice, and restrained the president and other officers of the Portage Company from doing any act or thing whatsoever in the name or behalf of the company during the continuance of the injunction.

In still further execution of the conspiracy, the Omaha Company caused the fact of the abandonment of the work and the dispersion of the laborers engaged thereon to be promptly and widely published throughout Wisconsin, and especially among the members of the legislature, then in session at Madison — concealing at the same time the means by which this had been accomplished.

Further, through its own agents, and especially through Jackson and Barnes, the corrupted officers of the Portage Company, it falsely represented to the legislature that no special progress had been made in the matter of constructing this road; that no considerable number of men had ever been at work, and that the Portage Company had finally abandoned it, and was wholly without means or credit to prosecute it.

On the strength of these representations the legislature, without inquiry or hearing, on February 16, 1882, (Laws Wisconsin, 1882, p. 11, c. 9,) hurriedly passed an act forfeiting and revoking the grant to the Portage Company and bestowing it upon the Omaha Company, which forfeiture and regranting were confirmed by an act passed March 5, 1883. Laws of 1883, 19, c. 29.

The contract with Angle having been thus broken by the Portage Company he commenced an action at law against that company. While this action was pending Angle died, but a revivor was had in the name of the present plaintiff, and on January 31, 1887, she recovered a judgment in the Circuit Court of the United States for the Western District of Wisconsin for $205,803.19.

Upon that judgment execution was issued and returned *nulla bona*, and thereupon this bill was filed to reach the land grant in the hands of the Omaha Company.

Mr. J. R. Doolittle and *Mr. Thomas Ewing* for appellant. *Mr. Milton I. Southard* was with *Mr. Ewing* on his brief.

Mr. John F. Dillon and *Mr. Thomas Wilson*, for appellee.

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

That which attracts notice on even a casual reading of the bill — the truth of all the allegations in which must be taken, upon this record, to be admitted by the demurrer — is the fact that, while Angle was actively engaged in executing a contract which he had with the Portage Company — a contract whose execution had proceeded so far that its successful completion within the time necessary to secure to the Portage Company its land grant was assured, and when neither he nor the Portage Company was moving or had any disposition to break that contract or stop the work — through the direct and active efforts of the Omaha Company the performance of that contract was prevented, the profits which Angle would have received from a completion of the contract were lost to him, and the land grant to the Portage Company was wrested from it.

Surely it would seem that the recital of these facts would carry with it an assurance that there was some remedy which the law would give to Angle and the Portage Company for the losses they had sustained, and that such remedy would reach to the party, the Omaha Company, by whose acts these losses were caused.

That there were both wrong and loss is beyond doubt. And, as said by Croke, J., in *Baily* v. *Merrell*, 3 Bulst. 94, 95, "damage without fraud gives no cause of action; but where these two do concur and meet together, there an action lieth."

The Portage Company held a land grant worth four millions of dollars. It had contracted for the construction of its road, such construction to be completed in time to perfect its title to the land. The contract had been so far executed that its full completion within the time prescribed was assured. The contractor had sixteen hundred men employed. The rails had been purchased. The company had lifted itself out of the embarrassments which years before had surrounded it. It had taken up all its old stock but $25,000, which was ignorantly or wrongfully withheld by one of its officers. It had issued one million of new stock, had authorized a new issue of bonds, and had arranged for the cancelling of all its obligations with seven hundred thousand of these bonds and one million of stock. It had consummated arrangements with a wealthy company for the advancement of moneys sufficient for its work, and had gone so far as to place in the hands of that company one hundred thousand of its bonds, upon which $50,000 in cash was to be advanced. Except through some wrongful interference, it was reasonably certain that everything would be carried out as thus planned and arranged.

At this time the Omaha Company, which was a rival in some respects, and which had located a line parallel and contiguous to the line of the Portage Company, interferes, and interferes in a wrongful way. It bribes the trusted officers of the Portage Company to transfer the entire outstanding stock into its hands, or at least place it under its control. Being thus the only stockholder, it induces the general manager to withdraw the several engineering corps, whose presence was necessary for the successful carrying on of the work of constructing the road; to give such notice as to result in the seizure of all the tools and supplies of the contractor and the company, and the dispersion of all laborers employed. To prevent any action by the faithful officers of the Portage Company, it wrongfully obtains an injunction tying their hands. In the face of this changed condition of affairs the company, which had negotiated with the Portage Company and was ready to advance it money, surrendered the one hundred thousand of the bonds, and abandoned the arrange-

ment. By false representations to the legislature as to the facts of the case, it persuaded that body to revoke the grant to the Portage Company and bestow the lands upon itself.

That this was a wrongful interference on the part of the Omaha Company, and that it resulted directly in loss to the contractor and to the Portage Company, is apparent. It is not an answer to say that there was no certainty that the contractor would have completed his contract, and so earned these lands for the Portage Company. If such a defence were tolerated, it would always be an answer in case of any wrongful interference with the performance of a contract, for there is always that lack of certainty. It is enough that there should be, as there was here, a reasonable assurance, considering all the surroundings, that the contract would be performed in the manner and within the time stipulated, and so performed as to secure the land to the company.

It certainly does not lie in the mouth of a wrongdoer, in the face of such probabilities as attend this case, to say that perhaps the contract would not have been completed even if no interference had been had, and that, therefore, there being no certainty of the loss, there is no liability.

Neither can it be said that the Omaha Company had a right to contend for these lands; that it simply made an effort, which any one might make, to obtain the benefit of this land grant. No rights of this kind, whatever may be their extent, justify such wrongs as were perpetrated by the Omaha Company. Here, bribery was resorted to to induce the trusted officers of the Portage Company to betray their trust, and to place at least the apparent ownership of the stock in the hands of the rival company.

Without notice, without hearing, and by false allegations, it secured an injunction to stay the hands of the honest officers of the Portage Company. Such wrongful use of the powers and processes of the court cannot be recognized as among the legitimate means of contest and competition. It burdens the whole conduct of the Omaha Company with the curse of wrongdoing, and makes its interference with the affairs of the Portage Company a wrongful interference.

Further, by false representations as to what the Portage Company has done and intends to do, it induced the legislature of the State to revoke the grant to the Portage Company and bestow it upon itself. The result, and the natural result, of these wrongful actions on the part of the Omaha Company was the breaking down of the Portage Company, the disabling it from securing the means of carrying on this work, the dispersion of the laborers, and the prevention of the contractor from completing his contract. It will not do to say that the contractor was not bound to quit the work, but might have gone on and completed his contract, and thus earned the lands for the Portage Company; nor that the wrongful act of the trusted officers of the Portage Company in betraying their trust could have been corrected by the Portage Company by appropriate suit in the courts; that the law in one shape or another would have offered redress to the Portage Company for all the wrongs that were attempted and done by the Omaha Company. Granting all of this, yet the fact remains that the natural, the intended, result of these wrongful acts was the breaking down of the Portage Company, the unwillingness of the foreign company to furnish it with money, and the prevention of the contractor from completing his contract.

It is not enough to say that other remedies might have existed and been resorted to by the Portage Company, and that notwithstanding the hands of its officers were tied by this wrongful injunction. It is enough that the Portage Company did break down; that it broke down in consequence of these wrongful acts of the Omaha Company, and that they were resorted to by the latter with the intention of breaking it down.

It has been repeatedly held that, if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer: *Green* v. *Button*, 2 Cr. Mees. & R. 707, in which the defendant, by falsely pretending to one party to a contract that he had a lien upon certain property, prevented such party from delivering it to the plaintiff, the other party to the contract, and was

held responsible for the loss occasioned thereby. *Lumley* v. *Gye*, 2 El. & Bl. 216, in which a singer had entered into a contract to sing only at the theatre of the plaintiff, and the defendant maliciously induced her to break that contract, and was held liable to the damages sustained by the plaintiff in consequence thereof. *Bowen* v. *Hall*, 6 Q. B. D. 333, 337, in which it was held that an action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer, which thereby would naturally cause, and did in fact cause, an injury to such employer. In the opinion of Brett, L. J., it was said "that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby* v. *White*. If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person; or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him." *Walker* v. *Cronin*, 107 Mass. 555, in which a manufacturer was held entitled to maintain an action against a third party who, with the unlawful purpose of preventing him from carrying on his business, wilfully induced many of his employés to leave his employment, whereby the manufacturer lost their services, and the profits and advantages which he would have derived therefrom. *Benton* v. *Pratt*, 2 Wend. 385. *Rice* v. *Manley*, 66 N. Y. 82, in which a party had contracted to sell and deliver to plaintiffs a quantity of cheese, but having been made to believe through the fraud of the defendant that the plaintiffs did not want the cheese, sold and delivered it to him, and it was held that an action could be maintained against the defendant for the damages which the plaintiffs sustained from failing to get the cheese. *Jones* v. *Stanly*, 76 N. C. 355, 356, in which the court said: "It was decided in *Haskins* v. *Royster*, 70 N. C. 601, that if a person

maliciously entices laborers or croppers to break their contracts with their employer and desert his service, the employer may recover damages against such person. The same reasons cover every case where one person maliciously persuades another to break *any* contract with a third person. It is not confined to contracts for service."

Under these authorities, if the Omaha Company had by its wrongful conduct simply induced the Portage Company to break its contract with Angle, it would have been liable to him for the damages sustained thereby. *A fortiori*, when it not only induces a breach of the contract by the Portage Company, but also disables it from performance.

But there is still another aspect in which these transactions may be regarded. The Omaha Company became by its wrongful acts the sole stockholder in the Portage Company. It matters not that it might have been dispossessed of this position by appropriate action in the courts. It was, for the time at least, the sole stockholder. As such sole stockholder, it took advantage of its position and its power to strip the Portage Company of its property and secure its transfer to itself.

Now, what rights, if any, a corporation may have against a sole stockholder who wrongfully causes the transfer of all the property of the corporation to be made to himself, need not be inquired into. It is clear that this stockholder cannot secure this transfer from the corporation to itself of the property of the latter so as to deprive a creditor of the corporation of the payment of his debt.

To put it in another way: The Portage Company, a corporation, owed Angle $200,000. It had property with which that debt could be paid. The Omaha Company became the sole stockholder in the Portage Company. As such sole stockholder, it used its powers to transfer the property of the Portage Company to itself, and its conduct all the way through was marked by wrongdoing.

Whatever the Portage Company might do, Angle may rightfully hold the sole stockholder responsible for that payment, which the corporation would have made but for the wrongful acts of such stockholder.

But the stress of the defendant's contention is not that the bill fails to state a case of wrong for which, generally speaking, the law would give a remedy, but that the action of the legislature of the State in revoking the land grant to the Portage Company and donating it to the Omaha Company is conclusive upon the courts, and prevents any recovery; and, secondly, that although actionable wrong on the part of the defendant may be disclosed by the bill, the only remedy which the plaintiff has therefor is an action at law for damages, and no grounds are shown for the interposition of a court of equity.

With respect to the first of these matters, it is insisted that the Portage Company was in default at the very time that these wrongs, on the part of the Omaha Company, were charged to have been committed and the act of forfeiture was passed. By section 8 (the granting section) of the act of March 4, 1874, it was provided: "This grant is made upon the express condition that said company shall construct, complete, and put in operation that part of its said railway above mentioned, as soon as a railway shall be constructed and put in operation from the city of Hudson to said point of intersection, and within five years from its acceptance of said lands as herein provided, and shall also construct and put in operation the railway of said company from Genoa northerly, at the rate of twenty miles per year." The act of March 16, 1878, reads that "the time limited for the construction of the railway . . . is hereby extended three years." It is said that this act in effect merely struck out the word "five" in the clause quoted, and substituted therefor the word "eight," leaving the other conditions of the grant unchanged. It is not claimed in the bill that the Portage Company had ever constructed any part of its road from Genoa northward, or that a railway had not been constructed and put in operation from the city of Hudson to the point of intersection, and, therefore, it is urged that it is not shown that the Portage Company was not in default or that the legislature had not the absolute right to forfeit, as it did, by the act of February 16, 1882. It is contended, on the other hand, by the plaintiff that the ex-

tension was an absolute extension of three years from May 5, 1879, irrespective of the other two conditions in the original grant, and gave to the Portage Company an interest in the land grant which the legislature had no power to take away before May 5, 1882. It is further insisted by the defendant that, even if this claim of the plaintiff be sustained, the act of March 5, 1883, confirming the revocation and resumption of the land grant to the Portage Company, and the regranting of the same to the Omaha Company, was after the expiration of the full limit of extended time as thus claimed by the plaintiff, and that then the Portage Company had unquestionably failed to earn the grant and had lost all right to the land. Hence, it is said that there was, in whatever aspect the matter may be looked at, a valid resumption by the State of the grant which it had made conditionally to the Portage Company and a regrant of the lands to the Omaha Company; that the act of the legislature cannot be questioned; that full knowledge of all the situation must be presumed, and that no inquiry is permissible as to the motives which actuated the legislature, it being presumed that everything which it did it did rightly.

In this respect, the case of *Fletcher* v. *Peck*, 6 Cranch, 87, 130, is relied upon. In that case a purchase of a large body of lands was made by James Gunn and others in the year 1795, from the State of Georgia, the contract for which was made in the form of a bill passed by the legislature. The title to some of these lands thus acquired passed by conveyances to Peck, who conveyed them to Fletcher. An action was brought on certain covenants in that deed. The third covenant was that all the title which the State of Georgia ever had in the premises had been legally conveyed to Peck, the grantor. The second count assigned, as a breach of this covenant, that the original grantees from the State of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in all the lands purchased from the said

State by virtue of such law. And that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity, etc., and so the title of the State of Georgia did not pass to the said Peck. In respect to this matter the court, by Chief Justice Marshall, observed, among other things, as follows:

"This is not a bill brought by the State of Georgia to annul the contract, nor does it appear to the court by this count that the State of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this: One individual who holds lands in the State of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favor of the law, which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

"This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a State. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the legislature which passed the law."

The rule upon which this decision rests has been followed in many cases and has become a settled rule of our jurisprudence. The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act.

This principle rests upon the independence of the legislature as one of the coördinate departments of the government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly. Upon that rule it is insisted that these two acts of the State of Wisconsin cannot be impeached; that whatever wrongs may in fact have been done by the Omaha to the Portage Company, the legislature of Wisconsin, in the exercise of its undoubted power, has taken away the lands from the Portage and given them to the Omaha Company, and, as its power is undoubted, no court can interfere or inquire as to why or under the influence of what motives or information those acts were passed; nor can any court decree, either directly or indirectly, that those lands which were taken away from one company and given to the other, either legally or equitably, still remain the property of the first company, and subject to the payment of its debts.

But it must be remembered that the wrongs of the Omaha Company were done before the legislature passed either the act of 1882 or that of 1883, and it is to redress those wrongs that this suit was brought. Can it be that the legislature, by passing those acts, condoned the wrongs, and relieved the Omaha from any liability to the Portage Company? Did the resumption of the land grant and the regrant to the Omaha Company make lawful its acts in bribing the officers of the Portage Company? Did it relieve the Omaha Company from any liability for the wrongful use of the process of the courts in the injunction? Could it act judicially and in effect decree that the wrongs done by the one company to the other created no cause of action? A right of action to recover damages for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged. The wrong was not one done by the State or in the act of the legislature in taking away the land grant, but in such proceed-

ings on the part of the Omaha Company as put the Portage Company in a position which apparently called for the action of the legislature. There is no more challenge of the validity of this legislation by suing the Omaha Company for the wrongs it did leading up to this legislation than there is in challenging the validity of a criminal proceeding by an action against the prosecutor for malicious prosecution. It may be, as counsel claim, that the legislature is presumed to act with full knowledge of the situation; that it knew of the wrongs done by the Omaha to the Portage Company; knew that those wrongs had disabled the Portage Company from proceeding with the work; knew that thereby a cause of action had arisen to the contractor, Angle, against the Portage Company, and also against the Omaha Company; and with all that knowledge in possession deliberately passed the statutes referred to, and yet it does not follow that its legislation was intended or was potent to relieve the Omaha Company from liability. There is in this suggestion no impugning the motives, the wisdom, or the power, of the legislature. It acts as the guardian of the public interests, to which all private interests must yield, and it may well have thought that, notwithstanding the wrong that had been done by the Omaha Company, the fact was obvious that the Portage Company had become disabled, and could not go on with the work; and that in subserviency to such public interest it was necessary that the grant be taken away from the former and given to the latter company, in order thus to expedite the construction. As the courts will not interfere with the action of the legislature, so it may rightfully be presumed that the legislature never intends to interfere with the action of the courts, or to assume judicial functions to itself. It may be presumed to have left to the courts the redress of the private wrongs done by the Omaha Company. In other words, it may have acted upon considerations like these: Public interest requires the speedy building of this road; the Portage Company cannot build it, the Omaha Company can if aided by this grant; therefore, the public interests demand a taking away of the grant from the one company and giving it to the

other. If the disabled condition of the Portage Company has been brought about by the wrongs of the Omaha Company, the courts are open, and the accepted maxim in those tribunals is, that where there is a wrong there is a remedy. It thus subserves the interests of the public and leaves the redress of the wrong to that department which has not only the requisite jurisdiction, but also the appropriate machinery for ascertaining the amount of the injury, and enforcing the due compensation.

Look at this from the opposite standpoint: When this matter was brought to the attention of the legislature, and its action invoked, was it confronted with only these alternatives? Must it, even if it could, as a condition of subserving the public interests, condone the private wrong done by the one company to the other, or must it let the public interests be neglected until such time as the question of private wrong has been determined, or must it, without the possession of the suitable machinery for investigation, arbitrarily determine — as a condition of this transfer in subservience to public interests — the measure of injury done by the one company to the other, and the amount and character of the compensation to be rendered? Large and unnecessary stress would be laid upon the legislature if the question of public interest was always to be thus hampered by suggestions of injury and compensation between private individuals. While if there be no such stress, abundant freedom of action is open to the legislature, the distinction between the separate functions of the coördinate departments of the government is preserved, and at the same time public interest and private justice may be secured. The legislature may proceed with sole regard in all its actions to the public interests, with the assurance that all questions of wrong and loss between individuals will be settled in the judicial department, and that its own action in subserviency to the public interest will bar no redress of a private wrong unless such bar be absolutely necessary to the accomplishment of the public interest.

But it is said that to permit this suit to be maintained, and to subject these lands in the possession of the Omaha Com-

pany to the satisfaction of the judgment against the Portage Company, is, *pro tanto*, to nullify the action of the legislature; that in taking the lands away from the one company and giving them to the other, it intended that the transfer should be absolute, without limitation, and subject to no contingencies or burdens. But it affirmatively expressed no such intention; it simply made the transfer, leaving the property subject to all the burdens and contingencies which might arise in the ordinary course of law. Suppose at the time of this transfer from the one company to the State, and from the State to the other company, there was an existing judgment in favor of the Portage against the Omaha Company, would it be for a moment contended that there was anything in the transfer which prevented the Portage Company from satisfying its judgment by a seizure and sale of the lands thus transferred to the Omaha Company? Unless there were in the words of the grant to the Omaha Company something which expressly tied up that land, it passed to the company, subject to seizure and sale in satisfaction of any of its past or future obligations.

Even if it be conceded that, under a true construction of the grant, taken in connection with the act extending the time for three years, the Portage Company was in default on February 16, 1882, and the legislature had then the absolute right to forfeit the grant, such concession would be no answer to the cause of action set out in the bill. For who can say that the legislature would have exercised that right of forfeiture? The mere fact that the Portage Company could not enforce at the time a legal right to the lands as against the State does not absolve the Omaha Company from liability for those wrongs which resulted in putting the Portage Company in a condition naturally calling for legislative action in furtherance of the public interest. If nothing of the kind had been done by the Omaha Company, and the Portage Company was, as it is stated, proceeding diligently in the work, with reasonable assurance that it would be completed within three or four months, it is fair to presume that the legislature would not have disturbed the grant, but would have permitted the Portage Company to fully earn that which it had already partially

earned. The selection of the Portage Company in the first instance was, of course, made by the legislature in good faith, and the time was extended with the intent that the Portage Company should do the work and have the grant, and if the legislature saw that the company was doing the work and would have it promptly completed, respect for the good faith of the legislature compels the conclusion that but for the untoward circumstances precipitated upon the Portage Company by the wrongful acts of the Omaha Company the act of February 16, 1882, would never have been passed. Assuredly it does not lie in the power of the wrongdoer, the party whose wrongs created that condition which induced the legislative forfeiture, to excuse its wrongs on the ground that the legislature had the power to forfeit, and might have done it anyway. The cases of *Benton* v. *Pratt*, 2 Wend. 385, 390, and *Rice* v. *Manley*, 66 N. Y. 82, 85, are suggestive upon this question. In the former of these cases it appeared that certain parties had contracted with the plaintiff to purchase of him twenty hogs, to be delivered at a future day, nothing having been done to make the contract binding under the statute of frauds. While the plaintiff was driving his hogs and preparing to fulfil his contract, the defendants, knowing the facts, fraudulently represented that he did not intend to deliver them, and thus induced those third parties to buy their hogs, and when the plaintiff arrived with his they refused to take them simply because they had already a full supply. The point was made that the plaintiff could not recover because there was no binding contract between him and the third parties, but the point was overruled, the court saying: "It was not material whether the contract of the plaintiff with Seagraves & Wilson was binding upon them or not, the evidence established beyond all question that they would have fulfilled it but for the false and fraudulent representations of the defendants." And in the latter case the plaintiffs had made an agreement with one Stebbins to purchase from him a quantity of cheese, to be delivered at a future day, and that contract, too, was not binding by reason of the statute of frauds. The defendant knowing of this, fraudulently, by means of a fictitious tele-

gram, persuaded Stebbins that the plaintiffs did not want the cheese and would not take it, and thus himself secured a purchase of it. Here, too, it was objected, in defence to an action against him for the damages caused by a failure on the part of the plaintiffs to obtain the cheese from Stebbins, that there was no contract which could be enforced against Stebbins for the sale and delivery of the cheese, but the court overruled the objection, saying: "Plaintiffs' actual damage is certainly as great as it would have been if Stebbins had been obliged to perform his contract of sale, and greater, for the reason that they cannot indemnify themselves for their loss by a suit against Stebbins to recover damages for a breach of the contract. Suppose a testator designed to give A a legacy, and was prevented from doing it solely by the fraud of B; in such case, while A has no right to the legacy which he can enforce against the estate of the testator, yet both law and equity will furnish him appropriate relief against B, depending upon the facts of the case. (Kerr on Frauds, 274, and cases cited; Bacon Ab. Fraud, B.) Suppose A made a parol contract with B for the purchase of land, and B is ready and willing to convey, but is prevented from so doing by the fraudulent representations of C as to A, by which B is deceived and induced to convey to C; in such case, although A could not have compelled B to give him the conveyance, it would be a reproach to the law to hold that C would not be liable to A for the damage caused by the fraud." The same line of thought applies to the case before us. While it cannot be affirmed with certainty that the legislature would not have passed the act of forfeiture, yet it is reasonable to presume that it would not, and that its act was induced by the situation of the Portage Company, which situation was brought about by the wrongful acts of the Omaha Company.

Our conclusions in respect to this matter may be summed up thus: The Portage Company would have completed the work but for the wrongful acts of the Omaha Company. In consequence of the disability thus caused, and also moved by the false representations of the Omaha Company, the legislature resumed its grant and made a regrant to the Omaha

Company. The validity of that act is conceded. It is to be presumed the legislature acted with proper regard to the public interests, and without any improper motives or inducements. Conceding all this, it is equally to be presumed that it left the redress of private wrongs to the judicial department. It attached no conditions to the grant to the Omaha Company which would prevent the appropriation of those lands to the satisfaction of any claims against that company. And hence to hold the Omaha Company as trustee for the creditors of the Portage Company, in respect to these lands, neither impeaches the validity of the action of the legislature nor casts any imputation upon its knowledge or motives. It may also be noticed that the purpose of this grant, from Congress in the first place and from the State to the companies in the second place, was to aid in the construction of the railroad. That purpose having already been accomplished, there is no thwarting public policy, or the purposes of the grant, if the lands granted shall now be appropriated, through the processes of the courts, to the satisfaction of any claims against the Omaha Company.

Passing now to the other of the two objections, it may be conceded that an action at law would lie for the damages sustained by the Portage Company, through the wrongful acts of the Omaha Company. Indeed, that is a fact which underlies this whole case. Yet, while an action at law would lie, it does not follow that such remedy was either full or adequate. Waiving the question as to the solvency of the Omaha Company, and assuming that any judgment against it for damages could be fully satisfied by legal process, there remains the proposition that it is contrary to equity that the defendant should be permitted to enjoy unmolested that particular property, the possession of which it sought to secure, and did in fact secure, by its wrongful acts. Ought the Portage Company to be compelled to experiment with the solvency of the Omaha Company before coming into a court of equity? While no express trust attached to the title to these lands, either in the Portage or in the Omaha Company, — while it may be conceded that when the legislature resumed

the grant it took the title discharged of any express trust or liability in favor of the creditors of the Portage Company, and might have transferred an absolute title to any third party beyond the reach or pursuit of the Portage Company, or its creditors, — yet it is still true that the lands were given to the Portage Company, as they had been given by Congress to the State in the first instance for the purpose of aiding in the construction of this road; that a part of the work necessary for such construction had been done, and there is, therefore, an equity in securing, to the extent to which the work had been done, the application of these lands in payment thereof. And when the Omaha Company, by its wrongdoings, secured the full legal title to those lands, equity will hold that the party who has been deprived of payment for his work from the Portage Company, by reason of their having been taken away from it, shall be able to pursue those lands into the hands of the wrongdoer, and hold them for the payment of that claim which, but for the wrongdoings of the Omaha Company, would have been paid by the Portage Company, partially at least, out of their proceeds. While no express trust is affirmed as to the lands, yet it is familiar doctrine that a party who acquires title to property wrongfully may be adjudged a trustee *ex maleficio* in respect to that property.

In Pomeroy Eq. Jur. § 155, the author says, citing many cases: "If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner." And again, in section 1053: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or

under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer."

These authorities are ample to sustain this suit. The property was in the Portage Company for the purpose of aiding in the construction of this road; work was done by the plaintiff in that direction. Equity recognizes a right that that property should be applied in the payment for that work. The wrongdoing of the defendant, the Omaha Company, has wrested the title to this property from the Portage Company and transferred it to itself. It has become, therefore, a trustee *ex maleficio* in respect to the property. It follows from these considerations that the court erred in sustaining the demurrer to this bill, and the decree of dismissal must be

Reversed, and the case remanded with instructions to overrule the demurrer, and for further proceedings in conformity to law.

Mr. Justice Harlan dissented from the opinion and judgment for the reasons stated by him, at the Circuit, in *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Railway*, 39 Fed. Rep. 912, and *Farmers' Loan & Trust Co.* v. *Chicago, St. Paul, Minneapolis & Omaha Railway*, 39 Fed. Rep. 143.

His opinion in the *Farmers' Loan & Trust Company's case*, 39 Fed. Rep. 143, was as follows:

"The Farmers Loan and Trust Company, a New York corporation, brings this suit in its capacity as trustee in a mortgage or deed of trust executed January 1, 1881, by the Chicago, Portage & Superior Railway Company, a corporation of Illinois and Wisconsin, having power to construct and equip a railroad from the city of Chicago to a point on the north line of the former State, at or near the village of Genoa, Wisconsin, thence by way of Portage to Superior, at the west end of Lake Superior. The object of the mortgage was to secure the payment of the principal and interest of negotiable bonds which the railway company proposed to issue, to the amount of $10,200,000, and to that end it conveyed to the plaintiff, as trustee, its entire road, together with all lands, land grants, franchises, privileges, powers, rights, estate, title, interest, and property belonging or appertaining thereto, including a certain grant of lands made by the United States to the State of Wisconsin, and by the latter to the mortgagor company. The mortgage authorized the trustee, upon default in the payment of interest, to enter upon the premises, and also, in certain contingencies, to sell the mortgaged property. It provided, among other things, that the right of action under it shall be vested exclusively in the plaintiff and its successors in trust, and that under no circumstances should individual bondholders institute a suit, action, or other proceeding, on or under the mortgage, for the purpose of enforcing any remedy therein provided.

"The bill shows that bonds to the amount of $5,000,000 were executed, and a part of them issued and sold; and that, in respect to the latter, the mortgagor company (which will be called the 'Portage Company') was in default as to interest. It is alleged that the defendant, the Chicago, St. Paul, Minneapolis & Omaha Railway Company, (which will be called the 'Omaha Company,') wrongfully claims to be the owner of the lands granted by the State to the Portage Company, such claim being founded upon enactments of the legislature of Wisconsin which, the plaintiff avers, are unconstitutional, null, and void. It is also alleged that even if said enactments vested the legal title in the Omaha Company, the latter, for reasons

to be hereafter stated, ought not to be permitted by a court of equity to hold the lands or their proceeds against the plaintiff and the creditors of the Portage Company. A decree is asked declaring this mortgage or deed of trust to be a first lien on the lands, including such as had been or might be certified to the State by the United States as indemnity lands under the above grant.

"In connection with this general outline of the present suit, it is necessary to state the history of these lands as disclosed by the legislation of Congress and of this State.

"By an act of Congress, approved June 3, 1856, there was granted to Wisconsin, for the purpose of aiding in the construction of a railroad from Madison or Columbus, by the way of Portage City, to the St. Croix river or lake, between townships 25 and 31, and from thence to the west end of Lake Superior, and to Bayfield; and also from Fond du Lac, on Lake Winnebago, northerly to the state line, every alternate section of land, designated by odd numbers, for *six* sections in width, within fifteen miles on each side of said road respectively; the lands to be held by the State, subject to the disposal of the legislature, for no other purpose than the construction of the road for which they were granted or selected, and disposed of only as the work progressed.

"The fourth section provided that the lands be disposed of by the State only in manner following, — that is to say: that a quantity not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of the roads, respectively, might be sold; and when the governor certified to the Secretary of the Interior that any twenty continuous miles of either road were completed, then another like quantity of the land granted might be sold; and so, from time to time, until the roads were completed; and if they 'are not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States.' 11 Stat. 20, c. 43.

"By an act of the Wisconsin legislature, approved October 8, 1856, the lands, rights, powers, and privileges granted by Congress were accepted upon the terms, conditions, and reser-

vations contained in the act of June 3, 1856, and the State assumed the execution of the trust thereby created. Laws Wisconsin, 1856, 137, c. 118.

"On the second of March, 1858, the State filed in the General Land Office of the United States a map fixing the definite location of the railway under the act of Congress of June 3, 1856.

"By an act approved May 5, 1864, 13 Stat. 66, c. 80, Congress enlarged the grant of lands in aid of the construction of a road running northerly from the St. Croix river or lake. The first section of that act granted to Wisconsin for the purpose of aiding in the construction of a railroad from a point on that river or lake, between townships 25 and 31, to the west end of Lake Superior, and from some point on the line of the railroad, to be selected by the State, to Bayfield, every alternate section of public land, designated by odd numbers, for ten sections in width, within twenty miles on each side of said road, deducting lands granted for the same purpose by the act of Congress of June 3, 1856, upon the same terms and conditions as are contained in that act; the State to have the right of selecting other lands, nearest to the tier of sections above specified, in lieu of such of those granted as should appear, when the line or route of the road was definitely fixed, to have been sold or otherwise appropriated, or to which the right of preëmption or homestead had attached; which lands 'shall be held by said State for the use of and purpose aforesaid.'

"The time limited for the completion of the roads specified in the act of June 3, 1856, was extended to a period of five years from and after the passage of the act of 1864. Sec. 5.

"The seventh section is in these words: 'That whenever the companies to which this grant is made, or to which the same may be transferred, shall have completed twenty consecutive miles of any portion of said railroads, 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, patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is

completed, and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said railroad is completed: *Provided, however*, That no patents shall issue for any of said lands unless there shall be presented to the Secretary of the Interior a statement, verified on oath or affirmation by the president of said company, and certified by the governor of the State of Wisconsin, that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin and where the same end; which oath shall be taken before a judge of a court of record of the United States.'

"The eighth section provided that the lands granted should, when patented as provided in section seven, be subject to the disposal of the companies respectively entitled thereto, for the purposes aforesaid, and no other, and that the railroads be, and remain, public highways for the use of the government of the United States, free from charge for the transportation of its property or troops.

"By a joint resolution of its legislature, approved March 20, 1865, the State accepted the grant made by the act of May 5, 1864, subject to the conditions prescribed by Congress, (Gen. Laws Wisconsin, 1865, 689,) and on the sixth day of May, 1865, filed in the General Land Office of the United States a certificate adopting the location on the map previously filed as the definite location under the last act. That map and location were accepted and approved by the Secretary of the Interior.

"A subsequent act of the legislature, approved March 4, 1874, and published March 11, 1874, (Laws Wisconsin, 1874, 186, c. 126,) granted to the North Wisconsin Railway Company, for the purpose of enabling it to complete the railroad, then partially constructed by it, all the right, title, and interest the State then had, or might thereafter acquire, in and to the lands granted by the acts of Congress to aid in the construction of a railroad from the St. Croix river or lake, between townships 25 and 31, to the west end of Lake Superior and Bayfield, 'except those herein granted to the Chicago and Northern Pacific Air-line Railway Company.'

"The eighth, ninth, twelfth, and fifteenth sections of that act are as follows:

"'SECTION 8. There is hereby granted to the Chicago and Northern Pacific Air-line Railway Company all the right, title, and interest which the State of Wisconsin now has, or may hereafter acquire, in or to that portion of the lands granted to said State by said two acts of Congress as is or can be made applicable to the construction of that part of the railway of said company lying between the point of intersection of the branches of said grants, as fixed by the surveys and maps on file in the Land Office at Washington, and the west end of Lake Superior. This grant is made upon the express condition that said company shall construct, complete, and put in operation that part of its said railway above mentioned as soon as a railway shall be constructed and put in operation from the city of Hudson to said point of intersection, and within five years from its acceptance of said lands as herein provided, and shall also construct and put in operation the railway of said company from Genoa northerly, at the rate of twenty miles per year.

"'SECTION 9. The governor is hereby authorized and directed, upon the presentation to him of satisfactory proofs that twenty continuous miles of that part of the railway of said company first above mentioned have been completed in accordance with said acts of Congress and this act, to issue and deliver, or cause to be issued and delivered to said company patents in due form from said State for two hundred sections of said land, and thereafter upon the completion of twenty continuous miles of said railway, he shall issue or cause to be issued and delivered to said company, patents for two hundred sections of said lands, and on the completion of that part of the railway of said company lying between said point of intersection and the west end of Lake Superior, he shall issue and deliver or cause to be issued and delivered to said company, patents for the residue of said lands hereby granted to said company.'

"'SECTION 12. The said Chicago and Northern Pacific Air-line Railway Company shall, within sixty days from and after

the passage of this act, file with the Secretary of State, a resolution duly adopted by the board of directors, accepting this grant upon the terms and conditions herein contained, and shall also, within said sixty days, give to the State of Wisconsin such security for the completion of that portion of its railway lying between said point of intersection and the west end of Lake Superior, in accordance with the provisions of said acts of Congress and this act, as shall be required by the governor: *Provided, however*, That said security shall be of no force or effect until Congress shall have passed an act renewing said grants or extending the time for the construction of said road, or until it shall have been decided by the Supreme Court of the United States that the present title of the State is absolute and indefeasible; and upon the failure of said company to file said resolution and to give the said security within the time hereinbefore limited, this act shall be of no effect so far as it grants to said company any interest in or right to said lands.'

"'SECTION 15. This act shall take effect and be in force from and after its passage and publication.'

"The bond required by the twelfth section of the above act was approved by the governor and filed May 9, 1874.

"Prior to March 16, 1878, the Chicago and Northern Pacific Air-line Railway Company changed its name to that of the Chicago, Portage and Superior Railway Company.

"By an act of the Wisconsin legislature, approved on the day last named, and published March 28, 1878, the time limited by the act of March 4, 1874, for the construction and completion of the railway of the Chicago, Portage & Superior Railway Company, was extended *three* years. Laws Wisconsin, 1878, 442, c. 229.

"By the first section of an act of the legislature, approved February 16, 1882, (Laws Wisconsin, 1882, 11, c. 10,) it was declared that the grant of lands made to the Chicago, Portage & Superior Railway Company, by the act of March 4, 1874, 'is hereby revoked and annulled, and said lands are hereby resumed by the State of Wisconsin.'

"The second section is in these words: 'There is hereby

granted to the Chicago, St. Paul, Minneapolis & Omaha Railway Company all the right, title, and interest which the State of Wisconsin now has, or may hereafter acquire in and to the lands granted to said State by acts of Congress, approved June 3, 1856, and May 5, 1864, to aid in the construction of a railroad from the St. Croix river or lake to the west end of Lake Superior and Bayfield, which are applicable under said acts of Congress to the construction of that portion of said railroad, from the St. Croix river or lake to the west end of Lake Superior, which lies between the point of intersection of said last-named railroad, by the Bayfield branch, as fixed by the surveys and maps of said railroad, and the branch on file in the General Land Office in Washington, and the west end of Lake Superior. This grant is upon the express condition that the said Chicago, St. Paul, Minneapolis & Omaha Railway Company shall continuously proceed with the construction of the railroad now in part constructed by it between said point of intersection and the west end of Lake Superior, and shall complete the same so as to admit of the running of trains thereover on or before the 1st day of December, A.D. 1882.'

"The seventh section provides that 'Sections 8, 9, and 10 of said chapter 126 of the Laws of 1874, and all acts and parts of acts in any manner contravening or conflicting with the provisions of this act, are hereby repealed.'

"By an act of the Wisconsin legislature, approved March 5, and published March 7, 1883, Laws of 1883, 19, c. 29, it was declared:

"'SEC. 1. The revocation, annulment, and resumption made by section 1 of chapter 10 of the Laws of Wisconsin for the year 1882, of the land grant mentioned in said section, are hereby fully in all things confirmed.

"'SEC. 2. The grant of land made by said chapter 10 of the Laws of 1882, to the Chicago, St. Paul, Minneapolis & Omaha Railway Company is hereby in all respects fully confirmed.

"'SEC. 3. All acts and parts of acts interfering or in any manner conflicting with the provisions of this act are hereby repealed.

"'SEC. 4. This act shall take effect and be in force from and after its passage and publication.'

"It will be seen from the above statement that the grant in the eighth section of the act of the Wisconsin legislature of March 4, 1874, embraced so much of the lands granted by the acts of Congress of June 3, 1856, and May 5, 1864, as were applicable to the construction of the part of the road of the Portage Company 'lying between the point of intersection of the branches of said grants, as fixed by the surveys and maps on file in the Land Office at Washington, and the west end of Lake Superior,' — a distance of about sixty-five miles. That is the road to which this suit relates.

"According to the most liberal construction of the act of March 4, 1874, and that of March 16, 1878, the time limited for the completion of that road expired, at least, in May, 1882, eight years after the railway company filed its bond, as required by the ninth section of the act of 1874. It is conceded that the Portage Company never completed its land-grant division. Nor did it ever construct any part of the road from Genoa northerly, as required by the act of 1874.

"The bill alleges that the Portage Company broke down in the monetary panic of 1873–4, under a large load of debts and embarrassments, and lay dormant until late in the year 1880, when its stockholders employed one Gaylord to find parties able and disposed to revive it and put it on the way of success; that the work of its rehabilitation had so far progressed that in the fall of 1881, and early in 1882, the company borrowed large sums of money and expended them in pushing the construction of the land-grant division in which it was interested; that, on the 19th of January, 1882, more than one-half of the *substructure* of that division had been completed; that at the time last named more than sixteen hundred men were at work upon it, and its construction, in ample time to lay the rails and complete the division before May 5, 1882, was assured.

"It is further alleged that the Portage Company would have completed its land-grant road but for the following causes: 1. The passage by the state legislature of the act of February 16, 1882, revoking and annulling the grant contained

in the act of March 4, 1874, which destroyed the credit of the company while it was actively engaged, under many disadvantages, in the construction of its road. 2. That the Omaha Company, its agents and emissaries, interfered with and defeated the efforts of the Portage Company to complete its road within the required time.

"Although the act of June 3, 1856, provided that if the roads therein named were not completed within ten years no further sales should be made, and the lands unsold should revert to the United States; and although the only extension of the period for such completion ever made by Congress was for five years from and after the passage of the act of May 5, 1864, no question is made in the present suit as to the title of these lands being in the State at the date of the passage of the act of March 4, 1874, for all the purposes indicated in the acts of Congress. This, perhaps, is because of the decision in *Schulenberg* v. *Harriman*, 21 Wall. 44, 64, in which the court had occasion to interpret the acts of June 3, 1856, and May 5, 1864; holding that the requirement that the lands remaining unsold after a specified time shall revert to the United States, if the road be not then completed, was nothing more than 'a provision that the grant shall be void if a condition subsequent be not performed;' that when a grant upon condition subsequent proceeds from the government, no individual can assail the title upon the ground that the grantee has failed to perform such condition; and that the United States having taken no action to enforce the forfeiture of the estate granted, 'the title remained in the State as completely as it existed on the day when the title by location of the route of the railroad acquired precision, and became attached to the adjoining alternate sections.' See also *McMicken* v. *United States*, 97 U. S. 204, 217; *Grinnell* v. *Railroad Company*, 103 U. S. 739, 744; *Van Wyck* v. *Knevals*, 106 U. S. 360, 368; *St. Louis, Iron Mountain &c. Railway* v. *McGee*, 115 U. S. 469, 473. These authorities also indicate the mode in which the right to take advantage of the non-performance of a condition subsequent, annexed to a public grant, may be exercised, namely, 'by judicial proceedings authorized by law, the equivalent of

an inquest of office at common law, finding the fact of forfeiture, or adjudging the restoration of the estate on that ground,' or by 'legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement.'

"The questions to which the attention of the court has been principally directed relate, more or less, to the act of February 16, 1882, revoking and annulling the grant to the Portage Company. The main contention of that company is that the grant of 1874, the acceptance thereof, and the bond given for the performance of the condition as to the construction of the land-grant division, constituted a contract, entitling it to earn the lands by completing the sixty-five miles of railway, to the west end of Lake Superior, by May 5, 1882, without opposition or hindrance on the part of the State; consequently, it is argued, the forfeiture declared by the act of 1882 impaired the obligation of that contract, and was unconstitutional and void.

"On the part of the Omaha Company it is contended that one of the conditions of the grant to the Portage Company was that it would construct and put in operation its road from Genoa northerly at the rate of twenty miles each year; that no part of that road had been constructed when the act of 1882 was passed; and that, by reason of such default, the State had the right to withdraw the grant from the latter company, without regard to what had or had not been done towards the construction of its land-grant division. To this the plaintiff replies that the obligation which the Portage Company assumed with reference to its road from Genoa northerly was not made, nor intended to be made, a condition of its right to earn the lands applicable to that part of the road between the point of intersection of the Bayfield branch with the branch extending to the west end of Lake Superior; and that, consistently with the acts of Congress, the State could not make the right to earn these lands depend upon the construction of any part of its line, except that which Congress intended to aid by the grant.

"It is also contended by the Omaha Company that the grant to the Portage Company was beyond the power of the State to make; that the mode in which the State disposed of the lands to the latter company was inconsistent with that prescribed in the act of Congress, — that is, that the State had no authority, in advance of the completion of the road, to dispose of the land, by sale, conveyance, or otherwise, beyond one hundred and twenty sections, or to make any additional contract in respect to their disposition. To this the plaintiff replies that the act of 1864, by necessary implication, permitted the State to dispose of the lands, subject to the conditions of the grant, as to the time when the absolute title should pass from the State to the corporation earning them, and as to the time within which the road should be completed. Such, it is claimed, was all that was done by the act of 1874.

"As will be seen from the views hereafter expressed touching other questions, it is not necessary to decide whether the eighth section of the act of 1874 made the construction by the Portage Company of its road from Genoa northerly *a condition* of the grant to it of these lands, or whether such a condition could have been legally imposed by the State. The court is inclined to the opinion that if the Portage Company had duly performed the condition prescribed as to the completion of its land-grant division, its right to the lands applicable to that division, and expressly set apart to aid in its construction, would not have been affected by its failure to construct the Genoa branch. But the decision will not be placed upon that interpretation of the legislation in question.

"Nor will it be necessary to determine the other questions above stated, nor the question as to the validity of the revocation contained in the act of February 16, 1882. For if it be assumed that such revocation was a nullity, as impairing the obligation of the alleged contract between the Portage Company and the State, especially because made before the expiration of the period limited for the completion of its road, and while the company was engaged in constructing it; if the mode in which the State disposed of the lands to the Portage Company be conceded to have been consistent with the acts

of Congress; and if the authority of that company to mortgage the lands in order to raise money for the construction of the road be admitted; still, there remain, in the way of granting the relief sought, these stubborn, indisputable facts:

"*First.* That no corporation could acquire, and, therefore, could not pass, an interest in the lands, except subject to the condition prescribed in the act of the state legislature as to the time within which the land-grant division should be completed, and, therefore, subject to the right of the State, in some appropriate mode, to resume its ownership and possession of the lands for any substantial failure to perform that condition;

"*Second.* That the road was not constructed or completed within the time prescribed by the acts of March 4, 1874, and March 16, 1878;

"*Third.* That, after the expiration of that period, the revocation, annulment, and resumption declared by the act of February 16, 1882, and the grant in the same act to the Omaha Company, were in all things confirmed by the act of March 5, 1883, which, besides, repealed the latter statute and all previous acts interfering with or in any manner conflicting with such act of confirmation.

"If the act of February 16, 1882, was a valid exercise of power by the legislature, that, plainly, is an end of this branch of the case. But if it was unconstitutional and void, upon any ground whatever, its passage did not, in a legal sense, deprive the Portage Company of the right to proceed with the work of construction, and, by completing the road within the required time, become entitled to receive patents, or to compel any corporation or persons to whom patents were wrongfully issued to surrender the title. The validity and effect of the confirmatory act of March 5, 1883, does not depend upon the validity of the act of February 16, 1882; for if the latter act was void, it was clearly within the power of the legislature, by the act of 1883, — neither the road, nor any twenty continuous miles thereof, having at its date been completed by the Portage Company, — to withdraw or annul the grant to that company, and to make a new grant of the lands to

another corporation. The revocation in the act of March 5, 1883, of the grant to the Portage Company, accompanied by a confirmation, in the same act, of the grant of the same lands to the Omaha Company, was equivalent to a revocation, made, for the first time, on that day, and to an affirmative grant, then, for the first time, to that company. The passage by the legislature, in 1882, of an act that was void did not prevent it from passing a valid act, in 1883, touching the same subject. In *Strother* v. *Lucas*, 12 Pet. 410, 454, it was said; 'That a grant may be made by a law, as well as a patent pursuant to law, is undoubted (6 Cranch, 128); and a confirmation by a law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*.' See also *Field* v. *Seabury*, 19 How. 323, 334; *Langdeau* v. *Hanes*, 21 Wall. 521, 530; *Slidell* v. *Grandjean*, 111 U. S. 412, 439; *Whitney* v. *Morrow*, 112 U. S. 693, 695.

"It results from what has been said that, unless restrained by some legal obligation or contract from revoking the grant to the Portage Company, after the expiration of the time limited for the completion of the road to the west end of Lake Superior, the power of the State to pass the act of March 5, 1883, cannot be questioned. Were the hands of the State tied by any such obligation or contract? It has already been said that the mere revocation of February 16, 1882, if invalid, did not put the State under any legal obligation to forbear the exercise of any power it had after, and by reason of, the failure of that company to complete its land-grant road within the time stipulated.

"Assuming that the completion of the road, within the time limited, was rendered impossible by the act annulling the grant made to the Portage Company, it is contended that the case comes within the familiar rule that 'where a condition subsequent be possible when made, and becomes impossible by act of God or the king's enemy, or the law, or the grantor, the estate, having once vested, is not thereby divested by the failure, but becomes absolute,' citing Co. Litt. 206 *a*, 206 *b*; 4 Kent Com. 130; *Davis* v. *Gray*, 16 Wall. 230, 231. This rule cannot be applied to the present case. It is not to be disputed

that the revocation of the grant to the Portage Company had an injurious effect upon its credit. But, in a legal sense, such revocation by an unconstitutional, void act of legislation — which the plaintiff affirms the act of February 16, 1882, to be — cannot be said to have made impossible the performance of the condition upon which the company's title to the lands depended. The attempted revocation by the legislature, in 1882, and the loss by the company of credit in financial circles, do not, in law, hold the relation of cause and effect. The contrary view is not sustained by *Davis* v. *Gray*, 16 Wall. 203, 230. While the court there recognized the rule excusing the performance of a condition subsequent where performance was rendered impossible by the act of the law, or of the grantor, it was alleged in the bill, and admitted by the demurrer, that the State, by plunging her people into civil war, had herself prevented the railroad company from earning the grant of lands made in aid of the construction of its road. A condition of war, it was conceded, wholly precluded the completion of the road. But, even in that case, performance within a reasonable time was held to be essential to any claim to have the benefit of the grant. Here, there has not been performance by the Portage Company in respect to any part of its land-grant division. If the act of 1882 was void, and if, despite its passage, the Portage Company had completed the road within the required time, it would not be disputed by the plaintiff that, as between the company and the State or any other grantee of the State, the equitable title to lands would have been in that company. Its misfortune — assuming the representations as to its general financial condition to be true — was, that it had no credit of consequence except such as it got from the State's grant of lands; a circumstance that cannot control the determination of the question whether the act of 1882, in a legal sense, rendered it impossible to complete the road in time. If this be not so, it would follow that the act of 1882 would excuse or not excuse the failure of the Portage Company to complete the road within the time, as the evidence was the one way or the other touching its financial ability to have done so, apart from the credit given by the

grant of the lands in dispute. But the rule invoked by the plaintiff surely does not rest upon such a shifting foundation. Within that rule, the impossibility to perform a condition subsequent is either one arising from some obstacle interposed by the grantor, actually precluding or preventing performance by the grantee, or one that ensues, as matter of law, from something that the grantor did or caused to be done. There is no claim of actual interruption by the officers or agents of the State of the construction of the road; and, assuming the act of 1882 to have been unconstitutional, it cannot be true, in any legal sense, that non-performance of the condition, as to the completion of the road within the prescribed time, resulted from the mere passage of that act.

"It remains to consider other aspects of the case that have been presented with marked ability by the counsel for the plaintiff.

"It is contended, in substance, that the forfeiture of the land grant was caused by false representations made to the legislature by the Omaha Company, which desired the transfer of the grant to itself to aid in the construction of its own road, and that that company by fictitious suits, and by corruptly conspiring with officers of the Portage Company, wrongfully and fraudulently prevented the latter company from performing the condition in respect to the time within which the road was to be completed; consequently, the lands and their proceeds should be subjected by a court of equity to the debts of the Portage Company, secured by its land mortgage. The principal allegation of the bill as to what the Omaha Company did is: 'Furthermore, it, and at its instance, others employed by it, and especially the said A. A. Jackson and C. J. Barnes, who were well known as officers of the Portage Company, and understood to be authorized to speak in its behalf, falsely represented to members of said legislature that the Portage Company had made no substantial progress towards the construction of said land-grant division, and never had any considerable number of men at work thereon, and was wholly without means or credit to prosecute said work; that it had at last voluntarily and finally abandoned all attempt to con-

struct the same, and that it was willing to have the grant to it forfeited and given to the Omaha Company; whereupon, the legislature of Wisconsin, relying on these false representations, and without inquiry or hearing, hurriedly passed the act of February 16, 1882, above named, to forfeit the said land grant of the Portage Company and confer it on the Omaha Company.'

"Undoubtedly the Omaha Company was both willing and anxious that this land grant should be wrested from the Portage Company and transferred to itself; and to effect that end it appeared by its agents before legislative committees for the purpose of showing that the Portage Company did not have the means or credit necessary to construct, and never would construct, the road in question within the time fixed. And it may be assumed, for the purposes of this case, that the agents of the Omaha Company made representations as to the condition of the other company that were not in all respects consistent with the truth or with fair dealing. Still, the question arises, how is a judicial tribunal to ascertain the extent to which the action of the legislative department in revoking this grant was controlled or influenced by representations made to its members by the Omaha Company about the other company? Can the courts, in any case, assume that the legislature was not fully informed, when it passed a statute relating to public objects, as to every fact essential to an intelligent determination of the matters to which that statute relates? Must it not be conclusively presumed that in disposing of lands held in trust for public purposes it was controlled entirely by considerations of the public good, and not, in any degree, by false representations of individuals having private ends to subserve, and having no special concern either for the general welfare or for the rights of other individuals?

"These questions are all answered in numerous adjudged cases, the leading one of which is *Fletcher* v. *Peck*, 6 Cranch, 87, 130, 131. That was an action for breach of certain covenants in a deed made by Peck for lands embraced in a purchase by Gunn and others from the State of Georgia, under an act passed by the legislature of that State. One of the covenants

alleged to have been broken was that all the title the State ever had in the premises had been legally conveyed to Peck, the grantor. It was assigned, in substance, as a breach of that covenant that the act there in question was a nullity, and so the title of the State did not pass to Peck, because its passage was procured by corruption and undue influence used by the original grantees from the State upon members of the legislature. Chief Justice Marshall, speaking for the court, said:

"'That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would in any way be competent, on proceedings instituted by the State itself, to vacate a contract thus formed, and to annul rights acquired under that contract by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements operating on members of the supreme sovereign power of a State, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption? or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority? or on what number of the members? Would the act be null, whatever might be the wish of the nation? or would its obligation or nullity depend upon the public sentiment? If the majority of the legislature be corrupted, it may well be doubted whether it be in the province of the judiciary to control their conduct; and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated is

not clearly discerned. . . . If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another, founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.'

"It is true that there is no suggestion in the present case that the act of revocation of February 16, 1882, was procured by bribery or corruption practised upon members of the Wisconsin legislature. But the charge is that that body was induced by false representations, made by the agents of the Omaha Company, to do what they would not otherwise have done. This difference in the facts does not make the principles announced in *Fletcher* v. *Peck* inapplicable to the present case; for, if an act of legislation cannot be impeached by proof of corruption upon the part of those who passed it, much less can it be made a matter of proof that legislators were deceived or misled by false representations as to facts involved in proposed legislation of a public character. The principle upon which *Fletcher* v. *Peck* rests excludes all extrinsic evidence of witnesses as to the motives of legislators, or as to the grounds of legislative action. In *Ex parte McArdle*, 7 Wall. 506, 514, the court said: 'We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution.' In *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535, 541: 'If the act done by the State is legal, is not in violation of the Constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law.' So, in *Soon Hing* v. *Crowley*, 113 U. S. 703, 710: 'The rule is general with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The

motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, preclude all such inquiries as impracticable and futile.'

"It was well said by the Supreme Court of Michigan, in *Plank Road Company* v. *Woodhull*, 25 Michigan, 103: 'The legislature will not only choose its own mode of collecting information to guide its legislative discretion, but from due courtesy to a coördinate department of the government, we must assume that those methods were the suitable and proper ones, and that they led to correct results; and if the records show no investigation, we must still presume that the proper information was obtained, for we must not suppose the legislature to have acted improperly, unadvisedly, or from any other than public motives, under any circumstances, when acting within the limits of its authority.'

"To the same general effect are many other cases: *Aldridge* v. *Williams*, 3 How. 24; *Maynard* v. *Hill*, 125 U. S. 190, 209; *Johnson* v. *Higgins*, 3 Met. (Ky.) 566, 576; *Sunbury & Erie Railroad* v. *Cooper*, 33 Penn. St. 278, 283; *Stark* v. *McGowan*, 1 Nott & McCord, 387, 400; *People* v. *Flagg*, 46 N. Y. 405; *Wright* v. *Defrees*, 8 Indiana, 298, 302; *Jones* v. *Jones*, 12 Penn. St. 350, 357.

"For the reasons stated, evidence as to the falsity or truth of the representations made by the Omaha Company, or its agents, to the legislature, or to legislative committees, in respect either of this land grant or of the Portage Company, as well as evidence as to any efforts by the Omaha Company to bring about the revocation of the grant made to the other company, is immaterial to the present controversy. Such evidence cannot be made the basis of judicial determination without entrenching upon the independence of a coördinate department of the government, and impairing its right to

proceed, in the exercise of its functions, upon such information as it deems necessary. An adjudication as to rights acquired by individuals under public enactments, based upon an inquiry as to whether those individuals made false representations to the legislature, or as to whether the legislature was probably influenced by such representations, is an indirect interference with the power of the legislature, acting within the limits of its authority, to enact such laws as it deems best for the general good. The courts must, of necessity, presume — whatever may be averred to the contrary — that no general statute is ever passed either for want of information upon the part of the legislature, or because it was misled by the false representations of lobbyists or interested parties. They must restrict their inquiries to the validity of such legislation. Such is the established doctrine as to legislative enactments relating to public objects, although a different rule is recognized by some courts in respect to private statutes alleged to have been procured by fraud practised upon the legislature by those claiming benefits under them.

"What has been said disposes of the suggestion that the dispersion of the force employed by the Portage Company in the early part of the year 1882 in the construction of its road, the suspension of the work of construction, and its inability to raise the necessary funds for the completion of the road within the time stipulated, was the result of the machinations of agents of the Omaha Company, acting by its authority, and of the corrupt conspiring by those agents with officers of the Portage Company, whereby those officers neglected to do towards the timely completion of the road what, in fidelity to their employers, they might have done.

"Whether this arraignment of the Omaha Company is justified by the evidence, or whether the Portage Company could, in its weak financial condition in 1882, have completed the road within the required time, if its plans had not been interfered with, in the manner stated, it is not necessary to determine. For, as already indicated, if all that is said in respect to the conduct of the Omaha Company were clearly established, the settled principles of law forbid the court from assuming that

the legislative department of the State when it passed the act of 1882, as well as the confirmatory act of 1883, was not in possession of every fact affecting the justice of such legislation. These principles cannot be disregarded in order to remedy the hardships of particular cases. If each member of the legislature was aware when that act was passed of everything which it is alleged was done by the Omaha Company in regard to this land grant and its rival company, and yet in discharge of what it deemed a public duty, and in order to secure the speedy completion of a public highway, supposed to be imperatively required by the interests of their constituents, the legislature passed the confirmatory act of 1883, and thereby selected the beneficiary of the grant made by Congress in aid of the construction of that highway, the conduct of the Omaha Company surely would not constitute any ground why a court of equity should attempt to thwart the wishes of the legislative department. That is precisely what would be done if the court took from that company the benefit of the grant deliberately made to it by the legislature in aid of the construction of its road. Legislative enactments, relating to public objects, so far as they confer rights upon individuals, must stand, if they be constitutional, without any attempt upon the part of the courts to conjecture or ascertain what the members of the legislature would or would not have done under any given state of facts established by extrinsic evidence.

"It is further said, in behalf of the plaintiff, that the Omaha Company became, as early as January and February, 1882, the owner of every share of the capital stock of the Portage Company, and of a large part of its bonded and floating indebtedness; that the former company built a road from Mud Lake to Superior City, parallel to and a few yards from the half-graded line of the latter company; and that the road so built was such an one as was described in the acts of Congress of 1856 and 1864. Upon these facts the plaintiffs rest the contention, that as that road was constructed by a corporation which was the sole stockholder and a principal creditor of the Portage Company, and as the law avoids forfeitures where

practicable, the condition imposed by the State may be regarded as having been duly performed, within the rule that 'any one who is interested in a condition may perform it, and when performed, it is gone forever;' citing 2 Crabbe's Real Prop. 815; 2 Washb. Real Prop. (2d ed.) 12, and other authorities.

"The court is unable to assent to this view, for the reason, if there were no other, that what was done by the Omaha Company towards the construction of its road to Superior City was not done by it as a stockholder and creditor of the Portage Company. It did not elect or intend, in that capacity, to perform the condition imposed by the State upon the latter company. The record conclusively establishes the fact that in constructing the road to the west end of Lake Superior the Omaha Company proceeded under its own charter, and represented its own stockholders, and not the stockholders of the other company. It built its own branch road, and did not complete the road commenced by the Portage Company. It was so understood by the plaintiff; for it alleges in the bill that 'in the year 1882 the Omaha Company constructed its branch to Superior City, alongside of the partially constructed line of the Portage Company, and has ever since operated the same.' And this is consistent with the second section of the act of February 16, 1882, which made the grant to the Omaha Company upon the express condition that it would continuously proceed with the construction of the road then 'in part constructed *by it* between said point of intersection and the west end of Lake Superior,' and complete it on or before December 1, 1882. It is impossible to suppose that the Omaha Company ever intended to perform the condition imposed upon the Portage Company in reference to the latter's road. It performed the condition imposed in the act granting these lands in aid of the construction of *its* road. The plaintiff's whole case proceeds upon the theory that the Omaha Company sought to prevent any result that would be beneficial to the other company. It would, therefore, be a perversion of the rule, upon which the plaintiff relies, and inconsistent with the entire evidence, to say that the Omaha Company was

interested in performing, or intended to perform, or that the State regarded it as performing, the condition in question for or in behalf of the Portage Company. That would make the Omaha Company do something for another corporation which it did not elect to do, and was not in law bound to do.

"Many other questions have been discussed by the counsel of the respective parties, about which the court forbears any expression of opinion. Their determination is rendered unnecessary by the conclusions reached upon the principal points."

FAMOUS SMITH *v.* UNITED STATES.

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

No. 1003. Submitted November 15, 1893. — Decided January 3, 1894.

A Cherokee Indian being indicted in the Circuit Court of the United States for the Western District of Arkansas for the murder of a white man, it was set up in defence that the murdered man was also an Indian, and that the court was therefore without jurisdiction. The evidence for the defence showed that the murdered man was generally recognized as an Indian, that his reputed father was so recognized, and that he himself was enrolled, and had participated in the payment of bread money to the Cherokees. To offset this the government showed that he had not been permitted to vote at a Cherokee election, but it also appeared that he had not been in the district long enough to vote. *Held*,

(1) That the burden was on the prosecution to prove that he was a white man;

(2) That the testimony offered by the government had no legitimate tendency to prove that the murdered man was not an Indian.

This was a writ of error to review the conviction of the plaintiff in error for the murder of one James Gentry, alleged to have been "a white man and not an Indian," on August 1, 1883, in the Cherokee Nation, Indian Territory. The case was tried before the Circuit Court of the United States for the

Western District of Arkansas at the May term of 1893, and the prisoner convicted and sentenced to death. Thirty-four assignments of error were contained in the record, none of which were considered except the first and last, which raised the question of the jurisdiction of the court, arising from the fact that both the accused and the deceased were Indians.

Mr. A. H. Garland for plaintiff in error.

Mr. Assistant Attorney General Whitney, for defendants in error, to the point on which the case turns in this court, said:

We do not understand that there is any difference between civil and criminal cases as to the necessity of presenting questions properly to this court, or as to the mode in which they should be presented, except where there may be some specific statutory provision relating to one or the other class of cases. Its decisions, since it received general criminal jurisdiction, seem to recognize that it exercises no wider jurisdiction than is given by the ancient practice with relation to writs of error. *Alexander* v. *United States*, 138 U. S. 353, 355; *Moore* v. *United States*, 150 U. S. 57; *Holder* v. *United States*, 150 U. S. 91.

Can the jurisdictional question be now raised, not having been raised at the trial? It was conceded at the trial that the evidence was conflicting. The only objections raised by the prisoner's counsel in this regard were objections to remarks of the court in submitting the evidence to the jury. Can this court decide that evidence was not conflicting which was admitted at the trial to be conflicting? It is familiar law that in civil cases jurisdictional objections may be taken by the court itself. This, however, results from statutory provisions applicable only to civil cases, and before these provisions were enacted the law upon the point was regarded as uncertain. Act of March 3, 1875, c. 137, § 5; *Williams* v. *Nottawa*, 104 U. S. 209, 211. For criminal cases there is no such statute. Except as to jurisdictional objections, there seems to be no doubt that the court, upon a writ of error, can

look into the bill of exceptions only to decide questions which are raised by a specific exception. The only points that can be raised here without an exception are errors or defects in the other portions of the record; that is, matters not resting on parol, such as those discussed in *Slacum* v. *Pomery*, 6 Cranch, 221, 225; *Garland* v. *Davis*, 4 How. 131; *Bennett* v. *Butterworth*, 11 How. 669; *Suydam* v. *Williamson*, 20 How. 427, 433; *Rogers* v. *Burlington*, 3 Wall. 654, 661; *New Orleans Railroad* v. *Morgan*, 10 Wall. 256, 260; *Insurance Co.* v. *Piaggio*, 16 Wall. 378, 386; *Clinton* v. *Missouri Pacific Railway*, 122 U. S. 469, 474; *Moline Plow Co.* v. *Webb*, 141 U. S. 616, 623. A bill of exceptions, as we understand the practice, is intended only to present the testimony bearing upon specific exceptions taken, and cannot be turned into a statement of facts for any other purpose. *Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall. 592, 602; *Hanna* v. *Maas*, 122 U. S. 24, 26. But see *Bassett* v. *United States*, 137 U. S. 496, 501; *East Tennessee &c. Railroad* v. *Southern Telegraph Co.*, 125 U. S. 695.

To decide whether Gentry was an Indian at all, it would be necessary first to ascertain the presumption in the absence of evidence. The evidence on the point is not controlling either way. It may be classed under three heads: First, statements of Gentry himself to various parties; second, general, though not universal, belief of his neighbors, based on his own statements; third, his personal appearance. We do not find any decision fixing the presumption in such a case in the absence of proof. The general rule is, however, that if the defendant belongs to a class of persons not subject to the jurisdiction of the court, that fact is not one to be negatived by the indictment or declaration, but one to be set up affirmatively by a plea or answer. Thus it has never been supposed that one should negative in declaration or indictment the possibility of defendant's being a foreign minister or consul. See also 1 Bishop Crim. Proc. § 513. It would be almost impossible to administer justice in the Indian Territory if the District Attorney were obliged to prove affirmatively the American citizenship of the defendant. The Territory is swarming not only

with quarter-breeds, but with whites, who have a rightful claim to citizenship; it swarms also with white men who claim such citizenship without a shadow of foundation. If the *onus* of proving which nation he really belongs to is cast upon the criminal, the courts are far more likely to obtain accurate information on the subject.

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

This case, so far as we have found it necessary to consider it, raises but a single question, namely, whether, Smith being admitted to be a Cherokee Indian, born and raised in the Cherokee Nation, and a citizen of that nation, the undisputed testimony did not also show Gentry to have been an Indian.

If this were the case, then it is clear the court had no jurisdiction of the offence. By Rev. Stat. § 2145, (c. 4, Tit. 28,) relating to the "government of Indian country," it is provided "that except as to crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." But by § 2146, as amended by the act of February 18, 1875, 18 Stat. 318, c. 80, "the preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offence in the Indian country who has been punished by the local law of the tribe, nor to any case where, by treaty stipulations, the exclusive jurisdiction over such offences is or may be secured to the Indian tribes respectively." As we held in *In re Mayfield*, 141 U. S. 107, there is nothing in the treaty of July 19, 1866, between the United States and the Cherokee Nation, 14 Stat. 799, which renders this statute inapplicable or indicates that the Circuit Courts of the United States have jurisdiction of crimes committed by one Indian against the person or property of another.

Upon this point a number of witnesses were sworn, who all stated that Gentry claimed to be a Cherokee Indian, and looked like one, having the dark hair, eyes, and complexion of an Indian, and that he was generally recognized as one. Kajo Gentry, his reputed father, appears to have been either of Cherokee blood or mixed Creek and Cherokee. He also was recognized as an Indian, and appears to have been enrolled and participated in the payment of "bread money" to the Cherokees.

The only testimony to the contrary tended to show that, in 1883, Gentry was not permitted to vote at an election held in the Cherokee Nation, but it also appeared that it was because he had not been in the district long enough. To entitle him to vote at an election he must not only have been a citizen of the Cherokee Nation, but must have resided in the particular district where he offered to vote six months prior thereto. There was also some testimony tending to show that Gentry had lived for some time, but it does not appear how long, in southern Arkansas, and came to the Cherokee Nation by the way of the Choctaw Nation.

In this connection the court charged the jury in substance that, to give the court jurisdiction, it was necessary to charge in the indictment that Gentry was a white man and not an Indian. "The meaning of that is, that he was a citizen of the United States; or, more correctly speaking, a jurisdictional citizen of the United States." That if he were, notwithstanding the defendant was an Indian, the court still had jurisdiction. That in this connection it was important "to ascertain whether he has been recognized legally by the authorities of that country as a citizen thereof." That "if a man is an Indian by blood, and if he goes out and lives among the white people, abandons his country, lives among white people, who are citizens of the United States, and performs the duty belonging to citizenship, or exercises the rights that pertain thereto, that that is evidence on his part of a purpose to abandon the relation he may have to that country and to its people, and he may abandon it in that way so as to cause him to become a jurisdictional citizen of the United States." That

the jury also had a right to consider that, if he were related there, his relatives took no interest in him when killed, etc. Exceptions were duly taken to this portion of the charge.

That Gentry was a white man, and not an Indian, was a fact which the government was bound to establish, and if it failed to introduce any evidence upon that point, defendant was entitled to an instruction to that effect. Without expressing an opinion as to the correctness of the legal propositions embodied in this charge, we think there was no testimony which authorized the court to submit to the jury the question whether Gentry was a white man and not an Indian. The objection went to the jurisdiction of the court, and if no other reasonable inference could have been drawn from the evidence than that Gentry was an Indian, defendant was entitled, as matter of law, to an acquittal. *Pleasants* v. *Fant*, 22 Wall. 116; *Commissioners of Marion County* v. *Clark*, 94 U. S. 278; *Marshall* v. *Hubbard*, 117 U. S. 415.

The testimony offered by the government had no legitimate tendency to prove that he was not an Indian. The evidence that he was not permitted to vote in the Canadian district, where the murder was committed, was explained by the fact that he had not resided in the district the six months required by law to entitle him to vote, and by the fact that one of the judges of election told him that he had no doubt that he was an Indian. Nor did the fact that Gentry said he lived in southern Arkansas, without any evidence showing how he came to live there, under what circumstances, or how long he lived there, constitute any evidence of his being a white man, or that, being an Indian, he had severed his tribal relations and become a citizen of the United States.

It was held by this court in *Elk* v. *Wilkins*, 112 U. S. 94, that an Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognized as a tribe by the government of the United States, who has voluntarily severed himself from his tribe, and taken up his residence among the white citizens of a State, but who has not been naturalized, taxed, or recognized as a citizen, either by the State or by the United States, is not a citizen of the

United States within the Fourteenth Amendment of the Constitution. Much more is that the case where it appears that the Indian was but temporarily a resident of a State, the length of his residence not being shown, and that he had done nothing to indicate his intention to sever his tribal relations.

Upon the testimony in this case, we think the defendant was entitled to an instruction that the court had no jurisdiction, and its judgment must, therefore, be

Reversed, and the case remanded with directions to set aside the verdict, and for further proceedings in conformity with this opinion.

WILSON *v.* OSWEGO TOWNSHIP.

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

No. 175. Argued and submitted December 20, 1893. — Decided January 3, 1894.

A township in Kansas delivered twenty-two of its bonds to a railroad company to aid in the construction of the company's road. The company contracted with B. to construct the road, and to receive these bonds in part payment. The bonds were delivered during the progress of the work to B., and to M., a non-resident of Missouri, as trustee, jointly, and were by them deposited in a Missouri savings institution in St. Louis to remain there until the completion of the work, and then to be delivered to B. upon the demand of himself and M.. B., claiming that he had performed all the work under his contract, demanded the bonds. The association refused to deliver them except upon the joint order of B. and M.. B. brought suit in St. Louis to recover them, making the association and the company defendants and serving process upon them, and making M. a defendant and serving upon him by publication. The township on its own motion intervened and was made party defendant. The savings association, M., and the township each answered separately. The railroad company was not served with process and made no answer. M. and the township then petitioned for the removal of the cause to the Circuit Court of the United States, setting forth that they were citizens of Kansas, that the plaintiff was a citizen of Missouri, and that the savings association had no interest in the result of the controversy. The prayer of the petition was granted, the cause was removed, and it proceeded to judgment in the Circuit Court. *Held,*

Opinion of the Court.

(1) That the savings association was a necessary and indispensable party to the relief sought for, and as that defendant was a citizen of the same State with the plaintiff there was no right of removal on the ground that it was a formal, unnecessary, or nominal party;
(2) That the removal could not be sustained on the ground that the controversy was a separable controversy between the plaintiff and the parties applying for and securing the removal.

THE case is stated in the opinion.

Mr. Frederick H. Bacon for the appellant.

Mr. John O'Day for appellees submitted on his brief.

MR. JUSTICE JACKSON delivered the opinion of the court.

The appellant, as the assignee of Edward Burgess, on August 10, 1886, filed his petition in the Circuit Court of the city of St. Louis, Missouri, against the Union Savings Association of that city, the Memphis, Carthage and Northwestern Railroad Company, a corporation organized under the laws of the State of Missouri, C. Montague, a non-resident of the State of Missouri, and certain unknown persons, to recover possession of twenty-two bonds of Oswego township, State of Kansas, of the value of $500 each, held by the Union Savings Association as bailee or trustee.

The petition alleged that the Memphis, Carthage and Northwestern Railroad Company was empowered to construct, maintain, and operate a railroad in the States of Missouri and Kansas, through the township of Oswego, a political subdivision of the county of Labette, in the State of Kansas; that said township was authorized and empowered to vote, grant, and issue to the railroad company its bonds to aid in the construction of the railroad through the county of Labette; that after due proceedings had been had the township of Oswego voted, issued, executed, and delivered to the railroad company twenty-two of its bonds of the value of $500 each, with interest coupons attached, bearing date September 2, 1872, numbered from 27 to 48, both inclusive; that the railroad corporation had previously entered into a contract with

Edward Burgess to construct a portion of its road, and that Burgess under this contract engaged in the execution of a large amount of such construction work on the railroad; that the railroad company, under its contract with Burgess, was to pay for the work and labor performed and to be performed with the bonds of the township, including the bonds in question; that on September 17, 1873, the company was indebted to Burgess in a large sum of money for work and labor performed on the railroad under his contract, which Burgess was still engaged in carrying out; that the railroad company, at the request of Burgess, and in consideration of the work performed and to be performed by him, delivered to him, and to the defendant, C. Montague, trustee, jointly, said twenty-two bonds upon the agreement and understanding between the railroad company, Burgess, and Montague that on the completion of the work then in progress on the railroad, up to the amount of the value of the twenty-two bonds, Montague would relinquish for himself, and for all others, these bonds to Burgess, which would then become the absolute property of the latter; and that to carry out this agreement the bonds, with all the coupons thereto attached, were placed by Burgess and Montague, jointly, in the custody of the defendant, the Union Savings Association, as trustee or bailee, where they were to remain until the completion of the work on the railroad by Burgess, when they were to be delivered by the Union Savings Association to him or his assigns on the demand of himself and Montague.

It was further set out in the petition that Burgess duly performed his work upon the railroad, under and in accordance with his contract, and became thereby entitled to the bonds, and that Montague ceased to have any right, interest, or claim thereto, either for himself or for any other person, and that the bonds became the absolute property of Burgess, who thereafter, for a valuable consideration, sold and assigned the bonds in controversy, with all his right, title, and interest therein and claim thereto to the plaintiff.

The plaintiff also stated that after the sale and assignment of the bonds to himself he notified the defendant, the Union

Savings Association, of his ownership thereof, and demanded them, which the defendant refused to deliver without the assent of Montague.

The petitioner further alleged that he was informed and believed that certain persons, to him unknown, claimed an interest in these bonds and coupons, but that he could not state the nature of their interest nor the residence of the claimants.

The prayer of the petition was that the defendant, the Union Savings Association, be ordered to deliver the bonds and coupons in controversy to the plaintiff; that said unknown persons claiming an interest therein be duly notified by publication of the pendency of the suit, and be required to answer the same, and that the plaintiff have all such further relief as might be proper.

Upon the filing of this petition a summons was issued to the sheriff of the city of St. Louis, whose return thereon shows that the same was duly served upon the Union Savings Association in August, 1886, and upon the Memphis, Carthage and Northwestern Railroad Company on October 1, 1886. It further appears that publication was duly made for the defendant, C. Montague, and the unknown parties having an interest in the bonds in controversy.

On October 11, 1886, the Oswego township, on its own motion, intervened in the cause, and was made a party defendant thereto.

At the October term, 1886, the Union Savings Association filed its answer to the petition, in which, after stating its want of knowledge or information as to the incorporation of the Memphis, Carthage and Northwestern Railroad Company, and the delivery to that company of the bonds in question, and other general allegations of the petition, denied that the bonds described, or any bonds, were placed by Burgess and Montague, jointly, in its custody, there to remain until Burgess had completed the work on the railroad, when they were to be delivered to him or his assigns on demand; but admitted that on December 17, 1873, Edward Burgess and C. Montague, trustee, deposited with it bonds which it believed to be the

same referred to in the plaintiff's petition, and that it issued and delivered a receipt therefor to Burgess and Montague at their request, which was in words and figures as follows:

"Received, St. Louis, Dec'r 17th, 1873, of Edward Burgess and C. Montague, trustees, ten thousand five hundred dollars of Oswego township, Labette Co., Kansas bonds, issued to the Memphis, Carthage and Northwestern Railroad Company, the numbers being twenty-eight to forty-eight, inclusive (also bond No. 27, $\frac{3}{5}$ of which [$300 worth] is to be held for same parties under same terms, in all $10,800 bonds), each bond for $500, due 20 years after date, dated Sept. 2nd, 1872, annual interest at ten per cent, represented by the nineteen coupons attached to each bond, all of such ten thousand eight hundred dollars of bonds subject to the joint order of said C. Montague, trustee, or his successors or successor in office, and the said Edward Burgess, upon the return of this receipt duly endorsed.

"(Signed) James B. Love, *Cashier*."

The defendant further answered that it had no knowledge that Burgess had completed the work on the railroad, nor of his having become the owner of the bonds, nor of his assignment to the plaintiff; and further, that before the commencement of the suit, Montague, trustee, acting in the premises on behalf of the Oswego township, had notified defendant that Burgess was not entitled to the bonds.

The defendant also stated that it was ready and willing to surrender the bonds to the party or parties legally entitled thereto, whenever it was settled in such manner as to protect defendant from further responsibility, and prayed that all claimants and the parties in interest might be brought into court and interplead for the bonds; and that it might be allowed a reasonable compensation for the custody thereof since the year 1873, and also a reasonable allowance for attorney's fees.

Montague and the Oswego township filed separate answers, in which they denied that the bonds in question had ever been delivered to the Memphis, Carthage and Northwestern Railroad

Company under any legal authority; alleged that the bonds were void because they were never lawfully issued under any authorized election and vote of the people of the township to the railroad company; that they were never, in fact, delivered to that railroad company, but that they were delivered to the Union Savings Association to secure the payment by Burgess of all debts, liabilities, and obligations which might be contracted by him in the prosecution of the work upon the railroad through the township and county; that he had never performed this work, according to his contract with the railroad company, and if the bonds had ever been regularly issued he had never acquired a title thereto. The Oswego township, therefore, claimed that the bonds should be surrendered to it for cancellation.

The Memphis, Carthage and Northwestern Railroad Company failed to answer the petition, and made default thereto.

On December 4, 1886, Montague and the Oswego township filed their petition to have the cause removed to the Circuit Court of the United States on the ground that at the commencement of the suit, and at the time of the motion, they were citizens of the State of Kansas, while the plaintiff was a citizen of the State of Missouri; that the Union Savings Association, though a citizen of the State of Missouri, was only trustee of the bonds, and had no interest in the result of the controversy, and that the Memphis, Carthage and Northwestern Railroad Company, named as a party defendant, had never been served with process or entered its appearance in the suit.

On this petition, and proper bond tendered therewith, the suit was removed into the United States Circuit Court for the Eastern District of Missouri. After such removal was effected the plaintiff moved the court to remand the cause to the Circuit Court of the city of St. Louis on the grounds, first, that the application was not made under the second paragraph of section 639 of the Revised Statutes; second, that the cause was not one in which there could be any final determination of the controversy as to the parties applying for the removal without the presence of the other defendants; third, that the

suit was not one between citizens of different States, but was one in which the plaintiff and the defendant, the Union Savings Association, and the Memphis, Carthage and Northwestern Railroad Company, were citizens of Missouri, while Montague and Oswego township were citizens of the State of Kansas; fourth, that the suit was not one in which there was a separable controversy between citizens of different States, and that the sheriff's return, as set out in the record, showed that the defendant, the Memphis, Carthage and Northwestern Railroad Company, had been duly served and brought before the court prior to the filing of the petition for the removal of the cause.

The motion to remand was, however, overruled, and thereafter various amended pleadings were filed in the Circuit Court, including a cross-bill on the part of the Oswego township to have the bonds in controversy declared void and returned to it for cancellation.

Upon the hearing of the cause the court entered a final decree holding that the bonds in question were issued without authority of law, and that the same should be delivered by the Union Savings Association to the Oswego township for cancellation; and, it further appearing that bond No. 27, referred to in the pleadings, had been appropriated by the Union Savings Association, and was no longer in its possession, a decree was entered against it for the value of the missing bond, subject to a deduction for the amount of compensation allowed it as custodian of the bonds. From the final decree the present appeal is prosecuted.

The question first presented for our consideration by the appellant is that the cause was improperly removed from the state court to the United States Circuit Court, and that his motion to remand the same to the state court should have been sustained for the reason that the defendants, the Union Savings Association and the Memphis, Carthage and Northwestern Railroad Company, were citizens of the same State as the plaintiff, and that the suit could not be finally disposed of without the presence of these defendants, both of whom were proper, if not necessary, parties.

Against this position it is urged, on behalf of the appellees,

that the real controversy in the case was wholly between the plaintiff, and the Oswego township, and C. Montague, and could be fully determined between them without reference to the other defendants; that the railroad company and the Union Savings Association were, at the most, only nominal or formal parties.

The removal in this case was had under the second section of the act of 1875, but under which clause of that section does not distinctly appear. The first clause of the section relates to removals of controversies that are not separable, and in which all the parties on one side of the suit are citizens of different States from those on the other side, which is a necessary condition to enable the Circuit Court to take jurisdiction of the entire suit. Under this clause, all of the plaintiffs, if there are more than one, or all the defendants, there being more than one, must, in order to remove the suit, unite in the petition therefor; and it is settled by the authorities that to enable a suit to be removed under this first clause of the section, when the ground for removal is diversity of citizenship, the party to the suit on the one side, whether consisting of one or more persons, must have a state citizenship different from that of the party on the other side, whether consisting of one or more persons; and that, for the purpose of removing the suit, these parties may be placed "on different sides of the matter in dispute according to the facts," so that all those on one side will be "citizens of different States from those on the other," and that this being done, those on either side may remove the suit, provided that all unite in the petition therefor.

The situation of the parties in this case, in connection with the relief sought by the petition, does not admit of placing the parties on different sides of the matter in dispute, so that those on one side will be citizens of different States from those on the other, for the purpose of removing the suit, unless it can be held that both the Memphis, Carthage and Northwestern Railroad Company, which was made a party defendant, and duly served, and the Union Savings Association, were merely nominal, formal, and unnecessary parties, as

these corporations were citizens of the same State as the plaintiff.

It is settled that the jurisdiction of the Federal courts will not be defeated by the mere joinder or non-joinder of formal parties. *Wormley* v. *Wormley*, 8 Wheat. 421, 451.

In *Wood* v. *Davis*, 18 How. 467, 470, where formal or nominal parties were united with the real parties to the litigation, it was held that such joinder would not oust the jurisdiction of the Federal court, if the citizenship of the real parties was such as to confer it, but, in speaking for the court, Mr. Justice Nelson said, in that case: "This is not a case of a stakeholder, or the holder of a deed as an escrow, where a trust has been created by the parties, which is sought to be enforced by one of them. In all such cases the trustee may be a proper party, as he has a duty to perform, and which the court may enforce, if improperly neglected or refused."

In *Bacon* v. *Rives*, 106 U. S. 99, where the complainants were citizens of the State in which the suit was originally brought, and the defendant, the real party to the controversy, against whom relief was sought, was a citizen of another State, his right to remove the suit to the Circuit Court of the United States was held not to be defeated upon the ground that the citizenship of another defendant, who was a stranger to that controversy, and who occupied substantially the position of a mere garnishee, was the same as that of the complainant. In that case, however, the relief sought was against a non-resident defendant, as the real party to the controversy. In the present case no relief is sought against the removing parties.

These authorities do not control in this case, for the reason that the relief sought by the plaintiff in his bill, or petition, was the recovery of the possession of the bonds held by the Union Savings Association. He sought no active or affirmative relief against any other defendant to the suit. He did not even make the Oswego township a party defendant. By his petition he raised no question whatever as to the validity of the bonds or the regularity of their issue. He alleged that they were regularly issued by the township of Oswego to the

Memphis, Carthage and Northwestern Railroad Company, and that by an arrangement between the railroad company and C. Montague, trustee, and Edward Burgess, they were placed in the possession of the Union Savings Association until Burgess should complete his contract with the railroad company, when the bonds were to be delivered to Burgess, or his assignee. The plaintiff, as his assignee, claimed that Burgess had complied with and completed his contract, thereby becoming the owner of the bonds, and entitled to their possession; and that thereafter he assigned his right, title, and interest in the same to the plaintiff, who by his petition only sought to recover possession of the bonds. The Union Savings Association, being the bailee or trustee of the bonds, was a necessary and indispensable party to the relief sought by the petition, and that defendant, being a citizen of the same State with the plaintiff, there was no right of removal on the part of Montague, or of the intervening defendant, the Oswego township, on the ground that the Union Savings Association was a formal, unnecessary, or nominal party.

Furthermore, under the allegations of the petition that the bonds had been issued to the Memphis, Carthage and Northwestern Railroad Company by the Oswego township, by authority of law, and that it had contracted with Burgess to pay him the bonds in question for work and labor performed and to be performed by him in the construction of its line of railroad, the railroad company was a proper, if not a necessary party, as it had an interest in the question whether Burgess had performed his contract and earned the bonds.

Considering the nature of the suit and the relief sought thereby, these defendants cannot be treated and regarded as purely formal and unnecessary parties. The character of the relief sought made the Union Savings Association, which occupied the position of a bailee or trustee, a necessary and indispensable party.

But can the removal be sustained under the second clause of the second section of the act of 1875, on the ground that the suit presented a separable controversy between the plaintiff

and the parties applying for and securing the removal? We think not. The question whether there is a separable controversy warranting a removal to the Circuit Court of the United States must be determined by the state of the pleadings and the record of the case at the time of the application for removal, and not by the allegations of the petition therefor, or the subsequent proceedings which may be had in the Circuit Court. *Barney* v. *Latham*, 103 U. S. 205.

The original petition, in the present case, filed in the state court, and the relief sought thereunder, did not present a controversy which was wholly between citizens of different States, or one that could be finally determined as between the plaintiff and the removing parties, without the presence of the Union Savings Association, and could not, therefore, be removed separately or jointly by either Montague or the township of Oswego.

The fact that the Memphis, Carthage and Northwestern Railroad Company did not answer, but made default, is unimportant, and placed the parties in no different position with reference to a removal of the cause than they would have occupied if that company had answered, and either admitted or denied the rights of the plaintiffs. *Putnam* v. *Ingraham*, 114 U. S. 57, 59.

The petition filed in the state court did not present several causes of action, some of which were against the resident defendants and others against the non-resident defendants, but embraced a single cause of action and a single ground of relief. It did not, therefore, come within the authorities which allow a removal on the ground of a separable controversy such as entitled the non-resident defendants to remove the cause.

Without reviewing the authorities on the subject of removal of causes on the ground of separable controversies, within the meaning of the second clause of the second section of the act of 1875, we deem it sufficient to cite the following cases as fully sustaining the conclusion to which the court has arrived, that the pleadings in the case under consideration present no ground on which to base the right of removal. *Brooks*

v. *Clark*, 119 U. S. 502, 511; *Brown* v. *Trousdale*, 138 U. S. 389, 396; *Torrence* v. *Shedd*, 144 U. S. 527, 530.

In this last cited case Mr. Justice Gray, speaking for the court, sums up the authorities on the subject as follows: "But in order to justify such removal on the ground of a separate controversy between citizens of different States there must, by the very terms of the statute, be a controversy 'which can be fully determined as between them;' and by the settled construction of this section the whole subject-matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit."

Considering the character of the relief sought by the original bill, and the situation of the parties, it cannot be properly said that the whole subject-matter of the suit was capable of being finally determined between the plaintiff, on the one side, and Montague and the Oswego township, on the other, without the presence of the Union Savings Association, so as to warrant the removal as a separable controversy.

The cases of *Thayer* v. *Life Association*, 112 U. S. 717, *St. Louis & San Francisco Railway* v. *Wilson*, 114 U. S. 60, and *Crump* v. *Thurber*, 115 U. S. 56, are not distinguishable in principle from the present case. In the former case the situation of the parties was substantially the same as in the case under consideration, and it was held that the resident corporation, as the holder of the stock which the complainant sought to have transferred to himself, was such an indispensable party as would prevent the removal of the cause from the state to the Circuit Court.

We are, therefore, of opinion that the cause was wrongfully removed and that the motion to remand should have been sustained. The decree below is

Reversed with costs, and the cause remanded to the Circuit Court of the United States for the Eastern District of Missouri with directions to remand the suit to the state court from which it was originally removed.

INGLEHART *v.* STANSBURY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 141. Argued December 6, 7, 1893. — Decided January 4, 1894.

If land is conveyed to a trustee, to hold for the benefit of a married woman for life, and then to convey to an infant in fee; and upon a bill in equity by the tenant for life against the remainderman and the trustee, and after the appointment of a guardian *ad litem* for the remainderman, part of the land is sold for the payment of repairs and taxes, and partition is decreed of the rest in equal moieties in fee between the tenant for life and the remainderman, and part of the land set off to the tenant for life is sold by her; and, by decree upon a bill by the remainderman, after coming of age, against the heirs of the trustee and of the tenant for life and the purchasers, the proceedings in and under the partition suit are set aside, and a new trustee appointed to convey the whole land to the remainderman; the heirs of the original trustee cannot appeal from this decree without joining the other defendants, on a summons and severance, or some equivalent proceeding, recorded in the court rendering the decree.

This was a bill in equity in the Supreme Court of the District of Columbia by Ida May Stansbury to enforce a trust under a deed dated June 10, 1870, by which Gustavus R. Dixon and Ada Georgiana Amanda, his wife, conveyed land of his in the city of Washington to Joseph Inglehart, his heirs and assigns, in trust for the sole and separate use and benefit of the wife during her life or widowhood and no longer, with remainder in fee to the heirs of the body of the husband, and, in default of such heirs, then (as the plaintiff contended and the court below held) to convey the land in fee simple to the plaintiff, then Ida May Campbell, not quite fourteen years old, living with her parents, and no kin of his, but a cousin of his wife, and about seven years younger than she.

Gustavus R. Dixon died December 1, 1871, leaving his wife Ada, but no issue, surviving him.

Upon a bill in equity, filed July 23, 1873, by Ada Dixon against Ida Campbell and Inglehart as trustee, that court, after appointing a guardian *ad litem* for Ida, and with his

and her written consent and that of her parents and of Inglehart, ordered part of the land to be sold by a trustee, appointed for the purpose, for the payment of repairs and taxes on the whole, confirmed his sale thereof, appointed commissioners to make a partition of the rest of the land in equal moieties in fee between Ada Dixon and Ida Campbell, and on May 6, 1874, decreed that the return of the commissioners be confirmed, and that said Ada and Ida each hold in severalty the moiety set off to her. The purchaser at the trustee's sale conveyed to Florian Trautman; and a part of the land set off to Ada Dixon was conveyed by her to John G. Thompson, who entered into possession thereof, and received the rents and profits.

Ada Dixon married William H. Davis, November 2, 1874; and died February 26, 1888, leaving an infant son and heir.

Ida Campbell became of age July 10, 1877; and on June 23, 1881, having meanwhile married Charles J. Stansbury, filed the original bill in the present case against Inglehart, as trustee under the deed of Gustavus R. Dixon, to compel him to convey to her in fee all the land included in that deed; and against Thompson to cancel the deed to him, as casting a cloud upon her legal title. To that bill Thompson filed a demurrer, which was sustained, with leave to amend the bill. On April 14, 1882, before the hearing upon Thompson's demurrer, and not having himself pleaded to the bill, Inglehart died, leaving infant heirs only.

Ida afterwards, from time to time, filed other bills, by way of amendment, supplement and revivor, joining her husband as plaintiff; making Inglehart's infant heirs, Ada's second husband, Davis, and her infant son and heir, as well as Thompson and Trautman, defendants; and praying that all the proceedings upon the bill for partition be declared null and void for want of jurisdiction in the court, and that those proceedings, as well as the deeds to Trautman and to Thompson, be set aside as clouds upon Ida's title, and that some proper person be appointed as trustee in Inglehart's stead to convey all the land to her.

Guardians *ad litem* were appointed for the infant heirs of

Inglehart, as well as for the infant Davis, and respectively answered in their behalf, submitting their rights to the protection of the court.

Trautman answered, alleging that he purchased in good faith; and William H. Davis and Thompson answered, denying the plaintiff's title to a conveyance or right to relief. A general replication was filed to the answers of the defendants.

The court, upon a hearing in general term on pleadings and proofs, entered a decree for the plaintiffs, as prayed for. 9 Mackey, 134. Inglehart's heirs, by their guardian *ad litem*, alone appealed to this court. Thompson was a surety upon the appeal bond.

The appellee moved this court to dismiss the appeal, on the following grounds:

First. "That the appellants are parties to the suit only as heirs at law of one Joseph Inglehart, who held as trustee only the legal title to certain real estate mentioned in the proceedings, without beneficial interest of any kind therein; and that his trust was and is at an end; and that the appellants have therefore no beneficial or appealable interest in the premises, and no interest whatever of any kind in the result of the suit."

Second. "That the appellants were joint parties in the suit with other persons who had beneficial and substantial interests therein; and said other persons have not been made parties to the appeal; and there has been no summons to them and severance, or any other equivalent action."

In opposition to this motion, affidavits of Trautman, of Thompson, and of the guardian *ad litem* of the infant Davis, who was also one of the attorneys for all the defendants, were filed in this court, stating that the appeal was taken in behalf of Inglehart's heirs alone, and no separate appeal by any other defendant, because, although the aggregate value of the whole land in question exceeded $5000, the value of the part claimed by each was less than that amount; and because said guardian and attorney was of opinion, and Trautman and Thompson were advised by counsel, that the appeal in behalf

of Inglehart's heirs was for the benefit of all the defendants; and that Trautman and Thompson paid all the costs and expenses of that appeal.

Mr. Saul S. Henkle for appellants.

Mr. J. J. Darlington for appellee.

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

The state of the case, so far as material for the disposition of the motion to dismiss the appeal, may be summed up thus:

The claim of the plaintiff and appellee, Ida Stansbury, formerly Ida Campbell, was based upon the position that the sole duty of Joseph Inglehart as trustee under the deed of Gustavus R. Dixon and his wife Ada was, after the expiration of an equitable estate for life or widowhood in Ada, to convey the legal title in fee in the whole land to Ida. The defence rested mainly on the decree obtained, with Inglehart's consent, by Ada Dixon in her lifetime, for the sale of part of the land for the payment of taxes and repairs, and for the partition of the rest of the land in equal moieties in fee between Ada and Ida. At the time of the final decree in the case at bar, Inglehart had died, Ada Dixon had married William H. Davis and afterwards died, and the parties to the suit were as follows: The plaintiffs were Ida and her husband. The defendants were Inglehart's infant heirs, by their guardian *ad litem;* Ada's second husband, Davis, and her infant heir, by his guardian *ad litem;* Trautman, claiming under the sale of part of the land by order of the court in the partition suit; and Thompson, claiming under a deed from Ada of part of the moiety set off to her by the decree of partition. Yet the only appellants are the heirs of Inglehart.

Those heirs were made parties defendant, solely because the legal title of Inglehart had descended to them. They had no greater interest in the subject of the suit, than he would have had if living at the time of the decree below. But Inglehart

never had any interest in the land, except as trustee under the deed of Dixon and wife. Under that deed, after the termination of her life estate, he had nothing but the naked legal title, and no duty in regard to the land, unless to convey the whole to Ida. On the other hand, if the proceedings in the suit for partition were valid, they divested his title as trustee, and left no interest in him or his heirs. He never had or claimed any title or interest under those proceedings, and in no way represented the parties claiming under them.

Inglehart, and his heirs after his death, were rightly made parties defendant to the bill, because the plaintiff asserted that, notwithstanding the proceedings in the partition suit, he, and they by descent from him, still held the legal title, and she was entitled to a conveyance thereof; and for the same reason Inglehart's heirs might perhaps join in an appeal from the decree in her favor.

But the principal matter in controversy was the validity of the proceedings in the partition suit. The real defendants, whose rights were affected by the decree appealed from, were the parties claiming title under those proceedings, and they were necessary appellants from the decree setting aside those proceedings and ordering the whole land to be conveyed to the plaintiff.

Whether the interests of Inglehart's heirs and of the other defendants were sufficient in amount or value to sustain a joint appeal by all the defendants need not be considered, because it is quite clear that Inglehart's heirs could not appeal alone, without joining the other defendants as appellants, or showing a valid excuse for not joining them.

This could only be shown by a summons and severance, or by some equivalent proceeding, such as a request to the other defendants and their refusal to join in the appeal, or at least a notice to them to appear and their failure to do so; and this must be evident upon the record of the court appealed from, in order to enable the party prevailing in that court to enforce his decree against those who do not wish to have it reviewed, and to prevent him and the appellate court from being vexed by successive appeals in the same matter. *Owings* v. *Kincannon*,

7 Pet. 399; *Todd* v. *Daniel*, 16 Pet. 521, 523; *Masterson* v. *Herndon*, 10 Wall. 416; *Hardee* v. *Wilson*, 146 U. S. 179.

Appeal dismissed.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* VOLK.

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

No. 161. Argued and submitted December 13, 1893. — Decided January 3, 1894.

In an action for personal injuries, exceptions to rulings upon exemplary damages become immaterial if the court afterwards withdraws the claim for such damages from the consideration of the jury, and a verdict is returned for "actual damages" only.

The omission of the court to instruct the jury upon a point of law arising in the case is not the subject of a bill of exceptions, unless an instruction upon the point was requested by the excepting party.

In an action against a railroad company by one of several workmen employed by another corporation in unloading a railroad car, for personal injuries sustained by being thrown off the car by the running of an engine and other cars against it, testimony of another of the workmen that they were busy at their work, and did not think of the approach of the engine until it struck the car, is competent evidence for the plaintiff upon the issue of contributory negligence on his part.

In an action for personal injuries, brought against a railroad company by a workman in the employ of another corporation, testimony that after his injuries his employer "just kept him on, seeing he got hurt, so he could make a living for his wife and family," is competent evidence upon the question how far his capacity of earning a livelihood was impaired by his injuries.

Judgment affirmed with additional damages under Rev. Stat. § 1010 and Rule 23 of this court.

This was an action against a railroad corporation incorporated by act of Congress, to recover for personal injuries.

The petition alleged that while the plaintiff, a laborer employed in the Fort Worth Iron Works, a corporation owning and carrying on a shop or foundry, was assisting in unloading an iron boiler from a railroad car disconnected from

any engine and standing upon a side track or switch belonging to or used by that corporation, close by its shop or foundry, and connected with the defendant's line of railway, the defendant, by its agents and servants, wilfully and with gross negligence, caused an engine and cars to run against the car upon which the plaintiff was at work, whereby he was knocked down and thrown off the car, severely injured, disabled to work, and put to expense for medicines and physicians' fees, "all to his damage twenty-five thousand one hundred and twenty-five dollars."

The petition further alleged that "said acts of negligence have by the defendant railway company been ratified and adopted in this, that said company has retained said reckless and negligent servants in its employ after having been notified of their said reckless and negligent acts and the injury inflicted upon the plaintiff thereby, and in failing to in any way prevent or to take any steps to prevent the occurrence of such accidents in future. By reason whereof the plaintiff says he is entitled to the further sum of ten thousand dollars by way of exemplary damages."

The defendant, by way of demurrer, excepted to the petition, because it did not appear therefrom that the plaintiff was without fault or negligence in the premises; and excepted also to the sufficiency of the allegations claiming exemplary damages; and, by way of answer, denied all the allegations of the petition, and pleaded not guilty; and, for special answer, set up that, if the plaintiff was injured as alleged, "said injuries were caused by the plaintiff's own contributory negligence and want of care in failing to get off the car after the danger was apparent, but before said car upon which the plaintiff was at work had been struck."

The jury returned a verdict "for the plaintiff, and assess his actual damages at eight thousand dollars." Judgment was rendered on the verdict, and the defendant tendered a bill of exceptions, so much of which as related to the points argued in this court was as follows:

First. The court overruled the exception to the sufficiency of the allegations in the petition claiming exemplary damages;

"and allowed the plaintiff, over the defendant's objection, to introduce evidence to the effect that the engineer and fireman in charge of said engine had been retained in the defendant's employment and had never been censured or reprimanded for the accident in question. To all of which the defendant excepted at the time. But the court, in its charge to the jury, after hearing the argument upon the question of exemplary damages, withdrew from their consideration the claim of exemplary damages."

Second. The court overruled the exception that the petition did not show that the plaintiff was without fault or negligence. The defendant, thereupon, in support of the answer setting up contributory negligence of the plaintiff, "introduced evidence tending to show that at the time of accident the plaintiff was on top of the car from which he was thrown, and walking upright with his face towards the approaching engine; and further evidence tending to show that the car upon which plaintiff was at work was separated from certain other cars on said track by an open space of fifty or sixty feet, and that the engine in motion ran against and struck certain other cars on said side track, pushed them over this intervening space, and ran them against the car upon which plaintiff had been at work. But the court did not charge upon contributory negligence; to which the defendant excepted."

Third. The plaintiff, in proving his case, introduced the deposition of one Bauer, in which he testified that he was one of those unloading the car upon which the plaintiff was at work, and, "in answer to a question by the plaintiff, and over the defendant's objection that the answer was incompetent, was allowed to testify as follows: 'We didn't know what was coming until she struck the car, for we were busy at work and not thinking of the engine coming in, knowing that they had no right to make any flying switch in there, anyhow.'" "To which ruling the defendant excepted."

Fourth. "In further proof of his case, the plaintiff introduced the witness Bauer to show the character of the work performed by the plaintiff, both before and after the accident; and, over the defendant's objection that it was irrelevant,

incompetent and misleading, said witness was allowed to testify that now the iron foundry 'just keep him on, being he got hurt (referring to the plaintiff), so he could make a living for his wife and family.' To which ruling the defendant excepted."

"To the action of the court in its rulings upon the exceptions to the plaintiff's petition and the testimony in the case, as well as the charge to the jury, the defendant excepted at the time;" and, after the allowance of its bill of exceptions, sued out this writ of error.

The defendant in error suggested that the writ of error had been sued out merely for delay; and asked for damages, in addition to interest on the judgment below, under section 1010 of the Revised Statutes and Rule 23 of this court.

Mr. John F. Dillon, (with whom were *Mr. Winslow S. Pierce* and *Mr. Harry Hubbard* on the brief,) for plaintiff in error.

I. The court erred in admitting evidence to the effect that the engineer and fireman in charge of the engine which caused the accident in question had been retained in defendant's employment, and had never been censured or reprimanded for the accident.

This point arises under the first exception. The facts which this evidence tended to prove occurred after the accident in question, and were wholly irrelevant. This evidence was inadmissible, because it was irrelevant, and was calculated to distract the minds of the jury from the real issue and to create a prejudice against the defendant. This precise point has been determined in a similar case in this court, in which this court decided that testimony as to the conduct of a railway company after an accident occurred is irrelevant, and its admission is error, for which the court will reverse the judgment. *Columbia Railroad Co.* v. *Hawthorne*, 144 U. S. 202.

The error committed in permitting this evidence to go to the jury, "distracting their minds from the real issue and prejudicing them against the defendant," was not cured by

the fact that the court afterwards withdrew from their consideration the claim for exemplary damages.

II. The court erred in failing to charge the jury upon contributory negligence.

As there was no charge upon this point, of course none could be set out in the bill of exceptions. The fact that the defendant excepted to the court's failing to charge upon contributory negligence shows that this matter was expressly called to the attention of the court, a request made to charge, and that the court declined to charge upon this subject. This action was taken by the court, notwithstanding the issue of contributory negligence was before the jury, and there was evidence on behalf of the defendant, as above stated, tending to support this issue. This was clearly error. *Rodrian* v. *New York &c. Railroad*, 125 N. Y. 526; *Dublin, Wicklow & Wexford Railway* v. *Slattery*, 3 App. Cas. 1166.

In the case of *Jones* v. *East Tennessee &c. Railroad*, 128 U. S. 443, this court decided that the question of contributory negligence should have been submitted to the jury under proper instructions from the court. The failure of the court to charge upon contributory negligence was therefore clearly error for which the judgment should be reversed.

Mr. A. H. Garland, for defendant in error, submitted on his brief.

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

The rulings as to the allegations and proof upon the subject of exemplary damages became immaterial by the subsequent instruction of the court withdrawing from the consideration of the jury the claim of such damages, and by the return of a verdict for actual damages only. *Pennsylvania Co.* v. *Roy*, 102 U. S. 451; *New York, Lake Erie & Western Railroad* v. *Madison*, 123 U. S. 524.

By the settled law of this court, not controverted at the bar, contributory negligence on the part of the plaintiff need not

be negatived or disproved by him, but the burden of proving it is upon the defendant. *Inland & Seaboard Co.* v. *Tolson*, 139 U. S. 551, 557. The omission of the court to instruct the jury upon the subject of the plaintiff's contributory negligence is not open to exception, because the bill of exceptions does not show that the defendant requested any instruction upon that subject. In England, it is misdirection, and not non-direction, which is the subject of a bill of exceptions. *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484, 499. In this country, the rule is somewhat more liberal; and the not giving an instruction upon a point in issue may be excepted to, if one was requested, but not otherwise. In a very early case, Chief Justice Marshall said: "There can be no doubt of the right of a party to require the opinion of the court on any point of law which is pertinent to the issue, nor that the refusal of the court to give such opinion furnishes cause for an exception." *Smith* v. *Carrington*, 4 Cranch, 62, 71. As afterwards more fully stated by Mr. Justice Story, "it is no ground of reversal that the court below omitted to give directions to the jury upon any points of law which might arise in the cause, where it was not requested by either party at the trial. It is sufficient for us that the court has given no erroneous directions. If either party deems any point presented by the evidence to be omitted in the charge, it is competent for such party to require an opinion from the court upon that point. If he does not, it is a waiver of it." *Pennock* v. *Dialogue*, 2 Pet. 1, 15. See also *Express Co.* v. *Kountze*, 8 Wall. 342, 353, 354; *Shutte* v. *Thompson*, 15 Wall. 151, 164. A request for instructions, being necessary to entitle the excepting party to avail himself of an omission to instruct, cannot be presumed, but must affirmatively appear in the bill of exceptions.

The testimony of one of the men who were working with the plaintiff in unloading the car at the time of the injury, that they were busy at their work and did not think of the approach of the engine until it struck the car, related to facts which might naturally be within his knowledge, and be apparent from the behavior of the workmen; and was competent, though perhaps not important, evidence upon the issue

of contributory negligence presented by the defendant's answer.

The testimony as to the circumstances of the continuance of the plaintiff in the employ of the iron works, after being injured, was offered only "to show the character of the work performed by the plaintiff, both before and after the accident;" and was competent evidence upon the question how far his capacity of earning a livelihood had been impaired by his injuries. *Vicksburg &c. Railroad* v. *Putnam*, 118 U. S. 545, 554; *Richmond & Danville Railroad* v. *Elliott*, 149 U. S. 266, 268.

The writ of error appears to this court to have had no plausible ground to support it, and to have been sued out merely for delay. The motion of the defendant in error is therefore granted, and the

Judgment affirmed, with interest, and ten per cent damages.

AZTEC MINING COMPANY *v.* RIPLEY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 870. Submitted December 18, 1893. — Decided January 3, 1894.

The Circuit Court of Appeals for the Eighth Circuit has no jurisdiction in error over a judgment of the Supreme Court of the Territory of New Mexico in a case not in admiralty, nor arising under the criminal, revenue, or patent laws of the United States, nor between aliens and citizens of the United States or between citizens of different States.

This court has jurisdiction to review decrees or judgments of the Supreme Courts of the Territories except in cases which may be taken to the Circuit Courts of Appeals, or where the matter in dispute, exclusive of costs, does not exceed the sum of five thousand dollars.

Congress intended to confer upon this court jurisdiction to pass upon the jurisdiction of the Circuit Courts of Appeals in cases involving the question of the finality of its judgment under section six of the act of March 3, 1891, 26 Stat. 826, c. 517.

MOTION to dismiss or affirm.

Mr. Rufus H. Thayer for the motion.

Mr. Nathan Frank opposing.

Mr. Chief Justice Fuller delivered the opinion of the court.

Judgment was recovered in the District Court for the Third Judicial District, within and for the county of Grant, in the Territory of New Mexico, on May 26, 1891, by John W. Ripley against the Aztec Mining Company for the sum of $1657.51 damages and costs, and affirmed on error by the Supreme Court of that Territory, August 19, 1891. The mining company thereupon sued out a writ of error from the United States Circuit Court of Appeals for the Eighth Circuit, which was dismissed for want of jurisdiction. *Aztec Mining Co.* v. *Ripley*, 10 U. S. App. 383. A writ of error was thereupon allowed from this court and comes before us upon a motion to dismiss or affirm.

By the fifteenth section of the Judiciary Act of March 3, 1891, 26 Stat. 826, c. 517, the Circuit Courts of Appeals, in cases in which their judgments were made final by the act, were empowered to exercise appellate jurisdiction over the judgments, orders, or decrees of the Supreme Courts of the several Territories; but as this case was not a case in admiralty, nor a case arising under the criminal, revenue, or patent laws of the United States, nor a case between aliens and citizens of the United States, or between citizens of different States, it did not belong to either of the classes defined by section six of that act, as cases in which the judgments or decrees of the Circuit Courts of Appeals should be final, and therefore the Circuit Court of Appeals for the Eighth Circuit properly declined to take jurisdiction.

The last paragraph of the section provides that "in all cases not hereinbefore in this section made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States, when the matter in controversy shall exceed one thousand dollars besides costs;" and as this case was not made final by that section, a writ of error

would lie were it not that under section fifteen that court had no jurisdiction to review the judgment.

As, however, in any case made final, the section made it competent for this court to require, by *certiorari* or otherwise, such case to be certified for its review and determination with the same power and authority in the case as if it had been brought up by appeal or writ of error; and as the paragraph quoted gave the appeal or writ of error as of right in cases not made final, we are of opinion that it may be properly held that it was the intention of Congress that jurisdiction might be entertained by this court to pass upon the jurisdiction of that court when involving the question of the finality of its judgment under section six. We have already held that an appeal or writ of error lies to this court from or to the decrees or judgments of the Supreme Court of the Territories, except in cases susceptible of being taken to the Circuit Courts of Appeals, and cases where the matter in dispute exclusive of costs does not exceed the sum of five thousand dollars. *Shute* v. *Keyser*, 149 U. S. 649.

Tested by that rule this case could not have been brought to this court, and as we are clear that the Circuit Court of Appeals for the Eighth Circuit rightly decided that it had no jurisdiction, it could not be brought to that.

Judgment affirmed.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* JOHNSON.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 138. Argued December 15, 1893. — Decided January 3, 1894.

A Circuit Court of the United States having appointed a receiver of a railroad in 1885, and the receiver having, during his possession of the property, used a very large amount of the net earnings in improving it, whereby it had been made much more valuable, the court, on the expiration of the receivership, ordered, on the 26th October, 1888, the receiver to transfer

Syllabus.

the property with its improvements to the company, and that it should be received by the company, charged with operation liabilities, and subject to judgments rendered or to be rendered in favor of intervenors, and that all claims against the receiver up to October 31, 1888, be presented and prosecuted by intervention prior to February 1, 1889, or be barred and be no charge upon the property. On the 14th of September, 1888, J. brought suit against the receiver in a state court to recover for personal injuries suffered by reason of defects in the road. On the 17th of December, 1888, the complaint was amended by making the railway company a party defendant. The receiver set up his receivership and discharge. The company denied liability for any injury inflicted during the receivership; and among other grounds of defence set up that the plaintiff below was subject to the order of October 26, and must resort to the court which entered it for the collection of his claim; that he could not recover a judgment *in personam;* and that the claim was barred by the terms of the order. The case was dismissed in the trial court as to the receiver, and judgment was given against the company, which judgment was sustained by the highest court of the State on appeal. The latter court held, in its opinion, that the company having received the property under the circumstances described, was bound by the acts of the receiver, and held the property charged with any claim which he ought to have paid out of earnings; that the receiver having been discharged, the property in the hands of the company was released from the custody of the Circuit Court and subject to any claim that might rest against it; that the order of the Circuit Court was not binding on the plaintiff as affecting his right to enforce his claim by suit; that the time in which such action should be commenced was fixed by law and could not be altered by order of court; that, under the act of March 3, 1888, 24 Stat. 552, c. 373, as amended by the act of August 13, 1888, 25 Stat. 433, c. 866, the state court had jurisdiction of the case, and the prosecution of the claim in that court could not be prevented; and that under the circumstances the suit could be maintained against the company. A writ of error was sued out to this court. *Held,*

(1) That the overruling of the defence set up by the company amounted to a decision against the validity of the order of the Circuit Court, or against a claim of right or immunity thereunder, which gave this court jurisdiction under the writ of error;

(2) That the state court had jurisdiction under the acts of Congress above cited to proceed to final judgment in the case, and that it was not necessary to submit that judgment to the Circuit Court;

(3) That after February 1, 1889, those who had not intervened in the suit in the Circuit Court, were remitted to such other remedies as were within their reach;

(4) That as the highest court of the State had held, on other than Federal grounds, that the company was directly liable to the plaintiff below, its judgment should be affirmed.

Statement of the Case.

THIS was an action commenced by T. R. Johnson in the District Court of Marion County, Texas, September 14, 1888, against John C. Brown, and amended, December 17, 1888, by making the Texas and Pacific Railway Company a party defendant. On January 14, 1889, plaintiff filed his first original amended petition against said defendants, wherein it was alleged that the defendant Brown was on December 15, 1885, duly appointed by the Circuit Court of the United States for the Eastern District of Louisiana receiver of the Texas and Pacific Railway Company and all of its property in the States of Texas and Louisiana; that he qualified as such receiver, December 16, 1885, and entered upon and exercised and performed his duties as such from that date until October 31, 1888, inclusive, and that during that time he operated and managed the property of the defendant corporation in all its parts in said States as a common carrier of freight and passengers, and into and through certain enumerated counties of the State of Texas. The petition, after stating the circumstances of the accident and the ground of liability in that respect, further averred that the receiver was discharged by the court appointing him, October 31, 1888, under an order of October 26, 1888, and that he delivered to the railway company all of its property, consisting of the *corpus* of said railway and all the earnings and income then in his hands as receiver, unexpended, and all the lands belonging thereto and all improvements and betterments which had been added to the property by him.

The provisions of this order requiring that the property should be so delivered subject to the liabilities of the receiver were specifically alleged and their legal effect and that of the acceptance of the property averred; and it was further stated that under the laws of the State plaintiff was entitled to a lien on the property for the satisfaction of his claim. Reference was also made to an order of May 31, 1888, relating to the termination of the receivership, June 1, 1888, and averring that after that date the road was continuously operated by the company.

The plaintiff further alleged that the receiver was originally

appointed at the instigation and by the consent of the railway company and for its benefit, and that the property in his hands from December 16, 1885, to June 1, 1888, inclusive, was operated and managed by him for the benefit of the defendant company and its property as originally intended, and that the property, on June 1, 1888, was redelivered to the defendant corporation, greatly improved in value without any sale or foreclosure and without any third parties acquiring any title thereto or interest therein of any kind. It was finally averred that "the said Brown, as receiver, and under orders and direction of said court and by consent of all parties interested, including defendant company, during the time above mentioned applied all the receipts, earnings, and income of said railway under said receivership, after the payment of current expenses, to the permanent improvement of said property to the betterment thereof, and to the purchase of large and valuable additional property for the use and operation of said road, amounting in the aggregate to the sum of three million dollars, all of which money and property is now in the possession of the defendant company as its own and under the conditions heretofore set out. Wherefore the plaintiff brings this suit and prays for citation to defendants according to law, and on final trial for judgment against the defendant John C. Brown, simply establishing the claim of plaintiff against the receivership under his management, and against the Texas and Pacific Railway Company for his damages, fifty thousand dollars, and to fix upon the said property of the said defendant company in the State of Texas a lien to satisfy the judgment rendered herein, for costs, and such other relief to which plaintiff may be entitled in law or in equity."

The answer of the defendant Brown set up that at the time the plaintiff was injured he was in the exclusive possession of the railway company, as receiver, appointed by the Circuit Court of the United States for the Eastern District of Louisiana in the suit of the Missouri Pacific Railway Company against the Texas and Pacific Railway Company, operating said road under and in conformity to the orders of said court, and he was so in possession and operating said road in Sep-

tember, 1888, at the date this suit was commenced; that on October 26, 1888, the judge of the Circuit Court of the United States for the Eastern District of Louisiana made an order in the cause of *Missouri Pacific Railway Co.* v. *The Texas and Pacific Railway Co.*, discharging defendant as receiver, and said discharge was to take effect and did take effect on October 31, 1888, and the receiver was ordered to deliver and did deliver all the property in his hands as receiver to the railway company, October 31, 1888, in strict compliance with the order of the court; that the railway company took and received the property subject to and charged with all traffic liabilities due to connecting lines and all contracts for which the receiver might be held liable, and also subject to any and all judgments which had been theretofore rendered in favor of intervenors in said cause, as well as such judgments as might thereafter be rendered by the court in favor of intervenors who should file interventions therein prior to February 1, 1889; that he had complied fully with the order of the court and delivered the property to the railway company and had been fully and finally discharged, and he prayed to be dismissed with his costs.

The railway company demurred on the ground that the petition showed no cause of action against it; and also answered stating that at the time the plaintiff was injured he was not in the employment of this defendant, but of the receiver; that the receiver was discharged October 31, 1888, by an order entered and filed on the 26th of that month in said cause; that on October 31 and November 1, 1888, the receiver delivered to this defendant all the property held by him as receiver, and fully complied with the order of court discharging him, and the railway company received and accepted the property charged with all traffic liabilities due to connecting lines, with all contracts by which the receiver might be held liable, and with the payment of any and all judgments which had theretofore been rendered in favor of intervenors in the case of *Missouri Pacific Railway Co.* v. *The Texas and Pacific Railway Co.*, in the United States court for the Eastern District of Louisiana, as well as such judgments as

might be rendered in favor of intervenors who might intervene in said cause prior to February 1, 1889, and free from any and all other demands or claims. The answer also contained a general denial.

The cause was tried January 18, 1889, and resulted in a judgment of dismissal as to defendant Brown, and a verdict against the defendant railway company in the sum of fifteen thousand dollars, upon which judgment was entered in the following language: "It is further ordered and adjudged by the court that the plaintiff, T. R. Johnson, do have and recover of and from the defendant, the Texas and Pacific Railway Company, the sum of fifteen thousand ($15,000) dollars, with 8 per cent interest thereon from date, together with all costs in this behalf expended as between plaintiff and said defendant, for which let execution issue."

A motion by the railway company for a new trial was made and denied, and it moved to reform the judgment so that it should be entered up as against the company to "be paid in due course of the administration of the property of the Texas and Pacific Railway Company in the United States Circuit Court for the Eastern District of Louisiana, at New Orleans, and that no execution issue from this court to collect said judgment." This motion was overruled, and the company excepted, and thereupon appealed to the Supreme Court of Texas, by which the judgment was affirmed. The opinion of that court will be found reported in 76 Texas, 421. The company applied for a writ of error, which was allowed, and the case duly docketed in this court.

Upon the trial of the cause there was read in evidence on behalf of the plaintiff the petition of Brown, receiver, filed May 31, 1888, in the receivership case, for discharge as receiver and the order of the court made on said petition, and filed May 31, 1888. By this petition the receiver represented that the objects contemplated by the different bills filed in the causes named in the title had been accomplished, and all parties had agreed that "after the settlement with the receiver and the payment of costs and other liabilities, or provision for such payment fully made," the receiver should be discharged

and the causes dismissed; and that his accounts were in condition for final settlement up to the first of May. Petitioner asked the court to have an accounting with him as receiver, and, when final settlement was made and petitioner fully indemnified against matters unsettled growing out of the receivership, that the property now in his hands "be turned over to the proper officer of the Texas and Pacific Railway Company." He further represented "that a large number of suits are pending in the courts of Texas and Louisiana against him as receiver for alleged torts connected with the conduct of the railway in its operation, and there are also judgments for small amounts before justices of the peace, aggregating about $12,000, for damages to stock and for property burned by sparks from engines. There are also a considerable number of claims pending in this court by proceedings in intervention which have not been finally settled. A statement of these claims will be filed. Petitioner prays that he be fully protected against these claims, and for such other and proper relief as may seem necessary and proper."

The order thereon directed that an accounting be made by the receiver to the first day of June, "and at the coming in of which report, and it being found satisfactory and accepted, the remaining prayers of the petition will be granted by the court. In the meantime the receiver will continue to hold the property under the orders of the court until the first of June, 1888, at which time, if this order is not vacated, the railway and its property may be operated by the corporation under such orders as may be made by the court from time to time and under the supervision and control of the receiver, to the end that the property shall not pass beyond the control of the orders of the court nor of the receiver until the accounting takes place with the receiver and until he is fully protected by the corporation for causes of action originating against him and against the property pending the receivership." Then follows a direction in relation to stating the account.

The plaintiff also read in evidence a petition of the receiver of October 26, 1888, and the order of the Circuit Court of the

United States for the Eastern District of Texas on that petition, bearing the same date.

The petition (omitting titles) and order were as follows:

"To the honorable the judges of the said Circuit Court:

"Your petitioner, John C. Brown, as receiver of the Texas and Pacific Railway and its property in the above entitled and numbered causes, represents that heretofore it has been made to appear to the court that the objects and purposes of all the bills in these causes have been accomplished by settlement and agreement of the parties, and evidence of that fact filed as part of the record; that on its being so made to appear the court ordered him to render his accounts as receiver up to the first of June, which has been done, and it has been examined and approved, and since that date petitioner has kept his account as with the company. By the same order he was directed to hold the property under the orders of the court until the first of June, 1888, at which time if said order was not vacated the railway company might operate the road under such orders as the court might make from time to time and under the supervision and control of the receiver. No formal delivery of the road and property in his hands has been made to said railway company, and petitioner now asks that he be allowed formally to deliver all property and funds in his hands as such receiver to said railway company, and that he be allowed to account to said company according to his account filed up to the first of June and for all receipts and expenditures by him received and made since the first of June. He has carried over on the present books of the company the cash balance and all other balances of property and assets as found in his hands by his report to the first of June aforesaid, and he is now the president of said railroad company, and after his discharge will be in possession of all of said company's road, property, and funds as such for the said company. Wherefore he asks that he be discharged from his said receivership, and that his bond as receiver be vacated and annulled on payment of all costs legally taxable, but he prays the court to make such order as will charge the property so turned over in

the hands of said railway company and its assigns with all liability for which he as receiver is or might be held personally liable. Your petitioner further says that the sum of his compensation as receiver has been agreed on by the parties in interest and is satisfactory to him and has been settled up to the 31st day of October, 1888, at which time he asks that his discharge take effect.

"(Signed) JNO. C. BROWN."

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The Texas and Pacific Railway Company. } No. 11,181.

"On consideration of the foregoing petition it is now ordered, adjudged, and decreed that the prayer of the same be granted, and accordingly that John C. Brown, receiver of the property of the Texas and Pacific Railway in the above-entitled causes, be, and he is hereby, directed to make delivery unto said Texas and Pacific Railway Company of all property, funds, and assets in his hands as such receiver, and that he be directed to account to said company according to his account filed and approved up to June 1st, 1888, and for all receipts and expenditures by him received and made since the said 1st June, 1888. Such delivery will be made as of October 31st, 1888. It is further ordered that said receiver be finally discharged on said 31st October, 1888, from his receivership on payment of all costs legally taxed, and that thereupon his bond be vacated and cancelled. It is further ordered that said property nevertheless shall be delivered to and received by said Texas and Pacific Railway Company, subject to and charged with all traffic liabilities due to connecting lines and all contracts for which said receiver is or might be held, made, or in any way liable, and subject also to any and all judgments which have heretofore been rendered in favor of intervenors in this case and which have not been paid, as well as to such judgments as may be hereafter rendered by the court in favor of intervenors, while it retains the cases for these determinations or interventions now pending and undetermined or which may be filed prior to February, 1889, together with

needful expenses of defending said claims, and upon the condition that such liabilities and obligations of the receiver, when so recognized and adjudged, may be enforced against said property in the hands of said company or its assigns to the same extent it could have been enforced if said property had not been surrendered into the possession of said company and was still in the hands of the court, and with the further condition that the court may, if needful for the protection of the receiver's obligations and liabilities so recognized by this court, resume possession of said property. The bills in these causes will be retained for the purpose of investigating such liabilities and obligations and for such other purpose as may seem needful. It is ordered that all claims against the receiver as such up to said thirty-first October, 1888, be presented and prosecuted by intervention prior to February first, 1889, and, if not so presented by that date, that the same be barred and shall not be a charge on the property of said company. It is further ordered that the said receiver advertise in a daily newspaper in New Orleans and in Dallas the fact of his said discharge, and a notice to said claimants to make claim within the time aforesaid, to wit, the first of February, 1889, and that he post a notice of similar purport in the station-houses of said railway.

"New Orleans, October 26th, 1888."

The deposition of John C. Brown was also read in evidence, in which he testified: That he was receiver from December 16, 1885, to and including October 31, 1888; that "all of the earnings and income of the road, after paying operating expenses, in addition to over two millions of dollars voluntarily contributed by the stockholders, were appropriated to the improvement of the road in my hands as receiver;" that the expenditure of the money above alluded to was made under orders of the United States Circuit Court for the Eastern District of Louisiana, at New Orleans; that the improvements and betterments were highly necessary to carry on the business of the road and to operate it as a common carrier; that "debts were created to raise money to make said improve-

ments to the amount of nearly two million five hundred thousand dollars, the larger portion of which has been paid, and some of which is in litigation;" that the circumstances under which the improvements were made were, briefly, as follows: "In the summer or early autumn of 1885 the owners of the property became satisfied that the company could not longer continue paying interest upon the bonded debt without first expending a large amount of money in the renewal of tracks, raising of roadway, widening cuts and embankments, putting in a large amount of new cross-ties, purchasing a large amount of rolling stock and motive power, and the renewal of bridges, etc. A committee was raised by the board of directors to give a personal inspection of the line with the aid of experts and report to the board the condition of the property and the amount necessary to place the property in a fair condition. The ultimate result of the report of that committee was to place the road in the hands of a receiver and suspend the payment of interest, it being then believed that it would be necessary to sell the road finally under foreclosure of mortgage. The committee of reorganization afterwards devised the plan which was approved by the parties in interest, which avoided final foreclosure. In the meantime the improvements aforesaid were made."

Plaintiff further offered to prove the money value of the improvements and betterments put upon the road during the receivership, whereupon it was admitted that "such betterments placed on said railroad out of the earnings of the road in excess of the operating expenses while in the hands of the receiver were of value sufficient to more than cover the amount claimed by plaintiff in this suit."

The record also contains the evidence as to the circumstances surrounding the accident and the nature of the injuries inflicted.

The Supreme Court of Texas held that a railway company, in the absence of some statute so providing, will not be liable for the acts of its receiver by reason alone of his relation to it; but that if such company and its creditors should by collusion procure a receivership, or if the receiver in fact operated the road under orders of a court without jurisdiction, it would

seem that the railway company would be bound by all acts of such receiver: That a claim for damages caused by injuries inflicted through the negligence of the receiver while he was operating the railway is entitled to payment out of current receipts, and if the current earnings be invested by the receiver in betterments on the road, which, without sale, is returned to the company at the close of the receivership, then the company must be held to have received the property, charged with any claim which the receiver ought to have paid out of the earnings: That when a receiver has been discharged and the property all returned to the company under order of the court in which the proceedings were had, the control of the court over the property is ended, and the property, when released from the custody of the court, stands subject to any claim that may rest against it: That the order of the United States Circuit Court for the Eastern District of Louisiana, in the receivership proceedings affecting the Texas and Pacific Railway, to which the plaintiff was not a party, prescribing that all persons who had claims, with which the property might be charged, should present them by intervention to that court, was without authority of law and not binding upon the plaintiff as affecting his right to enforce his claim by suit; and that the time within which a claim for damages might be prosecuted against a railway company was fixed by law and could not be altered by order of court: That under the act of Congress of March 3, 1887, persons having claims against receivers might sue upon and establish them in any court having jurisdiction, and this right could not be nullified by order of court; and that after discharging the receiver and restoring the property to its owners, the United States court could not maintain such jurisdiction over the matter as to prevent the prosecution of such claim to judgment and execution: That a suit in a state court for damages for personal injuries caused by the negligent operation of the Texas and Pacific Railway while in the hands of a receiver could be maintained against the railway company after its property was restored to it, the current earnings of the road having been used by the receiver in improving it.

Argument for Plaintiff in Error.

Other rulings were made in reference to the merits upon which the recovery rested.

Mr. John F. Dillon, (with whom was *Mr. Winslow S. Pierce* on the brief,) for plaintiff in error.

I. All the questions in this case are open for review by this court. The charter of the Texas and Pacific Railway is a public act of Congress. The company having been created to subserve public purposes, and its creation having been provided for by public law, the nature and sovereignty of its organization are judicially recognized. *Pacific Railroad Removal Cases*, 115 U. S. 1; *Osborn* v. *Bank of the United States*, 9 Wheat. 738.

This case comes here under the provisions of Rev. Stat. § 709. The language of the court in *McNulta* v. *Lochridge*, 141 U. S. 327, 329, is applicable here: "But, while we think that plaintiff in error is not entitled to immunity by virtue of the statute of 1887, we are authorized by Revised Statutes, sec. 709, to review the final judgment or decree of a state court where 'any title, right, privilege, or immunity is claimed under . . . any . . . *authority* exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such . . . authority,' . . . etc. Now, as McNulta was exercising an authority as receiver under an order of the Federal court, and claimed immunity as such receiver from suit without the previous leave of such court, and the decision was adverse to such claim, he is entitled to a review of such ruling whether his claim be founded upon the statute or upon principles of general jurisprudence. We regard this as a legitimate deduction from the opinions of this court in *Buck* v. *Colbath*, 3 Wall. 334; *Feibelman* v. *Packard*, 109 U. S. 421; *Pacific Railroad Removal Cases*, 115 U. S. 1; *Etheridge* v. *Sperry*, 139 U. S. 266, and *Bock* v. *Perkins*, 139 U. S. 628."

II. The state court had no power to render a personal judg-

ment against the Texas and Pacific Railway Company upon a cause of action arising out of the negligence of John C. Brown, receiver, nor had it power or jurisdiction to award execution against the railway company upon such judgment.

The court below seems to have recognized the difficulty — manifest enough — in the affirmance of a *personal* judgment founded exclusively on the theory of an equitable charge upon specific property in the hands of an owner who has taken it *cum onere*. Appreciating the necessity of a personal liability as the foundation of a personal judgment, it seems to have indulged its own suggestion that the receiver was, in some qualified sense sufficient for its purposes, the agent of the railway company. In cases involving hardship it has been more than once argued that liability on the part of a corporation, in such cases as the present, might be deduced through the application of the rules of agency, but the inapplicability of these rules has been easily demonstrated. It was with such a suggestion that the court dealt in the case of *Farmers' Loan and Trust Co.* v. *Central Railroad of Iowa*, 7 Fed. Rep. 537. See also *Hicks* v. *I. & G. N. Railway*, 62 Texas, 40; *Godfrey* v. *Ohio & Miss. Railway*, 116 Indiana, 30; *Bell* v. *Indianapolis, Cincinnati &c. Railroad*, 53 Indiana, 57.

In the case of *Davis* v. *Duncan*, 19 Fed. Rep. 477, a receiver had surrendered a railroad property to a company — the same company from which he received it — under an order which omitted provision for claims against the receiver which had not been put in suit. The receiver was subsequently sued on a claim of this description. Hill, J., said: "The railroad company is not liable for the injuries complained of in the bill for the reason that they were committed while it was out of possession of the property and had no control over it. This conclusion is sustained by principle and authority" (citing cases).

The equitable doctrine for the existence of which the court below contended, *i.e.* the doctrine that a railway company to which its property is surrendered by a receiver who has applied current receipts to its improvement and betterment,

leaving operating expenses unpaid, takes the property *cum onere* to the extent of such betterments and improvements, is a doctrine of comparatively recent announcement. It had its source and origin in the hardship of particular cases. Until the decision by the court below of the present case it was never decided, nor even contended, that the mere existence of such a situation could result in a personal liability of the company to the extent of the amount by which the property received by it was thus burdened. It has been well understood that the receiver of a railroad property represents the court in its administration, and is the agent of no person or corporation; and it has been equally well understood that it is the function of the court to provide for the expense of operation and for the liabilities of its receivership.

III. The equity upon which the trial court and the Supreme Court of Texas relied in the rendition and affirmance of the judgment below did not arise in this cause.

The equity upon which the plaintiff insists and which was recognized by the court below, has its foundation in a lack of opportunity to a claimant to prove his claim in the court in which the receivership cause is, or was, pending. This equity, in its broadest assertion, is recognized only to the extent of giving to a claimant an opportunity which has been denied by the discharge of property from the custody of the receivership without provision for his claim, and without reservation of power to resume possession for the purpose of meeting the liability involved in his claim.

No such equity exists, or will be recognized where there has been opportunity afforded to present claims in the court of administration, and seasonable notice or knowledge of such opportunity.

After full administration by a court of competent jurisdiction, and actual notice and opportunity to parties interested to present their claims, the purchaser or party taking from the court holds the property free from the claims of all such claimants with notice and opportunity. The practice in such cases, and the conclusiveness of such administration, are fully presented in the cases, in this court, of *Williams* v. *Gibbes*, 17

How. 239; *Gelston* v. *Hoyt*, 3 Wheat. 246; *Wiswall* v. *Sampson*, 14 How. 52.

IV. The order of the Federal courts retaining the bills, affording opportunity for intervention, and limiting the time within which intervention could be made so as to establish intervening claims as charges upon the property surrendered, was a legitimate, proper, and salutary exercise of jurisdiction.

It may be frankly conceded that the original petition of the plaintiff seeking a personal judgment against the receiver in his capacity as receiver, was properly brought without leave of court, and it may be even conceded for the purposes of argument that such suit was properly brought in the state court of Texas, and could have been there carried to recovery. But it is entirely clear that such a recovery would be effective only as a judicial ascertainment of the plaintiff's claim and that the judgment itself could only have been realized out of the property in the hands of the receiver, after it had been presented to the court in which the receivership cause was pending, subjected to the equitable scrutiny of that court, and allowed for payment in the course of its administration. *McNulta* v. *Lochridge*, *ubi supra*; *Dillingham* v. *Russell*, 73 Texas, 47; *Harding* v. *Nettleton*, 86 Missouri, 658; *Jessup* v. *Wabash & St. Louis Railway*, 44 Fed. Rep. 663.

In this case the defendant company has no relation to or concern with the claim of the plaintiffs except as the same might be adjudged to be a charge upon property of which it is the owner. The personal claim was against the receiver, and, before property surrendered by him could be reached with an equitable charge for his liabilities, the claim must have been ascertained and reduced to judgment. This is merely the familiar rule affecting creditors' bills, and clearly applicable to a case of this character. *Brown* v. *Long*, 1 Iredell Eq. 190; *Massey* v. *Gorton*, 12 Minnesota, 145; *S. C.* 90 Am. Dec. 287; *Van Weel* v. *Winston*, 115 U. S. 228; *Brown* v. *Wabash Railway Co.*, 96 Illinois, 297; *Jessup* v. *Wabash &c. Railway*, *ubi supra*; *Davis* v. *Duncan*, 19 Fed. Rep. 477.

It will be observed that the order of the Federal court charging the property with receivership liabilities, and limit-

ing the time within which interventions must be filed in order to reach the property, was in no sense an order analogous to a statute of limitation. It would have been competent for the court to have omitted these provisions from its order, and to have discharged the property absolutely from the custody of the court and its receiver. In such event, the property would not have been subject to any liens, or charges for receivership liabilities, except through the possible operation of the doctrine of equity in respect to betterments and improvements which we have heretofore discussed, and which has no bearing upon this branch of the argument. In discharging the property from the custody of the receivership, the court of its own motion exacted from the defendant company the condition that the property in its hands should remain subject to and charged with such receivership liabilities as the court had, or might, within a specified time and in a specified manner, adjudge against it. This was a voluntary provision of the court; and, no matter how usual or prudent it may have been, and no matter how careless or unjustifiable, from a standpoint of fairness, its omission would have been, it was still a voluntary precaution, and the right reserved was not one which would have existed independently of the reservation. It was not, therefore, an order made in limitation of any rights of the plaintiff.

The power in such cases to make orders limiting the time for presentation of claims in order that they shall be chargeable upon the surrendered property has been clearly recognized by this court. *Olcott* v. *Headrick*, 141 U. S. 543, and cases cited; *Union Trust Co.* v. *Morrison*, 125 U. S. 591. See also *Pine Lake Iron Co.* v. *Lafayette Car Works*, 53 Fed. Rep. 853.

Mr. H. J. May, (with whom were *Mr. C. A. Culberson* and *Mr. A. H. Garland* on the brief,) for defendants in error.

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

This is a writ of error to review the judgment of the highest court of a State in which a decision in the suit could be

had, under section 709 of the Revised Statutes, providing for such review where the validity of an authority exercised under the United States is drawn in question and the decision is against its validity, or "where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up and claimed, by either party, under such Constitution, treaty, statute, commission, or authority."

Because the suit might have been brought in the Circuit Court of the United States, or removed thereto from the state court on the ground that it was one arising under the laws of the United States, in that the Texas and Pacific Railway Company was a corporation organized under and by virtue of acts of Congress, it does not follow that the state court decided against any title, right, privilege, or immunity in exercising its jurisdiction. The railway company was not exempted from suit in the state courts by the law of its creation or any other act of Congress; and we perceive no title, right, privilege, or immunity secured by that law, which was denied by the judgment under consideration.

Nor can jurisdiction be maintained on the ground that a right or immunity was claimed under the authority exercised by the receiver in virtue of the order of the Circuit Court of the United States, which right or immunity was denied, as in *McNulta* v. *Lochridge*, 141 U. S. 327. The judgment was in favor of the receiver and the writ of error is brought by the company, and it is well settled that the right or immunity must be one of the plaintiff in error and not of a third person only. *Ludeling* v. *Chaffe*, 143 U. S. 301; *Giles* v. *Little*, 134 U. S. 645.

The validity of no treaty or statute of the United States was drawn in question, nor was any claim of right or immunity set up under the Constitution or any treaty or statute of, or commission under, the United States, so that we are confined to the inquiry whether the validity of an authority exercised under the United States in any other regard than above

indicated, or any claim under such authority, was denied. And as the defence was directly made that the plaintiff below was subject to the order of October 26, and must, therefore, resort to the court which entered it for the collection of his claim, and could not recover a judgment *in personam* collectible by the ordinary process ; and, moreover, that his claim was thereby barred; the overruling of that defence may properly be held to have amounted to a decision against the validity of the order, or against a claim of right or immunity thereunder.

As respects the contention for the railway company that a personal judgment could not be rendered against it because it was not liable for acts of negligence committed by the receiver, that was a question of general law and for the state court to pass upon. In the view of that court, a railway company might be held directly liable when a receiver is appointed in an amicable suit at the instigation of the company and for the company's own purposes, and, these purposes being accomplished, the property is returned to its owner, the rights of no third persons as purchasers intervening, upon the ground that the acts of the receiver might well be regarded as the acts of its own servant, rather than those of an officer of the court, which under such circumstances he would only be *sub modo*. But as the court did not feel authorized to entertain a conclusion which might carry the implication that this receivership would have been created or continued, although its object had only been to place the property temporarily beyond the reach of creditors until it could be augmented in value by improvements made from earnings under the protection of the court, that rule was not applied in this case. The company was held liable upon the distinct ground that the earnings of the road were subject to the payment of claims for damages, and that as, in this instance, such earnings to an extent far greater than sufficient to pay the plaintiff had been diverted into betterments, of which the company had the benefit, it must respond directly for the claim. This was so by reason of the statute, (Laws Tex. 1887, 120, c. 131, § 6,) and, irrespective of statute, on equitable principles applicable under the facts.

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The railway company contends that its liability turned upon the fact that it took possession upon condition that its property should be charged with the receivership liabilities, and that it is immaterial whether the property was so charged by the order of the Circuit Court of the United States or by operation of general doctrines of equity, because, in either aspect, it was the property alone that was charged: if by the order of the court, it could only be with such liabilities as had been or should be adjudged by that court; if, upon equitable principles, then it could only be to the extent of the amount diverted to betterments, and defendant in error should have been confined to a lien on specific improvements, measured by the proportion which the aggregate of like claims would bear to the amount diverted; but the state court decided otherwise, holding, in view of the facts disclosed, that the burden assumed by the company was that of a direct liability, and that judgment against it could be rendered in the usual form and collected in the ordinary way.

These conclusions did not rest upon the order of October 26 as affirmatively imposing a specific liability upon the company, and the only question for us to determine is, whether in ruling that that order did not preclude such a judgment as was rendered and did not operate to require the defendant in error to submit his judgment to the Circuit Court of the United States at New Orleans to obtain its collection in such manner and to such extent as that court might be advised, a claim of right or immunity under an authority exercised under the United States was erroneously decided against.

The position of plaintiff in error seems to be that the order constituted matter in bar of a recovery against the railway company on the merits, on the theory that the property passed to the company upon certain conditions as to outstanding claims, irrespective of the fact that those conditions were intended to secure payment in that court and not to defeat it, and that the company only resumed its own, augmented in value by the use of earnings which should have been applied to the extinguishment of such claims; or that the judgment should have been originally rendered, or been reformed, so as

to provide for payment in due course of administration in the Circuit Court, and not otherwise.

By section three of the act of March 3, 1887, 24 Stat. 552, c. 373, as corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, every receiver, appointed by a court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with the property, without the previous leave of the court by which such receiver was appointed. Necessarily, such suit may be brought in any court of competent jurisdiction and proceed to judgment accordingly. This suit was so brought; the railway company, on being made a party, answered in bar, and judgment followed.

Nevertheless it is insisted that this recovery was effective only as a judicial ascertainment of the amount, and that the judgment itself could only be realized out of the property of the company, after it had been presented to the court of the receivership cause and been allowed for payment, subject to the contingency that that court might hold that it was exhibited too late.

This result is declared to arise out of the necessities of the case and to be recognized in the last clause of the third section of the act of Congress of March 3, 1887, which adds to the provision that suit may be brought against a receiver without leave of the appointing court, the words, "but 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." And it is also urged, in repetition of the argument that judgment *in personam* could not be recovered, that this suit as against the railway company was necessarily a proceeding *in rem*, and could only be instituted and the property charged in the court having jurisdiction of the *res*. In other words, the contention assumes that all the property of the company after the discharge of the receiver was still under the protection of the Circuit Court of the United States for the Eastern District of Louisiana in respect of subjection to this and like claims.

We are of opinion that these views are inapplicable to the

case. This action was in itself in no sense a proceeding *in rem*, and the state court has held on other than Federal grounds that the company was directly liable. The property was no longer in the custody of the Circuit Court, and it had no possession that would be interfered with by the levy of an execution, so that defendant in error was not obliged to resort to an intervention in that court before he could collect, unless he was personally bound to do so by force of an adjudication to that effect operating upon him. In this connection it should be observed that the property was not sold but merely redelivered to the company. No judgment *in rem* was entered; no fund existed through a sale in foreclosure; the earnings far exceeded the debts during the temporary management; and it did not appear that either in reference to expenses incurred in the administration or in the matter of claims resting on controverted priorities, or otherwise, there were any equities to be adjusted which required the further exercise of jurisdiction.

The order of October 26 was entered by the Circuit Court for the Eastern District of Louisiana, but the record does not disclose that similar action was taken in Texas, although the titles of the petitions and orders of May 31 and October 26 include the names of two cases as pending in the Northern District of the latter State, and reference is made to them; but in any view, the Circuit Court for the Eastern District of Louisiana was deemed the court of primary administration.

The order provided that the property should be delivered to the railroad company subject to "such judgments as may be hereafter rendered by the court in favor of intervenors, while it retains the cases for these determinations or interventions now pending and undetermined, or which may be filed prior to February 1, 1889," and that such as were not so presented and prosecuted by intervention by that date should be barred, and should not "be a charge on the property of said company;" and further, that "the court may, if needful for the protection of the receiver's obligations and liabilities so recognized by this court, resume possession of said property."

The general equity jurisdiction of the Circuit Court no doubt embraced the authority to hold possession of the property and to determine the rights of all persons who were parties, or who made themselves parties to the proceedings before it; and if the property sequestrated had gone to sale and a fund been realized for distribution, then, upon notice appropriate to proceedings *in rem*, the defendant in error might have been bound by the disposition thereupon made; yet, not only was there no proof that the notice required by the order was ever given, or any other notice, but the receiver was discharged, his bond cancelled, and the property surrendered, without sale or transfer, so that it is in effect sought to have defendant in error held personally bound by an order to which he was not a party, entered by a court into which he was not brought in any manner. It is impossible to concede that he was in contempt in the recovery of his judgment or would be in enforcing it against the company's property; but that is the necessary result of the position taken by counsel.

Certainly the preservation of general equity jurisdiction over suits instituted against receivers without leave does not, in promotion of the ends of justice, make it competent for the appointing court to determine the rights of persons who are not before it or subject to its jurisdiction; and the right to sue without resorting to the appointing court, which involves the right to obtain judgment, cannot be assumed to have been rendered practically valueless by this further provision in the same section of the statute which granted it.

The order was not a decree *in rem* condemning the particular thing seized, but an order providing for the resumption of possession thereafter, if found necessary, to the end that such a decree might then be granted; and we are aware of no principle which would justify us in holding that a court, under the circumstances which existed here, could part with its jurisdiction over property by the complete surrender thereof to its owner, and at the same time constructively retain jurisdiction over such property so as in that respect to bind those who would otherwise be unaffected by its orders.

The case was not one of a fund in court, and the authorities upon the question of limitation of time for the presentation of claims to share in the distribution of such a fund are not in point. It was not a case of purchase in which compliance with stipulated conditions forms part of the consideration, and the extent of the burdens assumed is defined. It did not present the question of the power of the court in the instance of a sale to deliver the property free from any liabilities whatever incurred in administration. And we do not think the Circuit Court attempted to accomplish the result contended for, or that its order is open to the interpretation put upon it by counsel for the company.

The receiver was about to be discharged and the property redelivered to the company. On the one hand, the receiver was entitled to protection from liability, and on the other, just claims were entitled to be paid. The Circuit Court sought to secure both objects by the terms of the order and the conditions annexed to the acceptance of possession, but did not regard itself as constrained to indefinitely prolong the pendency of the equity proceedings for that purpose. It reserved those proceedings, therefore, for the disposition of pending interventions and such as might be filed within a time fixed, at the expiration of which the court could not be called on to allow further claims and assert control over the property for their satisfaction. They would thereafter be barred from prosecution under those proceedings.

In this way the Circuit Court recognized and relieved itself from the obligation to see that no injustice resulted from the action it was taking, which action operated to withdraw from claimants against the receiver the security of his bond and possibly of the property. But after February 1, 1889, those who had not intervened would cease to be entitled to resort to the Circuit Court in the equity suits, and would be remitted to such other remedies as might be within their reach. If the recovery of defendant in error and the collection of his judgment had been dependent upon the order or upon any action of the Circuit Court in his favor in the original suits, a different question would have been presented, but as the matter

stands we perceive no aspect in which that order can be treated as operating in limitation of the rights of defendant in error except in the particular of resort to the Circuit Court as above indicated.

From these considerations we conclude that there was no error in the result arrived at by the Supreme Court of Texas in the disposition of Federal questions, and its judgment is accordingly *Affirmed.*

TEXAS & PACIFIC RAILWAY *v.* GRIFFIN. TEXAS & PACIFIC RAILWAY *v.* OVERHEISER. Error to the Supreme Court of the State of Texas. Nos. 136 and 137. Argued with No. 138, *ante*, 81. MR. CHIEF JUSTICE FULLER: These cases are reported in 76 Texas, 437, 441, and involve here the same questions as those in the case above decided.

The judgments are, severally, *Affirmed.*

Mr. John F. Dillon, (with whom was *Mr. Winslow S. Pierce* on the brief,) for plaintiff in error.

Mr. H. J. May, (with whom was *Mr. C. A. Culberson* and *Mr. A. H. Garland* on the brief,) for defendants in error.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* SAUNDERS.

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

No. 162. Submitted December 13, 1893. — Decided January 3, 1894.

This writ of error is dismissed because the judgment does not exceed the sum of $5000, exclusive of costs, and the jurisdiction of the court below was not involved within the meaning of the act of February 25, 1889, 25 Stat. 693, c. 236, empowering this court to review the judgments of Circuit Courts when such is the fact.

An objection that an action is brought in the wrong district cannot be raised after the defendant has pleaded in bar.

Statement of the Case.

THIS was an action brought by Henry Saunders, June 4, 1888, in the Circuit Court of the United States for the Eastern District of Texas against John C. Brown, the receiver of the Texas and Pacific Railway Company, to recover damages for injuries sustained by Saunders through the negligence of the receiver, his agents, and employés, as he alleged. On February 6, 1889, plaintiff below filed an amended petition making the railway company a party defendant, and alleging the discharge of the receiver and the surrender of its property to the company, without sale, improved by the expenditure of some millions of dollars in betterments paid for out of, and augmented by property, both real and personal, purchased with the earnings during the receivership; and further, that under the order turning over the property, the company took it charged with the receiver's liabilities, which included plaintiff's claim, and that on that account, as well as because plaintiff was entitled to a lien on the betterments and property acquired by the use of the earnings, the company was liable to plaintiff; and he prayed for judgment and for general relief. The death of defendant Brown was suggested and the cause dismissed as to him. The company filed a demurrer and answered on September 12, 1889, assigning as ground of demurrer that the petition showed no cause of action, and answering by a general denial, and the averment of contributory negligence.

On September 23, 1889, the railway company, by counsel and not in its own person, further answered, pleading: (1) "That at the time plaintiff was injured the Texas and Pacific Railway and all its property was in the possession and control of John C. Brown, as receiver, appointed by the United States Circuit Court for the Eastern District of Louisiana. Defendant says that on October 31, 1888, the said John C. Brown was discharged from his trust as receiver by an order made October 26, 1888, in the United States Circuit Court for the Eastern District of Louisiana, and he was ordered to deliver all property in his hands to the defendant, and the defendant was ordered to receive said property, and did receive it on October 31, 1888, charged with all traffic liability due by the

receiver to connecting lines, charged with the performance of all contracts made by the receiver, and charged with the payment of all judgments that may be rendered in favor of claimants who may intervene in the cause of the *Missouri Pacific Railway Company* v. *The Texas and Pacific Railway Company*, in the United States Circuit Court for the Eastern District of Louisiana, at New Orleans, prior to February 1, 1889, and free from all other demands or claims arising against the receiver and prior to October 31, 1888. Defendant says that plaintiff did not intervene in said cause prior to February 1, 1889. Wherefore the defendants say they are not liable at suit of plaintiff in this court, and, if liable at all, they are only liable upon due intervention of plaintiff at New Orleans, as is provided by the order of —— discharging said receiver; which order is hereby attached and made a part of this plea. Wherefore they pray that this cause be dismissed." (2) Defendant "demurs to plaintiff's petition, and says said petition shows no cause of action, if this court has jurisdiction; and this court has not jurisdiction over the parties plaintiff and defendant, nor of the subject-matter." (3) General denial. (4) Contributory negligence. (5) Statute of limitations.

The cause coming on for trial, it appears from the bill of exceptions that the defendant first presented the plea above numbered one, which the court overruled and held insufficient. The defendant then presented its plea or demurrer to the jurisdiction on the ground that Saunders "resided in the Eastern District of Texas, and the defendant Brown resided in the county and city of Dallas, Texas, which is by law placed in the Northern District of Texas, and there was no fact alleged to give this court jurisdiction," which was also overruled. Exceptions were duly saved. The trial then proceeded, and, among other things, the order of the Circuit Court for the Eastern District of Louisiana of October 26, 1888, discharging the receiver and directing the delivery of its property to the railway company was put in evidence; and it was also proved that plaintiff had resided in Dallas, Texas, since May 2, 1888. At the close of the testimony, defendant moved to dismiss the cause because plaintiff must intervene at New Orleans, and,

this being overruled, further because, on the pleadings, plaintiff and defendant both resided in the Northern District of Texas, which was also denied.

The jury returned a verdict in favor of plaintiff for $7500, which, at the suggestion of the court, plaintiff reduced by remittitur to $2500, and, for the recovery of the latter sum, judgment was entered. The case was then brought on writ of error to this court, and the record filed August 30, 1890.

Mr. John F. Dillon and *Mr. Winslow S. Pierce* for plaintiff in error.

Mr. James Turner for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court.

We are of opinion that the writ of error must be dismissed because the judgment does not exceed the sum of five thousand dollars, exclusive of costs, and the jurisdiction of the court below was not involved within the meaning of the act of February 25, 1889, 25 Stat. 693, c. 236, empowering this court to review the judgments of Circuit Courts, when such is the fact. The order of October 26, 1888, of the Circuit Court for the Eastern District of Louisiana directed, among other things, that "all claims against the receiver, as such, up to said 31st day of October, 1888, be presented and prosecuted by intervention prior to February 1, 1889, and if not so presented by that date, that the same be barred and shall not be a charge on the property of said company." Assuming that the plea based upon the order in question was the sole plea, filed in due time, and technically sufficient in form, it is enough to observe that it alleged that by the terms of that order the property of the company was freed from all demands and claims arising against the receiver and prior to October 31, 1888, which were not adjudicated by the United States Circuit Court for the Eastern District of Louisiana in the cause of the *Missouri Pacific Railway Co.* v. *The Texas and Pacific Railway*

Co. upon intervention prior to February 1, 1889, and that the plaintiff did not intervene in said cause prior to that day. Without discussing the effect of that order, which has already been sufficiently considered in *Texas and Pacific Railway Co.* v. *Johnson*, *ante*, 81, it will be perceived that on September 23, 1889, when this plea was filed, the time within which the Circuit Court for the Eastern District of Louisiana would take cognizance of the plaintiff's claim had long before expired and the claim was barred as set forth by the plea, certainly so far as that court was concerned, and if the company, if liable at all, was only liable on intervention in that court as the plea asserted, then the plaintiff could not maintain any action in respect of his supposed cause of action. The plea was, therefore, not a plea to the jurisdiction, but a plea in bar. It did not seek to oust the jurisdiction of the Circuit Court for the Eastern District of Texas by reason of jurisdiction in the Circuit Court for the Eastern District of Louisiana or elsewhere, and so give the plaintiff a better writ, but to defeat his recovery altogether. We do not think this presented any question of jurisdiction, as such, which we could consider.

As to the suggestion that the suit was brought in the wrong district, that objection, if it could be raised by the company at all, came after the defendant had pleaded in bar and too late. *St. Louis & San Francisco Railway* v. *McBride*, 141 U. S. 127; *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593.

Under these circumstances, as no question of the jurisdiction of the Circuit Court was open to inquiry, we do not regard this case as coming within the act of Congress referred to.

Writ of error dismissed.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* HORN.

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

No. 163. Argued and submitted December 13, 1893. — Decided January 3, 1894.

A verdict being returned for plaintiff for $11,000, on suggestion of the court a remittitur of $6001 was entered. As recorded, the terms of the judgment were: "It is, therefore, ordered and adjudged by the court that the plaintiff, Henry Horn, do have and recover of the defendant, the Texas & Pacific Railway Company, the sum of eleven thousand dollars and all costs in this behalf expended. And it appearing to the court that on this day the plaintiff filed, in writing, a remitter of $6000.00: It is, therefore, ordered and adjudged by the court that execution issue for the sum of $4999.00 only, and all costs herein." The order of allowance of the writ of error declared that the judgment was rendered for $4999, and the bond and citation so described it. *Held*, that, upon the entire record, the judgment must be held to be for no larger sum than $4999.

THE case is stated in the opinion.

Mr. John F. Dillon and *Mr. Winslow S. Pierce* for plaintiff in error.

Mr. C. A. Culberson for defendant in error submitted on his brief.

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

Upon the trial of this cause a verdict was returned for the plaintiff in the sum of eleven thousand dollars, and upon the suggestion of the court the plaintiff entered a remittitur of six thousand and one dollars, and prayed that the same be allowed, and judgment entered for four thousand nine hundred and ninety-nine dollars. The bill of exceptions states that judgment was rendered for that amount, although as recorded the

terms of the judgment, after reciting the return of the verdict, were:

"It is, therefore, ordered and adjudged by the court that the plaintiff, Henry Horn, do have and recover of the defendant, the Texas and Pacific Railway Company, the sum of eleven thousand dollars and all costs in this behalf expended.

"And it appearing to the court that on this day the plaintiff filed, in writing, a remitter of $6000.00:

"It is, therefore, ordered and adjudged by the court that execution issue for the sum of $4999.00 only, and all costs herein."

The writ of error bore date June 24, 1890, and was made a supersedeas, the order of allowance declaring that the judgment was rendered for $4999.00, February 13, 1890, and that a motion for new trial was filed, but not acted on until June 5, 1890. The bond and citation describe the judgment as for $4999.00.

Although the judgment was entered immediately upon the return of the verdict in accordance with the practice in that jurisdiction, and, therefore, for the amount of the verdict, it was within the power of the court to allow the remittitur; and while the order to that effect might have been more accurately worded, we are of opinion that, upon the entire record, plaintiff in error cannot be permitted to insist that the judgment as it stands is for a larger sum than $4999, nor can it be hereafter held liable as on judgment for any other amount. Hence this case is not within our jurisdiction, unless it falls within the act of Congress of February 25, 1889, 25 Stat. 693, c. 236, which, for the reasons given in *Texas and Pacific Railway* v. *Saunders*, *ante*, 105, we do not think it does. The railway company, in this case, as in that, filed a plea based upon the order of October 26, 1888, of the Circuit Court of the United States for the Eastern District of Louisiana, and in this case, as in that, the matter set up was in bar and not in abatement. The jurisdiction of the Circuit Court for the Eastern District of Texas was not thereby questioned.

Writ of error dismissed.

HARDENBERGH *v.* RAY.

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

No. 113. Argued December 12, 13, 1893. — Decided January 3, 1894.

When the jurisdiction of a Circuit Court has fully attached against the tenant in possession in an action of ejectment, the substitution of the landlord as defendant will in no way affect that jurisdiction, although he may be a citizen of the same State with the plaintiff.

By the laws of Oregon in force in 1872, a testator was authorized and empowered to devise after-acquired real estate.

A will in Oregon, duly executed May 15, 1872, and duly proved after the testator's death in 1886, in which he devised to his sister "all my right, title, and interest in and to all my lands, lots, and real estate lying and being in the State of Oregon," except specific devises previously made, and also "all my personal property and estate," shows an intent not to die intestate, and passes after acquired real estate.

THE facts are stated at length in the opinion of the court. It is sufficient here to say that Peter De Witt Hardenbergh, of Portland, Oregon, made his will May 15, 1872, in form as prescribed by the laws of the State to pass real estate, that he died in 1886, and that the will was duly admitted to probate, and remains in full force. In 1882 he acquired a tract of land in Portland, of which he was seized and possessed at the time of his death. The question at issue in this case was, whether this after-acquired estate passed by a clause in the will devising to his sister "all my right, title, and interest in and to all my lands, lots, and real estate lying and being in the State of Oregon." The action to test this question was ejectment, brought by the brother of the testator, a citizen of New York, against tenants in possession. The devisee having died, her heirs were, on their own motion, substituted as defendants in the place of the tenants. One of these heirs was a citizen of New York. The statute in force in Oregon at the time of the making of the will and of the death of the testator provided that "every person of twenty-one years of age and upwards, of sound mind, may, by last will, devise all his

estate, real and personal, saving to the widow her dower." The court below held that it had jurisdiction in spite of the fact that the plaintiff and one of the defendants were citizens of the same State, and held that the after-acquired property passed to the sister under the will. 33 Fed. Rep. 872. The plaintiff sued out this writ of error.

Mr. Henry B. B. Stapler (with whom was *Mr. Henry W. Smith* on the brief,) for plaintiff in error.

I. Under the law of Oregon, as it stood at the date of the making of the will, and at the time of Mr. Hardenbergh's death, real estate acquired after the making of a will did not pass thereunder, but descended to the heirs at law.

Oregon was settled by settlers from the older States. They took the rules of the common law with them into their new home.

On June 27, 1844, "the common law of England, not modified by the statutes of Iowa or of this government," was formally declared by the legislature of the provisional government of Oregon to be the law of the land. Laws of Oregon, 1843-1849, 100. This shows the recognition of the common law by the early emigrants to Oregon. Upon the organization of the state government the common law in its entirety, not modified by the statutes of Oregon, became the law of the land.

That the common law is recognized as the law of Oregon in all cases where the same has not been modified by statute, has been held in numerous cases in the Oregon courts. *Bileu* v. *Paisley*, 18 Oregon, 47; *Wood* v. *Rayburn*, 18 Oregon, 3; *Paulson* v. *Buckman*, 9 Oregon, 264; *Ford* v. *Umatilla County*, 15 Oregon, 313.

So that the statute of wills of Oregon with the common law rules as to matters not covered by the statute, became the law of the State of Oregon, and so continued so far as the purposes of this case are concerned until after the death of Mr. Hardenbergh, and until nineteen years after the making of his will, when the law of Oregon was changed; and in the

year 1891 it was declared as a new rule of law, that "any estate or interest in real property acquired by any one after the making of his or her will shall pass thereby, unless it clearly appear therefrom that such was not the intention of the testator." Laws of Oregon, 1891, 99.

By the rule of the common law, under a statute simply giving the power to make a will of the real estate of the testator, real estate acquired after the date of the making of the will did not pass to the devisee, but descended to the heirs at law. *Harwood* v. *Goodkight*, 1 Cowp. 87, 90; *Brunker* v. *Cook*, 11 Mod. 121; *Arthur* v. *Bokenham*, 11 Mod. 148; *Wind* v. *Jekyl*, 1 P. Wms. 572; *Marwood* v. *Turner*, 3 P. Wms. 163; *Jackson* v. *Blanshen*, 3 Johns. 292; *S. C.* 3 Am. Dec. 485; *Jackson* v. *Halloway*, 7 Johns. 394; *Jackson* v. *Potter*, 9 Johns. 312; *Minuse* v. *Cox*, 5 Johns. Ch. 441; *S. C.* 9 Am. Dec. 313; *Van Kleeck* v. *Dutch Church of New York*, 20 Wend. 457; *Pond* v. *Bergh*, 10 Paige, 140; *Parker* v. *Bogardus*, 5 N. Y. 309; *Quinn* v. *Hardenbrook*, 54 N. Y. 83; *Ballard* v. *Carter*, 5 Pick. 112; *S. C.* 16 Am. Dec. 377; *Ewer* v. *Hobbs*, 5 Met. (Mass.) 1; *Fay* v. *Winchester*, 4 Met. (Mass.) 513; *Hays* v. *Jackson*, 6 Mass. 149; *Brigham* v. *Winchester*, 1 Met. (Mass.) 390; *Girard* v. *Philadelphia*, 4 Rawle, 323; *Johns* v. *Doe*, 33 Maryland, 515; *Jones* v. *Shoemaker*, 35 Georgia, 151; *Battle* v. *Speight*, 9 Iredell, (Law,) 288; *Roberts* v. *Elliott*, 3 T. B. Mon. 395.

This rule of the common law, thus universally recognized, prevailed also in the State of Oregon.

II. It is therefore respectfully submitted that the conclusion arrived at by the learned court below, that at the date of Mr. Hardenbergh's death real estate acquired after the making of his will passed thereunder, is erroneous.

It is to be observed that the court below cites no authority of the State of Oregon, in support of the position that after-acquired lands passed under a will made previous to their acquisition. Indeed, only two cases, *Liggat* v. *Hart*, 23 Missouri, 127, and *Applegate* v. *Smith*, 31 Missouri, 166, in support of the position of the court on the point in question are cited, over against which stands the vast array of decisions above

referred to, representing the concurring opinions of the courts of the American Union and of England. It is submitted that an examination of these cases shows that they are not authorities which support the position of the court below, but rest upon grounds peculiar to the State of Missouri and not applicable elsewhere.

III. There remains then only to consider the further reasons advanced in the opinion of the court below. The learned court concedes that the common law of England prevailed in Oregon. This concession would necessarily be fatal to the position taken by the court if the rules of the common law as to after-acquired real estate, which had been repeatedly declared under the statute of 32 Henry 8, c. 1, were held to be a part of the common law. This difficulty by the court is overcome by holding, that "the statute of Henry 8 is no part of the common law, and as such did not become a part of the law of the English colonies. It is conceded that the common law of England, as it stood prior to the accession of James 1, together with the statutes passed in aid thereof, was brought to this country by the colonists and became the basis of the law of the land, 1 Kent, 342, 472, Story's Constitution, secs. 147, 157–8. The Statute of Wills, so far from being in aid of the common law, was in derogation of it, and *pro tanto* superseded it." The court, therefore, holds that "this is not a question of the common law."

It is respectfully submitted that this position is erroneous, and that no distinction can be drawn between the statutes "in aid of" or "in derogation" of the common law, but that that statute of Henry 8, and all other general statutes, together with the common law rules in reference thereto, became the common law of the American colonies.

This was so ruled on an analogous point in the leading case of *Bogardus* v. *Trinity Church*, 4 Paige, 178. See also *Commonwealth* v. *Leach*, 1 Mass. 59; *Commonwealth* v. *Knowlton*, 2 Mass. 530; *Sackett* v. *Sackett*, 8 Pick. 309; *Girard* v. *Philadelphia*, 4 Rawle, 323.

As the Statute of Wills was enacted in the 32d year of Henry 8, viz.: in the year 1547, which antedated the emigration

to this country from England, it necessarily follows that under the above authorities it and the rules of the common law in relation thereto became a part of the common law of the American Colonies.

If, however, in any view of the matter the statute of wills of Oregon can be held to have granted the power to a testator to devise after-acquired real estate, it is submitted that an examination of the will of Mr. Hardenbergh shows that under well-settled law no such intention can be gathered therefrom.

The statute of 1785, Virginia, (now suspended,) provided "That every person aged twenty-one years and upwards, being of sound mind, and not a married woman, shall have power, at his will and pleasure, by last will and testament in writing, to devise all the estate, right, title, and interest in possession, reversion, or remainder, which he hath, or at the time of his death shall have, of, in, or to lands," etc. Under this a will which bequeathed the whole of my property was held not to pass after-acquired lands. *Smith* v. *Edrington*, 8 Cranch, 66. See also *Lynes* v. *Townsend*, 33 N. Y. 558; *Quinn* v. *Hardenbrook*, 54 N. Y. 83; *Wetmore* v. *Parker*, 52 N. Y. 450.

Mr. John H. Mitchell and *Mr. James K. Kelly*, for defendants in error, on the question of jurisdiction said:

It is disclosed by the record that a question of jurisdiction was urged by the defendants in the court below, growing out of the citizenship of the parties. And it is now suggested by the defendants in error, without indulging in argument of the question, or doing more than presenting the facts on which it rests, that the court below had no jurisdiction of any of the defendants, and, therefore, if any modification whatever of the judgment of the court below is to be directed by this court, it should be to order a dismissal of the action for want of jurisdiction. As this action was commenced and issues joined prior to the act of March 3, 1887, 24 Stat. 552, c. 373, the question of jurisdiction must be determined by the laws then in force.

Mr. Justice Jackson delivered the opinion of the court.

Opinion of the Court.

The principal questions presented by the record in this case are, first, whether by the laws of Oregon, in force in 1872, a testator was authorized or empowered to devise after-acquired real property; and, second, whether, if such power existed, the after-acquired real estate in controversy passed by the testator's will in the present case.

The facts which give rise to these questions are as follows: Peter De Witt Hardenbergh, unmarried and without children, a citizen of Portland, Oregon, died in 1886, leaving a will executed by him May 15, 1872, which was duly probated and remains in full force and effect. By the first clause of the will the testator devised to several nephews, named therein, a certain farm in Ulster County, New York; by the second clause he devised to his sister, Catherine L. Tremper, all his right, title, and interest in and to all other lands in that county and State; and by the third and last clause he gave and bequeathed to his sister, Ellen E. Ray, "all my right, title, and interest in and to all my lands, lots, and real estate lying and being in the State of Oregon, or elsewhere, except as aforesaid; also all my personal property and estate of whatsoever kind and nature."

At the date of the will the testator owned certain real property in Portland, Oregon, and in January, 1882, some ten years after the will was executed, he purchased, and at the time of his death owned, a parcel of land in the city of Portland, valued at $30,000, which is the subject of controversy in this suit.

Ellen E. Ray, the devisee under the third clause of the will, died intestate in 1873, leaving as her heirs Thomas L. Ray, Rachel L. Ray, Hylah E. Ray, and Mary E. Arbuckle, citizens of Oregon; John De Witt Ray, a citizen of Illinois; and Sarah A. Ray, a citizen of New York. Upon the death of the testator these heirs of Ellen E. Ray, who, under the laws of Oregon, (§ 3077, Hill's Anno. Laws of Oregon,) succeeded to her rights as devisee, took possession of the premises in controversy, as well as other real property in Oregon, owned by the testator at the time the will was executed.

Herman R. Hardenbergh, a brother of the testator, claimed

and demanded an interest in common with the heirs of Ellen E. Ray in the real property acquired after the execution of the testator's will, on the ground that as to those lands he died intestate. This claim was denied, and he thereupon brought an action at law in the nature of ejectment against Charles Sliter, J. C. Miller, and W. H. West, citizens of Oregon, who were in possession of the demanded premises as tenants of the heirs of Mrs. Ellen E. Ray.

Subsequently, on their own motion, these heirs were substituted as defendants in place of their tenants, against whom the action was originally brought, and by their answer set up that by the law of Oregon the land in question passed to them by the third clause of the will, and that the testator did not die intestate in respect thereto.

The heirs of Ellen E. Ray having thus made themselves parties to the suit, and one of them (Sarah A. Ray) being a citizen of the same State (New York) as the plaintiff, the point was made in the court below, and has been presented in this court, that the jurisdiction of the United States Circuit Court was thereby defeated.

This objection to the jurisdiction of the court is without merit, and was properly overruled by the lower court. When the original suit was brought against Sliter, Miller, and West, the persons in possession, the court acquired jurisdiction of the controversy, and no subsequent change of the parties could affect that jurisdiction. This is well settled by the authorities. *Mullen* v. *Torrance*, 9 Wheat. 537; *Dunn* v. *Clarke*, 8 Pet. 1; *Clarke* v. *Mathewson*, 12 Pet. 164; *Whyte* v. *Gibbes*, 20 How. 541; *Phelps* v. *Oaks*, 117 U. S. 236, 240. In this last case it was held that in ejectment against tenants in possession of real estate, whose landlord is a citizen of another State, the plaintiff has a real and substantial controversy with the defendant within the meaning of the act for the removal of causes from state courts, which continues after the landlord is substituted and becomes a party for the purpose of protecting his own interests. The rule announced in this case clearly settles, in a case like the present, that where the jurisdiction of the court has completely attached against the tenant

in possession, the substitution of the landlord as a defendant for such tenant will in no way affect or defeat the jurisdiction of the court.

By stipulation of parties the trial of the cause by jury was waived, and all questions of law and fact were submitted to the court for its decision. The court found the facts substantially as set out above, and the conclusions of law announced were to the effect that at the time the will was made the testator was empowered and authorized by the laws of Oregon to devise any real estate situated in that State, whether acquired before or after the making of the will, of which he might die seized and possessed. Also, that the intention of the testator, as manifested by the will in the present case, was to devise all of his real estate situated in the State of Oregon to Ellen E. Ray, and that under and by virtue of the devise the demanded premises, on the death of the testator, vested in the defendants as her heirs, and that they were entitled to the exclusive possession thereof. 33 Fed. Rep. 812.

The present writ of error is prosecuted to reverse that judgment. The two assignments of error present the questions heretofore stated.

For the plaintiff in error it is contended that the testator died intestate in respect to the demanded premises, for the reasons that at the time of the execution of his will he possessed no testamentary power to devise after-acquired lands, and because his will manifests no intention to dispose of such property. If either of these propositions can be sustained, the judgment of the court below must be reversed.

In support of the first proposition, it is urged, on behalf of the plaintiff in error, that the common law, with its limitations and restrictions upon testamentary power in respect to real estate, was in force in the State of Oregon at the date of the execution of the will, and up to the death of the testator. Without reviewing the authorities, it is well settled that by the common law lands were not devisable, except in particular places where custom authorized it. This disability of the common law was partially removed by the statute of 32 Henry 8, c. 1, which authorized persons having title to land to dispose

thereof by will, and was construed as restricting the right of devising lands, to such an interest only, as the testator had at the time of the execution of the will. Under this statute real estate, subsequently acquired, could not pass by devise; in other words, under the statute of 32 Henry 8 the will as to lands spoke from the date of its execution. So that a general devise of all the testator's estate would comprehend and include all the personalty to which he was entitled at the time of his death, but would not embrace after-acquired land, though such might be the expressed intention of the testator. The reason given for the distinction between real and personal estate was that a devise of land was regarded in the same light as a conveyance, and as a conveyance at common law would not vest for want of seizin, it was therefore held to be operative only on such real estate as the testator might have at the time of the making of the will, that is to say, that a devise was in the nature of a conveyance or appointment of real estate then owned, to take effect at a future date, and could not therefore operate on future acquisitions.

While this strict and arbitrary rule of the common law has been modified by the statutes of most, if not all, of the States of the Union, it is contended for the plaintiff in error that the rights of the parties in the present case are controlled by it, for the reason that the legislature of Oregon did not confer by statute testamentary power to dispose of after-acquired real property until February, 1891.

The provisional government of Oregon in 1844 formally declared by its legislature that "all the statute laws of Iowa Territory, passed at the first legislative assembly of that Territory, and not of a local character, and not incompatible with the conditions and circumstances of this country, shall be the law of this country, unless otherwise modified; and the common law of England, and principles of equity, not modified by the statutes of Iowa, and of this government, and not incompatible with its principles, shall constitute the law of the land."

Among the laws enacted by the first territorial legislature of Iowa, and thus adopted by the provisional government of Oregon, was the following act relative to wills:

"SECTION 1. *Be it enacted by the Council and the House of Representatives of the Territory of Iowa*, That any person having an estate in any lands, tenements, or hereditaments, or any annuity or rent charged upon, or issuing out of the same, or any goods or chattels, rights, credits, and choses in action, or in possession, and property of every description, whatever, may give or devise the same to any person by last will and testament by him or her lawfully executed." Laws of the first session of the legislative assembly of the Territory of Iowa, 1838–39, 471.

This statute was substantially the same as that of 32 Henry 8, under which, as settled by the decisions of the English courts, and by those of the States where that statute is in force, after-acquired real estate could not pass by will.

This statute remained in force until 1849, the year after Oregon became a Territory, when the legislature adopted a statute of wills, copied from the Revised Statutes of Missouri, which provided that "every person of twenty-one years of age and upwards, of sound mind, may, by last will, devise all his estate, real and personal, saving to the widow her dower." This Missouri statute, thus adopted by the Territory of Oregon, was a revision of the Virginia statute of 1785, which, by the first section thereof, empowered every adult person of sound mind to devise by last will and testament in writing "all the estate, right, title, and interest in possession, reversion, or remainder, which he or she hath, or at the time of his or her death, shall have of, in, or to, lands, tenements," etc.; "also all goods and chattels."

When the laws of Missouri were revised in 1835, it appearing that one section of the Virginia act gave to the testator the same testamentary power over his real estate that was given him in a separate and distinct clause over his personal estate, the superfluous words were dropped, and the testamentary power over both real and personal properties were united in the one section above quoted.

The Missouri statute thus adopted by Oregon was reënacted in December, 1853, and took effect May 1, 1854, as a part of the code of the Territory. After the admission of the State

into the Union in 1859, the legislature of Oregon, in 1862 re-enacted without change the above quoted section conferring testamentary power, which has since continued to be the law of Oregon. § 3066, Hill's Code.

By an act of the legislature of Oregon, approved February 20, 1891, it has been provided that "any estate or interest in real property, acquired by any one after the making of his or her will, shall pass thereby, unless it clearly appears therefrom that such was not the intention of the testator; nor shall any conveyance or disposition of real property by any one after the making of his or her will prevent or affect the operation of such will upon any estate, or interest therein, subject to the disposal of that testator at his or her death."

The construction which the plaintiff in error seeks to have placed upon these statutes is, that the territorial statute of 1849, copied from the Missouri statute, simply conferred the power to make a will devising real estate, which, under the rules of the common law, would not operate to pass real estate acquired after the making of the will, and that such testamentary power over after-acquired real estate was first conferred by the act of 1891.

Prior to the adoption of the Missouri statute by the territorial government of Oregon, that statute had received no construction by the Supreme Court of Missouri, but subsequently, in 1856, that court was called upon, in the case of *Liggat* v. *Hart*, 23 Missouri, 127, 137, to decide whether after-acquired real estate would pass by will under the statute, where such appeared to be the intention of the testator. The court said: "The question is as to the construction of the present law. Must we hold that the act now in force does not confer testamentary power over after-acquired land, and, on account of the change in phraseology of the statute, which was made in 1835, go back to the construction put upon the original statute? We think not. The language *now used* does not require such a construction at our hands. It is different from the English statute of wills. The testamentary power is given here in general language; it embraces both real and personal estate, and is a power to make a testamen-

tary disposition of all the testator's property, without any distinction between real and personal property, and not a mere power of particular disposition. It is more in the nature of a Roman will than an English devise of real property. But, however this may be, when we consider the plan of revising that was adopted, the impolicy of creating changes in laws of daily practical importance, the little probability, when all around us were abandoning the old, narrow construction of the testamentary power, that our legislature should adopt it, for the first time, by an express provision for that purpose, and when we consider, too, that neither the community nor the profession have generally, as we believe, been aware of the supposed change, . . . we do not think that we would be warranted in declaring that the legislature, by the change in the language, intended to effect the substantial change in the meaning of the law that is supposed, and we shall accordingly give to the act, as it now stands, as literal a construction in favor of the testamentary power as we should have felt constrained to have given to the original act."

Again, in *Applegate* v. *Smith*, 31 Missouri, 166, 169 (1860), the same court said: "We consider that the case of *Liggat* v. *Hart*, 23 Missouri, 127, settles the one now under consideration. That case determines that the power over the after-acquired lands possessed by the testator is the same as that which he possessed over lands which he owned at the making of the will; that with respect to after-acquired lands, when the question arises whether they have passed by the will, it is just the same and to be determined on the same considerations as would determine the question whether lands owned by the testator at the date of his will passed by it, or, in other words, that after-acquired lands, as to the power of disposition, rest on the same ground as the lands owned by the testator at the date of his will, and the personal estate. According to this there can be no question but that the lands in Missouri passed by the will."

The construction which the Supreme Court of the State of Missouri has thus given to its statute since its first adoption thereof by Oregon does not have the same controlling effect it

would have if the decisions had been rendered before such adoption, still, they are strongly persuasive of the proper interpretation of the act, and have been so regarded by the courts of Oregon, which have clearly indicated that the statute of wills of that State should receive the same construction which has been placed thereon by the Missouri decisions. Thus in *Gerrish* v. *Gerrish*, 8 Oregon, 351, 353, decided after the Missouri cases, it was said by the court: "Our statute is an exact copy of the Missouri statute, and the courts of that State having been called upon frequently to construe it, we must look principally to the decisions of that State to ascertain its proper judicial construction."

This approval of the construction placed by the Supreme Court of Missouri upon the statute, after its adoption by the territorial government, in connection with its reënactment by the legislature of the State in 1862 — after the date of the Missouri decisions — may be fairly considered as settling its proper interpretation by the courts of Oregon. If the same construction had been placed upon the statute by the courts of Missouri before its original adoption by the territorial government of Oregon, it is clear, upon the authorities, that that construction would have been adopted with the statute, and the same effect would seem properly to follow from an approval by the Supreme Court of the State of the construction placed upon the statute by the Supreme Court of Missouri, prior to its reënactment in 1862 by the legislature of the State of Oregon.

If the later act of 1849, copied from the Revised Statutes of Missouri, is no broader in its scope and operation than the statute of 32 Henry 8, which was embodied in the Iowa statute adopted by the provisional government of Oregon in 1844, then there would be a lack of testamentary power to dispose of after-acquired real property. This is practically what the contention of the plaintiff in error comes to. But the power of testamentary disposition conferred by the act of 1849, (copied from the Missouri statutes,) and reënacted in 1853 and 1862, as construed by the courts of Missouri and Oregon, is more comprehensive in its provisions than the act of 32 Henry 8,

confers a larger and broader power of disposition over real estate of which the testator may die seized and possessed, and extends to and includes after-acquired real estate.

In respect to the question of testamentary power of disposition over real estate, the Missouri act adopted by the territorial government, and reënacted by the State of Oregon, was unquestionably intended to be as broad and comprehensive as the Virginia act of 1785, which conferred the testamentary power to devise after-acquired land, and was more comprehensive than the prior act of 1844, taken from the Iowa statute. As already stated, the language of the statute makes no distinction between personalty and realty. It confers the power to dispose of the realty as broadly as the personalty. The saving to the widow her dower is itself indicative of an intention to make the will speak as of the date of the testator's death, at which time the widow's right of dower would come into actual possession and practical enjoyment, whether the dower right extended to all lands owned during coverture or possessed by the husband at his death.

In conformity with this construction, the Supreme Court of Oregon has held, in *Morse* v. *Macrum*, 22 Oregon, 229, that the will, as a general rule, speaks from the death of the testator, and not from its date, unless its language, by a fair construction, indicates a contrary intention; in this respect adopting the rule laid down by the Supreme Court of Connecticut in *Canfield* v. *Bostwick*, 21 Connecticut, 550; *Gold* v. *Judson*, 21 Connecticut, 616, where it is stated to be the general rule that a will speaks from the death of the testator, where there is nothing in its language to indicate a different intention.

Having reached the conclusion that the act of 1849, adopted from the State of Missouri, (and since reënacted,) as construed by the decisions of the Supreme Court of Missouri, and approved by the Supreme Court of Oregon, confers testamentary power to devise after-acquired real estate, it is not material to consider the statute of February 20, 1891, or to determine whether that statute was intended to be declaratory of the previous law, or was intended to

prescribe a rule for the construction of wills in respect to which the authorities have been and are in great conflict, many of the cases holding, as in *Smith* v. *Edrington*, 8 Cranch, 66, that even where the power exists to dispose of after-acquired real property, it would not pass unless such was the clear and manifest intention on the part of the testator; in other words, that the presumption in respect to such property was in favor of the heir at law. This rule of presumption, or construction, the Oregon statute of 1891 may have been intended to change by declaring that unless it appeared clearly from the will it was not the intention of the testator, such after-acquired real property would pass.

On this branch of the case our conclusion is that the testator (Hardenbergh) possessed the testamentary power to devise the after-acquired lands in controversy.

The remaining question is, whether by the third and last clause of his will the testator intended to dispose of all the real estate in Oregon, or elsewhere, of which he might die seized and possessed.

The cardinal rule for the construction of wills, to which all other rules must bend, as stated by Chief Justice Marshall in *Smith* v. *Bell*, 6 Pet. 68, 75, is, that "the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. This principle is generally asserted in the construction of every testamentary disposition. It is emphatically the *will* of the person who makes it, and is defined to be 'the legal declaration of a man's intentions, which he wills to be performed after his death.' These intentions are to be collected from his words, and ought to be carried into effect if they be consistent with law."

In *Jasper* v. *Jasper*, 17 Oregon, 590, the same rule is adopted, and in ascertaining what the intention of the testator is, the words used are to be taken according to their meaning as gathered from the construction of the whole instrument. It is furthermore settled by the authorities that when one undertakes to make a will it will be presumed that his purpose is to dispose of his entire estate. *Phelps* v. *Phelps*, 143 Mass. 570; *Pruden* v. *Pruden*, 14 Ohio St. 251; *Gilpin* v. *Williams*, 17

Ohio St. 396; *Leigh* v. *Savidge*, 14 N. J. Eq. (1 McCarter) 124; *Gourley* v. *Thompson*, 2 Sneed, 387; *Appeal of Boards of Missions*, 91 Penn. St. 507.

In the present case the devise to the testator's sister of all his right, title, and interest in and to all his lands, lots, and real estate lying and being in the State of Oregon, or elsewhere, except as to the specific devises previously made; and also all of his personal property and estate of whatsoever kind or nature, is sufficiently comprehensive to indicate an intention to pass everything of which he might die seized and possessed, both of real and personal property. This disposition, residuary in its character, is utterly inconsistent with an intention to die intestate as to any portion of his estate, real or personal. When the words of the will of a testator will fairly carry, as in the present case, the whole estate of which he dies seized and possessed, there is no presumption of an intention to die intestate as to any part of his property. This general rule is laid down in *Given* v. *Hilton*, 95 U. S. 594, where it is further stated that "the law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may be reasonably given, (*Vernon* v. *Vernon*, 53 N. Y. 351,) and certainly when, as in this case, the intent to make a complete disposition of all the testator's property is manifest throughout his will, its provisions should be so construed, if they reasonably may be, as to carry into effect his general intent."

Without going into any review of the authorities, special reference may be made to the case of *Wait* v. *Belding*, 24 Pick. 129, 136, 137, which arose under a will executed in 1797, before the Revised Statutes of Massachusetts went into effect, which devised to the testator's two sons the whole of his "lands and buildings, lying and being in the town of Hatfield." By a codicil, dated May 2, 1812, he gave to the same sons lands, not enumerated in the will, purchased since then, in the town of Hatfield, or elsewhere. In construing this will, Chief Justice Shaw said: "In general, a will looks to the future; it has no operation, either on real or personal property, till the death of testator. General words, therefore, may

as well include what the testator expects to acquire, as what he then actually holds. The term, 'all my property,' may as well include all which may be his at his decease, as all which is his at the date of the will, and will be construed to be so intended, unless there are words in the description which limit and restrain it. We are then brought back to the particular description, 'the whole of my lands and buildings lying and being in the town of Hatfield.' There are certainly no words, and nothing in the will, showing an intent to limit it to the lands and buildings then held by him. No such intent can be presumed. Had it been *all my lands and buildings in Hatfield* or elsewhere in the original will, the law would have equally restrained its operation to lands then held, not because it was the intent of the testator that it should so operate, but because, assuming that it was his intent that all should pass, such intent is in contravention of the rule of law, and cannot be carried into effect.

"The court are of opinion that this general description of the whole of his lands and buildings in Hatfield is broad enough to embrace the whole estate there, whether acquired before or subsequently to the making of the will, and there is nothing in the terms or construction of the will which would warrant us in restraining it to the lands then owned. By the Revised Statutes it is provided that a will shall embrace after-acquired real estate as well as personal property, when such is the intent of the testator. These statutes do not affect this will, and I only allude to them by way of illustration. Suppose this will had been made after the Revised Statutes, and the question should be, whether the estate now in controversy passed by this devise. There seems to be no doubt that it would, the description being general of all lands in Hatfield, without limitation as to the time of acquisition. Then, if this description was sufficient to include all real estate in Hatfield, it would have passed by the original will, but for the rule of law restraining the operation of all devises to estate held by testator at the date of the devise. But when the date is brought down by the republication of the will, it takes effect upon all estate acquired between the original date and the

republication, and held by the testator at the time of the republication. Had there been a general residuary clause, for instance, such would clearly have been the effect of a republication. But the only difference is that a residuary clause embraces all estate whenever acquired; but if the description actually used is sufficiently large to embrace the estate in controversy, the result must be the same as to such estate."

These views are directly in point in the present case, where the language is just as comprehensive, and manifests just as clearly an intention of the testator to devise all his lands in the State of Oregon.

It may, therefore, be laid down as a general proposition, that where the testator makes a general devise of his real estate, especially by residuary clause, he will be considered as meaning to dispose of such property to the full extent of his capacity; and that such a devise will carry, not only the property held by him at the execution of the will, but also real estate subsequently acquired of which he may be seized and possessed at the date of his death, provided there is testamentary power to make such disposition. 1 Jarman on Wills, 326, 5th ed., and other authorities cited.

From the foregoing considerations we are of opinion that there was no error in the judgment of the court below, and the same is accordingly

Affirmed.

CENTRAL TRUST COMPANY *v.* McGEORGE.

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

No. 965. Submitted November 27, 1893. — Decided January 3, 1894.

Exemption from being sued out of the district of its domicil is a privilege which a corporation may waive, and which is waived by pleading to the merits.

The fact that neither the plaintiff nor the defendant reside in the district in which the suit is brought do not prevent the operation of the waiver.

Statement of the Case.

When a defendant corporation voluntarily submits itself to the jurisdiction of a Circuit Court of the United States, its action cannot be overruled at the instance of stockholders and creditors, not parties to the suit so brought, but who were permitted to become parties by an intervening petition.

On the 8th day of August, 1892, the Central Trust Company, a corporation created by and existing under the laws of the State of New York, filed a bill in equity in the Circuit Court of the United States for the Western District of Virginia against the Virginia, Tennessee and Carolina Steel and Iron Company, created by and existing under the laws of the State of New Jersey.

The bill alleged that the defendant company had a place of business and carried on its business at Bristol, in the Western District of Virginia, and owned property, real and personal, at Bristol and elsewhere in the State of Virginia; that the said defendant company was insolvent; that the plaintiff company had obtained a judgment on the law side of the court, on which an execution had been sued out and returned by the marshal *nulla bona*, and prayed for the appointment of a receiver. The defendant company appeared by its president, John C. Haskell, and consented to the appointment of a receiver, and thereupon Judge Bond made an order appointing said John C. Haskell and D. H. Conklin receivers of said defendant company.

On the same day two other bills were filed in suits styled as follows: *The Central Trust Company of New York* v. *The South Atlantic and Ohio Railroad Company*, and *The Virginia, Tennessee and Carolina Steel and Iron Company* v. *The Bristol Land Company*.

In each of said additional bills the complainant company alleged the insolvency of the defendant company as evidenced by a judgment obtained against it by confession, in the court on its law side, on which an execution had issued and been returned on the same day as *nulla bona*. In the first named of these last two suits, the defendant company appeared by its vice-president, John C. Haskell, and consented that a receiver should be appointed; and in the last-named suit the

defendant company appeared by its president, John C. Haskell, and consented to the appointment of a receiver, and thereupon Judge Bond appointed said John C. Haskell and D. H. Conklin receivers of each of said companies respectively.

On the 19th day of October, 1892, a petition was presented to the Circuit Court by William McGeorge and others, claiming to be stockholders and creditors of the Virginia, Tennessee and Carolina Steel and Iron Company, and John M. Bailey, claiming to be the "valid receiver" of the corporations named, by virtue of an order made by Hon. D. W. Bolen, judge of the 15th judicial circuit of Virginia, in vacation, on the 6th day of August, 1890, asking that they might be made parties complainants or defendants as the court might determine, and that the several causes named might be consolidated and heard together. The petition further alleged that the Virginia, Tennessee and Carolina Steel and Iron Company was the main and substantial company; that the South Atlantic and Ohio Railroad Company and the Bristol Land Company were mere offshoots or dependent companies; that the several confessions of judgments, entered in the court on the 8th day of August, 1892, were made by a person who had no power or authority to make such confessions of judgment; that said judgments were procured by fraud and collusion between the representatives, respectively, of the complainant and defendant companies, and that the orders made by Judge Bond, appointing receivers for each of said defendant companies, were obtained by misrepresentation, fraud, and collusion by and between said representatives of the complainant and defendant companies. The said petition further alleged that in the cause of *The Central Trust Company of New York* v. *The Virginia, Tennessee and Carolina Steel and Iron Company* the court was without jurisdiction, for the reason that the complainant company was a corporation created by and existing under the laws of the State of New York, and a citizen and resident of said State of New York, and that the defendant company was a corporation created by and existing under the laws of the State of New Jersey, and a citizen and resident of said State of New Jersey.

The said petition was filed by leave of the court, and a rule was awarded, returnable on the 6th day of December, 1892.

The complainant company, the Central Trust Company of New York, filed an elaborate answer to said petition, denying under oath its material allegations. The defendant company, the Virginia, Tennessee and Carolina Company, filed a separate answer to the said petition, denying its allegations, as did also the other two defendant companies.

On the 16th day of May, 1893, the district judge filed an opinion and decree, declining to consolidate the said cases, and treating the petition of McGeorge and others as the answer of codefendants. The court decided that it had no jurisdiction, because while the parties complainant and defendant were citizens of different States, yet neither of them was a citizen of the State in which the suit was brought. The order appointing the receivers was accordingly vacated and the bill of complaint dismissed. From this decree an appeal was taken and allowed to this court.

Mr. Adrian H. Joline, for appellant. No brief filed for appellee.

Mr. Justice Shiras delivered the opinion of the court.

The court below, in holding that it did not have jurisdiction of the cause, and in dismissing the bill of complaint for that reason, acted in view of that clause of the act of March 3, 1887, as amended in August, 1888, which provides that "no civil suit shall be brought in the Circuit Courts of the United States against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant;" and, undoubtedly, if the defendant company, which was sued in another district than that in which it had its domicil, had, by a proper plea or motion, sought to avail itself of the statutory exemption, the action of the court would have been right.

But the defendant company did not choose to plead that provision of the statute, but entered a general appearance, and joined with the complainant in its prayer for the appointment

of a receiver, and thus was brought within the ruling of this court, so frequently made, that the exemption from being sued out of the district of its domicil is a personal privilege which may be waived, and which is waived by pleading to the merits.

In *Ex parte Schollenberger*, 96 U. S. 369, 378, which arose under the Judiciary Act of 1875, it was said: "The act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

So, under the act of February 18, 1875, 18 Stat. 316, 320, c. 80, which exempted national banks from suits in state courts in counties other than the county or city in which the bank was located, it was held, in *Bank* v. *Morgan*, 132 U. S. 141, that such exemption was a personal privilege which could be waived by appearing to such a suit brought in another county, and making defence without claiming the immunity granted by Congress.

St. Louis & San Francisco Railway v. *McBride*, 141 U. S. 127, 131, was a case wherein it was contended in this court that the court below, the Circuit Court of the United States for the Western District of Arkansas, had no jurisdiction, because the suit was brought against a railway company whose domicil was in another State, and therefore within the operation of the Judiciary Act of 1887, as amended in 1888, providing that no suit shall be brought against any person in any other district than that whereof he is an inhabitant; but it was held, citing *Ex parte Schollenberger*, 96 U. S. 378, and *Bank* v. *Morgan*, 132 U. S. 141, that "without multiplying authorities on this question, it is obvious that the party who in the first instance appears and pleads to the merits waives any right to challenge thereafter the jurisdiction of the court, on the ground that the suit had been brought in the wrong district."

The court below based its ruling on *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 453, and on *Southern Pacific Co.* v.

Denton, 146 U. S. 202, and it is true that the right of a corporation to avail itself of the exempting clause of the act of 1887 was there maintained, but, in both cases, the defendants specially appeared and set up such right, in the one case by a motion to set aside the service of the process, and in the other by a special demurrer.

The opinion in *Shaw* v. *Quincy Mining Co.*, contains a full history of the legislation on this subject, and refers to the several questions that have arisen and been determined by this court under such legislation. The court, speaking through Mr. Justice Gray, said: "The Quincy Mining Company, a corporation of Michigan, having appeared specially for the purpose of taking the objection that it could not be sued in the Southern District of New York by a citizen of another State, there can be no question of waiver, such as has been recognized where a defendant has appeared generally in a suit between citizens of different States, brought in a wrong district. . . . All that is now decided is that, under the existing act of Congress, a corporation, incorporated in one State only, cannot be compelled to answer, in a Circuit Court of the United States held in another State in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different State."

In *Southern Pacific Co.* v. *Denton*, where the subject was again elaborately discussed, it was said: "It may be assumed that the exemption from being sued in any other district might be waived by the corporation, by appearing generally, or by answering to the merits of the action, without first objecting to the jurisdiction," and the case of *St. Louis Railway* v. *McBride*, 141 U. S. 127, was cited to that effect.

The court below suggested that the present case is distinguishable from the others in which it was held that the right of exemption might be waived, in that neither the plaintiff nor the defendant resided in the district in which the suit was brought, that is, the Mercantile Trust Company, the plaintiff, had its residence in New York, and the Virginia, Tennessee, and Carolina Company, the defendant, was a corporation of New Jersey.

Syllabus.

But a similar state of facts existed in the case of *Shaw* v. *Quincy Mining Co.*, inasmuch as Shaw, the plaintiff, was a citizen of Massachusetts, and the mining company was a corporation of the State of Michigan, and the suit was brought in the Circuit Court for the Southern District of New York. Nor do we see any reason for a different conclusion, as to the subject of waiver, when the question arises where neither of the parties are residents of the district, from that reached where the defendant only is not such resident.

It is scarcely necessary to say that, as the defendant company had submitted itself to the jurisdiction of the court, such voluntary action could not be overruled at the instance of stockholders and creditors, not parties to the suit as brought, but who were permitted to become such by an intervening petition.

In view, then, of the authorities cited, and upon principle, we conclude that the court below erred in vacating the order appointing receivers and in dismissing the bill of complaint, and we reverse its decree to that effect and remand the cause with directions for further proceedings not inconsistent with this opinion.

Reversed.

VOORHEES *v.* JOHN T. NOYE MANUFACTURING COMPANY.

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

No. 734. Submitted December 19, 1893. — Decided January 3, 1894.

A final decree was entered January 7, 1891, and appeal allowed the same day. A motion for rehearing was made January 10, 1891, which was argued February 3, 1892, and denied February 17, 1892. An appeal bond was given April 15, 1892, conditioned for the prosecution of the appeal taken January 7, 1891, and the record was filed here April 19, 1892. *Held*, that, under the provisions of the act of March 3, 1891, 26 Stat. 826 c. 517, the Circuit Court of Appeals had jurisdiction of an appeal, and, upon the denial of the petition for a rehearing, a new appeal should have been taken to that court for the Eighth Circuit.

THE case is stated in the opinion.

Mr. C. S. Montgomery for appellant.

Mr. Alfred Hazlett for appellee.

THE CHIEF JUSTICE: The decree in this cause was entered on January 7, 1891, at the November term, 1890, of the Circuit Court of the United States for the District of Nebraska, and at its foot the court minuted: "Lucas A. Voorhees prays an appeal, which is allowed;" and also, "L. A. Voorhees has leave to file motion for rehearing Saturday." On the tenth of January, which was the Saturday following, the application of L. A. Voorhees for rehearing was filed.

It appears of record that on January 9, 1892, at the November, 1891, term of the court, "this cause coming on to be heard this day on the motion for rehearing filed herein, was argued and submitted to the court by solicitors for the respective parties; whereupon the court takes the same under consideration." On February 3, 1892, at the January term, 1892, the record shows that the motion for rehearing of the cause "on its merits was reargued and submitted to the court by solicitors for the respective parties," and taken under advisement.

February 17, 1892, at the same January term, the motion for rehearing was denied, the court holding that "it is now too late to sustain said motion or to interfere with the decree." March 23, 1892, the refusal of certain defendants to join in an appeal was filed, which refusal was dated January 17, 1891. April 15, 1892, an appeal bond was given by Lucas A. Voorhees, conditioned for the prosecution of the appeal allowed January 7, 1891, approved by the court and filed April 18, 1892. The record was filed in this court, April 19, 1892, certified by the clerk of the Circuit Court, April 5, 1892. The bond is certified to by the clerk of the Circuit Court under date, April 21, 1892.

The jurisdiction of the court below depended solely upon the diverse citizenship of the parties, and by the act of March 3, 1891, 26 Stat. 826, c. 517, the jurisdiction of this court in

such cases was taken away, although preserved by the joint resolution of March 3, 1891, 26 Stat. 1115, as to pending cases and cases wherein the appeal should be taken before July 1, 1891. The appeal was allowed January 7, 1891, but the decree did not take final effect as of that date for the purposes of an appeal, nor until February 17, 1892, because the application for rehearing was entertained by the court, filed within the time granted for that purpose, and not disposed of until then. *Aspen Mining &c. Co.* v. *Billings*, 150 U. S. 31.

The appeal bond was not given until April 15, 1892, but the record was filed in this court April 19, 1892, which was one of the days of the October term, 1891, of this court. Notwithstanding this, however, and without considering the question as to whether this appeal was properly prosecuted, in respect of parties, within *Hardee* v. *Wilson*, 146 U. S. 179, we are of opinion that as the Circuit Court had jurisdiction, and this court had not, long after July 1, 1891, the taking of a new appeal became necessary upon the denial of the rehearing, and this could only be to the Circuit Court of Appeals for the Eighth Circuit. *Cincinnati Safe & Lock Co.* v. *Grand Rapids Deposit Co.*, 146 U. S. 54.

Appeal dismissed.

BALTIMORE TRACTION COMPANY *v.* BALTIMORE BELT RAILROAD COMPANY.

ERROR TO THE BALTIMORE CITY COURT.

No. 994. Submitted December 11, 1893. — Decided January 8, 1894.

A public act of the State of Maryland providing for the condemnation of land for the use of a railroad company was held by the Court of Appeals of that State to require notice to the owner of the land proposed to be condemned, when properly construed. *Held*, that this court had no jurisdiction over a writ of error to a court of that State, when the only error alleged was the want of such notice, which, it was charged, invalidated the proceedings as repugnant to the Constitution of the United States.

MOTION TO DISMISS. The case is stated in the opinion.

Mr. John K. Cowen and *Mr. William Irvine Cross* for the motion.

Mr. Nicholas P. Bond opposing.

THE CHIEF JUSTICE: These were proceedings in condemnation, commenced June 15, 1892, in accordance with section 167 of article 23 of the Code of Public General Laws of the State of Maryland, plaintiff in error appearing therein.

It was objected below that that section violated the Fourteenth Amendment of the Constitution of the United States, in that the owner of land condemned thereunder might be deprived of his property without due process of law because the act did not provide for any notice to him of the proceedings; but it had been previously decided by the Court of Appeals of Maryland that the act, properly construed, required notice. *Baltimore Belt Railway Co.* v. *Baltzell*, 75 Maryland, 103.

We are bound to accept this conclusion of the state court as to the proper construction of the statute of the State. *Green* v. *Neal*, 6 Pet. 291; *Davie* v. *Briggs*, 97 U. S. 628; *Louisville &c. Railway* v. *Mississippi*, 133 U. S. 587, 590. At the time of these proceedings, therefore, notice was required. No suggestion is made that the validity of the statute was drawn in question as repugnant to the Constitution of the United States in any other particular, and as the want of requirement of notice did not exist, the alleged ground of our jurisdiction fails.

Writ of error dismissed.

KEYSTONE MANUFACTURING COMPANY *v.* ADAMS.

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

No. 156. Argued December 8, 11, 1893. — Decided January 8, 1894.

The invention patented to Henry A. Adams by letters patent No. 132,128, dated October 15, 1872, for a new and useful improvement in cornshellers, is a substantial and meritorious one, well worthy of a patent, and is infringed by machines manufactured under sundry letters patent granted to Harvey Packer.

When, in a class of machines widely used, it is made to appear that, after repeated and futile attempts, a machine has been contrived which accomplishes the result desired, and a patent is granted to the inventor, the courts will not adopt a narrow construction, fatal to the grant.

While it is undoubtedly established law that complainants in patent cases may give evidence tending to show the profits realized by defendants from use of the patented devices, and thus enable the courts to assess the amounts which the complainants are entitled to recover, yet it is also true that great difficulty has always been found, in the adjudicated cases, in applying the rule that the profits of the defendant afford a standard whereby to estimate the amount which the plaintiff is entitled to recover, and in defining the extent and limitations to which this rule is admittedly subject.

Such a measure of damages is of comparatively easy application where the entire machine used or sold is the result of the plaintiff's invention; but when, as in the present case, the patented invention is but one feature in a machine embracing other devices that contribute to the profits made by the defendant, serious difficulties arise.

The record shows that the complainant did not seek to recover a license fee, nor did he offer any evidence from which his damages could be computed. He relied entirely on the proposition that the amount which he was entitled to recover could be based on the profits realized by the defendant from the sale of the patented invention, and the amount of such profits he claimed to have shown by evidence tending to show what certain third companies were alleged to have made from the sale of similar devices in similar cornshelling machines. *Held*, that he could recover only nominal damages.

On the 14th day of May, 1886, Henry A. Adams filed in the Circuit Court of the United States for the Northern District of Illinois a bill of complaint against the Keystone

Manufacturing Company, a corporation of the State of Illinois, and Thomas A. Galt, J. B. Patterson, George S. Tracy, and E. L. Galt, officers and managers of the said company, complaining that the defendants were infringing his rights as the patentee and owner of letters patent No. 132,128, granted on October 15, 1872, by the United States to him as the original and first inventor of a certain new and useful improvement in cornshellers. The bill contains the usual averments and prayed for an account and an injunction. On August 2, 1886, the defendants filed a joint answer, admitting that letters patent had been issued to the complainant, as alleged, denying that said patent described any new or patentable invention, alleging that the said alleged invention had been anticipated in numerous other specified letters patent, and denying that the machines made and sold by the defendant company were infringements of any rights possessed by the complainant.

A replication was duly filed, evidence was taken, and argument had, the result of which was that, on June 30, 1888, the court entered an interlocutory decree sustaining the validity of the patent, finding an infringement, directing an account, and appointing a master to state the same. Afterwards, on June 21, 1889, the master filed a report awarding the sum of $27,620 to the complainant, being the amount of the profits he found to have accrued to the defendants from their use of the patented machines, to which report exceptions were filed. On February 5, 1890, a final decree was entered overruling the exceptions to the master's report, decreeing the payment by the defendant company of the sum of $27,620 and costs, and dismissing the bill for want of equity as against Thomas A. Galt, J. B. Patterson, George S. Tracy, and E. L. Galt.

From this decree an appeal was taken to this court.

Mr. John G. Manahan, for appellant, on the question of damages said:

It is established that there was positive testimony taken before the master which the master considered to be direct

and sufficient under the circumstances, to prove that the appellant made at least the amount of profit, in manufacturing and selling its machines, that was proven to be made by the other manufacturers in the same locality on the same kind of machines, and the master was warranted in finding in dollars and cents that as the amount of profit; and the court below decided that the master's report was correct, upon full consideration of the very points upon which the question is presented to this court.

The proofs in this case as to profits and damages bring the case clearly within all the decisions of this court upon that point. The doctrine laid down in *Illinois Central Railroad* v. *Turrill*, 94 U. S. 695, was that, where the defendants infringe complainant's patent by the use of a machine in repairing railroad rails, they are responsible for the advantages derived from the patented device over the use of other devices for doing such work. The advantage derived by the defendant by using the H. A. Adams device in their machine was at least the amount proven by the testimony taken before the master.

In *Mowry* v. *Whitney*, 14 Wall. 620, 651, it was held that the question to be determined in regard to profits is: "What advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public, and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits."

The evidence in this case is that the defendant's machine was benefited to such an extent that it was able to derive a profit equal to the amount found by the master by making and selling the machines containing H. A. Adams's invention.

The doctrine laid down in *Dobson* v. *Hartford Carpet Co.*, 114 U. S. 439, *Tilghman* v. *Proctor*, 125 U. S. 136, and other cases, is not controverted in any way by the findings in the case at bar. In the case at bar it was recognized by the court below that the burden of proof as to profits and damages rested with the complainant, and it is contended on behalf of the appellee that the complainant did prove in dollars and cents the amount

of profit which the manufacturers of these machines made in the locality where the appellant manufactured and sold machines. This proof was made in dollars and cents in specific amounts, and the number of machines made by appellant was proven and admitted by appellant. The master so found, the court so found, and the testimony fully bears out these findings. The appellee also proceeded to apportion the profit of manufacturing and selling these machines among the various improvements which were used in the machine, dividing the total profit into four parts, assigning one part to the invention of H. A. Adams, thereby conforming to the decision of this court in *Garretson* v. *Clark*, 111 U. S. 120.

Mr. Lewis L. Coburn and *Mr. John M. Thacher* for appellee.

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

Prior to the invention patented in 1872 by Henry A. Adams, a well-known defect in cornshellers consisted in the clogging or choking of the chute through which the ears of corn descended to the sheller. As the ears would approach the throat of the machine, they were liable to stop and wedge against each other. This sometimes necessitated the stopping of the machine in order to break the clog in the feed or chute, and usually the services of an attendant were required to clear the chute and break the clog by punching the ears with a stick.

The object of the Adams invention was to remedy this defect, and the device invented is described in the first claim of the patent in the following terms: "The combination with a cornsheller of a series of wings, wheels, or projections, so arranged on a shaft as to revolve in the same direction which the corn is running, and so placed relative to the throat as to force into the machine all misplaced or hesitating ears, substantially as specified." Resorting to the specification, we find the following description of the invention:

"This invention relates to an improvement upon the cornsheller patented by Augustus Adams, as described in his letters patent No. 54,659, dated May 15, 1866. In said patented cornsheller a winged shaft is placed above the openings into the sheller, and is revolved oppositely to the direction of the entering corn, in such a manner that the said wings strike the upper ear, if two ears attempt to enter the throat at once, and throw said upper ear back into position to descend properly; but I have discovered that the ear so thrown back retards the feed, inasmuch as the following ears are likely to override the ear so thrown back, and the difficulty is thus continued.

"In the present invention I propose to overcome this objection by forcing all the ears, as they approach the throat, to pass rapidly out of the way into the sheller; and to this end I arrange a shaft above the throat, with a series of wings, wheels, or projections, to revolve in the same direction as the entering corn, so as to force the corn rapidly forward into the sheller, which is capable of shelling all the corn that can be forced through the throat. By this means I avoid any chance of clogging the feed under ordinary circumstances."

That the patented device is useful and successfully overcomes the choking or clogging that interfered with the operation of cornshellers as previously constructed, is clearly made out in the case. The evidence is positive as to this point, and also to the effect that the application of the invention dispensed with the extra attendant, whose duty it was to remove the clog by using a stick or fork, and increased the ordinary capacity of the machines. It is also made to appear that the invention has gone into general use.

While it is true that the mere fact that a device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, does not establish, in all cases, that the later device involves invention within the meaning of the patent laws, yet such fact is always of importance, and is entitled to weight, when the question is whether the machine exhibits patentable invention. *Smith* v. *Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 495.

We, therefore, agree with the court below that "the change

was a substantial and meritorious one, and one which was well worthy of a patent, by reason of the improvement which it produced in the operative effect of the cornsheller."

We also concur in the reasoning and conclusion of the court below respecting the novelty of the invention. While it is true that the device patented by Augustus Adams, the father of the present patentee, in May, 1866, was intended to effect the same purpose, and used likewise a revolving shaft with wings or protuberances, yet the mode of operation was entirely different. The theory of the earlier machine was to prevent the clogging of the ears of corn in the throat of the sheller by driving back some of the ears, and thus keeping them from entering the sheller simultaneously. But it seems that this interrupted the continuous flow of the ears into the sheller, and retarded the operation of shelling.

Another patent alleged as an anticipation was that granted to Augustus Adams, August 6, 1861, No. 1861, and which is asserted to contain a rotating shaft with little wheels fastened thereon, having teeth or prickers on their faces. This shaft, however, is located underneath the chute, down which the ears of corn descend, and the evidence shows that this device did not operate so as to prevent clogging. On the contrary, the clogging of the feed in this machine required the attention of one man all the time. This was the defect which the same patentee, Augustus Adams, sought to obviate by the device patented by him in 1866.

It must be admitted that both of these patents granted to Augustus Adams, one in 1861, the other in 1866, describe mechanical contrivances closely resembling the invention in question, patented by H. A. Adams, October 15, 1872. There is present in all three machines a rotating shaft with spurs or wings, and the purpose sought to be effected is the same.

But, as we have seen, when the test of practical success is applied, the conclusion is favorable to the last patent.

Where the patented invention consists of an improvement of machines previously existing, it is not always easy to point out what it is that distinguishes a new and successful machine from an old and ineffectual one. But when, in a class of

machines so widely used as those in question, it is made to appear that at last, after repeated and futile attempts, a machine has been contrived which accomplishes the result desired, and when the Patent Office has granted a patent to the successful inventor, the courts should not be ready to adopt a narrow or astute construction, fatal to the grant.

The question of infringement is readily disposed of. The defendant, the Keystone Manufacturing Company, manufactures and sells machines made under certain patents granted to Harvey Packer, and it is claimed that because, in these machines, the ears of corn do not drop down a chute to the point where they pass into the throat of the sheller, but are brought directly to the shelling devices by carriers, such difference in the mode of bringing the corn to be operated on by the shelling devices distinguishes the machines. But we agree with the court below, that there is nothing in the H. A. Adams patent which restricts his device to cornshellers where the ears are fed into a chute, through which they drop to the throat of the sheller. It is equally well adapted to be used in that form of machine where the chute is dispensed with, and where the ears of corn are brought by other means to the throat of the machine. What we have to compare is the forcing device in the respective machines, and as we find that the defendant uses a spiked shaft at the entrance to the throat of his machine, revolving in the same direction in which the corn is running, for the purpose of urging or compelling the ears to enter the sheller, we cannot hesitate to hold it an infringement of the complainant's device.

It may be proper to say that there is a feature of the Packer machines, having reference to its operation after the corn has passed beyond the reach of the picker shaft, not found in the Adams, which seems to be a further improvement in the art of cornshelling, and which may have justified the granting of a patent for such improvement, though, of course, such a question is not now before us.

These views justify the decree of the court below, so far as it declares the validity of the patent sued on, and its infringement by the defendant. But we are unable to sustain that

decree in overruling the exceptions to the master's report, and in adjudging, in accordance with the finding of the master, the payment by the defendant company to the plaintiff of the sum of twenty-seven thousand six hundred and twenty dollars.

The record shows that the complainant did not seek to recover a license fee, nor did he offer any evidence from which his damages could be computed. He relied entirely on the proposition that the amount which he was entitled to recover could be based on the profits realized by the defendant from the sale of the patented invention, and the amount of such profits he claimed to have shown by evidence tending to show what certain third companies were alleged to have made from the sale of similar devices in similar cornshelling machines.

The reasoning of the master and of the court below on this subject can be made clearly to appear by the following extracts from the opinion of the learned judge:

"The complainant, to establish the extent of the defendant's profits, called witnesses familiar with the cost and selling price of the Sandwich, Joliet and Marseilles machines, and showed what the profits of these manufacturers were on the different sizes of machines made by them, and what proportion of these profits was fairly attributable to the defendant's device. No proofs were introduced by either party as to the actual profits realized by the defendant company, but it was evidently assumed by the master that the machines of the defendant were so near like those of the other companies in their material, form and cost of construction that the profits of defendant on machines made and sold by it must have been substantially the same as the profits made by these other manufacturers.

"Here are competing manufacturers making the same kind of machine for the same market, and the natural conclusion is that they would pursue substantially the same business methods and realize about the same profits."

While it is undoubtedly established law that complainants in patent cases may give evidence tending to show the profits realized by defendants from use of the patented devices, and thus enable the courts to assess the amounts which the com-

plainants are entitled to recover, yet it is also true that great difficulty has always been found, in the adjudicated cases, in applying the rule that the profits of the defendant afford a standard whereby to estimate the amount which the plaintiff is entitled to recover, and in defining the extent and limitations to which this rule is admittedly subject.

Such a measure of damages is of comparatively easy application where the entire machine used or sold is the result of the plaintiff's invention; but when, as in the present case, the patented invention is but one feature in a machine embracing other devices that contribute to the profits made by the defendant, serious difficulties arise.

It is unnecessary, in this opinion, to review the numerous cases, some at law, others in equity, wherein this court has considered various aspects of this question. It is sufficient to say that the conclusions reached may be briefly stated as follows: It is competent for a complainant, who has established the validity of his patent and proved an infringement, to demand, in equity, an account of the profits actually realized by the defendant from his use of the patented device; that the burden of proof is on the plaintiff; that where the infringed device was a portion only of defendant's machine, which embraced inventions covered by patents other than that for the infringement of which the suit was brought, in the absence of proof to show how much of that profit was due to such other patents, and how much was a manufacturer's profit, the complainant is entitled to nominal damages only. *Seymour* v. *McCormick*, 16 How. 480; *Rubber Co.* v. *Goodyear*, 9 Wall. 788; *Mowry* v. *Whitney*, 14 Wall. 620; *Elizabeth* v. *Pavement Co.*, 97 U. S. 126.

In the case last named it was said: "It is unnecessary here to enter into the general question of profits recoverable in equity by a patentee. The subject, as a whole, is surrounded with many difficulties, which the courts have not yet succeeded in overcoming. But one thing may be affirmed with reasonable confidence, that if an infringer of a patent has realized no profit from the use of the invention, he cannot be called upon to respond for profits; the patentee, in such case,

is left to his remedy for damages. It is also clear that a patentee is entitled to recover the profits that have been actually realized from the use of his invention."

In *Garretson* v. *Clark*, 111 U. S. 120, 121, this court quoted with approval the statement of the rule made in the court below by Mr. Justice Blatchford: "The patentee must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative."

Tilghman v. *Proctor*, 125 U. S. 136, 146, is an important case, in which many of the earlier cases were reviewed, and it was there said: "The infringer is liable for actual, not for possible, gains. The profits, therefore, which he must account for are not those which he might reasonably have made, but those which he did make, by the use of the plaintiff's invention; or, in other words, the fruits of the advantage which he derived from the use of that invention, over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result. If there was no such advantage in his use of the plaintiff's invention, there can be no decree for profits, and the plaintiff's only remedy is by an action at law for damages."

In the light of these decisions there was error in the court below, not in any formal disregard of the rule restricting the plaintiff's recovery to the profits actually realized, but in permitting the plaintiff to prove, not the defendant's profits, but those realized by other companies. This was in effect showing what, in the opinion of the master and the court, "he might reasonably have made, and not those which he did make."

The fallacy of this application of the rule is obvious, for nothing is more common than for one manufacturing concern to make profits where another, with equal advantages, operates at a loss.

The learned judge seems to have thought that the course of the defendant, in not itself disclosing the condition of its business, justified the master in estimating its profits upon

the basis of those of other similar establishments. But, as we have seen, the burden of proof was upon the plaintiff. He relied, notwithstanding defendant's objections, on incompetent and irrelevant evidence, and the decree in his favor, in so far as it awards more than nominal damages, cannot be sustained.

The decree of the court below is

Reversed, the costs in this court to be paid by the appellee; and this cause is remanded with directions to enter a decree for nominal damages with costs.

BATES *v.* PREBLE.

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

No. 123. Argued November 28, 29, 1893. — Decided January 8, 1894.

This court is not committed to the general doctrine that written memoranda of subjects and events, pertinent to the issues in a case, made cotemporaneously with their taking place, and supported by the oath of the person making them, are admissible in evidence for any other purpose than to refresh the memory of that person as a witness.

When it does not appear that such a memorandum was made cotemporaneously with the happening of the events which it describes, it should not be submitted to the jury.

If such a memorandum, made in a book containing other matter relating to the issues which is not proper for submission to the jury, be admitted in evidence, the leaves containing the inadmissible matter should not go before the jury.

In such case it is not enough to direct the jury to take no notice of the objectionable matter, but the leaves containing it should be sealed up and protected from inspection by the jury before the book goes into the conference room.

In Massachusetts, where an action in tort, grounded on fraud of the defendant, is commenced more than six years after the cause of action arose, and the general statute of limitations applicable to actions sounding in tort is set up, if the fraud is not secret in its nature, and such as cannot readily be ascertained, it is necessary to show some positive act of concealment by the defendant, to take the case out of the operation of that statute; and the mere silence of the defendant, or his failure to inform the plaintiff of his cause of action, does not so operate.

Statement of the Case.

THIS was an action at law brought by Sarah A. Preble to recover of the defendants Bates and Walley, stock brokers, the value of certain securities, the property of the plaintiff, which she alleged had been converted by the defendants to their own use.

The facts were substantially as follows: Mrs. Preble, a widow and a resident of Portland, Maine, acquired by her husband's will certain securities, consisting of stocks and bonds, which she kept in a box in the vaults of the Union Safe Deposit Company, in Boston. Upon the trial she gave evidence tending to show that she entrusted the key of the box to her son, Edward Preble; that she visited the box herself in 1878 and found all her securities there; that she next visited it in the autumn of 1882 and found them all gone; that at various times between these dates her son had abstracted these securities from the box, to which she had given him access, and had taken them to the defendants, who were stock brokers, without authority from her, and that the defendants had sold the securities for him; that Walley, one of the defendants, had notice that the securities belonged to the plaintiff and had fraudulently concealed from her the fact of the conversion, and that she did not discover the conversion until within six years before the bringing of the suit.

Defendants claimed that some of her securities they had never sold or dealt with in any way; that others they had received from Edward Preble, and had disposed of by his directions and upon his account in the ordinary course of business, believing them to be his property; that they had no knowledge or notice that any of the property belonged to the plaintiff; that in fact some of the securities did not belong to her, and that if she ever had any cause of action against them for the conversion of these securities, the same arose more than six years before the bringing of her suit, and hence that such action was barred by the statute of limitations.[1]

The jury returned a verdict for the plaintiff for $34,772.88

[1] This statute of limitations will be found in the opinion of the court, *post*, 158.

damages, and handed to the court with their verdict a schedule containing the special items upon which they held the defendants liable, showing the securities which they found to have been converted by the defendants with the value of the same, and the date of their conversion from which interest was computed. Upon motion for new trial, the court held that there was no evidence to sustain the finding of the jury with respect to certain of the securities; that the value of such securities should be remitted from the verdict, or that a new trial should be granted. Judgment was finally entered for the plaintiff for $28,496.52, being the amount of the verdict less the amount remitted. Defendants sued out a writ of error from this court.

Mr. Samuel Hoar for plaintiffs in error.

Mr. Robert M. Morse and *Mr. Louis C. Southard*, for defendant in error, made the following points in their brief as to the seventh, eighth, and ninth assignments of error:

As to the admission of Mrs. Preble's memorandum book and permitting it to go to the jury under certain instructions, the portions of the book upon which the plaintiff relied were a page from an earlier memorandum book which was pinned into the book produced, and the first, second, third, fourth, fifth, sixth, seventh, eighth, and ninth leaves and page marked "X," all of which were in the handwriting of the plaintiff. The entries were original entries, and the fair interpretation of the report of the evidence is that they were made in the several years which they purport to cover.

These memoranda were simply schedules of the securities in her box from 1877 to 1882. They were supplemented by the oath of the plaintiff that they were her original entries and that they were correct. It must be presumed by this court that the appearance and character of the plaintiff's book indicated to the satisfaction of the judge at the trial that it was kept honestly, carefully, and accurately.

That books of account containing original entries and supplemented by the testimony of the party who kept them, are

admissible in evidence is well established in the courts of the United States, of Massachusetts, and of the States generally. *Insurance Co.* v. *Weide*, 9 Wall. 677; *Cogswell* v. *Dolliver*, 2 Mass. 217; *Prince* v. *Smith*, 4 Mass. 454; *Smith* v. *Sanford*, 12 Pick. 139; *S. C.* 22 Am. Dec. 415; *Harwood* v. *Mulry*, 8 Gray, 250; *Pratt* v. *White*, 132 Mass. 477; *Miller* v. *Shay*, 145 Mass. 162; *Passmore* v. *Passmore*, 60 Michigan, 463; *Singer* v. *Brockamp*, 33 Minnesota, 501; *Webster* v. *Clark*, 30 N. H. 245; *Merrill* v. *Ithaca & Owego Railroad*, 16 Wend. 586; *S. C.* 30 Am. Dec. 130; *Payne* v. *Hodge*, 7 Hun, 612.

A book kept by a bank, containing entries of notices to makers and endorsers of notes, accompanied by the testimony of the clerk who kept the same, is admissible. *Shove* v. *Wiley*, 18 Pick. 558. See also *Farmers' & Mechanics' Bank* v. *Boraef*, 1 Rawle, 152.

Sheets of paper on which separate entries have been made have been received. *Hooper* v. *Taylor*, 39 Maine, 224; *Smith* v. *Smith*, 4 Harr. (Del.) 532; *Taylor* v. *Tucker*, 1 Georgia, 231. Also papers not evidence *per se*, but found to have been true statements of fact, are admissible in connection with the testimony of a witness who made them. *Insurance Companies* v. *Weides*, 14 Wall. 375.

In many States notes of testimony or of conversations, accompanied by the testimony of the person who made the memoranda, have been admitted on similar grounds to those on which the competency of books of account rests. *People* v. *Murphy*, 45 California, 137; *Labar* v. *Crane*, 56 Michigan, 585; *Halsey* v. *Sinsebaugh*, 15 N. Y. 485; *Clark* v. *Vorce*, 15 Wend. 193; *S. C.* 30 Am. Dec. 53; *Huff* v. *Bennett*, 4 Sandf. 120; *McAdams* v. *Stilwell*, 13 Penn. St. 90; *Glass* v. *Beach*, 5 Vermont, 172; *Marsh* v. *Jones*, 21 Vermont, 378; *S. C.* 52 Am. Dec. 67.

But it is unnecessary for the purposes of the case at bar to determine how far memoranda made by a party are admissible in evidence. The entries in the present case are of a character and made at times which rendered them competent. If, however, the memoranda were not admissible the defendant was not prejudiced by their admission.

Argument for Defendant in Error.

(1) As was said by Morton, C. J., in *Miller* v. *Shay*, 145 Mass. 162, 164, "The plaintiff had clearly the right to use his account book to refresh and aid his memory. The fact that the book went to the jury could not prejudice the defendant."

(2) The schedule, annexed to their verdict by the jury, shows that, of all the securities mentioned on the various pages of the plaintiff's book, the only ones on which the verdict was based were eight Minneapolis bonds of $1000 each, one Eastern Illinois bond of $1000, three Oregon Railroad Navigation bonds of $1000 each, five Chicago Sewerage Loan bonds of $1000 each, and two N. Y. & N. E. R. R. bonds of $1000 each, and from the amount reckoned on this basis the plaintiff remitted in accordance with the opinion of the court the amount allowed for one of the Chicago Sewerage bonds and for one of the Minneapolis bonds.

The defendant's ninth alleged error is to the ruling of the court, permitting the rest of the plaintiff's book to go to the jury without sealing up the same so that it could not be examined by the jury.

It is to be presumed that the court found that it was not practicable to seal up the rest of the book without impairing the use to be made of the leaves which were in evidence.

At all events, it was within the discretion of the presiding judge to send the book to the jury after instructing them not to examine the parts which were not in evidence. It will be presumed that the jury followed these instructions.

An examination of the part of the book not admitted in evidence shows that there was nothing contained therein, even if it had been read by the jury, which could have prejudiced the defendant unless it was the statement as to the plaintiff's dislike of the defendant Walley. But she had testified fully as to the facts on which this feeling was based.

But it is well settled that a paper which is in part legal evidence and in part not, may go to the jury if they are instructed to disregard the part which is not evidence. *Commonwealth* v. *Wingate*, 6 Gray, 485; *Commonwealth* v. *Dow*, 11 Gray, 316.

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

There are thirty-four assignments of error in this case, many of which are of little importance, and as we have come to the conclusion that the case must be reversed and a new trial ordered, it is neither necessary nor advisable that we should dispose of them all.

(1) The seventh and eighth assignments are taken to the admission of certain pages of a memorandum book purporting to contain a list of securities owned by the plaintiff. Concerning this book she testified that "it was her own book, in her own handwriting, never seen by any one until it went into the hands of counsel; that the entries were made in it from time to time; that it showed the securities which she had, which went into the box in the safe deposit vaults." One page she testified was cut from an earlier book kept by her, which was pinned into this book, and that page showed what securities she had in her box in 1878. On cross-examination, she testified with reference to the first page, "that the figures at the top in pencil she put there when she took the page out of the other book and put it into that book. Those figures in pencil were 1877 and 1878; that she did not remember at what time she did this; that it was before 1882, and was after she cut it out of the other books; . . . that she had no memorandum except what was on that paper in the book; that some of it was written in ink and some in pencil; that what was in ink was written when it was in the other book; that the pencil part was written after it was put in this book; that the summing up was made by her, but was not correct; that at the bottom of the page the value appeared to be as of 1871; she did not know whether it was its correct value in 1871 or 1877," etc. "That the entries in her memorandum book were not reliable; that she could not tell when she made the entries upon them or when the figures were set down; that she could not tell why she made the entries, nor why she had struck out any of them." This book was sought to be used, not for the purpose of refreshing the memory of

the witness, but was laid before the jury as independent evidence of the character and value of the securities.

There is no doubt that books of account kept in the usual and regular course of business, when supplemented by the oath of the party who kept them, may be admitted in evidence. *Insurance Company* v. *Weide*, 9 Wall. 677; *Cogswell* v. *Dolliver*, 2 Mass. 217; *White* v. *Ambler*, 8 N. Y. 170. But whether this rule extends to memoranda made by a witness contemporaneously with the event they purport to record, is open to very considerable doubt, elementary writers and courts being about equally divided upon the subject. 1 Greenleaf's Evidence, section 437, note 3; 1 Smith's Leading Cases, 6th Am. ed. 508, 510. In New York they are held to be admissible. *Halsey* v. *Sinsebaugh*, 15 N. Y. 485; *McCormick* v. *Penn. Central Railroad*, 49 N. Y. 303, 315. The cases in Massachusetts apparently favor a different view. *Commonwealth* v. *Fox*, 7 Gray, 585; *Dugan* v. *Mahoney*, 11 Allen, 572; *Commonwealth* v. *Ford*, 130 Mass. 64; *Commonwealth* v. *Jeffs*, 132 Mass. 5; *Field* v. *Thompson*, 119 Mass. 151. In this court it was held in *Insurance Companies* v. *Weides*, 14 Wall. 375, 380, that a statement in figures of the value of certain merchandise destroyed by fire, which statement professed to be a copy of another statement contained in a book, itself destroyed in the fire, accompanied by proof that on a certain day the witness took a correct inventory of the merchandise, and that it was correctly reduced to writing by one of them and entered in the volume burnt, and that what was offered was a correct copy, was admissible in evidence in a suit against the insurance company to fix the value of the merchandise burnt, though there was no independent recollection by the witness of the value stated. In delivering the opinion of the court Mr. Justice Strong observed: "How far papers, not evidence *per se*, but proved to have been true statements of fact, at the time they were made, are admissible in connection with the testimony of a witness who made them, has been a frequent subject of inquiry, and it has been many times decided that they are to be received. And why should they not be? Quantities and values are retained in

the memory with great difficulty. If at the time when an entry of aggregate quantities or values was made the witness knew it was correct, it is hard to see why it is not at least as reliable as the memory of the witness." This case might have been properly supported on the ground that they were entries made in the usual course of business, since from the report of a similar case (9 Wall. 677) this seems to have been the character of the entries. See also *Chaffee* v. *United States*, 18 Wall. 516.

In *Maxwell* v. *Wilkinson*, 113 U. S. 656, a memorandum of a transaction which took place twenty months before its date, and which the person who made the memorandum testified that he had no recollection of, but knew it took place because he had so stated in the memorandum, and because his habit was never to sign a statement unless it were true, was held to be inadmissible. Many of the authorities are cited, but the inadmissibility of the memorandum was put upon the ground that it was made long after the transaction it purported to state. The general question of the admissibility of such memoranda as independent evidence was not, however, decided.

In *Vicksburg & Meridian Railroad* v. *O'Brien*, 119 U. S. 99, which was an action against a railroad company by a passenger to recover for personal injuries, a written statement as to the nature and extent of his injuries, made by his physician while treating him for them, for the purpose of giving information to others with regard to them, was held not to be admissible in evidence against the company, even when attached to the deposition of the physician, in which he swore that it was written by him, and that in his opinion it correctly stated the condition of the patient. Numerous authorities were cited upon both sides of the general question as to the admissibility of such memoranda, but the court held that the case did not require an examination of such authorities, inasmuch as it did not appear but that at the time the witness testified he had, "without even looking at his written statement, a clear, distinct recollection of every essential fact stated in it. If he had such present recollection there was no necessity whatever for reading that paper to the jury."

Opinion of the Court.

We do not regard any of these cases as committing this court to the general doctrine that such memoranda are admissible for any other purpose than to refresh the memory of the witness.

But even if it were conceded that such a memorandum as that in question made cotemporaneously with the deposit of the securities, and properly authenticated by oath of the plaintiff, would be admissible as independent evidence, the testimony of the plaintiff fell far short of establishing the requisite qualifications for its admission. It does not appear when the memorandum was made, or that it was cotemporaneous with the deposit of the securities. Upon the other hand, it seems the entries were made from time to time, though not apparently as the securities were deposited in the box. Indeed, the plaintiff swears directly that she could not tell when she made the entries upon them, or when the figures were set down; that she could not tell why she made the entries, or why she struck out any of them, and that the entries were not reliable. She further testified that she never "saw any Oregon Navigation six per cent bonds, and never saw or received any Eastern Illinois bonds; . . . that she never had any New York and New England seven per cent bonds in her possession, and never saw them in her box; that she never saw any certificate of Consolidated Virginia stock;" and yet entries relating to these securities appear upon several of the pages of the book. Upon two or three of the pages there is not an entry that has the remotest connection with the question at issue, and it is difficult to see any ground upon which these pages were admitted.

Upon the whole, we think these memoranda, if inadmissible for no other reason, were not sufficiently authenticated to make it proper to submit them to the jury.

(2) By the ninth assignment of error it appears that after the close of the case, and when the jury were about to retire to consider their verdict, the court allowed the whole of the memorandum book to go to the jury without any sealing or other protection of the leaves and pages not put in evidence. It appears that when the court admitted the leaves and pages containing the memoranda above alluded to, it directed the

rest of the book to be sealed up or otherwise protected from the inspection of the jury; but that when the jury were about to retire, the plaintiff offered to send the whole book without such protection, and the court directed the jury not to examine any part of the book except what was put in evidence, and permitted the whole book with that instruction to go to the jury. To this the defendants excepted. We think the court should have adhered to its directions to take such measures as were necessary to prevent the jury from seeing other portions of the book, as they contained matter, which, though bearing upon the issue, was wholly inadmissible as testimony, and was calculated to create in the minds of the jury a strong prejudice against the defendants. This error was not cured by the instructions to the jury not to examine any part of the book except what was put in evidence. Such instructions might have healed the error, if the contents of the book had been unimportant. But the objectionable portions in this case were such as were likely to attract the eye of the jury, and accident or curiosity would be likely to lead them, despite the admonition of the court, to read the plaintiff's comments upon the defendants and her private meditations, which had no proper place in their deliberations. The precise question involved here arose in *Kalamazoo Novelty Co.* v. *McAlister*, 36 Michigan, 327, where an entire book was suffered to be taken to the jury room when but three pages were in evidence, and it was held that the instruction not to look at the unproved part should not be taken as relieving its admission to the jury room from error. See also *Commonwealth* v. *Edgerly*, 10 Allen, 184; *Stoudenmire* v. *Harper*, 81 Alabama, 242.

(3) The errors alleged in the 30th, 31st, and 32d assignments relate to the instructions given by the court upon the applicability of the statute of limitations, and to the competency of the testimony introduced to take the case out of the bar of the statute. The Massachusetts statute provides as follows, (Pub. Stat. Mass. c. 197):

"SEC. 1. The following actions shall be commenced within six years next after the cause of action accrues and not afterwards. . . .

"Fourth. All actions of tort, except those hereinafter mentioned. . . .

"SEC. 14. If a person liable to any of the actions mentioned in this chapter fraudulently conceals the cause of such action from the knowledge of the person entitled to bring the same, the action may be commenced at any time within six years after the person so entitled discovers that he has such cause of action."

It is undisputed in this case that the embezzlements which formed the subject of the action were committed between 1878 and 1882, and in the schedule brought in by the jury and handed up with their verdict, interest was computed upon all the securities alleged to have been converted from a date anterior to January 25, 1881. As the writ by which the action was begun was dated January 25, 1887, the action would appear to have been barred by the statute unless the evidence was such as to justify the jury in finding that there had been a fraudulent concealment of the embezzlement from the knowledge of the plaintiff. If the statute had simply provided that the six years should run from the discovery of the fraud, there could be no doubt of the right of the plaintiff to maintain this action, as there is no evidence that she discovered the fraud prior to her examination of the contents of her box in 1882. Such seems to have been the rule in common law actions, adopted by the Supreme Judicial Court of Massachusetts prior to the enactment of section 14. *Homer* v. *Fish*, 1 Pick. 435; *Welles* v. *Fish*, 3 Pick. 74; *Farnam* v. *Brooks*, 9 Pick. 212, 244. In construing this statute, however, the courts of Massachusetts have held in a number of cases that the mere silence of the defendant, or his failure to inform the plaintiff of the cause of action, is not such a fraudulent concealment as is contemplated by the statute, and that some positive act of concealment must be proved. Thus, in *Nudd* v. *Hamblin*, 8 Allen, 130, it was held that the omission to disclose a trespass upon real estate to the owner, if there is no fiduciary relation between the parties, and the owner has the means of discovering the facts, and nothing has been done to prevent his discovering them, is not such a fraudulent con-

cealment of the cause of action as will prevent the bar of the statute. The court cited with approval the case of *Cole* v. *McGlathry*, 9 Greenl. 131, in which the defendant had received from the plaintiff funds to pay certain debts, and falsely affirmed that he had paid them. It was held that though he was guilty of a breach of moral and legal duty, having added falsehood to his neglect to pay, yet it was not such a fraudulent concealment as would take the case out of the statute, because the plaintiff had the means of discovering the truth at all times by inquiry of the persons who should have received the money. The court also cited the case of *McKown* v. *Whitmore*, 31 Maine, 448. This was an action to recover money which the defendant had agreed to deposit in a certain bank for the plaintiff, and which he told the plaintiff he had deposited. It was held that, even if this statement was untrue, it did not constitute a fraudulent concealment, because the plaintiff had at all times the means of discovering the truth. In *Walker* v. *Soule*, 138 Mass. 570, the action was founded upon certain representations made by the defendant, the administrator of an estate, that he was licensed by the probate court to sell the real estate of his intestate; that he had good right to sell it; that the title to it was good; and that the deed, a copy of which was in evidence, was in proper form and sufficient to pass the title. It was held that, as these representations were as to the contents of public records, which the plaintiff had full opportunity of examining, they were not sufficient to prove a subsequent fraudulent concealment from the knowledge of the plaintiff. So in *Abbott* v. *North Andover*, 145 Mass. 484, it was held that the representation by a township officer that he had authority to bind the town by the renewal of a promissory note, when in fact he had no such authority, was not a fraudulent concealment by the town of the cause of action, and hence that an action could not be maintained on the note, of which this was a renewal, which was not brought within six years.

On the other hand, if the fraud itself be secret in its nature, and such that its existence cannot be readily ascertained, or if there be fiduciary relations between the parties, there need be

no evidence of a fraudulent concealment other than that implied from the transaction itself. This is illustrated by the case of the *First Massachusetts Turnpike Corporation* v. *Field*, 3 Mass. 201, in which the defendants, having contracted with the plaintiffs to make for them a turnpike road upon a firm foundation, with suitable materials, etc., made a road upon a bad foundation, using unsuitable materials and unfaithfully executed the work, and fraudulently and deceitfully concealed the foundation and materials by covering the same with earth and smoothing the surface, so that it appeared to the plaintiffs that the contract had been faithfully executed, it was held that the contract was of such a nature as to admit of a fraudulent and deceitful execution, and that the fraud was in fact concealed from the knowledge of the plaintiffs. So in *Manufacturers' National Bank* v. *Perry*, 144 Mass. 313, a bank overpaid to the clerk of the defendant the sum of $200 on a check drawn by the defendant. Defendant, being notified by the clerk of the mistake, instructed him not to return the money, and to deny to the bank that he had been overpaid, which he did. It was held that his approval and adoption of the lie told by the clerk to the bank teller were active steps taken by him to prevent the bank from discovering the fact that he had received the money, and constituted a fraudulent concealment of the plaintiff's cause of action. So in *Atlantic Bank* v. *Harris*, 118 Mass. 147, 154, a state bank paid to its president money which he falsely represented that he had paid to an agent to whom the bank was indebted. Subsequently the agent brought an action against the bank, and recovered the amount due him. It was held, in an action for money had and received, brought by the bank against the president, that the court was warranted in finding that the defendant had fraudulently concealed the cause of action from the bank, on account of the peculiar relations between them. "A bank," said the court, "must necessarily act through its officers; its officer upon whom it relied in this instance was the defendant, who had charge of this particular transaction with Pierce, and he who should have disclosed the cause of action, was the party engaged in concealing it." See also

Wood v. *Carpenter*, 101 U. S. 135; *Felix* v. *Patrick*, 145 U. S. 317.

In this connection the court in the case under consideration charged the jury as follows:

"Now, gentlemen, I shall charge you as matter of law this: That if you believe that the defendants here were not guilty of any fraud in these transactions, if you believe that they took these negotiable securities in, if you please, the ordinary course of their business and sold them, then Mrs. Preble would not have a right in this case to bring suit for anything that took place prior to January, 1881; but, on the contrary, if from the evidence you believe that Walley, one of the defendants, conspired with young Preble to obtain these bonds and afterwards to conceal the fact from the mother, he, Edward, having the key to the safety box containing the securities, this would be evidence going to prove a fraudulent concealment of the cause of action, such as would bring it within the exception of the statute. So that, gentlemen, whether there was a fraudulent concealment of the transaction such as would make Mrs. Preble's whole claim good here turns upon the question whether you believe from the evidence which has gone in before you that the defendants here acted in the ordinary course of their business, or whether you believe upon the evidence that one of the defendants, Walley, was a co-conspirator with Preble in these transactions, and that young Preble also had the key to his mother's safe, so that, if you please, his mother with great difficulty could obtain access to it or knowledge as to whether those securities existed or not. Those rules of law, gentlemen, you will apply upon the subject of the statute of limitations."

We think the court erred in this instruction. It assumes that the same evidence which tended to show a conspiracy between Edward Preble and the defendants to obtain these bonds was also evidence of an intention on defendants' part to keep a knowledge of the transaction from the plaintiff. This, however, does not necessarily follow. If it did, the result would be that whenever a party has been guilty of a fraud, which it is for his interest should not be known by the per-

son upon whom it is committed, he would practically lose the benefit of the statute, though he may not have made the slightest effort to keep it secret. The vice of the instruction in this particular was that there was no evidence whatever that the defendants, or either of them, said or did anything before or after the securities came into their hands, to conceal the transaction from the plaintiff. There was no claim that the defendant Bates knew anything about it. Defendant Walley was the active partner in the transaction, and there is nothing to indicate that he made any effort at concealment. While he sometimes called at the plaintiff's house, it does not appear that he ever spoke to her about business until the autumn of 1882, when he called upon her and told her that her son was in trouble and had been arrested in New York. Upon plaintiff offering to raise money and assist him by the sale of some of her bonds and stock, he then informed her that he was afraid they were lost. Within two or three days after that she went to the vault and found that they had been abstracted. Granting that the relations between Edward Preble and his mother were such as to make a revelation of the facts a duty upon his part, there was no such confidential relation between the plaintiff and defendants as would cause silence upon their part to be imputed as a fraud. Even admitting that they and Edward Preble were co-conspirators, and that they were responsible for his acts connected with such conspiracy, it would be carrying the doctrine to an unwarrantable extent to hold that his subsequent silence upon the subject could be chargeable to them.

Without discussing the other assignments we think the case should be

Reversed and remanded to the Circuit Court with instructions to set aside the verdict and grant a new trial.

TUCKER *v.* UNITED STATES.

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

No. 970. Submitted December 4, 1893. — Decided January 3, 1894.

An affidavit, under section 878 of the Revised Statutes, by a person indicted, setting forth that certain testimony is material to his defence and that he is without means to pay the witnesses, and praying that they may be summoned and paid by the United States, is not a "pleading of a party," nor "discovery or evidence obtained from a party or witness by means of a judicial proceeding," which cannot, by section 860, be given in evidence against him in a criminal proceeding.

On a trial for murder of a woman by shooting, the jury were instructed that if the defendant, at the time of the killing, although not insane, was in such a condition, by reason of drunkenness, as to be incapable of forming a specific intent to kill, or to do the act that he did do, the grade of his crime would be reduced to manslaughter. *Held*, that he had no ground of exception to a refusal to instruct that if at the time of the killing he was so drunk as to render the formation of any specific intent to take her life impossible on his part, and before being drunk he entertained no malice towards her and no intention to take her life, he could not be convicted of murder.

Rulings objected to at the trial, but not stated in the bill of exceptions to have been excepted to, are not subject to review on error.

THIS was an indictment, found at November term, 1892, of the Circuit Court of the United States for the Western District of Arkansas, against Marshal Tucker, for the murder of Lula May, a white woman, by shooting her with a pistol, at the Choctaw Nation in the Indian Country in that district on October 15, 1892.

The defendant pleaded not guilty; and by agreement of the parties the case was ordered to be continued to the next term and set down for trial on February 23, 1893.

On February 21, 1893, the defendant, by his attorney, filed an application, dated February 20, and signed and sworn to by him, pursuant to section 878 of the Revised Statutes, setting forth that certain persons named were material witnesses for

his defence; that "by the three first-named witnesses, who reside at South McAlester, he can show that he was so intoxicated at the time of the alleged homicide that he had no knowledge of what he was doing, and was incapable of forming any design;" that "these statements he believes to be true, and he is not possessed of sufficient means, and is actually unable to procure the attendance of said witnesses;" and therefore praying that they might be summoned at the expense of the United States. Thereupon the court ordered that the legal expense of procuring the testimony of those witnesses be paid by the United States, and that a subpœna be issued for them returnable February 23.

At the trial, in March, 1893, the government introduced evidence tending to show that the woman killed was an inmate of a house of ill fame, and that the defendant, on the evening of October 15, 1892, went to the house and asked for admittance, and, the door not being opened, fired a pistol through the door and killed the woman.

The defendant called none of the witnesses named in his application; but, having offered himself as a witness in his own behalf, testified as to what took place at the time of the killing, and, among other things, that he did not fire any shot at all; that after he had asked to be admitted to the house, a shot was fired by some other person, whether from the inside or the outside he did not know, and afterwards his pistol was put into his hand by another man whom he named.

On cross-examination, the defendant testified that he signed the application aforesaid; that he had not since changed his mind about whether he knew what was going on there or not; that the witnesses named were present, and saw him intoxicated at the time of the killing; that the defence then intended was not that he was crazy; and further testified that on the night of the killing he was not so drunk as not to know what he was doing, and everything that was going on.

The district attorney, in rebuttal, offered in evidence the application for witnesses. The counsel for the defendant objected that it was incompetent, under section 860 of the

Revised Statutes. But the court admitted the paper in evidence, and the defendant excepted to its admission.

The defendant contended that he did not kill the woman; that, if he did, his crime was manslaughter only; and that, at the time of the killing, he was intoxicated.

The substance of the instructions of the court upon the subject of intoxication sufficiently appears by the following extracts: "If the statement of the defendant himself, that he did know what he was doing, is true, and he intentionally drew the pistol, presented it, and fired it so as to take the life of this woman, that would not be a state of case where there would be that absence of that premeditation which goes to make malice aforethought. If he was in a condition of mind, at the time that he was so acting, that his mind was so disturbed by drinking, by a drunken condition, that he was incapacitated so that he was incapable of forming any intent, or intent to do a wrongful act that might result in death, that may be taken into account for the purpose of showing a state of case where the crime would be of less grade than that of murder." "When a man's mind is in a condition where he can form an intent to do a wrongful act that may result in murder, and he does deliberately form that intent, as evidenced by the drawing and presenting and firing his pistol, then intoxication does not mitigate his offence. If he is carried beyond that, although he may not be absolutely insane, so that his will power is gone, so that he has no control over it, so that he cannot restrain it, while he may not be insane, then there is an absence from the case of what is denominated by law as malice aforethought, and his offence would be manslaughter." "You are not to excuse him to the extent of mitigating his crime because he was drunk, unless he was in that condition where he was incapable of forming an intent, where he was incapable of coming to a conclusion — and it does not mean alone incapable of forming a specific intent to kill, but it means incapable of forming a specific intent to do an act that may kill, that goes so far as to reduce the grade of the crime. If he could not form a specific intent to do the act he did do, then that would reduce the grade of the crime, because of drunkenness."

The defendant requested the court to instruct the jury that if they believed from the evidence "that the defendant was at the time of the killing of Lula May drunk, and that before becoming drunk he entertained no malice toward her and had no intention to take her life, and that his intoxication was so deep as to render the formation of any specific intent to take life impossible on his part, he could not be convicted of murder." This request was refused, "because the law had been correctly given on the subject of drunkenness;" and to the refusal of the court to so instruct the jury the defendant at the time excepted.

The bill of exceptions further stated that the defendant objected to the instructions given by the court to the jury in several particulars, but did not show that an exception was taken to any of those instructions.

The defendant was convicted of murder and sentenced to death, and sued out this writ of error.

Mr. A. H. Garland for plaintiff in error.

Mr. Assistant Attorney General Conrad for defendants in error.

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

The only exception argued to any ruling upon evidence was to the admission, in contradiction of the defendant's own testimony at the trial, of the application made by him on oath, a few days before, for the summoning and payment by the United States of witnesses in his behalf.

That application was made under section 878 of the Revised Statutes, which is as follows: "Whenever any person indicted in a court of the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defence; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred

miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of witnesses, the court in term, or any judge thereof in vacation, may order that such witnesses be subpœnaed if found within the limits aforesaid. In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpœnaed in behalf of the United States."

The objection to the admission of this affidavit or application was founded on section 860 of the Revised Statutes, which is as follows: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

The paper in question was neither a "pleading of a party," nor "discovery or evidence obtained from a party or witness by means of a judicial proceeding." "Pleadings of parties" are the allegations made by the parties to a civil or criminal case, for the purpose of definitely presenting the issue to be tried and determined between them. "Discovery or evidence obtained from a party or witness by means of a judicial proceeding" includes only facts or papers which the party or witness is compelled by subpœna, interrogatory or other judicial process to disclose, whether he will or no: and is inapplicable to testimony voluntarily given, or to documents voluntarily produced. The clause as to discovery or evidence is conceived in the same spirit as the Fifth Amendment of the Constitution, declaring that no person shall be compelled in any criminal case to be a witness against himself; and as the act of March 16, 1878, c. 37, (20 Stat. 30,) enacting that a defendant in any criminal case may be a witness at his own request, but not otherwise, and that his failure to make

such request shall not create any presumption against him. *Boyd* v. *United States*, 116 U. S. 616; *Wilson* v. *United States*, 149 U. S. 60; *Lees* v. *United States*, 150 U. S. 476.

The application for witnesses, or "affidavit," as it is called in section 878, is clearly not a pleading of the defendant for the purpose of defining the issue to be tried in the case. Nor is it obtained from him by any judicial process, which he is obliged to obey. But it is made of his own motion; and it states such facts, and such only, as he, being in no way interrogated or cross-examined, may choose to state. His oath to the nature and materiality of the desired testimony, and to his own want of means, is required merely to establish the good faith of his demand that particular witnesses shall be summoned and paid by the government.

The affidavit being neither a "pleading" of the defendant, nor "discovery or evidence obtained" from him, within the meaning of the statute, the statements therein, as in any other paper voluntarily signed by him, whether upon oath or not, were competent evidence to contradict his testimony upon the stand.

In the matter of instructions to the jury, the only exception reserved at the trial was to the refusal to give the instruction requested as to the effect of the defendant's drunkenness upon his guilt.

In *Hopt* v. *People*, 104 U. S. 631, this court recognized the general rule that, at common law, voluntary intoxication affords no excuse, justification or extenuation of a crime committed under its influence; and went no further in favor of admitting evidence of intoxication than to hold that a defendant, indicted under a territorial statute establishing degrees of murder and requiring deliberate premeditation to constitute murder in the first degree, might show that at the time of the killing he was in such a condition, by reason of drunkenness, as to be incapable of deliberate premeditation.

No act of Congress has established degrees of the crime of murder. By the common law, neither deliberate premeditation, nor express malice or intent to kill, is required to make an unlawful homicide murder, but malice may be im-

plied from the use of a deadly weapon or other significant facts; and any unlawful killing without malice, express or implied, is manslaughter. It has often been held, and was formerly considered to be settled law, that a wanton killing without provocation could not, by reason of being done by a man voluntarily intoxicated to any degree not amounting to insanity, be excused, or reduced from murder to manslaughter. *United States* v. *Cornell*, 2 Mason, 91, 111; *United States* v. *Drew*, 5 Mason, 28; *United States* v. *McGlue*, 1 Curtis C. C. 1, 13; *People* v. *Rogers*, 18 N. Y. 9; *King* v. *People*, 31 N. Y. 330; *Commonwealth* v. *Hawkins*, 3 Gray, 463; *State* v. *Johnson*, 41 Conn. 584; *State* v. *John*, 8 Iredell, 330; 1 Bishop's New Criminal Law, §§ 400, 401. But that view has not been universally accepted in recent times, and we are not required in the present case to express any opinion in regard to it.

The instruction requested was that if the defendant at the time of killing the woman was so drunk as to render the formation of any specific intent to take her life impossible on his part, and before becoming drunk he entertained no malice towards her and no intention to take her life, he could not be convicted of murder. This instruction was refused, because it had been covered by the instructions given. In those instructions the jury were distinctly told that if the defendant at the time of the killing, although not insane, was in such a condition of mind, by reason of drunkenness, as to be incapable of forming a specific intent to kill, or to do the act that he did do, the grade of his crime would be reduced to manslaughter. The instructions given were quite as favorable to the defendant as that which he requested; and the fact that the court instructed the jury in its own words, and declined to adopt the language of the counsel to the same effect, affords no ground of exception. *Anthony* v. *Louisville & Nashville Railroad*, 132 U. S. 172.

The other instructions to which the defendant objected are not subject to review, because the bill of exceptions does not show that he excepted to them. *United States* v. *Breitling*, 20 How. 252. *Judgment affirmed.*

CADWALADER v. ZEH.

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

No. 106. Argued November 23, 1893. — Decided January 8, 1894.

If words used in a statute imposing duties on imports had at the time of its passage a well-known signification in our trade and commerce, different from their ordinary meaning among the people, the commercial meaning must prevail, unless Congress has clearly manifested a contrary intention; and it is only when no commercial meaning is called for or proved, that the common meaning is to be adopted.

The question whether small earthenware cups, saucers, mugs and plates, having on them letters of the alphabet and figures of animals or the like, are "toys," within the meaning of Schedule N, and not "earthenware," within Schedule B, of the act of March 3, 1883, c. 121, depends upon the commercial meaning of the word "toys," if that differs from the ordinary meaning.

THIS was an action, begun May 22, 1888, against the collector of the port of Philadelphia, to recover an excess of duties paid under protest upon four lots of earthenware, consisting of small cups, saucers and mugs, and plates five or six inches in diameter, having upon them pictures of animals and of other objects, and letters of the alphabet, imported by the plaintiffs during the winter of 1887–88, invoiced as toys, and which the plaintiffs contended should have been assessed under the clause in Schedule N in the tariff act of March 3, 1883, c. 121, "dolls and toys, thirty-five per centum *ad valorem;*" but which the collector assessed under Schedule B of that act, imposing a duty on "china, porcelain, parian and bisque, earthen, stone and crockery ware, including plaques, ornaments, charms, vases and statuettes, painted, printed or gilded, or otherwise decorated or ornamented in any manner, sixty per centum *ad valorem.*" 22 Stat. 495, 512.

At the trial, one of the plaintiffs and many other importers and sellers of china and earthenware, and of toys and fancy goods, in Philadelphia, called as witnesses for the plaintiffs,

testified that there was a class of goods in their business, made of earthenware, and consisting of cups, saucers, mugs and plates, commercially known and designated, bought and sold, as toys; that the articles in question (samples of which were produced by the plaintiffs) belonged to that class, were sold at six dollars a gross or fifty cents a dozen, and were intended for children to play with, although they could be, and sometimes were, used by children to drink or eat from.

The defendant called as witnesses two dealers in china and earthenware, who had been appraisers in the custom-house, and many manufacturers of earthenware at Trenton in the State of New Jersey, all of whom testified that there was a class of earthenware goods known in the trade as toys, but that the articles in question did not come within that class, because they were not small enough, and were fit for practical use; and some of whom testified that they were commonly bought and sold as cups, saucers, plates and mugs.

The defendant offered to prove by one of these witnesses that just before the trial he called at the toy-shop of Schwarz in Philadelphia, and asked for toy ware like the articles in question, was told that they did not keep such articles, and was shown tea sets of a smaller size. And he offered to prove by another of the witnesses that about the same time he called at John Wanamaker's establishment in Philadelphia, and, upon inquiry at the toy department thereof, was informed that the articles in question were not sold in that department as toys, but were to be found in the regular china or crockery department, and that he thereupon went to that department, and was shown such articles. The court excluded this evidence, and the defendant excepted to its exclusion.

The only other witness for the defendant testified, without objection by the plaintiffs, that he had been for two years in Mr. Wanamaker's employ as assistant manager of the crockery, china and glass department; that he knew the articles in question in his business; that they were known to the trade as plates, cups, saucers and mugs, and were sold as child's sets, and their principal use was to eat and drink from; that the business in his department was not large in those articles; and

that he knew nothing about a toy department in Mr. Wanamaker's establishment, except by passing through it.

The defendant requested the court to give to the jury the following instructions:

"1st. If you believe that the goods in question are bought, sold and used as earthen, stone or crockery ware, and not as toys, then your verdict should be for the defendant.

"2d. If you believe that the articles in question on March 3, 1883, and prior thereto, were commercially known and designated as earthenware, and if you believe that they were not at that time described and designated as toys, then it is immaterial how they have since been known and designated, and your verdict should be for the defendant.

"3d. If you believe that the articles in question are known as earthenware in the trade, and are chiefly used as other articles of earthenware, stone and crockery ware are used, and are not chiefly used as playthings for children, then your verdict should be for the defendant.

"4th. The circumstance that the articles in question may possibly be used for purposes other than household purposes is not controlling, and, even if you believe that sometimes they are incidentally used by children as playthings, your verdict should be for the defendant if you believe that their chief use is for household purposes and that they are not known as toys in the trade.

"5th. If you find that there is no trade designation of these articles as toys, then the question becomes purely and simply one of fact, viz.: what is the predominating use to which these articles are devoted, and if you believe that they are not chiefly used as playthings for children, then your verdict should be for the defendant.

"6th. If you believe that the articles in question are bought and sold under the names of a cup, saucer and plate, and not under the name of toys, then your verdict should be for the defendant.

"7th. A 'toy' is an article used exclusively for the amusement of children; and if you believe that the articles in question are chiefly used by children otherwise than as playthings, then

they are not toys within the meaning of the tariff act, and your verdict should be for the defendant; provided the word 'toys' has no special trade meaning.

"8th. Upon the evidence in this case, the term 'toys' should not be given any technical or particular or commercial meaning, but should receive its proper signification and natural import; and if the articles in question are not 'toys' in the popular and general sense of the term, but are used for ordinary household purposes, like other articles of earthenware, and if such use is predominating, and not exceptional, then your verdict should be for the defendant."

The court gave all those instructions, except the third; declined to give the third, because "if they were denominated toys by the trade at that time, then it is unimportant how they were used;" and instructed the jury that all the subsequent instructions were predicated upon the idea that the jury "do not find this term 'toy' to have a trade signification." To this instruction, as well as to the refusal to give the third instruction requested, the defendant excepted.

The court further instructed the jury that the signification of the term "toys," in common speech, embraces only such things as are primarily intended for the entertainment and amusement of children; that "the term 'toys,' used in the statute, is to receive the signification ordinarily attributed to it in common speech, unless the evidence shows that it has a different trade signification, that is, that it is differently used and understood when applied to such merchandise by those engaged in commerce respecting it, and had such different signification at the date of the statute in 1883;" that, if it had such different signification in trade and commerce, the statute must be understood as using the term in that sense; that the evidence seemed to put beyond doubt that the term had a well understood trade signification, inasmuch as the witnesses on both sides testified that at and before the date of the statute it was in common use among those engaged in this branch of commerce, and differed only as respected the scope of its application; and concluded the instructions to the jury as follows: "If you find that the term in question has a well

known trade signification, (had at the date of the statute,) and that these articles fall within it, your verdict must be for the plaintiff, no matter whether the trade designation seems to you to be reasonable or not. If you do not so find, your verdict must be for the defendant."

To those passages of the instructions given, which are above printed in quotation marks, the defendant excepted, and, after verdict and judgment for the plaintiff, sued out this writ of error.

Mr. Assistant Attorney General Whitney for plaintiff in error.

Mr. Frank P. Prichard for defendant in error.

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

The question in this case is whether four invoices of small earthenware cups, saucers, mugs and plates, having upon them letters of the alphabet and figures of animals or the like, are to be classed, under the tariff act of 1883, as "toys," subject to a duty of thirty-five per cent, or as "earthenware, decorated or ornamented in any manner," subject to a duty of sixty-five per cent *ad valorem*.

The jury were instructed that the word "toys," in common speech, means playthings for children; that the word was to have that meaning in this case, unless the evidence showed that at the time of the passage of the tariff act it had a different trade signification, that is, that it was differently used and understood when applied to such merchandise by those engaged in commerce respecting it; and that, if it then had a well known trade signification, the statute must be understood as using it in that sense. The principal exception of the defendant is to this last instruction. The words "trade" and "commerce" were evidently used, throughout the instructions requested and those given, as including both domestic and foreign traffic in this country.

The instruction excepted to was in accordance with the uniform current of decision in this court. It has long been a settled rule of interpretation of the statutes imposing duties on imports, that if words used therein to designate particular kinds or classes of goods have a well known signification in our trade and commerce, different from their ordinary meaning among the people, the commercial meaning is to prevail, unless Congress has clearly manifested a contrary intention; and that it is only when no commercial meaning is called for or proved, that the common meaning of the words is to be adopted. *United States* v. *Chests of Tea*, 9 Wheat. 430, 438; *Tyng* v. *Grinnell*, 92 U. S. 467; *Arthur* v. *Butterfield*, 125 U. S. 70; *Robertson* v. *Salomon*, 130 U. S. 412, 415; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468; *Toplitz* v. *Hedden*, 146 U. S. 252; *Nix* v. *Hedden*, 149 U. S. 304. Among the words to which this rule has been applied are "refined sugar," *Barlow* v. *United States*, 7 Pet. 404; "sugar" and "syrup," *United States* v. *Casks of Sugar*, 8 Pet. 277; "wool" and "worsted," *Elliott* v. *Swartwout*, 10 Pet. 137; "cotton bagging," *Curtis* v. *Martin*, 3 How. 106; "silk veils," *Arthur* v. *Morrison*, 96 U. S. 108; "bar iron," *Worthington* v. *Abbott*, 124 U. S. 434; "furniture finished," *Hedden* v. *Richards*, 149 U. S. 346.

None of the cases cited in behalf of the collector have any tendency to shake this rule; but all of them depended on special provisions of the statutes.

The case of *Maillard* v. *Lawrence*, 16 How. 251, which was much relied on, arose under the act of July 30, 1846, c. 74, imposing a duty of thirty per cent on "clothing ready made, and wearing apparel of every description, of whatever material composed, made up or manufactured wholly or in part by the tailor, sempstress or manufacturer;" and a duty of twenty-five per cent on "manufactures of silk, or of which silk shall be a component material," and on "manufactures of worsted, or of which worsted shall be a component material." 9 Stat. 45, 46. It was because of the peculiar language of the first of those clauses, making the designed object and actual use of the things the sole test, that this court, affirming the

judgment of the Circuit Court in 1 Blatchford, 504, held that the words "wearing apparel" must be given their natural and ordinary meaning, and that evidence that shawls of silk or of worsted were not known in trade and commerce as "wearing apparel" was not admissible to show that they were not included in that clause. In the Circuit Court, Mr. Justice Nelson said that "this phraseology, for the purpose of describing a dutiable article, was used for the first time in the act of 1846, and was introduced for the purpose of describing a class of articles, not as known in trade and commerce by any particular appellation, but by the actual use for which they were designed, and to which they were adapted, taken in connection with the fact that they were made up or manufactured wholly or in part by the tailor, sempstress, or manufacturer;" and that "Congress intended to depart from the commercial designation as the test to determine the description within which the duty should or should not be charged, and to leave such determination to the test of the actual use of the article." 1 Blatchford, 505. And Mr. Justice Daniel, in delivering the judgment of this court, said that it must be understood as being the intention of the legislature to comprise "every article which in its design and completion and received uses is an article of wearing apparel," "no matter of what material composed, either in whole or in part, or by whom composed or made up." 16 How. 260.

The decision in *De Forrest* v. *Lawrence*, 13 How. 274, was an application of the rule that where goods of a particular kind, which would otherwise be comprehended in a class described by a term having a settled commercial signification, have been described in the customs laws by a more specific designation and subjected to a distinct rate of duty from that imposed upon the class generally, they are taken out of that class for the purpose of the assessment of duties. See *Seeberger* v. *Cahn*, 137 U. S. 95, 98, and cases cited.

In *Greenleaf* v. *Goodrich*, 101 U. S. 278, and in *Schmieder* v. *Barney*, 113 U. S. 645, the extent of the decision was that the phrase "of similar description" was not a technical or commercial term; and that, while it might be competent to

ask merchants and importers what the words, in the act of July 14, 1862, c. 163, (12 Stat. 553,) "goods of similar description to delaines" were commercially understood to mean, they could not be asked whether in their opinion the goods in question were of similar description to delaines.

In *Barber* v. *Schell*, 107 U. S. 617, 621, the words held not to be affected by commercial usage were "all manufactures composed wholly of cotton, which are bleached, printed, painted or dyed." Act of March 3, 1857, c. 98, § 2; 11 Stat. 193. That designation, as observed by Mr. Justice Blatchford, speaking for this court, and following the decision of Mr. Justice Nelson in *Reimer* v. *Schell*, 4 Blatchford, 328, was a designation of articles by special description of quality or material, as contradistinguished from designation by a commercial name.

In *Newman* v. *Arthur*, 109 U. S. 132, the decision was that the clear meaning of the provisions of section 2504 of the Revised Statutes, fixing the rate of duty on manufactures of cotton by a classification based on the number of threads to the square inch, without reference to the mode of counting, could not be controlled by evidence as to what goods were usually bought and sold by the count of threads.

No reason is shown for taking the present case out of the general rule. The tariff act of 1883 contains nothing from which it can be inferred that the word "toys" is used therein in any other than its commercial meaning. At the trial the witnesses on both sides testified that there was a class of earthenware goods commonly known in trade and commerce as toys. They differed, indeed, upon the question whether these articles came within that class; the plaintiffs' witnesses testifying that they did, and the defendant's witnesses that they did not. But the comparative weight to be allowed to the different witnesses, or classes of witnesses, was a matter for the consideration of the jury. If the whole testimony in the case enabled the jury to determine whether the articles in question were commercially known as toys, their commercial designation by those carrying on the business of dealing in them was a safer test, and more in accord with the apparent

intent of Congress, and with the rule of construction judicially established in similar cases, than to leave the question, whether "toys" or "earthenware" was the fitter name for these articles, to be decided by the opinion of jurors, based upon their personal knowledge or experience. The jury having been distinctly instructed that if they found that there was no trade designation of these articles as toys, and that they were not chiefly used as playthings for children, the verdict should be for the defendant, the defendant has no just ground of exception to the instructions given, or to the refusal to instruct as requested.

The only other exception argued is to the exclusion of the testimony of two witnesses as to what each of them was told, upon inquiring for such articles, at a large toy-shop in Philadelphia just before the trial. This testimony was rightly excluded. Upon the question of the ordinary meaning of the word "toys," it was irrelevant. If such testimony could have been competent under any circumstances to prove a commercial meaning, (which we do not intimate,) it certainly had no tendency to prove what that meaning was at the time of the passage of the act of 1883. *Judgment affirmed.*

SOUTHWORTH *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 171. Argued December 15, 18, 1893. — Decided January 8, 1894.

8283 complaints being made to a commissioner of a Circuit Court charging that number of persons with violating the provisions of Rev. Stat. § 5512, by fraudulently obtaining registration in Louisiana, that number of warrants were issued and delivered to the marshal. 6903 of the persons against whom the warrants issued were not found. 1380 were arrested, 77 of whom were held for trial, and the remaining 1303 on examination were discharged. The commissioner presented his account to the court, claiming in each of the 8283 cases the fee of $10, allowed by Rev. Stat. § 1986 for "his services in each case, inclusive of all services incident to the arrest and examination." The Circuit Court approved and allowed the claim only as to the 77 cases, and that was paid. The commissioner

Statement of the Case.

brought suit in the Court of Claims to recover a fee of $10, in each of the other 8206 cases. The government demurred to the petition, and it was dismissed. The claimant appealed from this judgment. *Held,*

(1) That the refusal of the Circuit Court to approve the account of the commissioner, though no bar to the recovery, might be a matter for consideration in respect to the good faith of the transaction;

(2) That the payment of the claim for the 77 cases conceded the sufficiency of the complaint on which, in each case, the proceeding was founded;

(3) That when a defendant was arrested and an examination held, there was a criminal case entitling the commissioner to a fee, although the examination resulted in a discharge;

(4) That when no arrest was made, and no examination took place, no case had arisen within the meaning of Rev. Stat. § 1986, entitling the commissioner to a fee.

This is an appeal from a judgment of the Court of Claims. The action was commenced by John P. Southworth on December 16, 1882, to recover the sum of $82,830, for services as a Circuit Court commissioner for the District of Louisiana. The petition alleged that during the year 1876, 8283 complaints were made to him as such commissioner, charging certain persons named therein with the violation of section 5512, Revised Statutes; that on such complaints the petitioner, as commissioner, duly issued warrants against the persons named, and delivered them to the marshal of the district; that of the persons named in these complaints and warrants 6903 were not found, and 1380 were arrested; that of those arrested 77 were held for trial, while the remaining 1303 were, on examination, discharged.

The complaints are stated to have all been in this form:

"United States of America.

"District of Louisiana,
Parish of Orleans.

"——, ——, having been duly sworn, each for himself, on oath says, that he is a citizen of the State of Louisiana, residing in and a qualified elector of said parish of Orleans, duly registered, and that his name appears as a registered elector or voter upon the registration books of said parish for the year 1876; and they further say, each for himself, that they have

made due and diligent personal inquiry for ——, registered upon the registration book of the —— ward of the city of New Orleans, No. —, and claiming to reside at No. — —— street in said ward and city; and that said —— does not reside in said —— ward or parish of Orleans aforesaid; that therefore said ——, on or about the — day of ——, 187–, did fraudulently obtain registration as aforesaid in said —— ward and parish as stated, as an elector in said ward and parish, contrary to the 21st section of act No. 155 of the session of 1874, of the general assembly of the State of Louisiana, and contrary to and in contravention of section 5512 of the Revised Statutes of the United States.

—— ——.

—— ——.

"Sworn to and subscribed on the — day of ——, 1876.

"JNO. P. SOUTHWORTH,

[L. S.] "*United States Commissioner of the Circuit Court in and for the District of Louisiana.*"

The petition further alleged that the petitioner, as commissioner, made a docket entry of all the proceedings in each case, as required by law, including therein the title of the case with the name of the defendant, the drawing of the affidavit or complaint and the date of the same, the issuing of the warrant and its date, the return of the officer, the arrest and examination of the person charged in each case where an arrest was made, the number of oaths administered and affidavits filed, and that he also kept full and correct files in each case of all the papers therein, including affidavits, warrants, etc.; that he presented his account, duly verified by his oath, to the district attorney of said District of Louisiana, who submitted the same in open court to the District Court, and the court passed upon the same by approving the account as to the seventy-seven cases in which the persons arrested were held for trial, the amount of which was, as afterwards admitted, paid by the government, and disallowing and refusing to certify the same as to the other cases. It further alleged a presentation of his claim to the proper accounting

officers of the United States for settlement, and their refusal to allow the same.

A demurrer to this petition having been sustained, 19 C. Cl. 278, the plaintiff amended, by adding allegations to the effect that act No. 50 of the session laws of the general assembly of Louisiana, for the year 1874, required a registration of voters for the election in 1876, and showing in a general way the facts and circumstances which justified the commissioner, as claimed, in finding that there was probable cause to believe that offences had been committed, and in issuing the warrants.

A demurrer to this amended petition was thereafter filed and sustained, and judgment rendered dismissing the petition.

Pending the proceedings in the Court of Claims the petitioner died, and the suit was revived in the name of the present plaintiff, his executrix.

Section 5512, Revised Statutes, is in chapter seven of the title "Crimes." By section 1982 the commissioners, with other officers, are "authorized and required, at the expense of the United States, to institute prosecutions against all persons violating any of the provisions of chapter seven of the title 'Crimes,'" and by section 1986 the commissioner is "entitled to a fee of ten dollars for his services in each case, inclusive of all services incident to the arrest and examination."

Mr. George A. King and *Mr. Lewis Abraham* for appellant.

Mr. Assistant Attorney General Dodge for appellee.

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

The magnitude of this claim is startling. If the fact be, as stated in the report of the Comptroller, attached as an exhibit to the petition, that these complaints were filed and warrants issued during the twelve days from October 26 to November 6, or at the rate of about seven hundred a day, as only one out of six of the persons named was ever found and arrested,

it is calculated to arouse a suspicion that these proceedings were not had in the due and orderly administration of criminal law, and with a view to the arrest and punishment of offenders, but rather for the sake of rolling up a pecuniary claim against the government, or from some other equally dishonest motive. But it does not follow that the demurrer was properly sustained or that the claim can rightfully be denied by reason of the mere suspicion of wrong. If there had been but a single case before the commissioner, and the proceedings in that, as stated, be sufficient to establish a valid claim against the United States, then the demurrer ought to have been overruled, for the mere multiplication of the cases, even into the thousands, does not, as a matter of law, disclose any illegality. The facts attending the prosecutions should be fully presented in order that the *bona fides* of the transaction may be determined. We pass, therefore, to consider the petition as though it alleged but one case before the commissioner, one complaint filed, one warrant issued, and one party arrested.

That the refusal of the court to approve the account is no bar to the action is settled by *United States* v. *Knox*, 128 U. S. 230, although such refusal may be a matter for consideration in respect at least to the good faith of the transaction. *United States* v. *Jones*, 134 U. S. 483.

It is insisted by the government that the complaint does not state an offence; that in consequence there was no foundation for the issue of the warrant, or for the subsequent proceedings, and hence that there was in law no case before the petitioner as commissioner. We quote from the brief this statement of the alleged defects:

"It is not alleged that the accused did register; nor that he had no lawful right to register; nor that the registration books upon which his name appeared were made for an election at which a Representative in Congress might be chosen; nor, indeed, for any election whatever.

"It is, of course, perfectly clear that the affiants do not pretend to swear, as to facts, that accused fraudulently obtained registration contrary to law, but merely to express

a conclusion from the fact of non-residence at a certain place."

It may be conceded that the offence is not stated with the fulness and technical accuracy required in an indictment, but we do not think that the complaint can be treated as an absolute nullity. In the seventy-seven cases in which the parties were arrested and held for trial it would seem that its sufficiency was conceded, for the account therefor was allowed and paid. While no estoppel is created by the act of the government in making such payment, yet it is significant as showing that no technical accuracy in a complaint is considered essential. Doubtless the defect in a complaint may be so great as to suggest a lack of good faith on the part of the commissioner, but it would be placing an undue burden on such officers to hold that their right to compensation rested on the fact that the offence was stated with such precision as to be beyond the reach of challenge. It is sufficient if the complaint is full enough to clearly inform the defendant of the offence with which he is charged. It was well said by the Supreme Court of Alabama, in *Crosby* v. *Hawthorn*, 25 Alabama, 221, 223:

"In preliminary proceedings of this nature, which are usually had before justices of the peace, technical accuracy cannot be expected, and is not required. It is sufficient, if, giving to the language employed its ordinary signification, the court may gather from it that an offence against the criminal law has been committed or attempted. If such proceedings were to be subjected to the rigid rules of criticism, and all the constituent elements of the offence sought to be investigated were required to be set forth in the affidavit or warrant with certainty, the administration of the criminal law would be greatly embarrassed, and offenders would often go unpunished, by reason of the hazard which the justice who issues, the party who procures, and the officer who executes the warrant for arresting them would incur. We must be content to gather the meaning of the party from the affidavit, and disregard the want of technical accuracy of description."

There can be no mistake as to what was intended to be

charged in this complaint. It in effect alleges that the defendant was registered upon the registration books of a named ward, and registered as claiming to reside at a given number on a particular street in that ward; that he did not reside in such place, or in the ward or parish of Orleans, and that, therefore, he was fraudulently registered in violation of a specified section of the statutes. Fraudulent registration is the crime charged, and charged with particularity of section, ward, residence claimed, and section of the statute violated. Whether a party arrested upon a warrant issued on such complaint could be discharged on *habeas corpus*, it is unnecessary to determine. *Ex parte Watkins*, 3 Pet. 193, 203. For it cannot be that a commissioner guarantees to the government the sufficiency of the complaint filed before him, and is entitled to no compensation if it be found defective. If he has proceeded in good faith to render services to the government, acting upon a complaint manifestly intended to charge an offence, and, the defendant having been arrested upon such complaint holding an examination, and rendering a judicial decision thereupon — in the language of the statute, "hearing and deciding on criminal charges," he is entitled to compensation. We conclude, therefore, that this affidavit is not so defective as to deprive the commissioner of a right to compensation for services rendered in good faith in the proceedings founded thereon.

It, of course, cannot be tolerated, in the absence of express language, that compensation is to be paid when the defendant is bound over for trial, and not when he is discharged. That when the defendant is arrested and examination held there is a "criminal case," is clear. *Counselman* v. *Hitchcock*, 142 U. S. 547; *United States* v. *Patterson*, 150 U. S. 65. That, unless there be an arrest and examination, there is no "case" within the meaning of section 1986 is equally clear. The amount allowed, ten dollars, precludes the idea that the mere filing of a complaint and issue of a warrant is sufficient. And the language of the statute is plain. The allowance is "for his services in each case, inclusive of all services incident to the arrest and examination."

Syllabus.

It follows from these considerations that a cause of action was stated as to the 1303 cases in which there was an arrest, examination, and discharge of the defendant, and that the Court of Claims erred in sustaining the demurrer to this petition. Judgment will, therefore, be

Reversed, and the case remanded, with instructions to overrule the demurrer, and for further proceedings in conformity to law.

MILLER *v.* EAGLE MANUFACTURING COMPANY.

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

No. 143. Argued December 11, 12, 1893. — Decided January 8, 1894.

No patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ.

The second patent, in such case, although containing a claim broader and more generical in its character than the specific claims contained in the prior patent, is also void.

But where the second patent covers matter described in the prior patent, essentially distinct and separable, and distinct from the invention covered thereby, and claims made thereunder, its validity may be sustained.

A single invention may include both the machine and the manufacture it creates, and in such case, if the inventions are separable, the inventor may be entitled to a monopoly of each.

A second patent may be granted to an inventor for an improvement on the invention protected by the first, but this can be done only when the new invention is distinct from, and independent of, the former one.

It is only when an invention is broad and primary in its character, and the mechanical functions performed by the machine are, as a whole, entirely new, that courts are disposed to make the range of equivalents correspondingly broad.

The invention claimed and protected by the letters patent issued June 7, 1881, to Edgar A. Wright, for new and useful improvements in wheeled cultivators, was anticipated by the claim in letters patent No. 222,767, granted to him December 16, 1879, for improvements in wheeled cultivators.

The first claim in the said letters patent of June 7, 1881, was anticipated by letters patent No. 190,816, issued May 15, 1877, to W. P. Brown for an improved coupling for cultivators.

The said letters patent of December 16, 1879, in view of the state of the art at that time, are to be limited and restricted, if they have any validity, to the specific spring therein described; and, as thus restricted, they are not infringed by the sale of cultivators manufactured by P. P. Mast & Co. in accordance with various letters patent owned by them.

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

Mr. H. A. Toulmin and *Mr. John T. Morgan* for appellants.

Mr. L. L. Bond filed a brief for appellants.

Mr. George H. Christy, (with whom was *Mr. Nathaniel French* on the brief,) for appellee.

Mr. Justice Jackson delivered the opinion of the court.

The appellee, as assignee of letters patent No. 222,767, dated December 16, 1879, and No. 242,497, dated June 7, 1881, issued to Edgar A. Wright, for certain new and useful improvements in wheeled cultivators, brought this suit against the appellants, who were the defendants in the court below, for the alleged infringement thereof.

The defences made in that court were that Wright was not the first and original inventor of the improvements described in the patents; that the same were shown and described in previous devices and letters patent, set forth in the answer; that the invention shown in each of the patents in suit is identical; that in each the supposed improvements relate to a spring and its attachments; that the function and operation of the parts are exactly the same in each; that one or both of the letters patent in controversy were issued without authority of law, and therefore void; that in view of the state of the art at the date of the alleged improvements of Wright, the letters patent granted to him did not exhibit any patentable invention, and for that reason are invalid; that the defendants were not engaged in the manufacture of cultivators, but have

sold cultivators manufactured by P. P. Mast & Co., of Springfield, Ohio, constructed under and in accordance with various letters patent owned by that company; that they sold the cultivators of this company without notice or reason to suppose that they were an infringement of the patents of Wright, and that they do not, in fact, infringe the same.

The class of cultivators to which the Wright patents in question relate are of the ordinary character of wheeled, straddled-row cultivators, having vertical swinging beams, or drag bars, to carry the shovels or plows, suspended from an arch or frame, mounted on two wheels, a tongue fastened to the frame and beams connected with the horizontal portions of the arch, which serves as an axle for the wheels, and surrounding the axle on each side a pipe box, to which the beam is secured, the pipe box revolving on the axle, and the beam carrying the shovels adjusted so as to swing up or down with the pipe box, according to the direction in which it is turned.

The patented device consists of a round steel rod, or wire spring, having at its fixed end a coil attached to the swinging beam, or plow bars, and extending from the coil a slightly curved arm, the outer end of which terminates in a bend or shoulder, from which the rod continues to form a short arm terminating in a sharp bend, or curl, at the free end of the spring. This spring is so adjusted that the outer or free end thereof bears against the under side of an adjustable grooved roller, fixed upon an outwardly extending arm upon the upright portion of the axle. This spring, with its adjustment, is intended to have a duplex action, covering the double effect, of either raising or depressing the beams carrying the shovels. The curvature of the spring is such that as it moves along the groove of the roller it presses against the latter at different points of its periphery, and thereby the direction of its action is shifted or changed, as the position of the swinging beam is changed. Such changes in the direction of its action will assist in drawing or pulling the beam upwards in a vertical direction, giving it increased leverage as the spring is moved forward in its bearings on the roller.

In his original application, filed May 23, 1879, Wright fully

described his improved device for use in connection with cultivators and claimed for it, not only its lifting and depressing action, but also its lifting power, which increased as the beams were raised.

An interference with other pending applications being anticipated as to the broad claims of the invention, the application was divided, on November 12, 1879, for the purpose of obtaining one patent for the lifting and depressing effect of the spring on the beams, and another for the lifting power of the spring, increasing as the beams rise, the latter being sought upon the original application, while the former was based upon the divisional application of November 12, 1879. Patent No. 222,767, for the double effect or duplex action of the improved spring, was granted on December 16, 1879, and thereafter on June 7, 1881, patent No. 242,497, for the single effect of increased lifting force in raising the plow beams, was granted, after interference had been disposed of.

The court below sustained the validity of both patents, and held that the defendants infringed the first, second, third, fourth, and sixth claims of patent No. 222,767, and the first, second, third, and fourth claims of the patent granted June 7, 1881, (No. 242,497). The complainant waiving an accounting for profits and damages, a final decree was entered, enjoining the defendants from making, using, or selling to others to be used, cultivators constructed and operated in the manner and upon the principle described in the letters patent in controversy. From this decree the present appeal is prosecuted.

The appellants assign numerous errors, which need not be separately noticed and considered, as they are embraced in the general proposition that the court erred in holding that the patents sued on were valid, and that the cultivators sold by the defendants infringed the same.

In the specification, forming part of the letters patent 222,767, issued December 16, 1879, under the divided application filed November 12, 1879, the patentee states:

"The object of my invention is to give the operator mechanical assistance in raising and lowering the plows without interfering with their usual action and movement, to prevent the

plows from rising out of the ground accidentally, and to limit their descent; and to this end the invention consists in a spring which serves the double purpose of lifting or holding down the plows at will, as may be required; in so constructing and applying a spring that it exerts a lifting action on the plow only when the latter is raised above its usual operative position; in so constructing and applying a spring that it limits the descent of the plow; also, in details of minor importance, hereinafter described.

"In carrying out my invention the one spring may be adapted to serve all or either one or more of the offices above enumerated, and may be modified in its form, construction, and arrangement, as desired, provided its mode of action is retained."

It further stated that the improved springs may be attached to either the plows, as shown in figures 1 and 2, or to the axle, as shown in figure 3, on the opposite page.

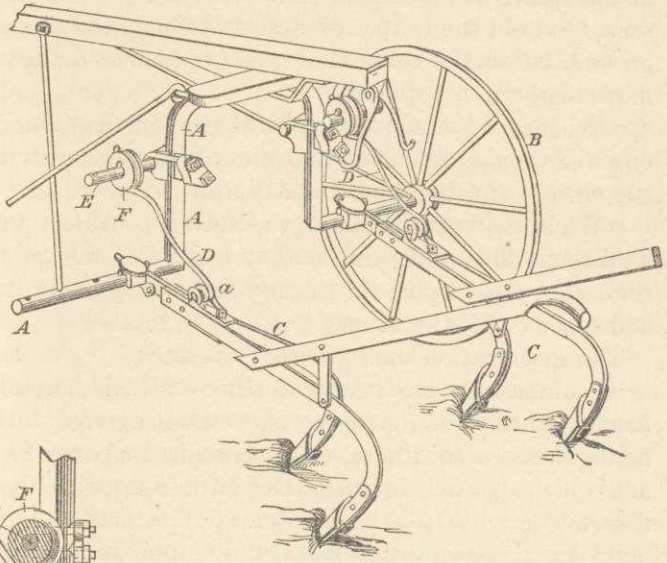
The improvements are described in the specification as follows:

"As shown in Figs. 2 and 3, each spring consists of a round steel rod or wire having at the fixed end a coil, *a*, and extending from the coil a long slightly-curved arm, *b*, the outer end of which terminates in a sharp bend or shoulder, *c*, from which the rod continues to form a short arm, *d*, the end of which has a sharp bend or curl, *e*, as represented in Figs. 2 and 3.

"When the spring is to be applied to the plow beam, as shown in Figs. 1 and 2, I first provide the upright portion of the axle with an outwardly-extending arm or rod, E, carrying a laterally-adjustable grooved roller, F, to serve as a bearing for the free end of the spring. The coiled end of the spring is then seated in a metal bearing-plate, G, which is secured rigidly but adjustably to the beam by means of a bolt, H, as shown, the free end of the spring being at the same time seated against the under side of the roller, and the parts so adjusted that when the beam is in its lowermost position the extreme end *e* of the spring will bear against the front of the roller, and the spring be under a strong tension.

"When the beam and its shovels are down in an operative position, so that the shovels enter the ground, the portion *d*

Fig. 1.



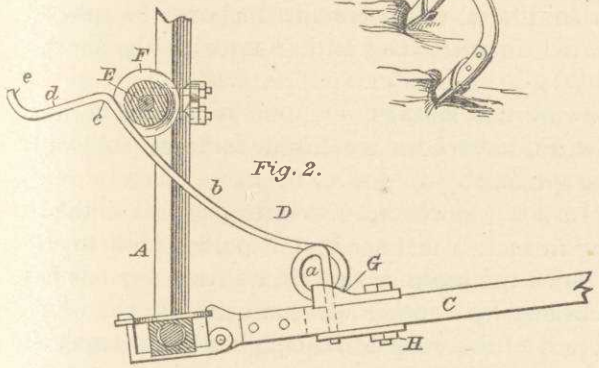


Fig. 2.

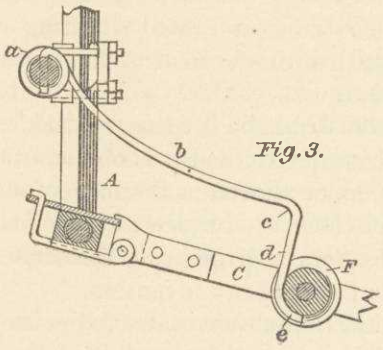


Fig. 3.

of the spring bears beneath the roller, as shown in Fig. 1, and serves to hold the beam down, so as to keep the shovels in the ground, but at the same time allows them a limited vertical movement when required.

"Whenever the shovels enter to the full depth desired, the end *e* of the spring encounters the roller, and serves to check the descent and to suspend the beams.

"When the beam is raised, the spring continues to urge or hold them down until the bend or angle *e* of the spring passes the roller, whereupon the spring instantly changes its action, and tends to lift the beam."

The specification then proceeds to state:

"I am aware that cultivator plows have heretofore suspended when in action by springs which exerted little or no lifting force when the shovels were lifted above the ground, and which exerted an increasing lifting force as the shovels descended.

"I am also aware that springs actuated by manual devices, and not automatic, have been employed to force cultivator shovels into the ground.

"I am not aware, however, that any one has hitherto applied a spring in such a manner that it served both to elevate and hold down the beam or shovels, nor that any one has suspended the beams by a spring which would lift the whole or the greatest part of the weight to the highest point required, and still permit an easy motion of the shovels in the ground with little or no tendency to rise therefrom; neither am I aware that any one has ever caused a lifting or depressing spring, which permitted a movement of the beam and shovels, to limit their descent.

"I therefore claim to be the inventor of each and all of said features, broadly considered; and it is obvious that they may be changed, modified, or altered in the form of embodiment as desired, it being obvious to the skilled mechanic that there are many equivalent ways of securing the same end without departing from the limits of my invention.

"I do not claim in the present patent the broad idea of a lifting spring which acts with increasing force as the beam

rises, as I have made the same the subject of a separate application bearing date prior hereto; but,

"Having described my invention, what I do claim is —

"1. In combination with a vertically-swinging beam or drag-bar, a spring, substantially as described and shown, arranged to urge the beam downward when in action and urge it upward when it is lifted above the operative position.

"2. In combination with a vertically-swinging beam or drag-bar, a double-acting automatic spring, substantially as described, serving the double purpose of holding the beam down to its work and of assisting to lift it when it is thrown out of action.

"3. In combination with a vertically-swinging beam or drag-bar, a spring, substantially as shown, adapted to exert an automatic spring action upward or downward upon the beam, according to the position of the latter.

"4. In a cultivator, the combination of a frame, a vertically-swinging beam or drag-bar attached thereto, and an automatic spring, substantially as described, connected with one of said members, and arranged to urge the beam downward while the latter is in an operative position, but not when it is raised above said position. . . .

"6. In a cultivator, the combination of a main frame, a vertically-moving beam or drag-bar connected therewith, and a spring, substantially as described, interposed between said parts and acting vertically upon the beam, said spring being constructed and arranged to pass a centre or dead point as the beam moves vertically, and in passing said point cease or change the direction of its action on the beam."

The second patent, No. 242,497, issued June 7, 1881, while describing in both the specification and the drawings the same invention or device covered by the patent of December 16, 1879, attempts to limit the invention and patent to the lifting operation of the springs, increasing as the beams are raised. The specification, forming a part of this patent, states that —

"The invention relates to that class of machines, generally wheeled, which have vertically-swinging beams or drag-bars

to carry the shovels or plow points; and the object of the invention is to render the operations of the machine easier and less laborious to the attendants by applying springs thereto in such manner that they will assist the operator in raising the beams and shovels attached thereto from their operative to their inoperative positions, and this without having the springs exert any objectionable lifting strain upon the beams when the latter are in action.

"To this end the invention consists in applying lifting springs in such manner that they exert upon the beams a maximum power or strain when the latter are above an operative position.

"The spring, operating in accordance with my improved plan, may be made and applied in various forms, which will readily suggest themselves to the skilled mechanic without departing from the limits of my invention.

"My springs may be arranged to sustain the whole or any desired portion of the weight of the beams when the latter are raised, and they may be arranged to exert a slight lifting strain when the beams are in action, or, if preferred, arranged to cease their lifting strain entirely at such time.

"The essential feature of my invention consists in applying a lifting spring or springs in such manner that they do not increase their lifting strain as the beam is depressed, the construction preferred being such that the springs exert an increased lifting action as the beams rise from an operative to an inoperative position.

"I am aware that springs have been applied in various ways to assist in lifting the beams in this class of machines; but in all cases their arrangement was such that they acted with an increased lifting strain as the beams were lowered, the consequence of which arrangement was, that the springs exerted their greatest upward strain when the shovels were in the ground, at the time when it was desirable that the shovel should not be lifted, and on the other hand, exerted but little force when the beams were elevated, and when it was required that they should be sustained to relieve the operator. This old action, it will be seen, is the reverse of that which is

desired, and the principal object of my invention is to reverse the old mode of action and have the springs act with little or no upward strain when the shovels are in the ground, but with a strong upward pressure when the beams are lifted.

"The accompanying drawings illustrate one manner of embodying my invention. The springs represented in the drawings are adapted to serve the double purpose of holding the beams down, and of lifting them, or assisting to lift them, when they are raised above an operative position. No claim is made in the present case to this duplex action of the springs, nor to the peculiar form or arrangement of the springs, otherwise than as regards the feature of exerting an increasing or a maximum strain on the beams as the latter rise, the peculiar construction of the spring being already covered in a patent hitherto granted to me."

After describing the drawings and the operation of the spring, the specification proceeds as follows:

"While it is believed that the form of spring represented in the drawings is preferable to all others, the invention includes, as before stated, any spring so combined with the beam or its equivalent that a greater or stronger lifting force or effect is exerted upon the beam when the latter is above the operative position than when it is in use; or, in other words, the invention includes any and all beam-lifting springs the effect of which is lessened or avoided when the beam descends to an operative position.

"I believe myself to be the first to apply a spring in such manner as to secure the above mode of action, and the first to so apply a spring in such manner that as it loses tension it acts with an increasing force or effect to lift the beam, or, in other words, with an effect which is not lessened by the decrease in the tension of the spring within the usual limits of operation.

"Among other arrangements which may be substituted for that shown is that of having a radius bar or link introduced between the spring and beam as a substitute for the curved spring and roller."

Having thus described his invention, the patentee claimed —

"1. In a cultivator, the combination of a vertically swinging drag-bar or beam and a lifting spring which acts with increasing force or effect on the beam as the latter rises, and *vice versa*.

"2. In a wheeled cultivator, the combination of a vertically moving beam and a lifting spring, substantially as described, whereby an increasing upward strain is communicated to the beam as the latter rises.

"3. The combination of a wheeled frame, a vertically moving beam or drag-bar attached thereto, and a lifting spring, substantially as described, which exerts a greater strain or effect upon the beam when the latter is elevated than when it is depressed.

"4. The combination of a vertically moving beam, a lifting spring, and a shifting or changing bearing or fulcrum, whereby the lifting action or effect of the spring upon the beam is increased as the beam is elevated, substantially as described and shown."

It is not deemed necessary to make a separate analysis of the respective claims alleged to be infringed.

The novelty of Wright's invention consists, as held by the court below, in the application of a double acting spring to assist the operator in either lifting the plow beams, or the plows attached thereto, or in sinking them deeper in the earth, as occasion might require, while the cultivator is in service. The first patent, issued in 1879, covered both the lifting and depressing actions or operations, while the second patent covered only the lifting effect. The spring device which was designed to accomplish these effects, or operations, is the same in both patents. The drawings in each of the patents are identical, and the specification in each is substantially the same. Under these circumstances can it be held that the second patent has any validity, or must it be treated as having been anticipated by the grant of the 1879 patent? If, upon a proper construction of the two patents — which presents a question of law to be determined by the court, (*Heald* v. *Rice*, 104 U. S. 737, 749,) and which does not seem to have been passed upon and decided by the court below — they should be

considered as covering the same invention, then the later must be declared void, under the well-settled rule that two valid patents for the same invention cannot be granted either to the same or to a different party.

Thus in *Suffolk Company* v. *Hayden*, 3 Wall. 315, it was held that where two patents, showing the same invention or device, were issued to the same party, the later one was void, although the application for it was first filed, thereby deciding that it is the issue date and not the filing date which determines priority to patents issued to the same inventor on the same machine.

In *James* v. *Campbell*, 104 U. S. 356, 370, 382, the court say: "It is hardly necessary to remark that the patentee could not include in a subsequent patent any invention embraced or *described* in a prior one, granted to himself, any more than he could an invention embraced or described in a prior patent granted to a third person. Indeed, not so well; because he *might* get a patent for an invention before patented to a third person in this country, if he could show that he was the first and original inventor, and if he should have an interference declared. . . . If he was the author of *any other* invention than that which the specification describes and claims, though he might have asked to have it patented at the same time, and in the same patent, yet, if he has not done so, and afterwards desires to secure it, he is bound to make a new and distinct application for that purpose, and make it the subject of a new and different patent." When a patentee anticipates himself, he cannot, in the nature of things, give validity to the second patent.

In *Mosler Safe Co.* v. *Mosler*, 127 U. S. 354, it was held that a patent having issued for a product, as made by a certain process, a later patent could not be granted for the process which results in the product.

In *McCreary* v. *Pennsylvania Canal Co.*, 141 U. S. 459, 467, it was held that where a party owned two patents, showing substantially the same improvement, the second was void, the court saying: "It is true that the combination of the earlier patent in this case is substantially contained in the later. If

it be identical with it, or only a colorable variation from it, the second patent would be void, as a patentee cannot take two patents for the same invention."

In *Underwood* v. *Gerber*, 149 U. S. 224, it was ruled that where a patentee obtained two patents on the same day, upon applications filed on the same day, they could not be treated as one patent with two claims, and that the complainant in suing upon the second, or the one having the latest number, could not use the first, or the one with the earlier number, to help sustain the action.

In *Odiorne* v. *Amesbury Nail Factory*, 2 Mason, 28, the reason for the rule since established by the above cited cases was stated to be that the power to create a monopoly is exhausted by the first patent; and for the further reason that a new and later patent for the same invention would operate to extend or prolong the monopoly beyond the period allowed by law.

The result of the foregoing and other authorities is that no patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ; that the second patent, although containing a broader claim, more generical in its character than the specific claims contained in the prior patent, is also void; but that where the second patent covers matter described in the prior patent, essentially distinct and separable from the invention covered thereby and claims made thereunder, its validity may be sustained.

In the last class of cases it must distinctly appear that the invention covered by the later patent was a separate invention, distinctly different and independent from that covered by the first patent; in other words, it must be something substantially different from that comprehended in the first patent. It must consist in something more than a mere distinction of the breadth or scope of the claims of each patent. If the case comes within the first or second of the above classes, the second patent is absolutely void.

It is insisted on the part of the appellee that "whether this invention shall be protected in part of its *features* by one

patent, and as to the rest by another, or shall be completely protected by a single patent, is a matter which concerns solely the Patent Office and the inventor." Under the rule announced in the foregoing authorities this proposition cannot be sustained.

The second and principal contention of the appellee is that the patent of 1881 covers a distinct and separate invention from the first, and in support of that proposition the appellee relies upon the rule announced in *Garratt* v. *Seibert*, 98 U. S. 75, 77; *Sewall* v. *Jones*, 91 U. S. 171, 190, and *Merrill* v. *Yeomans*, 94 U. S. 568. These cases do not, however, establish the appellee's position.

In *Garratt* v. *Seibert* the arrangement for the operation of the device in the second patent was entirely different from the original patent. In *Sewall* v. *Jones* it was held that there might be a patent for the process and one for the product. In *Merrill* v. *Yeomans* it was held that where a patent described an apparatus, a process, and a product, and the claims covered only the apparatus and the process, the law provided a remedy by a surrender of the patent and a reissue, for the purpose of embracing the product.

A single invention may include both the machine and the manufacture it creates, and in such cases, if the inventions are really separable, the inventor may be entitled to a monopoly of each. It is settled also that an inventor may make a new improvement on his own invention of a patentable character, for which he may obtain a separate patent, and the cases cited by the appellee come to this point, and to this point only, that a later patent may be granted where the invention is clearly distinct from, and independent of, one previously patented.

It clearly appears from a comparison of the two patents, and their respective specifications and drawings, that the first function or object of the patent of 1879, relating to the lifting power of the spring, is identical with the sole object or function covered by the patent of 1881, and that the improved device and combination for the accomplishment of the lifting operation are identical in both patents.

The invention covered by the first patent, as stated in the specification, consists in a spring which serves the double purpose of *lifting* or *holding* down the plows at will; and it is further stated that one spring may be adapted to serve all, or either one, or more, of the offices above enumerated.

The patent of 1879 thus embraces both the lifting and the depressing effects or operations of the spring device, while that of 1881 seeks to cover only the increased lifting effect of the same device. The first patent clearly includes the second. No substantial distinction can be drawn between the two, which have the same element in combination, and the same spring arrangement and adjustment to accomplish precisely the same lifting effect, increasing as the beams are raised from their operative positions. The matter sought to be covered by the second patent is inseparably involved in the matter embraced in the former patent, and this, under the authorities, renders the second patent void.

If the two patents in question had been granted to different parties, it admits of no question that the last would have been held an infringement of the first, for the reason that the patent of 1879 just as clearly includes as a part of the invention the increased lifting effect of the spring device, increasing as the beams are raised, as that disclosed in the patent of 1881. It certainly did not involve patentable novelty to drop or omit from the patent a claim for the depressing action of the spring arrangement which might be effected by any mere mechanical contrivance.

This view of the case is sustained by the statement in the specification forming a part of the patent of 1881, in which it is said: "The springs represented in the drawings are adapted to serve the double purpose of holding the beams down, and of lifting them, or assisting to lift them, when they are raised above the operative position. No claim is made in the present case to this duplex action of the springs, nor to the peculiar form or arrangement of the springs otherwise than as regards the feature of exerting or increasing a maximum strain on the beams, as the latter rise, the peculiar construction of the spring being already covered in a patent hitherto granted to me."

This statement admits that the peculiar construction of the spring device, by means of which the lifting effect was to be accomplished, was already covered in a patent previously granted to the patentee — referring to the patent of 1879. In thus admitting the existence of a prior patented device, identical with that described in the second specification and drawings, it is difficult to understand upon what principle the patentee can be allowed to withdraw from the operation of such prior patent, one of its distinct elements, and make it the subject of a second distinct patent. It is not the result, effect, or purpose to be accomplished which constitutes invention, or entitles a party to a patent, but the mechanical means or instrumentalities by which the object sought is to be attained, but a patentee cannot so split up his invention for the purpose of securing additional results, or of extending, or of prolonging the life of any or all of its elemental parts. Patents cover the means employed to effect results. *Rubber Tip Pencil Co.* v. *Howard*, 20 Wall. 498, 507; *Fuller* v. *Yentzer*, 94 U. S. 288.

The prior invention covered the means, and the only means, by which the results sought by the patent of 1881 were to be accomplished, and it is settled that the patentee of such prior device would be entitled to all of its uses, whether described or not. *Roberts* v. *Ryer*, 91 U. S. 150; *Stow* v. *Chicago*, 104 U. S. 547. Under these authorities a single element or function of a patented invention cannot be made the subject of a separate and subsequent patent, and it, therefore, follows that this *increased* lifting effect of the spring device, sought to be covered by the 1881 patent, being clearly shown and described in the specification, drawings, and claims of the 1879 patent, was not the subject-matter of a valid patent.

This conclusion is no way affected by the reservation attempted to be made in the 1879 patent, of the "broad idea of a lifting spring which acts with increasing force as the beam rises," for the reason that the broad idea sought to be reserved is embodied in identically the same mechanical device constituting the invention and covered by the first patent, which completely occupies all the ground that was reserved. The

spring and its connecting apparatus is the same in each patent, and the claims of the first covered the double automatic action — *upward* or *downward*. There is nothing in the specification or claims to indicate that in the first patent the lifting action is in any degree slighter or weaker, as the beam rises, than in the second patent. On the contrary, both specifications clearly indicate that the spring device acts with increasing force in each patent as the beam rises.

In addition to this, it distinctly appears that every claim of the 1881 patent could have been properly included and made a part of the claims of the 1879 patent. With the exception of the first broad claim of the 1881 patent, each of the other claims include the spring device with the limiting and qualifying words, "substantially as described," and by virtue of its reference to the specification, the lifting element of the spring device is shown to be the same in each patent. There is nothing in either patent, or the specification or claims thereof, to indicate that there is any greater or stronger lifting action in the one than in the other. It is thus shown that one and the same mechanical device, which covers the entire invention, is described in each of the patents; and the effort to secure a second patent on one part thereof, or on its function, after such part or its action had been clearly described and covered by a prior patent, cannot be sustained.

To hold under these circumstances that the first and second patents, in respect to the lifting effect of the same spring device, present distinct inventions, or that both are valid for the same invention, would involve the drawing of distinctions too refined for the practical administration of the patent law.

But aside from this 1879 patent, we think that the broad claim of the 1881 patent is clearly anticipated by the patent of W. P. Brown, No. 190,816, dated May 15, 1877, for an improved coupling for cultivators. The specification, forming a part of this patent, states that to "render the manipulation of the plows or cultivator easy, I provide an arrangement whereby either springs, weights, or the draft bar may be utilized for sustaining a part of the weight of the said cultivators, when they are lifted from the ground to be hung up or shifted late-

rally. In accomplishing this I construct the pipe box with a hooked arm *m* to lock the pipe box; and as the cultivator beam in the rear is rigidly attached to the pipe box, by the stirrup or sleeve, the spring has a tendency to rock the pipe box and assist the driver in lifting the cultivators." The flat curved spring device shown in this patent, with the link or arm connecting its free end with the plow beam, exerts little or no force when the drag-bars, carrying the plows, are in an operative position; but when the latter are raised above their normal position, and, as they are lifted, the spring exerts an increased lifting effect, sufficient to suspend the drag-bars and attached shovels in the air. While differing in form and mode of attachment, this Brown device clearly anticipates the first broad claim of the patent of 1881.

It admits of little or no question that if this Brown patent was one of later date than the Wright patent of 1881, it would be held to be an infringement thereof, and, under the authorities, "that which infringes if later, anticipates if earlier." *Peters* v. *Active Mfg. Co.*, 129 U. S. 530; *Thatcher Heating Co.* v. *Burtis*, 121 U. S. 286, 295; *Grant* v. *Walter*, 148 U. S. 547, 554; *Gordon* v. *Warder*, 150 U. S. 47; *Knapp* v. *Morss*, 150 U. S. 221.

In this view of the case it is not deemed necessary to determine whether the C. A. Hague patent, No. 243,123, of June 21, 1881, or the Berlew & Kissell patent, No. 260,447, dated July 4, 1882, anticipated that of Wright. The proofs do not show with sufficient clearness that either of these parties perfected and put in practical operation the spring device incorporated in their patents prior to the date of the invention of Wright. The proofs show, however, that they were experimenting — as was Wright — in 1876, 1877, and 1878 with springs for cultivators, but the evidence tends strongly to show that they did not perfect any operative device prior to May 1, 1879.

The remaining branch of the case turns upon the proper construction to be placed upon the 1879 patent, in view of the state of the art as illustrated in prior devices and patents.

The Peter Monaghan patent, No. 26,606, dated December

27, 1859, for an improvement in cotton cultivators, contains a bow-shaped spring, with deflected ends, one of which is secured to the cross-pieces of the shafts, while the other is free, and is in contact with the frame to which are attached the shovels. The spring shown in this patent is of such construction and location as to exert a constant lifting effect on the frame carrying the shovels, and when the operator releases the handles acts automatically in lifting the frame and in holding the plows above their operative position.

A similar flat or curved spring device is shown in the A. H. Allison patent, No. 61,649, dated January 29, 1867, for corn and cotton cultivators, where one end of the spring is fastened to the cross-beam of the main frame, while the free end bears and raises the cross-head to which is suspended the shovels. The shovels are made to enter the ground by means of a lever which forces the beam down, and by releasing the lever the springs operate to raise the shovels from the ground, and suspend them above their operative position.

In the H. N. Dalton patent, No. 95,437, dated October 5, 1869, for an improvement in a spring for a gang plow, the spring is coiled around a crank axle upon which the wheels revolve in the ordinary manner. The coiled spring is of such strength that when released by the lever or other appliances governing it, the axle is turned by the force of the spring, thereby raising the frame to which the plow is attached. One of the objects accomplished by the coiled spring is to enable the operator to lift the gang plow entirely from the ground.

Again, a spring device closely resembling that of the Wright invention is shown by the letters patent 154,666, dated September 1, 1874, issued to Marquis L. Gorham, relating to wheeled straddle-row cultivators, consisting of an improved device by means of which shovels are held and adjusted on the shovel standards. The device described in the specification and drawings consists of a spiral regulating spring, in connection with suspension rods and drag-beams, so constructed as to suspend the drag-bars to any height, or regulate the depth at which the shovels or plows shall work. The suspension rods connected with the spiral spring are arranged to assist in

raising the drag-bars for the purpose of elevating the plows in a fixed position when turning or moving the machine. This spring device is connected with the beams, and by means of screw nuts may be contracted so as to regulate the height of the drag-bars carrying the shovels. The spring device in this patent exerts, automatically, an increased lifting force as the beams are raised, or elevated above their operative position. The second claim of that patent is "the suspension rods *d*, regulating springs *g*, drag-bars *i*, in combination with hangers *e*, to which they are attached, substantially as they are described."

In addition to the foregoing spring improvements in cultivators, and like implements, letters patent for door-spring devices were issued to H. S. Frost in 1867, and to L. A. Warner in August, 1875, and April, 1879, which have automatic horizontal action in operating or closing the door, corresponding exactly in principle, operation, and function with the vertical action in the Wright spring device. These door springs and their adjustment close or open the door just as the dead centre is passed, either in an outward or inward direction. One or more witnesses testified in this case that these door-spring devices could readily be adapted to cultivators by the exercise of ordinary mechanical skill, and be made to perform, by change in position, the lifting and depressing action of the Wright spring. The witness Hague stated that he actually so applied these door springs in 1877 and 1878. We need not determine in this case whether the use of such springs in cultivators is analogous to their original use, so as to form anticipating devices. They show, however, the state of the art in reference to spring devices for producing action in different directions.

It is shown in the testimony that the spring device described in Wright's patent of 1879 interfered with the lateral motion of the beams, and therefore interfered with their successful operation. It also appears that the spring had a constant tendency to fly off the wheel, which compelled the adoption of a loop or bail (not described as a part of his device) to counteract such tendency; and further, that the springs were

subject to frequent breakage, so that their use was discontinued in 1883, about which time the appellee commenced the use of the same spring device as that employed in the cultivators manufactured by P. P. Mast & Company, under the patents issued to Gardiner & Downey, No. 237,740, February 15, 1881; Berlew & Kissell, No. 260,447, July 4, 1882; and to J. M. Elder, No. 222,391, December 9, 1879, and sold by the appellants.

The form of spring as shown in these patents was substantially adopted in 1883 by the appellee, on the theory that the Wright patent comprehended all forms of springs for accomplishing the upward and downward action. The use of this substituted spring for that described in the patent is, to some extent, explained by the fact, which appears in the record, that Wright obtained letters patent 259,656, dated June 13, 1882, for certain improvements in walking straddle-row cultivators, the specification forming part of which states "that the invention relates to an improved manner of constructing the frame and applying the springs for the purpose of raising, or assisting the operator to raise, the beams or drags-bars, the springs having, in some cases, the additional function of holding the shovels to their proper place in the ground. The improvement consists mainly in providing the frame with axles capable of rotating independently of the wheels, coupling the wheels directly to the axles, and providing the axles with arms arranged to coöperate with a spring, a weight, or draft device to which the team is attached."

The spring in this 1882 patent of Wright's is spiral, encircling a rod, and bears upon collars on the lower ends of the same. This rod is pivoted to another rod which is firmly fastened to the axle. When the shovels are in an operative position the spring performs no function. But when the rod attached to the axle, and pivoted to the rod upon which the spring is mounted, is thrown off its centre, then the function of the spring is to depress or elevate the shovels, just as the pivoted rod connected with the spring is thrown backward or forward. The real object of the spring is to raise the shovels, which is accomplished by slightly elevating the handles. This

action deflects the straight downward pressure of the spring to an angle formed by the bent joint between the rigidly attached rod on the axle and rod encircled by the spring, thereby causing the axle to revolve forward. When the spring is straight and in a vertical line with the axle it performs no function whatever, just precisely the same as with the door spring when the door is in the neutral position, or on the dead centre. The form of this spring, and its mode of operation, is identical with that adopted by the appellee in 1883, in place of the original spring device, shown in the patent of 1879.

The taking out of this patent, covering precisely what is now claimed for the patent of 1879, clearly indicates that the latter patent was not supposed to extend to the device covered by the 1882 patent, which is not distinguishable from the prior patents issued to Gardiner & Downey, Berlew & Kissell, and J. M. Elder, under which P. P. Mast & Company construct the cultivators sold by the appellants.

The range of equivalents depends upon the extent and nature of the invention. If the invention is broad or primary in its character, the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions. The doctrine is well stated in *Morley Machine Co.* v. *Lancaster*, 129 U. S. 263, 273, where it is said: "Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine."

Tested by this rule, and in view of the prior devices and the great variety of springs in use previous to the granting of his patent, Wright cannot be treated as a pioneer in the art. Neither can he, nor his assignee, be allowed to invoke the doctrine of equivalents, such as the courts extend to primary inventions, so as to include all forms of spring devices and adjustments which operate to perform the same function, or accomplish the same result.

Again, the issuance of the patents to Gardiner & Downey, Berlew & Kissell, and Elder creates a *prima facie* presumption of a patentable difference from that of the Wright patent of 1879. *Corning* v. *Burden*, 15 How. 252; *Duff* v. *Sterling Pump Co.*, 107 U. S. 636.

We think it manifest, from the prior state of the art, if the invention covered by his patent of 1879 was not anticipated, and if it has any validity, that it must be limited and confined to the specific spring device which is described in the specification and shown in the drawings forming parts of the letters patent. Being thus limited, there is clearly no infringement in the device used by the appellants or their principals, P. P. Mast & Company.

The specific device described in and covered by the Wright patent could not be used in the appellants' combination, nor the appellants' spring in the appellees' combination. This interchangeability, or non-interchangeability, is an important test in determining the question of infringement. *Prouty* v. *Ruggles*, 16 Pet. 336; *Brooks* v. *Fiske*, 15 How. 212; *Eames* v. *Godfrey*, 1 Wall. 78.

In respect to the so-called depressing action of the spring, when the drag-bars and shovels are lowered to an operative position, it is perfectly manifest that little or no effect is produced in that direction, for the reason that the downward movement of the shovels is limited, and more greatly restricted than the upward movement of the beams or drag-bars, the range of movement, in other words, not being in the downward line anything like that in the upward direction of the drag-bars. Hence, the depressing effect of the spring is of no practical importance. The operator holding the handles of the cultivator is not assisted, to any appreciable extent, in keeping the plows in the ground by the depressing action of the spring. The downward action or position of the shovels is not required to go, and does not in fact go, below their operative position, at which point the spring device becomes practically inoperative.

Our conclusion on the whole case is that the patent of 1881 is anticipated by that of 1879; that the first claim thereof is

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anticipated by the Brown patent; that the patent of 1879, in view of the state of the art, is to be limited and restricted, if it has any validity at all, to the specific spring therein described; and, as thus restricted, it is clearly not infringed.

We are, therefore, of opinion that the decree of the court below should be

Reversed, and the cause remanded, with directions to dismiss the bill.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* LOWELL.

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

No. 173. Argued December 19, 1893. — Decided January 8, 1894.

The station of a railway near a large town contained platforms and other accommodations on each side of the tracks, with a double track between them on which many trains were moving both day and night. There was an underground connection between the two by means of a public street, which was in a bad condition. It was a rule of the company that "when a train is standing on a double track for passengers, trains from the opposite direction will come to a stop with the engines opposite to each other." A passenger who was in the habit of travelling on the road and of stopping at this station arrived there in the rear car, in which a notice was posted, that passengers leaving the car by the forward end should turn to the right, and that those leaving by the rear should turn to the left, in each case landing the passenger on the platform, "and thus avoid danger from trains on the opposite track." The passenger passed out at the forward end, where he found the collector, gave up his ticket, and passed out at the left, on the track, with the knowledge of the collector, and without any objection on his part. In crossing he was struck by an engine coming from an opposite direction, which had not observed the rule to stop. He brought suit to recover damages for the injuries which he had suffered. The company set up the defence of contributory negligence. Plaintiff, as a witness in his own behalf, testified that he had never seen the notice posted in the car, and that he had been in the habit of alighting on the left side, without objection. When plaintiff rested, the defendant asked the court to instruct the jury to find a verdict for it on the ground that the contributory negligence of the plaintiff

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was established as matter of law. The court declined, and the defendant introduced evidence, and did not renew his request, but excepted to such parts of the charge as related to the question of contributory negligence. Verdict and judgment being had for plaintiff, the case was brought here by writ of error. *Held*,

(1) That there was no doubt of the gross negligence of the defendant;

(2) That there was no obligation on the part of the plaintiff to cross the track by the underground public street;

(3) That the plaintiff was not, under the circumstances, guilty of negligence in law, in turning to the left on leaving the car;

(4) That the charge was, as a whole, sufficiently favorable to the defendant, and that the question of negligence was properly left to the jury.

This was an action at law for personal injuries received by the plaintiff Lowell while crossing the track of the defendant at Ridgeway station, within the limits of the city of St. Paul.

It appears by the bill of exceptions that the following facts were established by the evidence:

The defendant, on the 17th day of March, 1889, was a common carrier of passengers for hire, and was on that day operating a railroad between St. Paul and Minneapolis. One of the stations on the road was Ridgewood Park, within the corporate limits of St. Paul, the general course and direction of the road through such station being east and west.

There was a double track at that point and for some distance both east and west of it; the trains going east, or towards St. Paul, moved on the south track, and the trains going west, or towards Minneapolis, on the north track. There were many unscheduled trains — freight, transfer, and wild trains — moving back and forth on the tracks both day and night.

The tracks at Ridgewood Park station were about nine feet apart; the passenger trains were run on schedule time between the two cities, and passed this station; during the day there were many trains moving on both of these tracks; between the hours of nine and eleven in the evening there were only two passenger trains passing Ridgewood Park station, one going east and the other going west; there were no trains of defendant scheduled to meet at Ridgewood Park station. The west-going train, upon which plaintiff was a passenger, reached

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Ridgewood Park at 10.10 P.M., and the only scheduled train that would pass this station going east was due fifteen minutes later, which fact was well known to the plaintiff.

The railroad company had erected two depots at Ridgewood Park station, one on each side of the tracks — one south of the south track and one north of the north track and opposite to each other; each of these depots was supplied with a platform for the accommodation of passengers getting upon and alighting from the cars, one of which platforms was on the south side of the south track and the other was on the north side of the north track.

The only depot used by the defendant was the one situated on the south side of the tracks; all the tickets were sold in the depot on the south side; telegraph office, baggage-room, and waiting-room were there, and the station on the north side was closed, and had never been used by the defendant in any way as a depot.

At the east end of each of these depots there was a flight of steps leading down about fifteen or twenty feet to Victoria Street, which at that point passed under the two tracks, the tracks passing over the street by means of an iron bridge; and it was possible for the passengers to go from one depot to the other by the way of these steps and Victoria Street; but Victoria Street on the 17th day of March, 1889, was not graded or in any way improved, but was a natural ravine passing under the tracks at Ridgewood Park station.

Victoria Street about the station and underneath the tracks was marshy, muddy, and wet at that time; the steps leading down on the north side from the north depot came down only to within two feet of the ground, and passing in front of the steps at the bottom thereof was a stream of water which ran from there over the surface and in a zigzag direction down Victoria Street and under the tracks.

This stream varied in width from two to six feet and in depth from three or four inches to two feet; the ground under the tracks at Victoria Street was uneven and irregular, and there were no lights or any illumination whatever along Victoria Street at that point and under the tracks, and the night

was dark. It was customary for all persons living on the south side of the tracks at the station to cross over the south-lying tracks in going to their homes, and not under the tracks by Victoria Street, which custom was well known to the defendant.

There was no planking between the two depot platforms, except at the easterly end of the platforms across the tracks at Ridgewood Park station, but the surface of the ground was occupied by the tracks and ties as on any other part of the road.

The platform on the north side was lighted by two large kerosene lamps on posts, and the south platform was furnished with the same kind and number of lamps, but there was conflicting evidence as to whether one of these lamps was burning on the night of the accident.

The north-side building was closed, but the platform on the north side was in good order for the embarkation and debarkation of passengers, and was of the same size as the one on the south side; the plaintiff was at the time of the accident, a man thirty-six years of age, in full possession of all his faculties; he lived in a house situated on the south side of the tracks, about one thousand feet west of the depots and about two hundred and fifty south of the tracks; he had lived there prior to the accident continuously for about six months, and the only way he could reach his home after alighting from defendant's train at the station, was to cross over the south-line track of the defendant's road, except through Victoria Street; he was in the habit of taking the cars at Ridgewood Park depot for St. Paul about twice each week during his residence at the point mentioned, and would return from St. Paul by the trains of defendant and debark at this station. In so doing plaintiff had always boarded and departed from the defendant's train on the south side of the same, as he did on the night the accident in question occurred; and he had worked as a laborer on the streets in the neighborhood of the depot, and was familiar with it and its surroundings.

On the afternoon of the 17th day of March, 1889, he purchased a round-trip ticket at the Ridgewood Park depot for

St. Paul and return, and went to St. Paul, leaving there on his return home at 10 P.M.; he was with a companion named Fosberg, both plaintiff and Fosberg riding in the smoking car, which was on the rear end of the train, and was a combination car, divided by a partition in the middle, the rear half being for baggage and the front half for passengers desiring to smoke.

The train was composed of an engine, tender, two passenger coaches, and this combination car; in each end of the smoking apartment of the combination car, there were posted up notices or signs in large printed letters as follows, which could be plainly seen and read by all passengers in the car: "Passengers leaving this car at the forward end will turn to the right; if at the rear end, will turn to the left, and avoid danger from trains on the opposite track."

Plaintiff could read English. He testified that he had never seen the sign; that he generally rode in the smoking car; that the train arrived at the Ridgewood Park station at about ten minutes past ten o'clock P.M. and pulled in with the cars opposite the north platform, and two ladies and five or six gentlemen alighted, all on the north side of the train and on the north platform; that there was a conductor, a ticket collector, and a brakeman on the train, and as the train stopped the plaintiff and Mr. Fosberg got up and passed out of the front door of the smoking car, Mr. Fosberg being first, and the plaintiff following.

On the platform they were met by the collector, who was standing in front of and a little to the north side of the door, and who asked for their tickets, which they delivered to him, Fosberg first and plaintiff after him. They immediately left the car on the south side and started across the space between the tracks and the south track towards the south platform, Fosberg being about ten feet in advance of plaintiff. The collector saw them getting off on the south side and said nothing to them, but immediately on receiving their tickets, entered the smoking car.

That before the plaintiff had time to alight from said car the train had begun to move slowly away from the station.

This conductor or ticket collector saw both Fosberg and the

plaintiff turn and step down the steps towards the south side of the car to cross over to the side station, and raised no objection, and did not caution either of them against so doing.

That plaintiff, in stepping down from said car, took hold of the iron railing on the end of the platform on the right-hand side, and stepped down with the left foot first and faced toward the west up the south-line track.

That plaintiff saw no train coming on the south-line track, and Fosberg, who had already crossed over the track ahead of him, neither saw nor heard any train coming from the west on the south-line track; that just as soon as plaintiff stepped from the car he started towards the station across the south-line track for the purpose of going to his home; that just as he was crossing the track he was struck by a wild train coming from the west and which was being run backwards on the south-line track, and was knocked a distance of thirty feet, falling upon the platform of the station a little to the east of the centre thereof.

Several witnesses swore that the train had a headlight burning at both ends, and several witnesses swore that they saw no headlight on the end approaching the east and the depot.

There was conflicting evidence as to the rate of speed at which the engine was moving before and at the time it reached the station, some witnesses putting it as high as twenty miles an hour and some as low as five or six. Several witnesses swore that the engine whistled for the station about a quarter of a mile before reaching it, and that its bell was rung all the way from where it whistled to the station, and several witnesses swore that they heard neither whistle nor bell. The crew of the engine on it at the time was an engineer, fireman, conductor, and brakeman.

Fosberg crossed the south track and got on the platform safely and before the arrival of the engine, and was about ten feet in advance of plaintiff, when he attempted to step across the south rail of the south track, and Fosberg, seeing the engine coming, called out, "Look out, Martin!" to the plaintiff, but

plaintiff was struck by the corner of the tender and knocked on to the south platform.

The crew who were on the wild train, consisting of the fireman, brakeman, and conductor, saw the west-going passenger train as it came into the station and as it stopped there to receive and discharge passengers, and knew that it stopped for that purpose. Plaintiff introduced general rule No. 66 of the defendant, in regard to the running of its trains, which was as follows: "When a train is standing on a double track for passengers, trains from the opposite direction will come to a stop with the engines opposite each other, and proceed slowly until trains are past."

The train did not in any way stop until it had run far past the station and until after plaintiff was struck.

The conductor of the passenger train, after seeing his passengers off the train on the north platform, gave the signal to his engineer to go ahead, and got upon the platform of one of the coaches, and, seeing the plaintiff and Fosberg going in the direction of the approaching engine, called to them as loud as he could to look out for themselves. There was an unobstructed view up the tracks to the west from any point at the Ridgewood Park depot of at least 1500 feet, and a train approaching could be seen that distance.

There was conflicting evidence as to whether the passenger train was moving westward or standing still when the engine from the west reached a point opposite the passenger engine.

The plaintiff, who was sworn as a witness in his own behalf, testified that in going in and out of this station he was in the habit of getting off the cars on the south side; that he had seen other people getting on and off in that way, and that no one ever objected to his doing this. He further testified, under objection, that he had seen people getting off upon the south side both before and after the accident, and that he never saw them get off on the north side and go down the steps and under the bridge. His companion that night, Fosberg, also testified that he had seen other people get off upon the south side. Upon the conclusion of the testimony on the part of the plaintiff, counsel for the defendant requested the court to in-

struct the jury to find a verdict for the defendant, upon the ground that the plaintiff was proven to have been guilty of contributory negligence in leaving the train upon the south side, in disobedience of the rules and notice of the defendant, and in not looking for, and seeing, the coming engine and avoiding the same. The court denied the motion, and counsel for defendant excepted. There was no evidence from either side showing, or tending to show, that any reason or cause existed for the plaintiff leaving the cars on the south side, instead of the north side, except as above set out. Upon the conclusion of the entire testimony in the case defendant's counsel did not renew his request to direct a verdict in his favor, but took exceptions to such portions of the charge as submitted to the jury the question of the contributory negligence of the plaintiff.

The case was submitted to the jury, who returned a verdict for the plaintiff in the sum of $8500, for which judgment was entered. Upon motion a new trial was ordered unless plaintiff would consent to remit $3000 from his judgment, which was done. The defendant thereupon sued out this writ of error.

Mr. Charles E. Flandrau for plaintiff in error.

I. The court was correct (if it had not been qualified) in its charge to the jury that the plaintiff could not recover, having violated the reasonable rules of the defendant, and alighted from the cars in a manner prohibited by the defendant. *Bancroft* v. *Boston & Worcester Railroad*, 97 Mass. 275; *Forsyth* v. *Boston & Albany Railroad*, 103 Mass. 510; *Gonzales* v. *Harlem Railroad*, 38 N. Y. 440; *S. C.* 98 Am. Dec. 58; *Zebe* v. *Pennsylvania Railroad*, 33 Penn. St. 318.

II. The mere fact that the plaintiff may have entered or alighted from the cars on the south side, instead of upon the platform, and that he may have seen some others do the same thing, cannot be construed in any way to be a license or a consent on the part of the defendant for the plaintiff to repeat the act at its expense. *Wheelwright* v. *Boston & Albany Railroad*, 135 Mass. 225, 229.

III. The plaintiff was clearly guilty of contributory negligence, even if he had not been at fault in alighting on the south side of the train, because when he got upon the space between the two tracks, before he attempted to cross the south track, it was his duty to exercise all his functions of seeing and hearing to ascertain whether it was safe for him so to do. *Schofield* v. *Chicago, Milwaukee & St. Paul Railway*, 114 U. S. 615; *Chaffee* v. *Old Colony Railroad*, 17 R. I. 658.

The train was evidently very close to the plaintiff when he stepped out upon the south track, because he was immediately struck by it, and there can be no reason why he did not see it and avoid it, except that Fosberg, his companion, had just got across in time to save himself, about ten feet ahead of him, and he was in a great hurry to catch up with him; there is no other explanation of his reckless conduct.

Mr. M. D. Munn, (with whom was *Mr. Cushman K. Davis* on the brief,) for defendant in error.

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

Practically the only question in this case is whether the evidence so clearly showed the plaintiff to have been guilty of contributory negligence as to entitle the defendant, as matter of law, to an instruction to the jury to return a verdict in its favor.

It was not seriously contended that the defendant was free from fault in failing to stop its train, in compliance with its own rule, which demanded that "when a train is standing on a double track for passengers, trains from the opposite direction will come to a full stop, with the engines opposite to each other, and proceed slowly until trains are past." In view of the frequency of accidents occurring to passengers crossing one track at a station, after alighting from a train standing upon another track, the rule is doubtless a proper one, and if it had been observed on that evening, this accident would probably not have occurred. In determining whether the plaintiff was so clearly guilty of contributory negligence as to

entitle the defendant to a verdict, we are bound to put upon the testimony the construction most favorable to him, and to assume that the eastward bound train did not stop opposite the other engine, but that it was passing at the rate of twenty miles an hour; that it gave no signal by whistle or bell, and carried no headlight upon the rear or east end of the engine. If such were the facts, there could be no doubt of the gross negligence of the defendant.

We are of the opinion that there was no absolute obligation on the part of the plaintiff to cross the track by way of the ravine known as Victoria Street. To do this would have required him to descend a flight of steps at the east end of the station, about fifteen feet to the level of the street, which was not graded or in any way improved, but was a natural ravine passing under the tracks at this point. There was a stream of water varying in width from two to six feet, and in depth from two or three inches to two feet, running over the surface of the street under such tracks. The ground beneath the tracks was marshy, muddy, and wet at the time; the street was uneven and irregular, and there were no lights or other illumination along the street at that point, and the night was dark. It seems to have been the universal custom for all persons living on the south side of the tracks to cross over the tracks in going to their homes, and not under the tracks by Victoria Street. Under such circumstances, the plaintiff had a right to make use of the customary mode of alighting and reaching his home.

The case resolves itself into the question, then, whether the plaintiff was, as matter of law, guilty of negligence in failing to get off the train on the north side, there being in the opinion of the court no question that if he had alighted upon the platform and waited until the train passed he would not have been injured. There was, it is true, a notice conspicuously posted at each end of the smoking car, in which plaintiff was riding, requiring passengers leaving the car at the forward end to turn to the right and at the rear end to turn to the left, and avoid danger from the trains on the opposite track. There was testimony tending to show that this notice had

never been read by the plaintiff. Assuming, however, that he was bound to read it, and was chargeable with knowledge of its contents, there was other testimony tending to show that it was habitually disregarded by passengers with the acquiescence of the conductor and the servants of the road about the station. There was evidence that plaintiff and his companion Fosberg were met upon the platform of the car by the collector, who asked for their tickets, which were delivered to him; that the collector saw them get off on the south side and said nothing to them, but immediately upon receiving their tickets entered the smoking car; that no objection was raised to their getting off upon the south side, and that other people were in the habit of getting off in the same way. Now if the custom of passengers to disregard the rule was so common as to charge the servants of the road with notice of it, then it was either their duty to take active measures to enforce the rule, or to so manage their trains at this point as to render it safe to disregard it. A railway company does not discharge its entire obligation to the public by a notice of a certain requirement, permitting the requirement to be generally disregarded, and then proceeding upon the theory that every one is bound to comply with it. If, in such case, an accident occur, the defendant should not be allowed to rely exclusively upon a breach of its regulation. In this particular the case resembles that of the *Dublin &c. Railway Co.* v. *Slattery*, 3 App. Cas. 1155, in which the House of Lords held that a notice not to cross the tracks which the company had permitted to fall into desuetude and made no attempt to enforce, did not debar the plaintiff, who had disregarded it, from a recovery. Had the plaintiff complied with the notice and alighted upon the platform, he would still have been obliged to cross the track with the same possibility of being struck by a passing train that confronted him in this instance. There was, in addition to this, some evidence to go to the jury that it was customary for persons living on the south side of the track to get off the train on that side, as the plaintiff did, and none that they were in the habit of crossing by way of Victoria Street.

In his manner of leaving the train there seems to have been no negligence. He took hold of the iron railing at the end of the platform on the right-hand side, stepped down with the left foot first and faced towards the west on the south-line track, saw or heard no train coming upon that track, and supposed that he was perfectly safe in crossing, as he knew that no train was then due. It is in this connection, and under these circumstances, that the question of the necessity was to be considered. While there may have been nothing which the law would recognize as a special necessity that evening for his getting off on the south side, if it were usual and customary for passengers to do so, and it was not manifestly dangerous, and the plaintiff had been in the habit twice each week for six months prior thereto of alighting in the same manner, and in doing this he took the precaution to get off in such a way, that if a train properly lighted had been coming, he could not have failed to see it, it would be a question for the jury whether he was guilty of contributory negligence in disregarding the notice. In this view it is possible that the charge of the court to the effect that unless there was some existing necessity established by the testimony authorizing the plaintiff to alight from that side of the train and cross over the tracks, he could not recover, was too favorable to the defendant. But, however that may be, it seems to have been subsequently qualified by the court saying that if passengers embarking upon or alighting from the train at that point went customarily over that route, then the mere fact that the plaintiff did cross there in order to reach his home cannot of itself be considered negligence, and leaving it for the jury to say whether, under the circumstances of this case, the plaintiff should not have obeyed the rules and regulations of the company, and have alighted upon the platform. The charge as a whole was sufficiently favorable to the defendant, and the question of negligence was a proper one for the jury — in other words, proof that the plaintiff violated the regulations of the company, even without the excuse of a cogent necessity, will not as matter of law debar him from a recovery.

The judgment of the court is, therefore, *Affirmed.*

Statement of the Case.

MR. JUSTICE GRAY and MR. JUSTICE SHIRAS concurred in the result, because the only ruling in matter of law requested or made at the trial on the question whether the defendant was entitled to a verdict, by reason of contributory negligence of the plaintiff, was upon a motion made at the close of the plaintiff's evidence and before the defendant had rested its case, and therefore, by the settled rule, could not be the subject of exceptions or error; *Columbia Railroad* v. *Hawthorne*, 144 U. S. 202, 206; *Bogk* v. *Gassert*, 149 U. S. 17, 23; and because the instructions given and duly excepted to were sufficiently favorable to the defendant.

WOLLENSAK *v.* SARGENT.

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

No. 150. Argued December 7, 1893. — Decided January 8, 1894.

Reissued letters patent No. 9307, granted July 20, 1880, to John F. Wollensak for new and useful improvements in transom lifters and locks, on the surrender of the original letters patent No. 136,801, dated March 11, 1873, are void for want of patentable novelty in the invention described and claimed in them.

Reissued letters patent No. 10,264, granted December 26, 1882, to John F. Wollensak for a new and useful improvement in transom lifters, on the surrender of the original letters patent, dated March 10, 1874, are void as to the claims sued on, by reason of laches in the application for a reissue.

The fact that the patentee followed the advice of his solicitor in delaying to apply for the reissue within due time does not justify the delay.

THIS was a consolidated bill in equity founded on two reissued patents granted to appellant for improvement in transom lifters as follows: No. 9307, July 20, 1880, original patent No. 136,801, March 11, 1873, and No. 10,264, December 26, 1882, original patent No. 148,538, March 10, 1874. Appellee was charged with the infringement of the third claim of the reissued patent No. 9307, and the third, fourth, fifth, sixth, and ninth claims of reissue No. 10,264.

The Circuit Court, on pleadings and proofs, held reissue No. 9307 invalid for want of patentable novelty, and, on demurrer, reissue No. 10,264 void as to the claims relied on, for laches apparent on the record and not sufficiently explained by the allegations of the bill.

The opinion of Judge Shipman on motion for preliminary injunction is reported in 33 Fed. Rep. 840, and that on final hearing in 41 Fed. Rep. 53.

Mr. Ephraim Banning, (with whom was *Mr. Thomas A. Banning* on the brief,) for appellant.

Mr. John Kimberly Beach for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court.

1. The specification and claims of reissue No. 9307 are as follows:

"Transom lifters have heretofore been constructed with a long upright rod or handle jointed at its upper end to a lifting arm which extends to and is connected with the side or edge of the transom sash, the sash being opened or closed by a vertical movement of the long rod. When thus constructed the upright rod is liable to be bent by the weight of the transom, owing to the want of support at or near the point of junction between the long rod and the lifting arm.

"The object of my invention is to remedy this difficulty; and to such end it consists in providing the proper support or support and guide for the upper end of the lifting rod during its vertical movements and while at rest.

"This may be accomplished in a variety of ways, one of which I will now proceed to describe in detail, although I wish it clearly understood that I do not limit my invention to this construction, but regard it as covering broadly any construction, combination, or arrangement of parts which shall support the long or operating rod and prevent it from being bent or displaced by the weight of the transom.

Opinion of the Court.

"In the drawings, D is the door; T, the transom sash, pivoted at top, bottom, or middle, as preferred; A, the lifting arm that connects the sash to the upright rod; U, the upright rod, passing through two guides, GG', one above and one below the point of junction with the lifting arm; R, a friction roller secured to the lifting rod so as to bear against the wall and support said rod at its point of junction with the lifting arm; *nn*, notches cut in the upright rod to receive the end of the set screw; and *s*, a set screw arranged, in connection with the lower guide and the rod U, so as to be convenient of operation for the purpose of fixing the transom at any required angle. The upright rod is thus supported at three points, to wit, above, below, and at the joint where it sustains the weight of the transom. It can also be adjusted and securely fastened so as to open the sash as much or as little as may be desired, and to lock it in that position.

"Having thus described my invention, what I claim as new is —

"1. The combination, with a transom, its lifting arm and operating rod, of a guide for the upper end of the operating rod, to prevent it from being bent or displaced by the weight of the transom.

"2. The roller R, arranged at the junction of the lifting arm A and upright rod U in a transom lifter, substantially as and for the purpose described.

"3. The guide G', arranged above the junction of the lifting arm and upright rod, in combination with the prolonged rod U, the guide G, and arm A, substantially as and for the purpose specified."

In the matter of the action of the Patent Office upon this reissue, it appeared from the file wrapper and contents that the claims were rejected by the examiner on reference to the patent of Bayley and McCluskey, No. 79,541, July 7, 1868, and that his decision was reversed on appeal by the examiners-in-chief, who held, among other things, that "Wollensak's device is, in the first place, a 'lifter' designed for raising against gravity a transom, hinged and swinging horizontally. The improvement covered by the claim consists simply in

furnishing the vertical operating rod with a guide above the lever connection, as well as below, to prevent the rod from being bent and displaced and thus impaired for operating, as occurs with the old form." In the statement of the case and the points relied on in support of the appeal, it was said:

"Prior to Wollensak's invention, transom lifters had been composed of a long vertical rod arranged to move through guides on the door casing, its upper end projecting a considerable distance above the upper guide and jointed to the transom by a pivoted connecting rod. An example of the lifter is shown on the transoms of the examiners-in-chief's rooms.

"The upper projecting end of the lifting rod has no lateral support, and, being made of a small iron rod, is liable to be easily bent.

"The function of the rod is to sustain the weight of the transom in opening and closing, and as the end of the connecting rod pivoted thereto moves in the arc of a circle while sustaining the weight of the transom, such weight is transmitted to the long upper end of the operating rod in a lateral direction, and has the effect of bending it to such an extent as to prevent it from moving freely through the guide. The bends are either permanent and destroy the rod for practical use, or the rod vibrates above the guide and thus binds therein. To overcome these defects, Wollensak provides a guide for the upper end of the rod, by which its movements are steadied and the lateral bends prevented. Many expedients may be resorted to for guiding the end of the rod, one of which he shows and describes.

"The rejected claims cover this guide in combination with the rod and transom, and the rod, transom, and lifting arm."

The reissue was before this court in *Wollensak* v. *Reiher*, 115 U. S. 87, 94, and the case disposed of on the ground of non-infringement. And the court there said: "The specification of the complainant's patent undertakes broadly to describe the invention, intended to be embraced in it, as 'any construction, combination, or arrangement of parts which shall support the long or operating rod and prevent it from being bent or displaced by the weight of the transom.' But, having refer-

ence to the state of the art at the date of the alleged invention, and the claims of the patent, the patentee must be limited to the combination, with a transom, its lifting arm and operating rod, of a guide for the upper end of the operating rod, prolonged beyond the junction with the lifting arm so as to prevent the operating rod from being bent or displaced by the weight of the transom. Putting by the question whether this is a patentable invention in view of the existing state of the art, the claim must be regarded as a narrow one, and limited to the particular combination described." After this decision was announced, the first claim was disclaimed, and the patent limited to the second and third claims.

The Circuit Court rightly held that the guide above the junction and the prolongation of the rod constituted the improvement. It is now insisted that the third claim embraced the elements of the transom window T, the lifting arm and bracket A, the upright rod U, the guide G' near the upper end, the guide G, including set screw *s* near the lower end, and an intermediate guide not lettered. This adds to the specific elements of the claim, the set screw *s*, an intermediate guide and a bracket A. The argument is that the third claim is a specific combination claim and includes the elements, expressed and implied, of a transom window, swinging vertically; a bracket on the window projecting outwardly; a lifting arm hinged to the bracket; an upright rod jointed to the lifting arm; a guide and support G'; a guide and support G near the lower end of the upright rod and provided with a set screw to lock it; a third guide and support located between G and G'; and it is assigned as error that the Circuit Court erred "in not construing the third claim of reissue No. 9307 to be for the specific form of transom lifter shown and described; and in not holding that various features were sufficient, separately, or together, to impart novelty and patentability to the construction as a whole." But the reissued patent cannot be treated as covering a claim for the whole transom lifter as improved. What the patentee declared his invention to consist in was in providing "the proper support or support and guide for the upper end of the lifting

rod." And we do not regard ourselves as justified in importing into the claim elements that would operate to so enlarge its scope as to cover an invention not indicated upon its face. *Day* v. *Fair Haven & Westville Railway*, 132 U. S. 98, 102.

The Circuit Court was of opinion that the inventor naturally extended his rod beyond the junction with the lifting arm, and provided a support for the end of the prolonged rod, and that this did not seem to have a patentable character, but to be the obvious suggestion which would occur to any mechanic. The patent itself declared that "transom lifters have heretofore been constructed with a long upright rod or handle jointed at its upper end to a lifting arm which extends to and is connected with the side or edge of the transom sash, the sash being opened or closed by a vertical movement of the long rod;" and there can be no doubt that they were common contrivances for opening and closing apertures at a distance from the hand of the operator. *Aron* v. *Manhattan Railway*, 132 U. S. 84. The conclusion that the prolongation of the rod and its confinement within an additional metallic loop, thereby providing a support where it was needed, lacked patentable novelty, appears to us unavoidable on comparison with the Bayley and McCluskey patent of July 7, 1868.

In that patent an invention was described for the opening and closing of a series of passenger car ventilators or transoms, which consisted of a long rod sliding horizontally in a series of guides, past a series of windows, and connected with each window by a separate arm, so that by sliding the rod backward or forward the windows would be opened or shut. If this device were turned into a vertical position, it would present the combination of the third claim under consideration. The parts of the device would coöperate in the same way whether used horizontally or vertically, and the window would swing outward or inward according to whether it was hinged at one end or the other. The complainant's expert testified that it was of the essence of the third claim that it should be used in a vertical position, and that if the defendant's transom lifter were used horizontally, so as to open a

transom swung sideways, it would not then be described by the language of the third claim, because it would not be a transom lifter. But if the mechanical identity with the Bayley and McCluskey device be admitted, as it was in substance by complainant's expert, it cannot be distinguished by importing additional elements into the claim not described in the patent as the invention of the patentee, or upon the suggested distinction between a transom lifter and a transom opener. The novelty must be a novelty in the means or mechanical device, and not in the use to which the combination is put. *Knapp* v. *Morss*, 150 U. S. 221.

2. Reissue No. 10,264 was under consideration in *Wollensak* v. *Reiher*, 115 U. S. 96, and it was held that the delay in the application invalidated it in the absence of special circumstances showing that such delay was reasonable. The original of this reissue was dated March 10, 1874, and the application for the reissue was filed May 31, 1882, so that a lapse of eight years was to be accounted for. The bill averred that, upon discovering the mistake in his original patent, complainant wrote to his solicitors, but at what date does not appear. It was further alleged that some considerable delay was occasioned by the illness of his solicitor, but the first date given is April 9, 1878, that of a letter from the solicitor advising him not to apply for a reissue of No. 148,538, but for a reissue of No. 136,801, which he did, and obtained reissue No. 9307. A second period of four years elapsed before the application for reissue 10,264 was filed. The bill stated that after complainant had obtained his reissue No. 9307, which was dated July 20, 1880, he filed a bill in equity against Reiher in the Circuit Court for the Northern District of Illinois to restrain him from infringing the same, which suit was decided by Judge Drummond on April 25, 1882, against complainant; that he had previously prepared an application for a reissue in No. 148,538, which was executed by him August 21, 1880, but for some reason unknown to complainant was never filed in the Patent Office, and his solicitor, to whom he forwarded it, died about January, 1881; that he afterwards employed other counsel, who advised him that inasmuch as he had a patent in

terms broad enough to cover the invention, he had better delay the filing of the application until the infringement suit could be heard and determined; "that the delay in applying for a reissue of said patent after your orator became aware of the defect in the original patent, No. 148,538, was because of the advice aforesaid, and that the delay that occurred before that time was due to the fact that your orator was young and inexperienced in such matters, never before having had occasion to take out a reissued patent or otherwise become familiar with the law in relation to reissues, and to the further fact that your orator was then struggling to build up his business and unable to incur or assume any more expense in the obtaining of patents than was considered actually necessary for the protection of his business." The bill then referred to the action of the examiners-in-chief in his favor.

We fail to find in this such excuse or explanation of the lapse of time as can properly be recognized as sufficient. Complainant elected not to apply for a reissue until at least four years after he discovered the alleged mistake, and could not retain his right to correct the mistake while he speculated on the chances of including the omitted claims in a reissue of patent No. 136,801. Nor can he be regarded as occupying any different position upon the averment that he would have seasonably applied but for the advice of his counsel.

In *Ives* v. *Sargent*, 119 U. S. 652, 661, 662, *Wollensak* v. *Reiher*, 115 U. S. 96, and *Mahn* v. *Harwood*, 112 U. S. 354, are cited with approval, and it is declared to be settled that while no invariable rule can be laid down as to what is a reasonable time in which the patentee should seek for the correction of a claim which he considers too narrow, a delay of two years, by analogy to the law of public use, before an application for a patent, should be construed equally favorably to the public, and that excuse for any further delay than that should be made manifest by the special circumstances of the case, and it is said: "In the present case no special circumstances in excuse for the delay are alleged. The excuse profferred is simply an attempt to shift the responsibility of the mistake made, from the patentee to his solicitor; but no

excuse is offered why the patentee did not discover the negligence and error of his solicitor in due time. On the contrary, he assumed, without examination, that the specification and claims of his patents were just what he had desired and intended they should be, and rested quietly in ignorance of the error and of his rights for nearly three years, and then did not discover them until after others had discovered that he had lost the right to repair his error by his neglect to assert it within a reasonable time."

In the case in hand the excuse put forward is that the patentee followed the advice of his solicitor, and, therefore, did not apply within due time. Manifestly this will not do. *Dobson* v. *Lees*, 137 U. S. 258.

As the charge of infringement related to claims which were expansions of the original claims and not covered by them, *Wollensak* v. *Reiher*, 115 U. S. 96, the demurrer was properly sustained.

Decree affirmed.

HALLIDAY *v.* STUART.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 25. Argued October 12, 1893. — Decided January 8, 1894.

The attorneys of record on both sides, in a suit in equity to enforce a lien on real estate in which a decree for sale had been entered and an appeal taken without a supersedeas, made and signed a written agreement that the property might be sold under the decree pending the appeal, and that the money might be paid into court in place of the property, to abide the decision on the appeal. The property was sold under the decree, and the money was paid into court. *Held*, that the agreement was one which the attorneys had power to make in the exercise of their general authority, and as incidental to the management of the interests entrusted to them, and that the principals should not be permitted to disregard it to the injury of one who purchased, in good faith, at a judicial sale.

THE case is stated in the opinion.

Mr. A. H. Garland, (with whom were *Mr. D. H. Reynolds* and *Mr. H. J. May* on the brief,) for appellant.

Mr. Mark Valentine and *Mr. Julian S. Jones* for appellees.

Mr. Justice Harlan delivered the opinion of the court.

This case presents a dispute as to the ownership of certain lands in Chicot County, Arkansas. The appellant, who was the plaintiff below, holds a commissioner's deed made by order of the Circuit Court of that county in a foreclosure suit brought by the personal representative of Junius W. Craig, while the appellees hold a commissioner's deed made by order of the same court, in the same cause, at a subsequent date. The relief sought is a decree restraining the defendants from all attempts to take possession of the lands, or from obtaining a writ of possession for them. The bill having been dismissed, the present appeal has been prosecuted.

The transcript does not contain the pleadings in the suit in which the lands were sold, but from various orders made in that cause, copies of which are made exhibits to the bill in the present suit, the following facts appear:

On the 2d day of February, 1878, the equity suit of *Emma J. Wright, Executrix*, v. *Samuel R. Walker et al.*, came on to be heard in the Chicot Circuit Court on the answer and cross-bill of John S. Whitaker, executor of the estate of Horace F. Walworth, deceased, the motion to strike out a part of that answer and cross-bill, and a demurrer to the remainder thereof, the petition of Richard H. Stuart, and the motion to strike out the same, and the original pleadings in the cause. These motions and the demurrer were sustained, and it was adjudged that there was a lien on the lands here in question to secure the payment of a certain sum found to be due the plaintiff in that suit. The lands were ordered to be sold at public auction, in satisfaction of that amount, on the notice required in cases of sales of land under execution, the terms being one-half cash and the balance in eight months, with a lien retained to secure the deferred payment. James R. Martin was appointed commissioner to make the sale. Whitaker, as executor of Wal-

worth, excepted to the decree, and prayed an appeal, which was granted.

An order was entered, February 5, 1879, appointing R. M. Gaines commissioner in the place of Martin to make the sale.

On the 27th of February, 1879, a written agreement, signed C. H. Carlton and W. W. Wilshire as "attorneys for Whitaker et al.," and by D. H. Reynolds as "att'y for receiver," was filed in the cause, and was as follows: "In the above-entitled cause it is hereby agreed that the proceeds of any sale or sales that may be made under any order or orders of sale or decree of the court aforesaid shall be paid into said court by the master or commissioner appointed by said court, sitting in chancery or at chambers, for the sale of the property or any part thereof ordered or decreed to be sold by said court in said cause and held by said court until the disposition of an appeal taken by said John S. Whitaker in said cause to the Supreme Court of this State and now pending is disposed of, and the mandate of said Supreme Court therein is filed in the office of the clerk of said Circuit Court, and then only in pursuance of such mandate in the further proceedings in said Circuit Court." Commissioner Gaines made his report July 15, 1879, showing a sale of the lands under the above decree, upon due notice, on the 1st day of May, 1879, at which sale Halliday, being the highest and best bidder, became the purchaser at the price of $1200, one-half of which was paid at the time in cash. The commissioner brought the cash payment into court, and reported for examination and approval a deed to Halliday, retaining a lien for the deferred payment. The court confirmed the sale in all things, and approved the deed, directing its approval to be entered of record, endorsed on the deed, and recorded with it.

From the exhibits attached to the answer the following facts appear:

On the 30th day of October, 1880, the Supreme Court of Arkansas, in the above case, on the appeal of John S. Whitaker, executor, made the following order: "This cause came on to be heard upon the transcript of the record of the Circuit Court of Chicot County, in chancery, and was argued by

solicitors; on consideration whereof it is the opinion of the court that there is error in the proceedings and decree of said Circuit Court in chancery in this cause, in this, that said Circuit Court in chancery erred in striking out a part of the answer as stated in the opinion, and also in sustaining the demurrer to the cross-bill and in decreeing in favor of the complainant. It is therefore ordered and decreed by the court that the decree of said Circuit Court in chancery in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled, and set aside, with costs, and that this cause be remanded to said Circuit Court in chancery for further proceedings to be therein had, according to the principles of equity and not inconsistent with the opinion herein delivered, with instructions that an administrator *de bonis non* of J. W. Craig may be appointed, if there is none, and that he be made a party complainant."

The opinion of the Supreme Court of Arkansas, referred to in that order, was rendered at the May term, 1880, of that court, and is reported as *Whittaker* v. *Wright*, 35 Arkansas, 511, 514. That case was first before the court at the May term, 1875, (*Wright* v. *Walker*, 30 Arkansas, 44, 46,) upon the appeal of Emma J. Wright, to whom letters of administration upon the estate of Junius W. Craig had been granted, and who had been substituted as plaintiff in place of Joshua M. Craig, former administrator of the same estate. The same opinion states that in Whitaker's cross-bill in the original cause it is averred that Emma J. Wright, the plaintiff therein, "had married and removed from the State, and so had ceased to be executrix; and that she had previously, on the 15th day of December, 1867, entered into an agreement in writing with certain of the principal creditors of the estate, that the whole assets of the estate should be placed in the hands of a receiver, and to retire from the administration; in accordance with which agreement, and upon her application, a receiver was appointed, and he had taken possession and charge of the same, and her connection with the estate, and authority in respect to it, had from that time ceased." The court, among other things, said: "We, therefore, think the court erred in

sustaining the demurrer to the appellant's cross-bill. It also erred in striking out of his answer the averment that the complainant had married and removed from the State, and so had ceased to be executrix. Neither a married woman nor a non-resident of the State can be an executrix or administratrix. Gantt's Digest, secs. 9, 17, 35. If the averment was true, the complainant had no authority to further prosecute the suit, and though the assets of the estate were in the hands of a receiver, as alleged, there was no representative of the estate who might prosecute it; and it could not be further prosecuted until an administrator, with the will annexed, was appointed." The decree was, therefore, reversed, "and the cause remanded, that an administrator, with the will annexed of Junius W. Craig, may be appointed, if the complainant has ceased to be executrix, and for further proceedings."

On the 30th day of January, 1882, Stuart and Walker, as executors, etc., and as defendants in the cause which was then entitled "*John G. B. Sims, Adm'r de bonis non, &c.* v. *Samuel R. Walker & others*," filed, by leave of the court, (but, so far as the record discloses, without notice to Halliday,) a motion to set aside the decree theretofore rendered, and the sale and order of confirmation made under it. On the same day the cause was heard on that motion, and on the mandate of the Supreme Court of Arkansas, and it was ordered: "It appearing that the decree of foreclosure and sale was rendered when there was no representative of the estate of Junius W. Craig, deceased, who could prosecute said suit, and that the sale was made and confirmed when the cause was pending in the Supreme Court on the appeal of John S. Whitaker, as executor of Horace F. Walworth, deceased, and this court had no jurisdiction, etc., on consideration whereof the court doth adjudge, order, and decree that said decree and sale and order of confirmation are null and void, and that the same be set aside." On the same day (Halliday not being before the court in any form) that cause was finally heard, and the lands ordered to be again sold to pay the claim of Craig's estate, which was declared to be a lien on the lands, subject to certain claims of Stuart, and of Whitaker as executor of Walworth.

The last sale occurred on the 10th of July, 1882, Stuart and Whitaker, as agents and attorneys of the heirs of Walworth, becoming the purchasers at the price of $2000. That sum was credited on their respective claims, which exceeded the amount of their bid. The sale was confirmed, and a deed by the commissioner to the purchasers was made, and approved by the court.

Whitaker, as executor of Walworth, prosecuted his appeal from the decree of February 2, 1878, without supersedeas, and the point is much pressed by the present appellant, that, independently of the agreement of February 27, 1879, that appeal did not prevent the sale of May 1, 1879, at which he purchased. This contention is based upon sections 1293, 1294, and 1295 of the statutes of Arkansas, by one of which sections it is provided that "an appeal or writ of error shall not stay proceedings on the judgment or order, unless a supersedeas is issued." Mansfield's Dig. 1884, Title, Court-Supreme, p. 386. The appellees insist that these sections do not apply to judgments or orders affecting the estates of decedents, and that by section 1387 in the chapter relating to appeals to the Circuit Courts, from the judgments or orders of Probate Courts, administrators, executors, and guardians are relieved from giving bond, on appeal, and "all orders against them as such shall be superseded by the appeal." Mansfield's Dig. 1884, Title, Courts of Probate, p. 405.

In the view this court takes of the case it is not necessary to determine this question of statutory construction. In our opinion the appellees are estopped by the agreement of February 27, 1879, from questioning the validity of the sale at which Halliday purchased, upon the ground of its having been made pending the appeal by Whitaker, as executor of Walworth. That agreement is exhibited with the bill, and there is no dispute that it was signed by the attorneys of the appellees after Whitaker had taken his appeal. It is true that, in their answer, appellees "deny that pending said appeal an agreement was entered into between these defendants and the plaintiff in said suit by which these defendants agreed that the proceeds of any sale of property under said decree should

be paid into court, and there held in place of the property to abide the decision of the case on appeal." Upon comparing the allegations of the bill and the answer, it is manifest that the defendants purposely restricted their denial to those averments of the bill which stated what the plaintiffs supposed was the legal effect of the agreement. It is not denied that the signatures of Carlton and Wilshire are genuine, or that they were the attorneys of appellees in the foreclosure suit. Nor is it suggested or hinted that they acted, in the matter of that agreement, without the authority, knowledge, or consent of appellees. So that the answer only intended to make the point that appellees themselves did not agree that the proceeds of any sale should be held by the Circuit Court, "in place of the property, to abide the decision of the case on appeal." That is simply playing upon words. The agreement was made after Whitaker asked and was allowed an appeal. And it was one which the attorneys of appellees might well have made in the exercise of their general authority, and as incidental to the management of the interests entrusted to them. *Saleski* v. *Boyd*, 32 Arkansas, 74; *Holker* v. *Parker*, 7 Cranch, 436, 452; *Jeffries* v. *Mut. Life Ins. Co.*, 110 U. S. 305, 309; *Moulton* v. *Bowker*, 115 Mass. 36, 40; *Cox* v. *New York Central &c. Railroad*, 63 N. Y. 414, 419. It was not, to use the words of Chief Justice Marshall in *Holker* v. *Parker*, "so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on or not fairly exercised in the case." It was simply an arrangement by which a sale that all the parties desired to take place at some time, should not be delayed by the pendency of Whitaker's appeal. And those who were parties to it, directly or indirectly, should not be permitted to disregard it to the injury of one, who purchased, in good faith, at a judicial sale.

If, as appellees now insist, the appeal itself, without supersedeas bond, stopped all proceedings under the decree, until it was disposed of in the Supreme Court, the only possible object of an agreement, declaring that the proceeds of any sale or sales made under any order of the court "shall be paid into

court," and held there until Whitaker's appeal was determined, was to enable a sale — a real, effective sale — to take place notwithstanding the appeal, leaving the parties to continue their contest over the proceeds of sale, rather than over the lands in suit. And if a sale took place under the decree pursuant to that agreement, it was intended, so far at least as the parties to the agreement were concerned, that the purchaser should take title *to the lands* if the sale was in conformity with the decree, and was approved by the court. Under all the circumstances, it must be taken that the sale, at which Halliday purchased, occurred with the assent of the appellees. Any other interpretation of the agreement would impute bad faith to the parties by whom it was executed.

It is said the agreement was not effectual for any purpose, because the only parties to it were the receiver of Craig's estate and the counsel for Stuart and Whitaker. But it was assumed by the parties to the agreement that if signed by those attorneys and by the attorney of the receiver, it would be sufficient for all the purposes therein expressed. If Craig's estate was not then before the court, by a personal representative, competent to bind it, that fact was known to those who were parties to the agreement. Appellees, in effect, said by the agreement to all who might attend a sale under the decree of 1878, that so far as they were concerned, and notwithstanding Whitaker's appeal, they would look to the proceeds of the sale of the lands, and not to the lands. Halliday having purchased at a sale that took place with their assent, if not by their procurement, and his purchase having been confirmed by the court, the appellees ought not be heard now to say that they will look to the lands and not to the proceeds of sale.

The argument, in support of the opposite view, assumes that it must be taken as true, as against Halliday, that Emma J. Wright married and removed from Arkansas before the first decree of sale was rendered, and, therefore, had ceased to be the personal representative of Craig's estate. But no such fact is established against Halliday in this case. It is true that the order of January 30, 1882, recites that when the original decree of foreclosure and sale was rendered "there

was no representative of the estate of Junius W. Craig, deceased, who could prosecute the suit," and that the Chicot Circuit Court, at that date, "had no jurisdiction." But the want of jurisdiction does not appear on the face of that decree. Nor does the answer in the present case allege that, at the date of the original decree of foreclosure, the estate of Craig was without a personal representative to prosecute the suit by reason of the executrix having married and removed from the State. Upon this point the answer only says that the Supreme Court of Arkansas reversed the decree for the reason, among others, that "there was no party plaintiff to said suit." But the Supreme Court did not say, in its opinion or mandate, that such was the fact. It sent the cause back with instructions "that an administrator *de bonis non* of J. W. Craig may be appointed, *if* there is none, and that he be made a party complainant." If the appellees desired to make the point, as against Halliday, that Emma J. Wright, executrix of Craig's estate, had married and removed from the State, before the decree, under which he purchased, was rendered, they should have alleged that fact in their answer in this case, and established it by evidence, if it was not admitted. But they did not adopt that course. They have proceeded upon the ground that the mere recitals in the orders of the Chicot Circuit Court, made long after Halliday received his deed, and without notice to him, would establish, *in this case*, the fact that the original decree of sale, which shows no want of jurisdiction as to parties or subject-matter, was passed when there was no personal representative of Craig's estate entitled to prosecute the suit. But, as against Halliday, they can take nothing under the proceedings in the Chicot Circuit Court after the return of the original cause from the Supreme Court of the State, and in virtue of which the second sale took place. Of those proceedings, as already suggested, he had no notice. No direct issue was made with him as to the validity of the sale at which he purchased. Not even a rule was taken against him to show cause why his deed should not be annulled. The title he acquired was of record in the very cause in which appellees obtained the order setting aside the decree under

which he bought and the confirmation of his purchase, as well as the order directing another sale of the lands. And yet he was not notified that any steps were being taken to annul his purchase and to cancel his deed. When appellees present a decree of sale under which they purchased the lands, and, in virtue of that decree and the sale had under it, claim the lands, Halliday may well say, "Whatever may be the rights of Craig's estate in respect to the lands, and whatever may be your right to the proceeds of the sale at which I purchased, you cannot claim the lands purchased by me under a former decree, which sale occurred with your consent, and which purchase was confirmed and a deed made to me without objection from you." And this position is consistent with the principles of equity.

As the decree of sale under which Halliday bought does not appear to be void for want of jurisdiction in the court which rendered it, and as, pending Whitaker's appeal, the sale at which Halliday purchased took place with the assent of the present appellees, and was confirmed by the court without objection from them, the appellant should have been awarded, as against them, the relief asked by him.

The decree is reversed and the cause remanded for further proceedings consistent with this opinion.

IOWA *v.* ILLINOIS.

ORIGINAL.

No. 5. Original. Submitted December 11, 1893. — Decided January 15, 1894.

At October term, 1892, an order was made appointing commissioners "to locate and mark the state line between the States of Iowa and Illinois, pursuant to the opinion of this court in this cause," reported in 147 U. S. 1. At the same term the commissioners filed a report of their doings, which was ordered to be confirmed, and it was further ordered "that said commissioners proceed to determine and mark the boundary line between said States throughout its extent, and report thereon to

this court, with all convenient speed." At the present term the State of Illinois moved to set aside the order of confirmation. The State of Iowa resisted on the ground, among others, that the decree of confirmation was a final decree, which could not be set aside at a term subsequent to that at which it was entered. *Held*, that the confirmation of the report was not a final decree deciding and disposing of the whole merits of the cause, and discharging the parties from further attendance; that the court could not dispose of the case by piecemeal; and that until the boundary line throughout its extent is determined, all orders in the case will be interlocutory.

In the exercise of original jurisdiction in the determination of the boundary line between sovereign States, this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded.

THIS was a motion to set aside a decree entered in this cause at October term, 1892.

The case is stated in the opinion.

Mr. M. T. Moloney, Attorney General of the State of Illinois, *Mr. A. W. Green*, and *Mr. Henry S. Robbins* for the motion.

Mr. John Y. Stone, Attorney General of the State of Iowa, *Mr. John F. Lacey*, *Mr. Felix T. Hughes*, and *Mr. James C. Davis* opposing.

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

This was an original suit in equity instituted in this court to determine the boundary line between the States of Iowa and Illinois, and considered upon submission on the pleadings and the briefs of counsel.

On the third of January, 1893, the question at issue was decided, *Iowa* v. *Illinois*, 147 U. S. 1, and an interlocutory decree entered, whereby it was "ordered, adjudged, and declared by this court that the boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi River at the places where

the nine bridges mentioned in the pleadings cross said river; and it is further ordered that a commission be appointed to ascertain and designate at said places the boundary line between the two States, said commission consisting of three competent persons, to be named by the court upon suggestion of counsel, and be required to make a proper examination, and to delineate on maps prepared for that purpose the true line as determined by this court, and report the same to the court for its further action."

March 6, 1893, a joint request was filed in this court, dated January 19, 1893, signed by the attorneys general of the two States concerned, requesting the appointment of certain persons therein suggested as commissioners to fix the boundary line, and that the line be located at once at the Keokuk and Hamilton bridge, and on the next day an order was entered in accordance with this request, as follows: "It is ordered that said Montgomery Meigs, John R. Carpenter, and Albert Wempner be, and they are hereby, appointed commissioners to locate and mark the state line between the States of Iowa and Illinois, pursuant to the opinion of this court in this cause, at each of the nine bridges across the Mississippi River between these States. And inasmuch as there is an emergency existing therefor, it is ordered that said commissioners proceed at once to ascertain and mark the boundary line between said States at the Keokuk and Hamilton bridge, and report at once their action in that regard before proceeding to ascertain the line or mark the same at the other bridges, and that afterward they determine and mark the said state line at the other eight bridges when requested by either party, and report the same. That before entering upon their duties they take and forward to the clerk of this court, to be filed, an oath that they will faithfully perform their duties as such commissioners, under the decision rendered in this cause, to the best of their ability. That the clerk of this court furnish to said commissioners a copy of this order, and the opinion of the court in this cause."

The commissioners filed their report March 30, 1893, as to the boundary line at the bridge mentioned, and on the same day the State of Iowa moved for an order confirming the re-

port, counsel making the application being advised that it was consented to on behalf of the State of Illinois. On April 10, 1893, an order was entered in these words: "This cause coming on to be heard upon the application of the State of Iowa for an order confirming the report of the commissioners, presented herein, ascertaining and marking the boundary line between the State of Illinois and the State of Iowa, at the Keokuk and Hamilton bridge at Keokuk, Iowa, it is ordered that the said report be, and the same is hereby, confirmed; and it is further ordered that said commissioners proceed to determine and mark the boundary line between said States throughout its extent, and report thereon to this court, with all convenient speed, and that the order herein entered on March 7, 1893, be, and it is hereby, modified in accordance herewith."

As will be seen, these proceedings were had at October term, 1892. The State of Illinois on October 11, 1893, one of the first days of October term, 1893, by leave of court, moved to set aside the order confirming the report of the commissioners filed as before stated, upon the ground that notice was not given of the application for the confirmation of said report, and that the consent of the State was signified to the court through mistake and inadvertence. This motion was resisted by the State of Iowa, and numerous affidavits have been filed on both sides.

We are satisfied, upon a careful examination of the papers, that counsel were laboring under misapprehension in the matter of the application for the confirmation, and that the order of the tenth of April was improvidently entered in that the State of Illinois had not received due notice of the application and had not consented to the order. It is unnecessary to rehearse the facts and circumstances which led to the misapprehension. It is objected by the State of Iowa that the order of April 10 was a final finding and decree, and that it cannot be changed or set aside upon motion at a term of court subsequent to that at which it was entered; but we regard the order as interlocutory merely. The confirmation of the report was but a step in the cause and not a final decree de-

ciding and disposing of the whole merits of the cause, and discharging the parties from further attendance. We cannot dispose of the case by piecemeal, and until the boundary line throughout its extent is determined, all orders in the case will be interlocutory.

In the exercise of original jurisdiction in the determination of the boundary line between sovereign States, this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded. Without intimating any opinion on the controversy raised as to the action of the commissioners,

The order of April 10, 1893, so far as it confirms the report in question, will be vacated, and it is so ordered.

In re BONNER, Petitioner.

ORIGINAL.

No. 8. Original. Argued November 27, 28, 1893. — Decided January 15, 1894.

When a person accused of crime is convicted in a court of the United States and is sentenced by the court, under Rev. Stat. § 5356, to imprisonment for one year and the payment of a fine, the court is without jurisdiction to further adjudge that that imprisonment shall take place in a state penitentiary under Rev. Stat. § 5546; and the prisoner, if sentenced to be confined in a state penitentiary, is entitled to a writ of *habeas corpus* directing his discharge from the custody of the warden of the state penitentiary, but without prejudice to the right of the United States to take any lawful measures to have the petitioner sentenced in accordance with law upon the verdict against him.

Where a conviction is correct, and where the error or excess of jurisdiction is the ordering the prisoner to be confined in a penitentiary where the law does not allow the court to send him, there is no good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence, in order that its defect may be corrected.

The court discharging the prisoner in such case on *habeas corpus* should delay his discharge for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, in order that the defects in the former judgment for want of jurisdiction, which are the subjects of complaint, may be corrected.

Statement of the Case.

THE petitioner, John Bonner, a citizen of the United States, represents that he is now and has been since the 23d of May, 1893, unlawfully deprived of his liberty by one P. W. Madden, as warden of the penitentiary of Iowa, situated in Anamosa in that State. He sets forth, as the cause of his restraint and detention, that at the October term, 1892, of the United States court for the Third Judicial Division of the Indian Territory, he was indicted for the larceny, in May previous, in the Chickasaw Nation, within the Indian Territory, of four head of cattle of the value of fifty dollars, the property of one Robert Williams, who was not a member of any Indian tribe; that during that month he was arraigned before the same court and pleaded not guilty to the indictment, and was tried and found guilty. The statute under which the indictment was found is contained in section 5356 of the Revised Statutes, and is as follows: "Every person who, upon the high seas, or in any place under the exclusive jurisdiction of the United States, takes and carries away, with intent to steal or purloin, the personal goods of another, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment." The court by its judgment sentenced the petitioner to imprisonment in the penitentiary at Anamosa in the State of Iowa for the term of one year, and to the payment of a fine of one thousand dollars. It also added that the marshal of the court, to whose custody he was then committed, should safely keep and convey the petitioner and deliver him to the custody of the warden of the penitentiary, who would receive and keep him in prison for the period of one year in execution of the sentence. The petitioner also sets forth that the warden of the penitentiary has no other authority to hold him than the said judgment and order of commitment.

The petitioner alleges that the said sentence and order of commitment are void; that the court was without power or jurisdiction, under the law, to render the judgment; and that he had applied to the United States Judge of the Northern District of Iowa for a writ of *habeas corpus* to be released from confinement, and that the writ was denied to him. He,

Counsel for Petitioner.

therefore, prays that this court will issue the writ of *habeas corpus* to the said warden to appear before this court and show what authority, if any, he has for restraining the petitioner of his liberty, and that upon final hearing he may be discharged.

An order was issued from this court in October last to the warden to show cause why the writ should not be granted as prayed. The warden returns answer that he holds the prisoner by virtue of a warrant of commitment issued upon the judgment and sentence of the United States court, as above stated, of which a copy is annexed to the petition, and that at the time of the petitioner's conviction, and of the judgment and sentence, there was no penitentiary or jail suitable for the confinement of convicts or available therefor in the Indian Territory, and that the state penitentiary at Anamosa had been duly designated by the Attorney General, under section 5546 of the Revised Statutes of the United States, as the place of confinement for prisoners convicted of crime by that court, and that the order of the court for the confinement of the petitioner in that penitentiary under its sentence of imprisonment was in pursuance of that designation.

So much of section 5546 of the Revised Statutes as bears upon the question under consideration in this case is as follows: "All persons who have been or who may hereafter be convicted of crime by any court of the United States, whose punishment is imprisonment, in a district or territory where, at the time of conviction, there may be no penitentiary or jail suitable for the confinement of convicts or available therefor, shall be confined during the term for which they have been or may be sentenced in some suitable jail or penitentiary in a convenient State or Territory, to be designated by the Attorney General, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the district or territory where the conviction has occurred."

Mr. John C. Chaney, (with whom was *Mr. William J. Rannells* on the brief,) for petitioner.

Mr. Solicitor General opposing.

I. An excessive sentence upon a lawful conviction is not absolutely void, so as to entitle the prisoner to be discharged on *habeas corpus*.

It is true that in the *case of Mills*, 135 U. S. 263, 270, the petitioner was discharged on *habeas corpus* because he had been sentenced to imprisonment in a penitentiary instead of in a jail, upon the ground, as stated by Mr. Justice Harlan delivering the opinion of the court, that "The court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment to be executed in a penitentiary are void. This is not a case of mere error, but one in which the court below transcended its powers. *Ex parte Lange*, 18 Wall. 163, 176; *Ex parte Parks*, 93 U. S. 18, 23; *Ex parte Virginia*, 100 U. S. 339, 343; *Ex parte Rowland*, 104 U. S. 604, 612; *In re Coy*, 127 U. S. 731, 738; *Hans Nielsen, Petitioner*, 131 U. S. 176, 182."

I am obliged to admit upon the authority of that case, construing Revised Statutes, sections 5541, 5547, that the petitioner should not have been sentenced to imprisonment in a penitentiary, but I beg to submit that the judgment and sentence are not for that reason absolutely void, so as to entitle the petitioner to a writ of *habeas corpus* for his discharge; and I ask the court to reconsider the doctrine announced in the passage quoted above from the opinion of Mr. Justice Harlan.

I respectfully submit that the authorities cited by Mr. Justice Harlan do not support his statement of the law. None of them involve the question of an excessive sentence at all, except *Ex parte Lange*, and in that case the court said in express terms that the excessive sentence was not void, but only voidable; and a writ of *habeas corpus* having been denied in three of the remaining five cases cited, they certainly cannot be accepted as adjudications in favor of the point ruled in *Ex parte Mills*.

In *Ex parte Lange*, 18 Wall. 163, 176, the petitioner had been convicted in the Circuit Court, under a statute which

authorized the court to impose either a fine of not more than $200, or imprisonment not to exceed one year. The court erroneously sentenced the petitioner to pay a fine of $200 *and* to be imprisoned for a period of one year; and the defendant, having paid the fine of $200, was brought into court and, the error in awarding judgment against him having been discovered, an order was entered vacating the judgment, fixing the punishment at a fine and imprisonment both, and the prisoner was a second time sentenced to one year's imprisonment from the date of the second judgment. This court held that he was entitled to an absolute discharge upon *habeas corpus*, but upon the ground that he had already satisfied the penalty of one of the alternative judgments prescribed by the statute, in the payment of the fine of $200, and that he could not, therefore, be properly adjudged to undergo imprisonment. Mr. Justice Miller said (p. 176): "The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case and for that very offence the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offence, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offence was at an end."

But the learned justice took occasion to say that the original judgment, in awarding the excessive punishment of both fine and imprisonment, was not for that reason void, but only erroneous. He said (p. 174): "The judgment first rendered, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and of the offence, on a valid verdict. The error of the court in imposing the two punishments mentioned in the statute, when it had only the alternative of one of them, did not make the judgment wholly void."

In *Ex parte Parks*, 93 U. S. 18, 23, Mr. Justice Bradley thus stated the ground of the judgment in the case of *Lange:* "In *Ex parte Lange* we proceeded on the ground that when the court rendered its second judgment the case was entirely out of its hands. It was *functus officio* in regard to it. The

judgment first rendered had been executed and satisfied. The subsequent proceedings were therefore, according to our view, void."

In *Sennott's Case*, 146 Mass. 489, 493, Knowlton, J., said of the case of *Lange:* "The leading cases of *Ex parte Lange*, 18 Wall. 163, and *People* v. *Liscomb*, 60 N. Y. 559, do not decide that a sentence which is merely erroneous and excessive through a mistake of law is void, in such a sense as to make an officer liable for executing it, or to call for a discharge upon *habeas corpus* of a person held under it. Indeed, in the former case, Mr. Justice Miller, in his opinion, at page 174, asserts that it is not. The principle upon which this case goes is, that when a court has once imposed a sentence, whether in accordance with law or not, which has been served or performed in whole or in part, it has no jurisdiction to impose another, either in addition to or in substitution for the first. And the case of *People* v. *Liscomb*, rests on similar grounds. See *People* v. *Jacobs*, 66 N. Y. 8."

Ex parte Parks was not the case of an excessive sentence, but of sentence under an indictment which, it was claimed by the petitioner, charged him with no crime against the laws of the United States; but this court held that that was a question which the trial court had jurisdiction to determine, and a writ of *habeas corpus* was accordingly denied. The case is surely no authority for the proposition that an excessive sentence is a void sentence. No case to that effect was cited by Mr. Justice Bradley, and no countenance to such a view was given by anything said in his opinion. On the contrary, after citing, in addition to *Ex parte Lange*, *Ex parte Kearney*, 7 Wheat. 38, and *Ex parte Wells*, 18 How. 307, in both of which writs were denied, and in the first of which the rule, that *habeas corpus* cannot be used as a writ of error, was declared in the strongest terms by Mr. Justice Story, Mr. Justice Bradley said (p. 23): "But if the court had jurisdiction and power to convict and sentence, the writ cannot issue to correct a mere error. . . . But, in the case before us, the district court had plenary jurisdiction, both of the person, the place, the cause, and everything about it. To review the decision of that court by means of

the writ of *habeas corpus* would be to convert that writ into a mere writ of error and to assume an appellate power which has never been conferred upon this court."

In *Ex parte Virginia*, 100 U. S. 339, it was claimed that the act under which the prisoner was arrested was unconstitutional, but this court held otherwise and denied the writ. The case of *Coy* is to the same effect, the court denying the writ and refusing to consider the sufficiency of the indictment.

In *Hans Nielsen, Petitioner*, 131 U. S. 176, the prisoner was convicted and sentenced for the crime of adultery, which was included in the crime of unlawful cohabitation for which he had previously been convicted and punished, and this court ordered his discharge, upon the ground that the trial court was without jurisdiction to render *any* judgment, the prisoner having already been convicted of the same offence.

Having endeavored to show, by an analysis of the cases cited in *Ex parte Mills*, that none of them support the doctrine announced in that case, that an excessive sentence upon a lawful conviction is void, I now refer the court to several well-considered cases in which the opposite rule is adjudged.

In *Sennott's Case*, 146 Mass. 489, 492, 493, which involved a sentence not in accordance with the statutes, and in which the court refused a *habeas corpus*, Knowlton, J., said: "The better rule seems to be, that where a court has jurisdiction of the person, and of the offence, the imposition by mistake of a sentence, in excess of what the law permits, is within the jurisdiction, and does not render the sentence void, but only voidable by proceedings upon a writ of error. *Ross's Case*, 2 Pick. 165; *Feeley's Case*, 12 Cush. 598, 599; *Semler, Petitioner*, 41 Wisconsin, 517; *Ex parte Shaw*, 7 Ohio St. 81; *Ex parte Van Hagan*, 25 Ohio St. 426; *Phinney, Petitioner*, 32 Maine, 440; *Kirby* v. *State*, 62 Alabama, 51; *Lark* v. *State*, 55 Georgia, 435."

Ex parte Shaw, 7 Ohio St. 81, 82, was a case of *habeas corpus* for the release of a prisoner sentenced to imprisonment for one year, under a statute which required a sentence for a period of not less than three years. Swan, J., said: "Does this render the sentence void and the commitment of the re-

lator unlawful? The question is one simply of jurisdiction. The court had jurisdiction over the offence and its punishment. It had authority to pronounce sentence; and, while in the legitimate exercise of its power, committed a manifest error and mistake in the award of the number of years of the punishment. The sentence was not void, but erroneous. . . . But if the court had sentenced the relator for an offence over which, by law, it had no jurisdiction whatever, so that the proceedings and sentence were manifestly *coram non judice* and void, the imprisonment following such void sentence would have been unlawful, and the relator entitled to be discharged on *habeas corpus*."

A similar rule was applied in *Ex parte Van Hagan*, 52 Ohio St. 426, where the petitioner, upon a lawful conviction, had been erroneously sentenced to imprisonment in the workhouse for six months, instead of for thirty days in the dungeon of the county jail, as prescribed by the statute; and in *Williams* v. *State*, 18 Ohio St. 46, 49, where the sentence was vague and indefinite, being imprisonment for "ten years, to commence at the expiration of the sentence aforesaid," there being nothing in the record showing to what the term "aforesaid" related, the court remanded the case "for judgment and sentence upon the verdict of the jury pursuant to law," with this observation: "As the error in this case is only in the insufficiency of the judgment and sentence of the court, the reversal will not affect the validity of the conviction."

In re Graham, and *In re McDonald*, 74 Wisconsin, 450, the petitioners applied for writs of *habeas corpus*, claiming to have been sentenced respectively to imprisonment in the state prison for thirteen and fourteen years, when the act under which convictions were had, permitted imprisonment for not more than ten years nor less than three years. The court said: "We deny the writs for the reason that the error in the judgments does not render them void, or the imprisonment under them illegal, in that sense which entitles them to be discharged on a writ of *habeas corpus*. The judgments are doubtless erroneous and would be reversed on writ of

error. But the judgments are not void. The court had jurisdiction of the persons and subject-matter or offence, but made a mistake in the judgment. For mere error, no matter how flagrant, the remedy is not by *habeas corpus*. The law is well settled in this court that on *habeas corpus* only jurisdictional defects are inquired into. The writ does not raise questions of errors in law or irregularities in the proceedings."

The prisoners applied a second time for writs, but they were refused, 76 Wisconsin, 366. Graham then applied to this court, *In re Graham*, 138 U. S. 461, but his application was denied on the ground that there was no Federal question involved.

In *Elsner* v. *Shrigley*, 80 Iowa, 30, 34, the plaintiff was convicted of maintaining a nuisance and sentenced to pay a fine of $300 and costs, including an attorney's fee of $50. The judgment further provided for imprisonment for failure to pay, at hard labor, until the fine and costs were paid. The prisoner sued out a writ of *habeas corpus*, claiming that the judgment was void, because it failed to fix the time for which he was to be imprisoned. The court said: "It was not, of course, to be understood that a court has acted in a lawful manner when the judgment it pronounces is absolutely void, for such a judgment has no support in the law. Neither the law in its substance nor 'manner or form' can aid it. But if it is merely voidable, it has support until set aside in a proper proceeding. The court in that proceeding had jurisdiction of the subject matter and of the person. It had the right to impose a fine, and provide for imprisonment until the fine was paid. In so doing it could not make the imprisonment exceed one day for each three and one-third dollars. If the judgment exceeded the limit of the law, it would be void as to the excess, but not as to the remainder. *People* v. *Jacobs*, 66 N. Y. 8; *People* v. *Baker*, 89 N. Y. 460. Conceding that the court could, under the language of the statute, make the imprisonment less than the rate named, it could not make it more, and within the limits it possessed a discretionary power, and in the erroneous exercise of such a power a court cannot generally, if ever, be

said to be acting in an unlawful manner, nor are such acts generally, if ever, absolutely void."

In the next paragraph the court said that the failure of the trial judge to fix a definite term of imprisonment "made the judgment erroneous, but not void, and the law on appeal afforded the plaintiff ample protection." And they "reached the conclusion that *habeas corpus* is not available to question the correctness of the proceedings of the district court with reference to the judgment in question," and affirmed the judgment, remanding the petitioner to custody, citing many authorities (p. 36).

In *Ex parte Max*, 44 California, 579, 581, Max petitioned to be discharged, on *habeas corpus*, because he was sentenced as for conviction of a felony when he was convicted of a misdemeanor merely. His counsel contended that the judgment was absolutely void, and conferred no authority to the warden to detain the petitioner. The court said: "We are of opinion, however, that the position cannot be maintained. The indictment upon which judgment is founded is sufficient in all respects; the offence of which the prisoner was convicted was one within the scope of the indictment, and the judgment one which the county court had the authority to render upon the appearance and plea of the petitioner. These conditions constitute jurisdiction; all others involve questions of mere error, and the latter cannot be inquired into upon writ of *habeas corpus*, but only upon proceedings in error."

In *People* v. *Kelly*, 97 N. Y. 212, an application was made for a writ of *habeas corpus* by a prisoner who had been convicted of an assault in the third degree, and sentenced to imprisonment at hard labor in the state prison for the term of one year. The Court of Appeals held that the offence was a misdemeanor, and punishable only by imprisonment for not more than one year, or by a fine of not more than $500, or by both. The case is one of an excessive sentence upon a valid conviction. But the court refused to discharge the petitioner, and remanded him to the sheriff in order that the trial court might deal with him according to law.

In *Ex parte Bond*, 9 S. C. 80, the petitioner had been con-

victed of assault with intent to kill and sentenced to confinement in the penitentiary at hard labor. The court held that the offence was not punishable by confinement in the state penitentiary, and that the sentence was therefore erroneous, but that it was not void, and refused to discharge the prisoner on *habeas corpus*.

In re Petty, 22 Kansas, 477, was an original proceeding in *habeas corpus*. The petitioner, for a murder committed in 1866, was sentenced, under an act of 1872, which provided that a person sentenced to death was to be delivered to the warden of the penitentiary, under a warrant of a court pronouncing judgment, and kept at hard labor within the walls of the penitentiary until the warden received the order of the governor fixing the day on which the sentence of the law was to be carried into effect, which order should not be made before one year had elapsed from the time of conviction. Prior to the act of 1872, whenever any convict was sentenced to the punishment of death, the court appointed a day on which such sentence was to be executed, the day not being less than four nor more than eight weeks from the time of the sentence. The court held that the prisoner was not subject to the punishment of the act of 1872; but that the trial court having had jurisdiction of the person of the prisoner and of the offence, the verdict was valid; that under the verdict he was liable to be sentenced to the punishment of death, and that the proviso in the sentence that the governor should set the day of the execution at a time not less than one year from the day of sentence "was an irregularity, or rather an erroneous order, to carry out the sentence of death, and not a void judgment." The writ was denied, and the prisoner remanded to the custody of the warden.

In *Phinney, Petitioner*, 32 Maine, 440, the sentence of the petitioner had erroneously ordered the fine to be paid to the State. The court, while recognizing the error, said: "Still the judgment is valid until reversed," and refused to discharge the prisoner.

The People v. *Cavanagh*, 2 Parker's Crim. Rep. (N. Y.) 650, 662, was a case in *habeas corpus* for relief from an errone-

ous sentence of imprisonment. The court said: "There is no force in the point raised that Cavanagh should have been sentenced to the penitentiary, and not to the county jail. We must assume that the *oyer* and *terminer* determined it had the power to pronounce the sentence under which he was imprisoned. If it was an error to designate the county jail as the place of his confinement, which I by no means assert, it cannot be reviewed and corrected in this proceeding. It forms no ground for his discharge upon *habeas corpus*."

In *Ex parte Mooney*, 26 W. Va. 32, 36, the writ was refused to a prisoner who had been improperly sentenced to both fine and imprisonment.

The sentence at bar is in accordance with the statute in the amount of the fine and in the term of the imprisonment imposed. It violates the statute only in the designation of the place of imprisonment. I beg to submit whether, in view of the provisions of title 70, chapter 9, of the Revised Statutes, the designation by the United States courts of the place at which their sentences of imprisonment shall be executed, is such a part of the sentence itself as to make the sentence absolutely void if there is error in the designation. In *Ex parte Waterman*, 33 Fed. Rep. 29, 30, Coxe, J., referring to these statutes said: "By these provisions Congress clearly recognizes a distinction between a sentence and an order for the execution of the sentence. After the former has been *passed*, the order is made designating the prison, but the *order* is not necessarily a part of the judgment of the court." This seems to be a plausible view of section 5541 of the Revised Statutes, which provides that, "in every case where any person convicted of any offence against the United States is *sentenced* to imprisonment for a period longer than one year, the court by which the *sentence is passed* may order the same to be executed in any state jail or penitentiary."

II. The petitioner should not be released on *habeas corpus*, even if he is entitled to be discharged on writ of error. The practice at common law is well established.

III. The erroneous sentence can be corrected in the Circuit Court of Appeals, the conviction being valid, and the petitioner should not therefore be discharged absolutely.

IV. The petitioner should be remitted to the Circuit Court for relief.

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

The petitioner asks for the issue of the writ of *habeas corpus* in order that he may be thereby set at liberty, on the ground that his imprisonment in the penitentiary at Anamosa in Iowa is in pursuance of a judgment of a court which possessed no authority under the law to pass sentence upon him of imprisonment in the state penitentiary, upon his conviction of the offence for which he was indicted and tried. That is a sentence which can only be imposed where it is specifically prescribed, or where the imprisonment ordered is for a period longer than one year, or at hard labor. To an imprisonment for that period or at hard labor in a state penitentiary infamy is attached, and a taint of that character can be cast only in the cases mentioned.

Section 5356 of the Revised Statutes of the United States, under which the defendant was indicted and convicted, prescribes as a punishment for the offences designated fine or imprisonment — the fine not to exceed one thousand dollars and the imprisonment not more than one year, or by both such fine and imprisonment. Such imprisonment cannot be enforced in a state penitentiary. Its limitation being to one year, must be enforced elsewhere. Section 5541 of the Revised Statutes provides that: "In every case where any person convicted of any offence against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose." And section 5542 provides for a similar imprisonment in a state jail or penitentiary where the person has been convicted of any offence against the United States and sentenced to imprisonment and confinement at hard labor. It follows

that the court had no jurisdiction to order an imprisonment, when the place is not specified in the law, to be executed in a penitentiary when the imprisonment is not ordered for a period longer than one year or at hard labor. The statute is equivalent to a direct denial of any authority on the part of the court to direct that imprisonment be executed in a penitentiary in any cases other than those specified. Whatever discretion, therefore, the court may possess, in prescribing the extent of imprisonment as a punishment for the offence committed, it cannot, in specifying the place of imprisonment, name one of these institutions. This has been expressly adjudged in *In Re Mills*, 135 U. S. 263, 270, which, in one part of it, presents features in all respects similar to those of the present case.

There the petitioner, Mills, was detained by the warden of the state penitentiary in Columbus, Ohio, pursuant to two judgments of the District Court of the United States for the Western District of Arkansas sentencing him in each case to confinement in the penitentiary of that State. Application was made by the prisoner for a writ of *habeas corpus*, on the ground that the court by which he was tried had no jurisdiction of the offences with which he was charged, and on the further ground that his detention in the penitentiary under the sentences, neither of which was for a longer period than one year, was contrary to the laws of the United States. The first position was not considered tenable, but the second was deemed sufficient to authorize the issue of the writ. The court held that, apart from any question as to whether the court below had jurisdiction to try the offence charged, the detention of the petitioner in the penitentiary upon sentences, neither of which was for imprisonment longer than one year, was in violation of the laws of the United States, and that he was, therefore, entitled to be discharged from the custody of the warden of the institution. "A sentence simply of 'imprisonment,'" said the court, "in the case of a person convicted of an offence against the United States — where the statute prescribing the punishment does not require that the accused shall be confined in a penitentiary — cannot be executed by confinement in that institution, except in cases where

the sentence is 'for a period *longer* than one year.' There is consequently no escape from the conclusion that the judgment of the court sentencing the petitioner to imprisonment in a penitentiary, in one case for a year and in the other for six months, was in violation of the statutes of the United States. The court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment to be executed in a penitentiary are void." The court added: "This is not a case of mere error, but one in which the court below transcended its powers," citing *Ex parte Lange*, 18 Wall. 163, 176; *Ex parte Parks*, 93 U. S. 18, 23; *Ex parte Virginia*, 100 U. S. 339, 343; *Ex parte Rowland*, 104 U. S. 604, 612; *In re Coy*, 127 U. S. 731, 738; and *Hans Nielsen, Petitioner*, 131 U. S. 176, 182.

Counsel for the government admits that, upon the authority of that case construing the Revised Statutes, the petitioner should not have been sentenced to imprisonment in the penitentiary; but he claims that the judgment and sentence are not for that cause void so as to entitle the petitioner to a writ of *habeas corpus* for his discharge, and he asks the court to reconsider the doctrine announced, contending that neither the reason of the law nor the authorities sustain the position. According to his argument, it would seem that the court does not exceed its jurisdiction when it directs imprisonment in a penitentiary, to which place it is expressly forbidden to order it. It would be as well, and be equally within its authority, for the court to order the imprisonment to be in the guard-house of a fort, or the hulks of a prison-ship, or in any other place not specified in the law.

We are unable to agree with the learned counsel, but are of opinion that in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms. There has been a great deal said

and written, in many cases with embarrassing looseness of expression, as to the jurisdiction of the courts in criminal cases. From a somewhat extended examination of the authorities we will venture to state some rule applicable to all of them, by which the jurisdiction as to any particular judgment of the court in such cases may be determined. It is plain that such court has jurisdiction to render a particular judgment only when the offence charged is within the class of offences placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void. Proceeding within these limitations, its action may be erroneous, but not void.

To illustrate: In order that a court may take jurisdiction of a criminal case, the law must, in the first instance, authorize it to act upon a particular class of offences within which the one presented is embraced. Then comes the mode of the presentation of the offence to the court. That is specifically prescribed. If the offence be a felony, the accusation in the Federal court must be made by a grand jury summoned to investigate the charge of the public prosecutor against the accused. Such indictment can only be found by a specified number of the grand jury. If not found by that number, the court cannot proceed at all. If the offence be only a misdemeanor, not punishable by imprisonment in the penitentiary, *Mackin* v. *United States*, 117 U. S. 348, the accusation may be made by indictment of the grand jury or by information of the public prosecutor. An information is a formal charge against the accused of the offence, with such particulars as to time, place, and attendant circumstances as will apprise him of the nature of the charge he is to meet, signed by the public prosecutor. When the indictment is found, or the information is filed, a warrant is issued for the arrest of the accused to be brought before the court, unless he is at the time in custody, in which case an order for that purpose is made, to the end, in

either case, that he may be arraigned and plead to the indictment or information. When he is brought before the court, objections to the validity or form of the indictment or information, if made, are considered, or issue is joined upon the accusation. When issue is thus joined, the court must proceed to trial by a jury, except in case of the accused's confession. It cannot then proceed to determine the issue in any other way. When the jury have rendered their verdict, the court has to pronounce the proper judgment upon such verdict — and the law, in prescribing the punishment, either as to the extent, or the mode, or the place of it, should be followed. If the court is authorized to impose imprisonment, and it exceeds the time prescribed by law, the judgment is void for the excess. If the law prescribes a place of imprisonment, the court cannot direct a different place not authorized; it cannot direct imprisonment in a penitentiary when the law assigns that institution for imprisonment under judgments of a different character. If the case be a capital one, and the punishment be death, it must be inflicted in the form prescribed by law. Although life is to be extinguished, it cannot be by any other mode. The proposition put forward by counsel that if the court has authority to inflict the punishment prescribed, its action is not void, though it pursues any form or mode which may commend itself to its discretion, is certainly not to be tolerated. Imprisonment might be accompanied with inconceivable misery and mental suffering, by its solitary character or other attending circumstances. Death might be inflicted by torture, or by starvation, or by drawing and quartering. All these modes, or any of them, would be permissible, if the doctrine asserted by him can be maintained.

A question of some difficulty arises, which has been disposed of in different ways, and that is as to the validity of a judgment which exceeds in its extent the duration of time prescribed by law. With many courts and judges — perhaps with the majority — such judgment is considered valid to the extent to which the law allowed it to be entered, and only void for the excess. Following out this argument, it is further claimed that, therefore, the writ of *habeas corpus* cannot be

invoked for the relief of a party until the time has expired to which the judgment should have been limited. But that question is only of speculative interest here, for there is here no question of excess of punishment. The prisoner is ordered to be confined in the penitentiary, where the law does not allow the court to send him for a single hour. To deny the writ of *habeas corpus* in such a case is a virtual suspension of it; and it should be constantly borne in mind that the writ was intended as a protection of the citizen from encroachment upon his liberty from any source — equally as well from the unauthorized acts of courts and judges as the unauthorized acts of individuals.

The law of our country takes care, or should take care, that not the weight of a judge's finger shall fall upon any one except as specifically authorized. A rigid adherence to this doctrine will give far greater security and safety to the citizen than permitting the exercise of an unlimited discretion on the part of the courts in the imposition of punishments as to their extent, or as to the mode or place of their execution, leaving the injured party, in case of error, to the slow remedy of an appeal from the erroneous judgment or order, which, in most cases, would be unavailing to give relief. In the case before us, had an appeal been taken from the judgment of the United States court of the Indian Territory, it would hardly have reached a determination before the period of the sentence would have expired, and the wrong caused by the imprisonment in the penitentiary have been inflicted.

Much complaint is made that persons are often discharged from arrest and imprisonment when their conviction, upon which such imprisonment was ordered, is perfectly correct, the excess of jurisdiction on the part of the court being in enlarging the punishment or in enforcing it in a different mode or place than that provided by the law. But in such cases there need not be any failure of justice; for, where the conviction is correct and the error or excess of jurisdiction has been as stated, there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence in order that its defect may be cor-

rected. The judges of all courts of record are magistrates, and their object should be not to turn loose upon society persons who have been justly convicted of criminal offences, but, where the punishment imposed, in the mode, extent, or place of its execution, has exceeded the law, to have it corrected by calling the attention of the court to such excess. We do not perceive any departure from principle or any denial of the petitioner's right in adopting such a course. He complains of the unlawfulness of his place of imprisonment. He is only entitled to relief from that unlawful feature, and that he would obtain if opportunity be given to that court for correction in that particular. It is true where there are also errors on the trial of the case affecting the judgment, not trenching upon its jurisdiction, the mere remanding the prisoner to the original court that imposed the sentence, to correct the judgment in those particulars for which the writ is issued, would not answer, for his relief would only come upon a new trial; and his remedy for such errors must be sought by appeal or writ of error. But in a vast majority of cases the extent and mode and place of punishment may be corrected by the original court without a new trial, and the party punished as he should be whilst relieved from any excess committed by the court of which he complains. In such case the original court would only set aside what it had no authority to do and substitute directions required by the law to be done upon the conviction of the offender.

Some of the state courts have expressed themselves strongly in favor of the adoption of this course, where the defects complained of consist only in the judgment, — in its extent or mode, or place of punishment, — the conviction being in all respects regular. In *Beale* v. *Commonwealth*, 25 Penn. St. 11, 22, the Supreme Court of Pennsylvania said: "The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence. If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established."

It is true that this language was used in a case pending in the Supreme Court of a State on writ of error, but if then the court would send the case back to have the error, not touching the verdict, corrected and justice enforced, there is the same reason why such correction should be made when the prisoner is discharged on *habeas corpus* for alleged defects of jurisdiction in the rendition of the judgment under which he is held. The end sought by him — to be relieved from the defects in the judgment rendered to his injury — is secured, and at the same time the community is not made to suffer by a failure in the enforcement of justice against him.

The court is invested with the largest power to control and direct the form of judgment to be entered in cases brought up before it on *habeas corpus*. Section 761 of the Revised Statutes on this subject provides that: "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." It would seem that in the interest of justice and to prevent its defeat, this court might well delay the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that the defects for want of jurisdiction which are the subject of complaint in that judgment may be corrected. *Medley, Petitioner*, 134 U. S. 160, 174.

In the case of *Coleman* v. *Tennessee*, 97 U. S. 509, a party, who had been convicted of a capital offence, and the judgment had been confirmed by the Supreme Court of that State, was discharged by judgment of this court because it was held that the state court had no jurisdiction to try a soldier of the army of the United States for a military offence committed by him whilst in the military service and subject to the articles of war. But as it appeared that the prisoner had been tried by a court-martial regularly convened in the army for the same offence and sentenced to be shot, and had afterwards escaped, this court, in reversing the judgment of the Supreme Court of Tennessee, stated that that court could turn the prisoner over to the military authorities of the United States. He was so turned

over, and the punishment was commuted to life imprisonment, and he was sent to Fort Leavenworth to serve it out.

In some cases, it is true, that no correction can be made of the judgment, as where the court had under the law no jurisdiction of the case — that is, no right to take cognizance of the offence alleged, and the prisoner must then be entirely discharged; but those cases will be rare, and much of the complaint that is made for discharging on *habeas corpus* persons who have been duly convicted will be thus removed.

Ordered, that the writ of habeas corpus issue, and that the petitioner be discharged from the custody of the warden of the penitentiary at Anamosa in the State of Iowa; but without prejudice to the right of the United States to take any lawful measures to have the petitioner sentenced in accordance with law upon the verdict against him.

DAVIS *v.* UTAH TERRITORY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 961. Submitted November 15, 1893. — Decided January 8, 1894.

In Utah it is not necessary that an indictment for murder should charge that the killing was unlawful.

An indictment which clearly and distinctly alleges facts showing a murder by the unlawful killing of a human being with malice aforethought is good as an indictment for murder under the Utah statutes, although it may not indicate upon its face, in terms, the degree of that crime, and, thereby, the nature of the punishment which may be inflicted.

The indictment in this case sufficiently charged the crime of murder.

After the verdict of the jury that the defendant was guilty of murder in the first degree, the court, the defendant being present, announced that he had been convicted of murder in the first degree without any recommendation, and, as he elected to be shot, therefore it was ordered, adjudged, and decreed that he be taken, etc., and shot until he was dead. *Held* that this was a full compliance with the requirements of the statutes of Utah.

THE case is stated in the opinion.

Opinion of the Court.

Mr. Warren N. Dusenberry for plaintiff in error.

Mr. Solicitor General for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

The plaintiff in error, Enoch Davis, was indicted in the First Judicial District Court of the Territory of Utah for murder, alleged to have been committed as follows:

"The said Enoch Davis, on the sixth day of June, A.D. eighteen hundred and ninety-two, at the county of Uintah, in said Territory of Utah, in and upon one Louisa Davis, there being, wilfully, feloniously, and of his deliberately premeditated malice aforethought, did make an assault with a certain revolver by him, the said Enoch Davis, then and there had and held, with which said revolver he, the said Enoch Davis, her, the said Louisa Davis, upon the head did then and there wilfully, feloniously, and of his deliberately premeditated malice aforethought beat, bruise, and wound, thereby then and there inflicting upon the head of her, the said Louisa Davis, one mortal wound, of which the said Louisa Davis then and there instantly died, and so the grand jurors aforesaid so say that in manner aforesaid, he, the said Enoch Davis, her, the said Louisa Davis, then and there did kill and murder, contrary to the form of the statutes of said Territory, in such cases made and provided, and against the peace and dignity of the people aforesaid."

The defendant demurred to the indictment on the ground that it did not state facts sufficient to constitute a public offence. The demurrer was overruled, and he excepted. The defendant then pleaded not guilty. After trial, the jury returned the following verdict: "We, the jury empanelled in the above-entitled cause, find the defendant, Enoch Davis, guilty of murder in the first degree as charged in the indictment. Newell Brown, foreman."

There was a motion for a new trial upon various grounds. And defendant also moved in arrest of judgment upon the following grounds: first, the indictment does not charge murder in the first degree; second, the verdict against the

defendant of murder in the first degree was in excess of the offence charged in the indictment.

Under date of November 3, 1892, appears the following order of the court:

"The defendant being present in court, the motions for a new trial and in arrest of judgment having been separately argued by respective counsel, and the court now being fully advised therein, orders that said motions be overruled; to which order the defendant excepts. Defendant being present in court and being asked by the court if he had anything to say why sentence should not be now pronounced against him, and he answering in the negative, and said defendant having chosen to be shot instead of hanging:

"Thereupon the court rendered its judgment: Whereas you, the said Enoch Davis, having been duly convicted of the crime of murder in the first degree, without any recommendations whatever; it is therefore ordered, adjudged, and decreed that you, the said Enoch Davis, be taken hence to the penitentiary of the Territory of Utah, where you shall be safely kept until Friday, December 30, 1892, and that between the hours of ten in the forenoon and four in the afternoon on said day you be taken from your place of confinement to the jail or jail yard of the county jail of the county of Uintah, or some other private and convenient place in said county of Uintah, and that you then be shot till you are dead. You are hereby remanded into the custody of the U. S. marshal of Utah, who will see that this judgment and sentence of the court are carried out and executed. To which orders defendant excepts."

An appeal was taken to the Supreme Court of the Territory, and the judgment was affirmed.

Murder is declared by the statutes of Utah to be "the unlawful killing of a human being with malice aforethought." This is substantially murder as defined at common law. 4 Bl. Com. 195; 3 Inst. 47. And such malice may be express or implied; express, when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature; implied, when no considerable provocation appears, or when

the circumstances attending the killing show an abandoned or malignant heart. 2 Comp. Laws of Utah, 578, §§ 4452, 4453.

It is also provided, Ib. 579, §§ 4454, 4455, that "every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate malice and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery, or perpetrated from a premeditated design, unlawfully and maliciously to effect the death of any other human being, other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life, is murder in the first degree; and any other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree;" further, that "every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned, at hard labor in the penitentiary for life, at the discretion of the court, and every person guilty of murder in the second degree shall be imprisoned, at hard labor, in the penitentiary for a term not less than five or more than fifteen years."

In respect to the forms of pleadings in criminal actions and the rules by which their sufficiency is to be determined, it is provided that the indictment must contain a clear and concise statement of the acts or omissions constituting the offence, with such particulars as to time, place, person, and property, as will enable the defendant to understand distinctly the character of the offence charged, and to answer the indictment; and must be direct and certain as regards the party and the offence charged, and the particular circumstances of the offence. The words used in the indictment are to be construed according to their usual acceptance in common language, except such words and phrases as are defined by law, and they are to be construed according to their legal meaning. Words in the statute defining a public offence need not be strictly pursued in the indictment, but other words conveying the same meaning may be used. 2 Comp. Laws of Utah, 687–8, §§ 4928, 4929, 4930, 4931, 4936, 4937.

In respect to the description of the offence, an indictment is sufficient, under the laws of Utah, if the act or omission charged as the offence is clearly and distinctly set forth, without repetition, and in such a manner as to enable the court to understand what is intended, and to pronounce judgment upon conviction according to the right of the case. Comp. Laws of Utah, vol. 2, § 4938.

The first assignment of error relates to the overruling of the demurrer to the indictment. The point here made is that as murder is defined by the statute to be the unlawful killing of a human being with malice aforethought, it was necessary to charge, in words, that the killing was "unlawful." This position cannot be sustained; for the facts alleged present, in clear and distinct language, a case of unlawful killing. It is not necessary, as we have seen, to use the very words of the statute defining the offence. It is sufficient if those used convey the same meaning. The indictment sets forth the case of an assault and battery, committed by the defendant wilfully, feloniously, and with deliberately premeditated malice aforethought, and resulting in instant death, whereby the defendant did kill and murder, contrary to the statute, etc. Such facts plainly import an unlawful killing.

Other assignments of error present the objection that the indictment is so framed that it will not support a verdict of guilty of murder in the first degree. This objection is based, in part, upon the theory that murder in the first degree and murder in the second degree are made distinct, separate offences. But this is an erroneous interpretation of the statute. The crime defined is that of murder. The statute divides that crime into two classes in order that the punishment may be adjusted with reference to the presence or absence of circumstances of aggravation. And, therefore, "whenever a crime is distinguished into degrees," it is left to the jury, if they convict the defendant, "to find the degree of the crime of which he is guilty." 2 Comp. Laws of Utah, 715, § 5076. If the defendant pleads guilty "of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree." Ib. § 5101. An in-

dictment which clearly and distinctly alleges facts showing a murder by the unlawful killing of a human being with malice aforethought is good as an indictment for murder under the Utah statutes, although it may not indicate, upon its face, in terms, the degree of that crime, and thereby the nature of the punishment that may be inflicted. Of course, if an indictment is so framed as to clearly show that the crime charged is not of the class designated as murder in the first degree, the jury could not find a verdict of guilty of murder in that degree. But, as already suggested, the pleader need not indicate the degree, but may restrict the averments to such facts as, in law, show a murder, that is to say, an unlawful killing with malice aforethought, leaving the ascertainment of the degree to the jury, or, in case of confession, to the court. As the acts which, under the Utah statute, constitute murder, whether of the highest or lowest degree, constituted murder at common law, it is clear that an indictment good at common law as an indictment for murder, in whatever mode or under whatever circumstances of atrocity the crime may have been committed, is sufficient for any degree of the crime of murder under a statute relating to murder as defined at common law, and establishing degrees of that crime in order that the punishment may be adapted to the special circumstances of each case.

These views are abundantly sustained by authority. The earliest legislative enactment in this country by which degrees of murder were established was the Pennsylvania statute of April 22, 1794, "for the better preventing of crimes," etc. That statute recites as the reason for its passage that the several offences, which were included in the general denomination of murder, differed greatly in the degree of their atrocity, and that it was unjust to involve them in the same punishment. It was consequently enacted that all murder perpetrated by means of poison, etc., should be deemed murder of the first degree, and all other kinds of murder should be deemed murder of the second degree, leaving the jury, if there was a trial, or the court, if the prisoner pleaded guilty, to ascertain from evidence the degree of the crime. In the

Supreme Court of Pennsylvania, Chief Justice Tilghman said: "Now this act does not define the crime of murder, but refers to it as a known offence; nor so far as it concerns murder in the first degree does it alter the punishment, which was always death. All that it does is to define the different kinds of murder, which shall be ranked in different classes, and be subject to different punishments. It has not been the practice since the passing of this law, to alter the form of indictments for murder in any respect; and it plainly appears by the act itself that it was not supposed any alteration would be made. It seems taken for granted that it would not always appear on the face of the indictment of what degree the murder was, because *the jury are to ascertain the degree* by their verdict, or, in case of confession, *the court are to ascertain it* by examination of witnesses. But if the indictments were so drawn as plainly to show that the murder was of the first or second degree, all that the jury need do would be to find the prisoner *guilty* in manner and form as he stands indicted." Yeates and Brackenridge, JJ., concurred in these views, the former observing, p. 188: "Different degrees of guilt exist under the general crime of murder, which is, therefore, arranged under two classes of murder of the first and second degree. The uniform practice since the act was passed has been to lay the offence as at common law." *White* v. *Commonwealth*, 6 Binney, 179, 182 (1813). The same principle was announced in *Commonwealth* v. *Flanagan*, 7 W. & S. 415, 418.

So, in *Wicks* v. *Commonwealth*, 2 Virginia Cas. 387, 391, decided in 1824 in Virginia, where the statute dividing the crime of murder into degrees was like that of Pennsylvania, it was said that the legislature did not intend to change, much less to divide, the common law crime of murder into two separate offences to be prosecuted and punished under two distinct indictments, but intended to graduate the punishment of each murder according to the circumstances under which it should be committed.

In *Green* v. *Commonwealth*, 12 Allen, 155, 170, the Supreme Judicial Court of Massachusetts, referring to the previous

cases of *Commonwealth* v. *Gardner*, 11 Gray, 438, and *Commonwealth* v. *Desmarteau*, 16 Gray, 1, said: "The reason on which these decisions were founded was this: that the statute establishing degrees of murder did not create any new offence or change the definition of murder as it was understood at common law; that the forms of indictment previously in use descriptive of murder embodied every shade or degree of the crime, from that which was most aggravated, malicious, and premeditated down to that which had only the element of implied malice in its most mitigated form; and that as the offence was not changed, but only its punishment mitigated in certain cases, the indictment was sufficient to embrace every species of murder, whether it fell within one or the other of the degrees of homicide as defined by the statute. The logical and necessary conclusion from these discussions is, that an indictment for murder at common law does charge murder in the first degree." To the same effect are many other adjudged cases, among which are *Graves* v. *State*, 45 N. J. Law, (16 Vroom,) 203, 206; *Mitchell* v. *State*, 8 Yerger, 513, 526; *People* v. *Murray*, 10 California, 309, 310; *People* v. *Dolan*, 9 California, 576, 584; *Kennedy* v. *People*, 39 N. Y. 245, 250; *People* v. *Conroy*, 97 N. Y. 62, 70; *State* v. *Lessing*, 16 Minnesota, 64, 66, 67; *State* v. *Verrill*, 54 Maine, 408, 415; *Gehrke* v. *State*, 13 Texas, 568, 573, 574; *McAdams* v. *State*, 25 Arkansas, 405, 416.

We are of opinion that the indictment in this case sufficiently charged the crime of murder. The acts constituting the crime are set forth with such clearness and distinctness that both the defendant and the court understood the character of the offence charged, and the court was enabled to pronounce judgment according to the right of the case. The defendant was charged with having wilfully, feloniously, and of his deliberately premeditated malice aforethought, assaulted the deceased with a revolver, with which he beat, bruised, and wounded her upon the head, inflicting a mortal wound, from which death instantly resulted, whereby, in the manner stated, the defendant killed and murdered the person so assaulted. The indictment alleges an unlawful killing with

malice aforethought and thereby a murder. It was not necessary to allege, in express words, an intent to kill, because murder, as defined by the statute, may be committed if the killing be unlawful, and if no considerable provocation appears, or the circumstances attending the killing show an abandoned or malignant heart. Under the charge made in this case it was competent to show by evidence, under section 4454 of the Compiled Laws of Utah, that the killing was with wilful, deliberate malice, and was premeditated, and it was, perhaps, competent to show that the killing, in the mode charged, was by an act greatly dangerous to the life of the decedent, and "evidencing a depraved mind, regardless of human life." In either case, a verdict of murder in the first degree would have been proper. If the evidence showed a case of homicide that under the statute was not murder in the first degree, but was nevertheless committed under such circumstances as would have constituted murder at common law, then the verdict should have been that the defendant was guilty of murder in the second degree. But as the evidence was not preserved in a bill of exceptions, we cannot say that the verdict of guilty of murder in the first degree was unauthorized by the facts adduced at the trial. It certainly was within the scope of the indictment.

Another assignment of error is that the court failed to adjudge that the defendant was guilty of some offence. This objection is supposed to be sustained by section 5100 of the Compiled Laws of Utah, which provides: "After a plea or verdict of guilty, or after a verdict against the defendant, on a plea of a former conviction or acquittal, if the judgment is not arrested, or a new trial granted, the court must appoint a time for pronouncing judgment, which must be at least two days after the verdict, if the court intend to remain in session so long; or, if not, as remote a time as can reasonably be allowed, but in no case can the judgment be rendered in less than six hours after the verdict."

There is nothing in the record upon which this assignment can be based. The motions for new trial and in arrest of judgment having been overruled, and the defendant having been

asked, as required by the statute, (§ 5108,) if he had anything to say why sentence should not be pronounced, and having answered that inquiry in the negative, the court proceeded to judgment. The appellant insists that it was necessary that the court itself, in the exercise of its independent judgment upon the facts, and as a condition of its authority to sentence, should have adjudged that he was guilty of the crime charged before imposing the sentence prescribed by the statute. The court, the defendant being present, announced that he had been duly convicted of the crime of murder in the first degree, without any recommendation, and, therefore, it was "ordered, adjudged, and decreed" that he be taken, etc., and shot until he was dead. What the court said, on the occasion of the sentence, was, in effect, a judicial determination that the defendant had been duly convicted of the offence named. That was the only judgment it was necessary to render, and the sentence which followed gave legal effect to that adjudication. The statutes of Utah required nothing more.

There are no other assignments of error which require notice at our hands.

The judgment of the Supreme Court of the Territory is

Affirmed.

GOTTLIEB *v.* THATCHER.

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

No. 192. Argued January 4, 5, 1894. — Decided January 15, 1894.

The proofs fail to establish that the transactions complained of by the appellant were fraudulent, as alleged.

The relationship of brothers does not of and in itself cast suspicion upon a transfer of property by one to the other, or create such a *prima facie* presumption against its validity as would require the court to hold it to be invalid without proof that there was fraud on the part of the grantor, participated in by the grantee.

A judgment being filed for record and recorded as required by the statutes of Colorado, a lien attaches at once upon the real estate of the judgment debtor.

The proviso in the Colorado statute concerning liens, suspending the running of the statute when issue of execution is restrained by injunction, applies to a suspension of issue by supersedeas on appeal.

IN EQUITY. Decree dismissing the bill, from which complainant appealed. The case is stated in the opinion.

Mr. R. T. McNeal, (with whom was *Mr. E. G. Wells* on the brief,) for appellant.

Mr. J. Warner Mills, (with whom was *Mr. Henry C. Dillon* on the brief,) for appellee.

MR. JUSTICE JACKSON delivered the opinion of the court.

This suit was brought by the appellant, who was the complainant below, against the appellee to set aside conveyances made to him by Samuel H. Thatcher, and the sheriff of Arapahoe County, in the Territory of Colorado, of certain lots and parcels of land, lying and being in that county, and in the eastern division of the city of Denver, on the ground that the lands were conveyed, and caused to be conveyed, to the appellee for the purpose of hindering, delaying, and defrauding the complainant, and other creditors of Samuel H. Thatcher.

The case made by the pleadings and proofs, so far as need be noticed, is this: On May 7, 1874, one Samuel Kaucher recovered a judgment in the District Court of Arapahoe County, Colorado, against Samuel H. Thatcher for $2710.40. A certified copy or abstract of this judgment was duly filed for record, and was recorded in the office of the clerk and recorder of the county on June 18, 1874. From this judgment Thatcher prosecuted a writ of error to the Supreme Court of the Territory, and executed a supersedeas bond, with sureties, in the sum of $3500. That judgment was affirmed by the Supreme Court of the Territory. Thereupon Thatcher

prosecuted a writ of error to the Supreme Court of the United States, and, as appears from the record of the case in this court, executed a supersedeas bond with sureties, which suspended the execution of the judgment of the court below. It is shown that the sureties on the supersedeas bond or bonds were protected by securities placed in their hands by Thatcher. The case was heard in this court at the October term, 1877, and on December 17, 1877, the judgment of the Territorial Supreme Court was affirmed, and a mandate issued for the execution of the judgment. On January 29, 1878, execution issued on this judgment against Thatcher, and was levied upon the lands in controversy in the present case, as the property of the defendant, and pursuant to that levy the premises were sold by the sheriff of Arapahoe County, and were purchased by the appellee, Lewis C. Thatcher, for the debt and interest, amounting to about $3850. A certificate of purchase was given to the appellee, and thereafter, on November 25, 1878, a sheriff's deed was made to him for the premises.

Prior to the affirmance of the Kaucher judgment in this court, Samuel H. Thatcher, by warranty deed dated November 13, 1876, conveyed the premises in question to his brother, Lewis C. Thatcher, who was then a resident of the city of St. Louis, Missouri, the consideration for the conveyance being the sum of $4000, for which the grantee executed to the grantor his two notes for $2000 each, payable two and three years from date of the sale. The deed was duly recorded November 18, 1876, in the register's office of the county.

On November 18, 1875, the complainant loaned to Zella Glenmore the sum of $2700 for one year, with interest at the rate of five per cent per month, payable monthly, for which she executed a note with Samuel H. Thatcher as her surety. This note was secured by a chattel mortgage on the household furniture of Zella Glenmore, worth from five to six thousand dollars, and by a deed of trust executed by Samuel H. Thatcher on 320 acres of land in Douglas County, Colorado, of the value of about $3000. The interest on this note appears to have been paid, except a portion of the last month of the year during which the note had to run. At the maturity of the note

the complainant seized the furniture covered by the chattel mortgage executed by Zella Glenmore, for default in payment, and caused the same to be sold at auction, realizing therefrom the net proceeds of $1519.43, which were applied upon the note. The complainant on November 30, 1876, also caused the Douglas County lands owned by Thatcher to be advertised and sold under the deed of trust, and the same were bid in by the appellant for $320, and on December 27, 1877, he received a deed from the trustee conveying to him the lands thus sold.

On November 25, 1876, the complainant commenced an action in attachment against Thatcher and Zella Glenmore on the note, and on July 23, 1877, he obtained judgment against Thatcher for the sum of $2170. The ground of this attachment was that Samuel H. Thatcher had disposed of his property to defraud his creditors. The attachment was levied upon the same property covered by the conveyance of November 13, 1876, to the appellee, and, after recovery of judgment in the attachment proceedings, it was sold under special execution and bid in by the appellant for the sum of $1800, of which sum $1694.10 was paid over to or applied on the complainant's debt. Thereafter, on July 19, 1878, a sheriff's deed was duly executed to complainant for the premises thus sold.

The complainant alleges in his bill that at the time Samuel H. Thatcher conveyed the premises to his brother, Lewis C. Thatcher, he was insolvent; that said conveyance was made for the purpose of hindering, delaying, and defrauding his creditors, and that it was without consideration, and therefore void as against the complainant.

He further alleges that the purchase made of the property in the name of Lewis C. Thatcher, under the Kaucher execution in January, 1878, was collusive and fraudulent as between Samuel H. and Lewis C. Thatcher; that the $3850 paid to the sheriff at that sale, and in satisfaction of the judgment, was the money of Samuel H. Thatcher; and that the conveyance made by the sheriff to Lewis C. Thatcher was a part of the fraudulent scheme on the part of Samuel H. Thatcher

to hinder, delay and defraud the complainant in the collection of his debt.

The answer denies all of these allegations of fraud, and states that the purchase of the property by Lewis C. from his brother was in good faith, without any knowledge or notice on the part of the appellee that any fraud was intended; that the consideration was a fair and reasonable one for the property, and that it was duly paid; and that the notes executed for the purchase money were paid and were taken up by him. The answer also alleges that the defendant furnished the money with which to purchase the property when sold under execution issued in the Kaucher judgment.

Upon these questions testimony was taken on both sides. Among other proofs introduced the complainant examined the appellee in his own behalf, or as his own witness, touching the transactions and conveyances called in question. In this examination, as a witness for the complainant, the appellee stated that the purchase was made without notice of any fraud on the part of his brother; that the negotiation leading to the purchase was made partly through an attorney, (H. R. Hunt,) and that the notes given for the consideration had been duly paid by him; that in purchasing the property from his brother it was to be free and clear from all incumbrances, and the deeds contained such warranty; that he knew of the existence of the Kaucher judgment before making the purchase and taking the conveyance; that he was advised that that judgment, if affirmed, would not be a lien upon the property, but it was understood and agreed between his brother and himself that if the judgment should be affirmed, and thereby become a lien on the property, then some provision should be made for his protection against the lien. The question of the lien of that judgment, in case of its affirmance in the appellate courts, was a matter upon which there was a difference of opinion, and the appellee testifies that in view of that uncertainty he forwarded money to his brother from time to time, while the Kaucher suit was pending, for the purpose of having it in readiness to meet the judgment, if it was a lien, and in the event it was not a lien upon

the property, the money could be used for the payment of the two notes which Samuel H. Thatcher held against the appellee for the original purchase money of the property.

When the Kaucher judgment was affirmed, and the execution issued thereunder was levied upon the property, the appellee directed that it be purchased in his name and for his account, and the money which he had from time to time placed in the hands of his brother for that purpose, amounting to about $4000, was applied in that way, to the extent of $3850, and credited on his notes — the first one being surrendered by his brother, and the second, which had been transferred by Samuel H. Thatcher to A. Jacobs & Company, on which a partial payment had been credited, was taken up and paid by the appellee.

It was clearly stated by the appellee that the money he placed in the hands of his brother, Samuel H. Thatcher, to be used to satisfy the Kaucher judgment, or to purchase the property sold under the execution of that judgment, was to be endorsed on the appellee's notes executed for the price of land, if the funds were required to be and were so used.

It is further shown by the deputy sheriff who levied upon and sold the lands in controversy, under the Kaucher judgment, that Samuel H. Thatcher informed him, before the sale under the execution took place, that his brother, the appellee, would buy the property, and that Samuel H. Thatcher would bid for the property for and in the name of his brother.

There is no testimony going to show that the value of the property at the time of its purchase in November, 1876, exceeded to any great extent the sum of $4000. There was testimony taken to show that six or eight years later the value exceeded $4000, but that during that period, prices of real estate in and around Denver had greatly advanced. It does not appear, therefore, that there was any gross inadequacy in the price of the property.

It further appears that the appellee took possession of the property, through his agents, soon after its purchase, and continuously thereafter paid taxes on the same.

The allegation of insolvency on the part of Samuel H.

Thatcher at the time of the conveyance of the property to his brother is not established by the proofs. The only indebtedness of Samuel H. (aside from that of the complainant's and of the Kaucher judgments) which is shown to have been in existence in November, 1876, was a note for the sum of $1000, with a small amount of interest thereon, which he owed to Gray & Eicholtz, of Denver, amounting in all to about $1015. This indebtedness was protected by a note of $1350, made by Anna C. McCormick, secured by a deed of trust upon twenty acres of valuable land owned by her, and lying near the city of Denver. On his indebtedness to Gray & Eicholtz, Samuel H. Thatcher, on November 15, 1876, paid the sum of $1000, leaving but $15 due. Subject to that balance of $15 this note for $1350, owned by Samuel H. Thatcher, was attached by the complainant under the attachment proceedings above referred to, and was sold thereunder to the complainant for the sum of $80, who, after paying Gray & Eicholtz the balance of $15, enforced the deed of trust covering the twenty acres of land which secured the note, and, under the trustee's sale, purchased the same on January 10, 1879, for $1600.

The appellant credited Samuel H. Thatcher in this transaction with only the sum of $80, which he bid for the note of Anna C. McCormick, and it is exceedingly doubtful whether the proceeding to subject this note was sufficiently valid to have divested Samuel H. Thatcher of his title thereto, or to confer a title on the complainant, who credited the indebtedness of Samuel H. Thatcher with only the sum of $80. It admits of a very grave question whether the complainant should not have credited Samuel H. Thatcher with the sum of $1600, for which the land securing the note was sold. If the complainant is chargeable with that amount, and with the sum of $1694.10 for which the property in controversy was sold under his execution sale, then the judgment of $2170 has been more than satisfied, so that he would have no equity in this case. But, without going into that question, it is shown that every debt that Samuel H. Thatcher owed at the time of the conveyance of the property to his brother in November, 1876, was well secured. The complainant's debt of $2700, for

which Samuel H. Thatcher was security, was secured by property reasonably worth $8000, while the debt to Kaucher, for about the same amount, was secured by collaterals placed in the hands of the sureties on the supersedeas bonds; and the remaining debt to Gray & Eicholtz of $1015 was protected by ample collateral in the shape of the Anna C. McCormick note of $1350, bearing interest at the rate of twenty per cent per annum, (which was lawful under the laws of the Territory of Colorado,) secured by a deed of trust on twenty acres of valuable land, which at the trustee's sale the complainant bid in for $1600.

The appellant claims as a badge of fraud that on January 11, 1878, Lewis C. Thatcher, appointed his brother, Samuel H. Thatcher, his attorney in fact. This instrument was duly recorded January 29, 1878, and empowered Samuel H. to bargain, sell, convey, or exchange for other lands and property all his (Lewis C. Thatcher's) lands in the State of Colorado, and to execute all deeds or other instruments in writing therefor; and also to purchase and acquire by exchange other lands in that State — such other lands to be acquired in the name of Lewis C. Thatcher, and the title to be vested in him.

The proofs establish that Lewis C. Thatcher held other lands in the State of Colorado to which this power of attorney had application, as well as to the lands described in the deed of November 13, 1876, from Samuel H. Thatcher to his brother, the appellee. There is nothing in the fact of the execution of this power of attorney, or in its provisions, to raise any presumption of fraud in the original purchase.

The only proof introduced by the complainant tending in the slightest degree to contradict the testimony of the appellee was a loose conversation held between the appellant and the appellee in February, 1879. This conversation, as stated by the appellant in his testimony, in no way tends to establish fraud in connection with the conveyance of November 13, 1876, as alleged in the bill, and besides it is positively contradicted by the appellee. The statements made by Samuel H. Thatcher in 1878 to his sureties on the supersedeas bonds,

and to the deputy sheriff of Arapahoe County, tending to show that he entertained a strong dislike for the appellant, and was disposed to obstruct the collection of his judgment, are not sufficient to show fraud, even on the part of Samuel H. Thatcher, but having been made in the absence of Lewis C. Thatcher, and long after the date of the conveyance, they were clearly incompetent as against the appellee.

It is claimed for the appellee that as the appellant called and examined him as a witness touching the conveyance of November, 1876, and the consideration therefor, and of the payment of that consideration, he thereby represented him as worthy of belief, and cannot impeach or impugn his credit or his general character for truth under the authorities. 1 Greenleaf, § 442; *Jones* v. *People*, 2 Colorado, 351, 356. Without going into the question as to how far, or to what extent, if any, the appellant was concluded from impeaching the credit of the appellee, after having introduced and examined him as a witness touching the matters in question, it is sufficient to say, in this case, that the testimony of the appellee has not been contradicted in any substantial or material respect, and, treating it as worthy of belief and uncontradicted by any independent proof, it establishes that the purchase from his brother of the lands in question was free from fraud. The testimony taken as a whole falls far short of establishing the allegation of the bill that the conveyance of November 13, 1876, was made for the purpose of hindering, delaying, or defrauding the complainant or the creditors of the grantor.

The relationship of the parties does not, of and in itself, cast suspicion upon the transaction, or create such a *prima facie* presumption against its validity as would require the court to hold it to be invalid without proof that there was fraud on the part of the grantor, participated in by the grantee. This proposition is so well settled that authorities need not be cited in its support.

But, again, the statute of Colorado on the subject of liens (1862) in force at the time of these transactions provided that judgments should be a lien on the judgment creditor's real estate, not exempt from execution, owned by him at the time,

until the lien expires; and "the lien shall continue for six years from the entry of the judgment, unless the judgment shall be previously satisfied: *Provided*, that execution be issued at any time within one year on such judgment; and from and after the said six years the same shall cease to be a lien on any real estate as against *bona fide* purchasers, or subsequent incumbrances by mortgage, judgment, or otherwise: *Provided*, that in case the party in whose favor any such judgment shall have been entered shall be restrained by injunction out of chancery or order of any judge or court, either from issuing execution or selling thereon, the time which he shall be so restrained shall not be deemed or considered as any part of the said six years." Gen. Laws Col. 1877, 523, 524, c. 53, § 1.

By the first section of the act of February 13, 1874, it is provided that "When a judgment shall be rendered in any District or Probate Court of this Territory, the clerk of such District Court, or the probate judge, shall, upon demand, give to the plaintiff, his agent or attorney, an abstract thereof, setting forth the name or names of plaintiff or plaintiffs, and defendant or defendants, in full, the title of the court, the date when the judgment was rendered, and the amount of the same, with damages and costs, which shall be signed by such clerk or probate judge, and attested by the seal of the court; and when so executed, such abstract may be filed for record in the office of the clerk and recorder of the county where such judgment is rendered, or in any county in the Territory, and from the date of such filing, and not before, such judgment shall become a lien upon all the real estate of defendant in the county where such abstract may be recorded, and not until such abstract shall be so filed, nor in any county other than the one in which so filed." Laws Colorado, 1874, p. 168.

The Kaucher judgment having been filed for record, and having been recorded, as required by this section, the lien upon the real estate of Samuel H. Thatcher, in controversy in this suit, attached at once, as held in *McFarran* v. *Knox*, 5 Colorado, 217, 220.

But the execution was not issued within a year from the rendition of the judgment, for the reason that it was superseded

by the order of the District Court and of the Supreme Court, by the allowance of the supersedeas bonds, which suspended all proceedings under the judgment. This suspension of the proceedings comes fairly within the proviso of the act of 1862, above quoted, and the execution, after the affirmance of the Kaucher judgment by this court, having been issued within a year from the date of its affirmance and within six years from the date of the judgment, gives the lien of that judgment priority over the complainant's attachment and judgment, so that the sale made under the Kaucher execution conveyed a superior title to that which the complainant acquired either by his attachment or by his execution, levy, and sale.

It is clearly established, as we think, that Lewis C. Thatcher furnished the money to pay off the Kaucher judgment, or to purchase the property sold under the execution issued thereon; that Samuel H. Thatcher acted only as his agent in making the purchase, and in paying over the money to the sheriff; and that the sheriff of Arapahoe County was so informed before that execution sale was made. Under these circumstances, and in the absence of any fraudulent collusion on the part of Samuel H. Thatcher and Lewis C. Thatcher in the transaction, we think that Lewis C. acquired a title to the property superior to that which complainant acquired under his attachment and execution sale; and that the complainant cannot, even as an unsatisfied creditor of Samuel H. Thatcher, successfully attack this purchase of Lewis C. Thatcher on the ground of fraud or of bad faith on the part of the appellee.

Now, without going into the equitable considerations set up in the second amended answer, which induced the court below to consider that the complainant could not enforce his judgment against the appellee, 34 Fed. Rep. 435, we are satisfied that the proofs fail to establish that the transactions by which Lewis C. acquired the property in controversy were fraudulent as alleged, and that the complainant is not entitled to have the conveyances made to the appellee, either by Samuel H. Thatcher or by the sheriff of Arapahoe County, set aside.

The judgment of the court below is, therefore,

Affirmed.

HAUGHEY *v.* LEE.

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

No. 189. Argued January 3, 1894. — Decided January 15, 1894.

Letters patent No. 379,644, granted March 20, 1888, to Michael Haughey for an improvement in interfering devices for horses, in view of the state of the art at that time as shown by the evidence, are void for want of patentable novelty in the invention covered by them.

On October 24, 1889, Michael Haughey filed a bill of complaint against Jesse Lee, Lewis S. Lee, and Walter Lee, as partners, under the style of Jesse Lee & Sons, alleging that the United States had, on March 20, 1888, granted him letters patent (No. 379,644) for an improvement in interfering devices for horses; that the defendants were infringing complainant's rights as such patentee; and praying for an injunction and account. On January 21, 1890, the defendants filed an answer, denying infringement, and alleging the invalidity of complainant's patent, because of certain specified anticipations and because, under the condition of the art, of want of invention. Replication was duly filed, evidence was taken, and, on May 13, 1890, after argument, the court below decreed the dismissal of the bill. From this decree an appeal was duly taken and allowed to this court.

Mr. E. J. O'Brien for appellant.

Mr. Ernest Howard Hunter for appellee.

Mr. Justice Shiras delivered the opinion of the court.

The bill of complaint alleged infringement of the complainant's rights as grantee of letters patent, and the court below, upon issue joined and evidence taken, dismissed the bill for want of patentable novelty in the complainant's invention.

The question thus presented for our consideration is the frequent and troublesome one, whether a given patented device evinces novelty or invention, within the meaning of the law of patents, or is merely an improvement, useful perhaps, but so obviously a mere conclusion from what has gone before as not to be entitled to protection as an invention.

In the history of most of the arts, the first invention is of a striking and undeniable character; and the earlier improvements likewise usually display an unmistakable power of invention. But, after the field of invention has been mainly occupied, it becomes difficult to distinguish between improvements that involve patentable invention and those that are the result of the exercise of ordinary mechanical knowledge and skill.

The object of the invention in the present case is to provide a remedy for preventing or curing the habit of interfering in horses. This habit of interfering is the striking of one leg by the other during motion, causing injury of the part struck, and impeding the movement. Many trotting horses carry their feet closely together, and during rapid motion are liable to strike one leg with the hoof of the other, often causing a serious injury. The complainant's design is to fasten a strap on one of the legs of the horse, to which strap shall be attached a pendant that will move or swing freely between the legs, and strike the leg opposite to the one provided with the strap. The effect upon the horse is to lead him to strive to avoid the touch of the swinging pendulum. This he can only do by moving with his legs sufficiently apart to avoid it, and in this way, it is claimed, he soon loses the habit of striking.

Assuming that the complainant's device really operates so as to educate the horse to correct a habit of striking, it would certainly be a useful invention, and, if novel, would be entitled to the protection of letters patent.

It, however, appears from the evidence that interfering devices are old and of various forms, all having the same object — protection of the leg and spreading or widening the

stride. The earlier devices were chiefly to protect the leg, and were in the nature of boots or bandages. However, it was soon perceived that, owing to the docile character of the horse, the interfering apparatus might be made to operate not merely as a protection to the legs when they came in contact, but to train the horse to widen his stride, so as to prevent such contact. Thus we find it stated in letters patent to John J. Davy, granted January 29, 1867, that the patentee sought to cure horses of the vice of intervention by interposing a strap upon one of the legs to which was attached a boot with radiating bristles. The pricking of the bristles led the horse to widen his stride, and thus to effect a cure.

Charles B. Dickinson, in letters patent granted to him on October 14, 1879, claims that by the use of interfering straps to which soft and yielding loops are attached, which strike the horse's leg, he is taught to spread his gait. In the patent granted to Jefferson Young, Jr., on December 13, 1881, it is proposed to cure the habit of interference by a leather boot, which, being attached to one foot, shall lightly touch the other when the two are brought too near each other.

The complainant points to the fact that the pendant swings or moves freely from a loose joint as a feature distinguishing his invention from the preceding ones. As a matter of fact, there is evidence in the record tending to show that just such a pendant, loosely hung, was in use in Norristown, Pennsylvania, and in Philadelphia years before the date of the patent in suit. There is likewise evidence that in all the prior devices the stiff projecting striker would, in time, sag or hang down more or less, thus practically exemplifying the same method of operation as that of the complainant. It likewise appears that the idea of employing a dependent striker, loosely jointed to a leg strap, was not original with the patentee. Such a pendant was used in devices to prevent kicking, and no invention would seem to be exercised in adapting the device to the new purpose of curing interference.

The further contention, that the plaintiff's striker taps the leg to which it is attached as well as the opposite leg, presents no substantial difference. As observed by the court below,

every such device used strikes and rubs the leg to which it is attached, as whenever the projecting striker is hit by the opposing leg the blow is communicated to the other. Nor is such supposed function described or referred to in the specification or claim of the plaintiff's patent.

In view, then, of the state of the art, as shown to exist by the defendants' evidence, the court below was right in finding that the complainant's device exhibits no patentable novelty.

There is no merit in the proposition made in the second assignment of error, that defendants are estopped from asserting that there is no patentable novelty in plaintiff's invention, by their conduct in seeking to procure, through one of their employés, a patent for substantially the same invention. Whether or not there is any inconsistency in trying, at one time, to get a patent for a supposed invention, and in afterwards alleging, as against a rival successful in obtaining a patent, that there is no novelty in the invention, it certainly cannot be said to constitute an estoppel. Besides, the defence of want of patentable invention in a patent operates not merely to exonerate the defendant, but to relieve the public from an asserted monopoly, and the court cannot be prevented from so declaring by the fact that the defendant had ineffectually sought to secure the monopoly for himself.

The decree of the court below is accordingly

Affirmed.

SHEFFIELD AND BIRMINGHAM COAL, IRON AND RAILWAY COMPANY *v.* GORDON.

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

No. 176. Argued December 20, 1893. — Decided January 15, 1894.

Exceptions to the report of a master should point out specifically the errors upon which the party relies, not only that the opposite party may be apprised of what he has to meet, but that the master may know in what

Statement of the Case.

particular his report is objectionable, and may have an opportunity to correct his errors or reconsider his opinions.

The main object of a reference to a master being to lighten the court's labors, the court ought not to be obliged to rehear the whole case on the evidence, when the report is made.

If the report of a master is clearly erroneous in any particular, it is within the discretion of the court to correct that error.

When a contract provides that work done under it shall be examined by a superintendent every two weeks, and if done to his satisfaction it shall be a final acceptance by the other party, so far as done, the acceptance by the superintendent forecloses that party from thereafter claiming that the contract had not been performed according to its terms.

In the absence of a certificate by a master that the entire evidence taken by him was sent up with his report, it is impossible to impeach his conclusions upon it.

The proceedings in this case were taken within the time required by the statutes of Alabama.

This was an intervening petition filed by the firm of Gordon, Strobel & Laureau, in a case pending in the Circuit Court for the Northern District of Alabama, for the foreclosure of a deed of trust, setting up and claiming a mechanic's lien on certain furnace property described in the petition, to secure the payment of a large balance due to them as builders. The Central Trust Company of New York, trustee under the deed of trust, and plaintiff in the foreclosure suit; the Sheffield and Birmingham Coal, Iron and Railway Company, the mortgagor;. Jacob G. Chamberlain, who was receiver in the foreclosure suit, and one Charles D. Woodson, as holder of certain bonds of the company, were made defendants to the petition. Petitioners' claim arose under a contract whereby they agreed to construct for the Alabama and Tennessee Coal and Iron Company, the predecessor of the appellant corporation, three iron blast furnaces at Sheffield, in Colbert County, Alabama, for $564,000, ninety per cent of which amount was to be paid from time to time during the construction of the furnaces, and which ninety per cent had been practically paid as agreed between the parties, the claim of the appellees being the balance, together with some amounts alleged to have been paid out for excessive freight charges, and upon material furnished to repair and reconstruct one of the furnaces.

Argument for Appellant.

Joint and several answers were filed by the defendants, setting forth certain defences to the petition, and demanding proof of each allegation thereof. It was admitted that the defendant company had become liable for whatever amount was due the petitioners by the original Alabama and Tennessee Coal and Iron Company. The main defence was that Gordon, one of the intervenors, had undertaken to supervise the blowing in of one of the three furnaces, in which operation the furnace was ruined and subsequently abandoned; that in the blowing in of a second furnace, it suffered such damage that it required about six months to put it in good condition; that the furnaces were not built according to the plans, specifications, and agreements of the contract, but were constructed in so faulty and inadequate a manner that their daily expense for coal was much larger than it would have been had they been properly constructed.

A decree was entered by consent referring the case to a special master to examine and report the facts as to the existence of the contract, the construction of the furnaces, the payments made therefor, the amount due the petitioners, the existence of their lien, and also to report upon all matters of defence stated in the answer.

In pursuance of this order the master took the depositions of a number of witnesses, found the facts, and reported a balance due of $57,808.12, with interest from September 18, 1888. Exceptions were filed to this report by the defendants, which upon argument were overruled by the court, and a final decree entered in favor of the intervenors for the amount reported by the master. From this decree an appeal was taken to this court.

Mr. Henry B. Tompkins for appellant.

I. The rule is well settled that the acceptance of work built under a written contract does not estop the owner from showing a non-compliance by the builder with the contract and corresponding damage to him. The effect of his acceptance is to hold him liable on a *quantum meruit*. *Thomas* v.

Ellis, 4 Alabama, 108; *Merriwether* v. *Taylor*, 15 Alabama, 735; *Hawkins* v. *Maddox*, 19 Alabama, 54; *Bell* v. *Teague*, 85 Alabama, 211; *Cutcliff* v. *McAnally*, 88 Alabama, 507.

II. In actions by which it is sought to declare and enforce a lien given by statute to mechanics and material men and the like, every fact necessary to the creation of the lien must be alleged and proven. The statute requires it (the claim of lien) to be filed within the time, and that it was so filed must, as we have seen, be averred in the complaint and proved on the trial. *Corrugating Co.* v. *Thacher*, 87 Alabama, 458.

The filing of the claim of lien in the office of the judge of probate of a county in the State of Alabama, being a proceeding or record of a state court, could only be proven in a Federal court by copy of same duly certified according to the acts of Congress. The enforcement of the claim of lien by appellees was in the nature of a proceeding *in rem;* and the right or title, to subject the property, should be clearly shown. *Pennoyer* v. *Neff*, 95 U. S. 714, 733, 734.

III. Filing the claim of lien properly sworn to in the office of the judge of probate is not giving the notice such as the statute requires to invest the mechanic or contractor with a lien. But notice of the same must be given, and this is only done by having the statement duly recorded. *Bell* v. *Teague*, 85 Alabama, 211; *Chandler* v. *Hanna*, 73 Alabama, 390.

IV. The court was without jurisdiction to decree a lien in favor of appellees against the property of appellant, because the lien at the time of the filing of the petition for its enforcement had become lost under the statutes of Alabama providing for mechanics' and contractors' liens and their enforcement.

Mr. W. A. Gunter and *Mr. R. C. Brickall* for appellees.

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

An interlocutory decree was entered in this case by consent, and the questions in issue arise upon exceptions to the report

of the special master, to whom the case was referred to take proofs, and to report the amount found by him to be due. He was not, however, required to report the testimony. Defendants excepted to so much of said report and the findings of the master in reference thereto as determined —

"1. That the defences set up by the defendants are not sustained by the evidence;

"2. That the petitioners, Gordon, Strobel & Laureau, are entitled to be paid the contract price for their work and material;

"3. That the sum of $57,808.12, with interest from the 18th day of September, 1888, is the amount due the intervenors; and

"4. That the intervenors have a lien upon the property described in their petition; and for grounds and reasons for such exceptions they assign the following:

"1st. Because the evidence in the case sustained the defences set up by the defendants; and showed, 2d, that the work and materials done and furnished by intervenors were not up to the requirement and guaranty of their contract, by which the value of the plant, as built and equipped, was worth sixty or seventy-five thousand dollars less than the contract price; and, 3d, because such report is contrary to the weight of testimony on each of the matters so reported."

There are two difficulties in the way of considering the case upon these exceptions.

(1) The exceptions themselves are too broad, and amount simply to a general denial of the facts and conclusions of the master. The first three are to the finding of the master that the defences are not sustained, that the petitioners are entitled to the contract price, and that the sum awarded is the amount due. In other words, they are general denials of the merits of the claim. The fourth is a denial of petitioners' lien because the evidence sustained the defences, because the work was not up to the requirements of the contract, and because the report was against the weight of testimony. This exception is scarcely more definite than the other. There are no exceptions here to the findings of the master, now assigned

as error, that the intervenors did not guarantee that the work or plant, *as a whole*, should be adequate in design, strength, and capacity for the purposes intended and specified; or to the finding that the petitioners were entitled to be paid the freight excess payments and extra material furnished for the construction of the furnaces, or that the furnaces had attained the product in the making of pig iron, as specified in the contract.

Proper practice in equity requires that exceptions to the report of a master should point out specifically the errors upon which the party relies, not only that the opposite party may be apprised of what he has to meet, but that the master may know in what particular his report is objectionable, and may have an opportunity of correcting his errors or reconsidering his opinions. The court, too, ought not to be obliged to rehear the whole case upon the evidence, as the main object of a reference to a master is to lighten its labors in this particular. In the case of *Dexter* v. *Arnold*, 2 Sumner, 108, 125, an exception to a report of a master that he had stated and certified that there was due on a certain mortgage a certain sum when he ought to have reported that there was nothing due, was held by Mr. Justice Story to be quite untenable. "It is too loose and general in its terms," said he, "and points to no particulars. It comes to nothing, unless specific errors are shown in the report; and those errors, if they exist, should have been brought directly to the view of the court in the form of the exception itself. At present it amounts only to a general assignment of errors, and the argument on this exception has shown none."

The same rule was laid down in *Story* v. *Livingston*, 13 Pet. 359, 366, wherein the exceptions to the report of a master were held to be too general, indicating nothing but dissatisfaction with the entire report; and furnishing no specific grounds, as they should have done, wherein the defendant had suffered any wrong, or as to which of his rights had been disregarded. The court observed that "exceptions to a report of a master must state, article by article, those parts of the report which are intended to be excepted to." The court cited with ap-

proval the case of *Wilkes* v. *Rogers*, 6 Johns. 566, wherein it was said that exceptions to reports of masters in chancery are in the nature of a special demurrer; and the party objecting must point out the error, otherwise the part not excepted to will be taken as admitted.

So in *Greene* v. *Bishop*, 1 Cliff. 186, 191, Mr. Justice Clifford held that "general allegations of error, without pointing to any particulars, are clearly insufficient, for the reason that, if allowable, the losing party might always compel the court to hear the case anew, and should that practice prevail, references such as made in this case would become both useless and burdensome, as they would only operate to promote delay and increase the expenses of litigation, without relieving the court from any of the labor of the trial or ever accomplishing anything of value to either party." See also *Stanton* v. *Alabama &c. Railroad*, 2 Woods, 506, 518.

That this is not a novel practice in Alabama is evident from a number of decisions of the Supreme Court of that State affirming the general doctrine in the most specific terms. *Alexander* v. *Alexander*, 8 Alabama, 797; *Royall's Administrator* v. *McKenzie*, 25 Alabama, 363; *O'Reilly* v. *Brady*, 28 Alabama, 530; *Mahone* v. *Williams*, 39 Alabama, 202. See also *White* v. *Hampton*, 10 Iowa, 238; *Reed* v. *Jones*, 15 Wisconsin, 40; *Smalley* v. *Corliss*, 37 Vermont, 486, 492. Cases are referred to a master, not on account of his presumed superior wisdom, but to economize the time and labor of the court, and as exceptions are usually filed to his report, if they are so general as to require a rehearing of the entire case, there is really nothing saved by a reference.

It is true that if the report of the master is clearly erroneous in any particular, it is within the discretion of the court to correct the error, but we see no occasion for exercising such discretion in this case. It would appear from the report and the recital in the final decree of the court that the main contest was over the construction of a certain guaranty in the contract that "all the work" was "to be done in good and workmanlike manner and of suitable material, and each part to be adequate in design, strength, capacity, and workman-

ship for the purposes for which it is intended, for the sum of $564,000." Immediately following this is a stipulation that the "superintendent shall pass upon the work every two weeks, and if to his satisfaction, it shall be a final acceptance by" the company "so far as done. But if not in compliance with the contract, and to his satisfaction, as to the quality of material or character of workmanship," petitioners agreed "to make it so as rapidly as possible." The evidence showed without contradiction that one Doud, who was the superintendent of the Coal and Iron Company, made inspections and supervised the work from time to time, and accepted it when, in his judgment, it was in compliance with the contract. The contractors claimed to have finished the work on the 8th of August, 1888, and requested its final acceptance. The president of the Sheffield and Birmingham Coal, Iron and Railroad Company, which had become, by consolidation with the Alabama and Tennessee Coal and Iron Company, responsible on this contract, referred the matter of final acceptance to Mr. Doud, the superintendent, who on the 18th of August accepted, in writing, the plant as completed according to the terms of the contract.

The master and the court agreed in holding that the intervenors did not guarantee in their contract that the work or plant *as a whole* should be adequate in design, strength, capacity, and workmanship for the purposes intended and specified, and that, as an acceptance of the work bi-weekly as it progressed was shown, and a further acceptance of the whole on completion of the contract was made by the superintendent in compliance with the terms of the contract, such acceptance in the absence of fraud or mistake on the part of the superintendent was conclusive upon the company. We see no reason to question the correctness of this conclusion. It is difficult to see what effect should be given the acceptance of the work by the superintendent, if not to foreclose the parties from thereafter claiming that the contract had not been performed according to its terms. *Martinsburg &c. Railroad* v. *March*, 114 U. S. 549. There was, it is true, a proposal for an additional remuneration of $20,000 to guarantee a certain

product, with an additional proposal that neither the ten per cent reserved in the hands of the company, nor the $20,000, should become due until the specified product had been attained; but it does not appear that this proposal had ever been accepted, nor any agreement made to pay the extra $20,000 for the attainment of this product. The only guaranty in the proposal as accepted was that each part — by which we understand each part as related to every other part — should be adequate in design, strength, capacity, and workmanship for the purpose for which it was intended. In view of the other provisions, we think the court was correct in holding that there was no guaranty intended of the plant as a whole.

(2) There is another objection, however, to our examination of the facts in this case. The order referring the case to the special master, though minute in its details, did not require him to send up the testimony; neither does he purport to do this in his report; and while a number of depositions taken before him are filed, there is nothing to indicate that these were all the testimony in the case. He finds in this connection that the defences set up by the defendants are not sustained by the evidence, and that the petitioners, Gordon, Strobel, and Laureau, are entitled to be paid the contract price for the material.

In the absence of any certificate that the entire evidence taken by the master was sent up with his report, it is impossible to impeach his conclusion in this particular. *Scotten* v. *Sutter*, 37 Michigan, 526; *Nay* v. *Byers*, 13 Indiana, 412; *Fellenzer* v. *Van Valzah*, 95 Indiana, 128. There is no presumption that all the testimony was sent up.

(3) A further objection is made that the proofs contained in the record do not disclose the filing of the claim of lien in the office of the judge of probate of Colbert County, as required by the statute. The master, however, finds that on the 18th of January, 1889, a verified statement of the amount claimed to be due on this contract was filed with the judge of probate of Colbert County in substantial conformity with section 3022 of the Code of Alabama of 1886, and there is no evidence to

impeach his finding in that particular, and no objection or exception taken to the want of proof upon this point. There would appear to have been, from a memorandum we find in the testimony, a mechanic's lien introduced in evidence as an exhibit; but as it is not attached to the record, it is impossible to say that it does not bear out the finding of the master. The statute of Alabama requires a statement in writing, claiming a lien, to be filed in the office of the judge of probate within six months after the indebtedness to the lien holder has accrued, and as it appears that the work in this case was finished on August 8, 1888, and accepted August 18, that the unpaid residue of the consideration was not due for several months thereafter, and that suit was begun on February 11, 1889, there seems to be nothing in the objection that proceedings were not taken within the time required by law.

Upon the whole, we think the decree of the court below was correct, and it is, therefore,

Affirmed.

FORT WORTH CITY COMPANY *v.* SMITH BRIDGE COMPANY.

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

No. 565. Submitted January 3, 1894. — Decided January 15, 1894.

This court cannot take notice of a stipulation of counsel as to evidence bearing on a finding of the court below in an action brought here by writ of error.

Time was not of the essence of the contract upon which this action is founded.

A corporation created for the purpose of dealing in lands, and to which the powers to purchase, to subdivide, to sell, and to make any contract essential to the transaction of its business are expressly granted, possesses, as fairly incidental, the power to incur liability in respect of securing better facilities for transit to and from the lots or lands which it is its business to acquire and dispose of.

Statement of the Case.

It being within the power of such a corporation to enter into such a contract, the provisions of the constitution of Texas, touching the issue of bonds by corporations formed under its laws, will not prevent its becoming liable to perform its agreements therein, after receiving benefits under it at the expense of the other contracting party.

The Smith Bridge Company, a private corporation, incorporated under the laws of Ohio, and having its domicil in the city of Toledo in that State, brought this action against the Fort Worth City Company, incorporated under the laws of, and having its domicil in, the city of Fort Worth in the State of Texas, in the Circuit Court of the United States for the Northern District of Texas, and alleged that on May 19, 1888, the parties entered into a certain contract whereby the bridge company, for the consideration of $8166.66 to be paid to it by the defendant company, agreed to build for the latter a bridge across the Trinity River near Fort Worth, at a point just north of the public square in that city to be designated by the city engineer, and in accordance with specifications furnished by him. It was further averred that the contract price of the bridge was $24,500, and that the city of Fort Worth and the county of Tarrant had agreed with the bridge company, each to pay one-third of the cost, and had done so; that the bridge company constructed the bridge according to the contract; that the consideration to be paid by the Fort Worth City Company was contracted to be paid in the first mortgage bonds of that company and the North Side Street Railway Company, and that the defendant had failed and refused to deliver the bonds, which were of the face value of $8166.66.

The defendant company answered by way of demurrer and special exception that the petition did not disclose the purposes for which the two corporations were incorporated; nor any power or authority in the defendant to use its funds and property for the purpose of constructing the bridge; general denial; and also that the contract sued on was without authority on the part of the board of directors and officers of the Fort Worth City Company, which was organized "for the purchase, subdivision, and sale of land in cities, towns, and villages," under the provisions of title twenty of the Revised

Statutes of Texas; that the bridge was to be and was built for the use and benefit of the general public on one of the public streets of the city; and was not under defendant's control or owned by it; that defendant company was not to have and did not have any property in the same or other right to use the same than such as the public in general had; that, therefore, the contract was illegal and unauthorized; and that the contract was also void in providing that the defendant should deliver to the plaintiff bonds executed by itself and by the North Side Street Railway Company, the latter being a separate and independent corporation; and that it could not and did not obligate itself to deliver any bonds executed by any other corporation, and was not authorized to legally acquire the bonds of any other corporation. Defendant further stated "that the sole and only benefit it ever expected to derive from the construction of said bridge was the enhancement of its property by making it more convenient of access and so more readily salable; that the contract made by the plaintiff with the city of Fort Worth required the completion of the bridge by the first day of November, 1888, and with reference to this stipulation, the contract here sued on was entered into; that the value of the bridge to the defendant depended on its early completion;" that the bridge was not completed until at least six months after the time stated in the contract with the city, and defendant had been greatly damaged by the failure to complete it, "for that at the time the said contract was made there was an active demand for real estate in Fort Worth and its suburbs, which defendant expected would continue to the time, and for a long time after the date when the bridge was to be completed;" and that had the bridge been completed, a considerable amount of its property could have been sold at a profit.

Plaintiff thereupon filed its supplemental petition in reply, excepting to the special answers of the defendant, and alleging that, at the time of making the contract with the defendant, the latter owned a large tract of land lying on the north side of the Trinity River, over which river the bridge was built, which land it had subdivided into lots, and was offering them

for sale; that the river separated the land from the city of Fort Worth; that it was necessary, in order to accomplish a ready sale of the lands, that the company have a ready means of access from the city thereto, and that the company had this object in view when it made the contract sued on with the plaintiff; that the erection of the bridge afforded such means of access from the city to the lands, and immediately upon the completion of the bridge the North Side Street Railway Company constructed across the bridge a railway connecting the city of Fort Worth with the lands. It was further alleged that the latter company was organized in the interest of the defendant for the purpose of bringing its lots into the market; that the stockholders of both companies were for the most part the same; that by reason of the erection of the bridge and the operation of the street railway the value of the lots was greatly enhanced and the sale thereof was promoted; and that the defendant made this contract for the purpose of promoting its business, and expected to use the same in the transaction thereof after its construction by the plaintiff under the contract; and that the defendant, having contracted with plaintiff to construct the bridge, and having accepted and used it, was estopped from denying the validity of the contract on the ground of want of power in the defendant to make the same.

The case coming on to be tried, the exceptions to plaintiff's petition and to defendant's answer were overruled, and a jury having been waived by written stipulation, the cause was submitted to the court for trial, whereupon it found the law and facts for the plaintiff and entered judgment in its favor for the sum of $9633.02, with interest and costs; and findings of fact and conclusions of law were made and filed as follows:

"The court makes the following special findings of fact on the issues made in the case:

"1. The defendant, the Fort Worth City Company, was at the time of making the contract with the plaintiff here sued on and is now a private corporation created and organized for the purchase, subdivision, and sale of land in cities, towns, and villages under the general laws of the State of Texas relating to private corporations.

"2. That on the 16th day of May, 1888, the City of Fort Worth, a municipal corporation of the State of Texas, entered into a contract with the plaintiff herein, for the construction of a certain bridge on one of the streets of said city where it crosses the Trinity River in said city, it being provided in the said contract that one-third of the contract price of said bridge — that is, eight thousand one hundred and sixty-six dollars and sixty-six and two-thirds cents — should be paid by the defendant herein, and a like amount by Tarrant County, which is also a municipal corporation of said State, the bridge to be completed on or before the first day of November, 1888, the plaintiff being required to give a bond within twenty days from the 16th day of May, 1888, payable to said city, in the sum of ten thousand dollars, for the completion of said bridge on or before November 1, 1888, in accordance with certain specifications, said bond to be made part of the contract with the said city.

"3. That on the 19th day of May, 1888, the president and secretary of the defendant corporation, owning together eighty-eight per cent of its stock, executed a contract in its name, obligating it to pay said sum of $8166.66\frac{2}{3}$ cents in the joint first mortgage bonds of the defendant and the North Side Railway Company, another separate and distinct corporation, in which said president and secretary owned likewise said per cent of stock, said bonds secured on the lands, franchises, and possessions of both corporations, the said bonds to be delivered on the building of said bridge according to the terms of said contract between plaintiff and defendant and the said contract between plaintiff and the city of Fort Worth to the acceptance of the street and alley committee and the city engineer of said city, and the turning of the same over to said city completed in accordance with the above-mentioned contracts and the contract between plaintiff and Tarrant County.

"4. That the bridge was not completed and turned over to the city of Fort Worth until the 19th day of March, 1889, but the delay was caused neither by the plaintiff nor the defendant herein, but altogether by the city of Fort Worth, and time was not of the essence of the contract.

"5. That the said bridge was to be and is a part of a public street of the incorporated city of Fort Worth, and the defendant was not to have nor has it ever had any property interest in or control over the same or use of it, except as a part of the general public.

"6. The defendant was not damaged by the delay in the completion of the bridge.

"7. That the bridge when completed and turned over to the said city was in substantial compliance with the contracts mentioned herein.

"8. That a proper demand was made by the plaintiff on the defendant for the delivery of the said bonds, and the defendant refused to deliver the same on said demand.

"9. That Tarrant County and Fort Worth paid their proportional part of the sum of ——.

"10. That the bridge was expected to enhance the value of the property owned by the defendant by furnishing another mode of access thereto from the city of Fort Worth.

"And on the findings of fact the conclusions of law are as follows:

"1. That the defendant had the power to make the contract here sued on, and that the same is therefore legal, valid, and binding upon it.

"2. That the plaintiff is entitled to judgment in this court for the sum of eight thousand one hundred and sixty-six dollars and sixty-six and two-thirds cents, with eight per cent interest from the 19th day of March, 1889."

Thereupon this writ of error was brought.

Mr. Thomas P. Martin for plaintiff in error.

Mr. M. L. Crawford for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court.

This case having been tried by the court under the statute, we can only inquire whether the facts found in the special

findings, considered in connection with the pleadings, are sufficient to sustain the judgment, and whether any error was committed upon rulings on matters of law properly preserved by bill of exceptions. Two bills of exception were taken, but they simply present the same questions as the special findings of fact and the conclusions of law deduced therefrom. A stipulation of counsel as to the evidence bearing on the tenth finding appears in the record; but of that we cannot take notice. *Tyre & Spring Works Co.* v. *Spalding*, 116 U. S. 541.

Of the five errors assigned in the brief of the counsel, the first, second, fourth, and fifth present the question in various aspects of the power of the Fort Worth City Company to make the contract sued on, or incur the liability for which recovery was had, and the third relates to the failure of the bridge company to complete the bridge within the time stipulated in its contract with the city of Fort Worth.

The court found that the bridge was to be completed on or before November 1, 1888, and that bond was required to be given to the city to secure that result; that it was not completed and turned over until March 19, 1889, but that the delay was caused not by the plaintiff or defendant, but altogether by the city; that time was not of the essence of the contract, and that the defendant was not damaged by the delay. The contract between these parties is attached to the petition, and refers to the contracts by the bridge company with the city and the county, the defendant agreeing to pay the stipulated sum in consideration of the building and construction of the bridge in accordance with the specifications and to the acceptance of the city engineer and the city, and the turning of the bridge over to the city, completed in accordance with this and the other contracts; but as we agree with the court that time was not of the essence, and as the court has found as matter of fact that plaintiff was not in default, and that the defendant was not injured by the delay, the result necessarily follows that the third error assigned is not well taken.

The Fort Worth City Company was organized under the provisions of title twenty of the Revised Statutes of the State of Texas relating to private corporations and the amendments

thereto, "for the purchase, subdivision and sale of land in cities, towns, and villages," as authorized by article 566 of those statutes, (one of the articles under title twenty,) as amended by chapter 61 of the Laws of 1885. Sayle's Tex. Civ. Stat. 212; Laws Tex. 1885, 59, c. 61.

The general rule is that corporations have only such powers as are granted and the powers incidental thereto, and in arriving at a conclusion as to the powers of this corporation the applicable provisions of the title under which it was organized must be considered; legislation which will be found to be in harmony with the common law.

Article 575 provided that every private corporation as such has power "to enter into any obligation or contract essential to the transaction of its authorized business;" and article 589, that "no corporation created under the provisions of this title shall employ its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation." Sayle's Tex. Stat. 217, 219.

In *Green Bay & Minnesota Railroad* v. *Union Steamboat Co.*, 107 U. S. 98, 100, it was said: "The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

This corporation was formed under a general law containing, in addition to the provision for the creation of such a corporation, the other provisions we have quoted.

The question of power is reduced, therefore, to this: Whether a corporation created for the purpose of dealing in lands, and to which the powers to purchase, to subdivide, and to sell, and to make any contract essential to the transaction of its business, are expressly granted, possesses as fairly incidental, the power to incur liability in respect of securing better facilities for transit to and from the lots or lands, which it is its busi-

ness to acquire and dispose of? We entertain no doubt that under these findings the defendant company possessed the power to enter into the contract in question, and that the contract having been fully performed by the bridge company, and the defendant company having the full benefit thereof, the latter cannot now be allowed to say that the power was not properly exercised.

The object of the creation of the corporation was the acquisition and sale of lands on subdivision, and it cannot successfully be denied that that object would be directly promoted by the use of legitimate business methods to render the lands accessible. This involved the expenditure of money or the assumption of liability, but there is no element in this case of any unreasonable excess in that regard, or of the pursuit of any abnormal and extraordinary method. The result sought was in accomplishment of the legitimate objects of the corporation and essential to the transaction of its authorized business, and the power to make the contract was fairly incidental if not expressly granted.

Reference is made to section 6 of article 12 of the Constitution of Texas, which provides: "No corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void." But if this section be in any way applicable and could be regarded as invalidating so much of the contract as provided that the consideration should be paid in bonds, which is not to be conceded, the company "having received benefits at the expense of the other contracting party, cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform," and would still remain liable on its contract, otherwise within its lawful powers. *Hitchcock* v. *Galveston*, 96 U. S. 341, 351; *Central Transportation Co.* v. *Pullman Co.*, 139 U. S. 24, 58.

Judgment affirmed.

HICKORY *v.* UNITED STATES.

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

No. 841. Submitted October 19, 1893. — Decided January 15, 1894.

The genuineness of disputed handwriting cannot, as a general rule, be determined by comparing it with other handwriting of the party.

A writing specially prepared for purpose of comparison is not admissible.

If a paper, admitted to be in the handwriting of the party or to have been subscribed by him, is in evidence for some other purpose in the cause, the paper in question may be compared with it by the jury; but if offered for the sole purpose of comparison, it is not admissible.

The right of a person indicted for a capital offence to have delivered to him, under Rev. Stat. § 1033, at least two days before the trial, a list of the witnesses to be produced, may be waived by sitting by and listening to the testimony in chief of a witness not on such list, before inquiring whether his name had been furnished to defendant.

Proof of contradictory statements by one's own witness, voluntarily called and not a party, is in general not admissible, although the party calling him may have been surprised by them; but he may show that the facts were not as stated, although this may tend incidentally to discredit the witness.

Whether or not a particular homicide is committed in repulsion of an attack, and, if so, justifiably, are questions of fact, not necessarily dependent upon the duration or quality of the reflection by which the act may have been preceded.

Allen v. *United States*, 150 U. S. 151, followed in condemning the doctrine as impracticable, which tests the question whether a person on trial for murder is entitled to excuse on the ground of self-defence, or exceeded the limits of the exercise of that right, or acted upon unreasonable grounds, or in the heat of passion, by the deliberation with which a judge expounds the law to a jury, or the jury determines the facts, or with which judgment is entered and carried into execution.

Matter excepted to should be brought to the attention of the court before the retirement of the jury.

When several distinct propositions are given, and the exception covers all of them, it cannot be sustained if any one of them is correct.

Sam Downing, alias Sam Hickory, and Tom Shade, two Cherokees, were indicted and tried for the murder of Joseph Wilson, a United States deputy marshal, the trial resulting in

the acquittal of Shade and the conviction of Hickory, who, being sentenced to death, prosecuted this writ of error. As stated in the brief for the government, Hickory admitted that he killed Wilson, but claimed that he was the attacking party; that the marshal came to arrest him for a violation of the liquor laws, and after the arrest, and while he was proceeding toward his house to get a saddle, the marshal began firing at him; that he ran into the house and an affray occurred there, in which there was shooting by both, until the marshal was killed; that he concealed the body in a ravine, where it was found two or three days later; then hid in the neighborhood for awhile, and wandered about until he was arrested among the Osage Indians. One Carey testified that he went with the marshal to show him where Hickory lived, and that it was arranged that he should remain in the woods while Wilson went to the house and made the arrest; that after he had arrested Hickory he would fire his pistol to notify Carey that he had done so, so that Carey could meet him at a designated point; that in about half an hour Carey heard a shot, followed by several others.

There was some evidence that Wilson's skull had been fractured; also that Wilson's horse was found dead, with his throat cut, lying in an opposite direction from the body; and an attempt to show that Wilson, after being wounded by Hickory, was finally killed with an axe by Shade.

A letter written in the Cherokee alphabet, claimed to be in Hickory's handwriting, to Ollie Hickory, alias Williams, was put in evidence and marked "A," and was interpreted as follows: "October 15th, 1891. Ollie: I write you a few lines. You must never disclose how this is about Tom Shade. Just say that I was the only one that did it. You must never tell anybody that he killed the horse and all that he done. I tell you you must not. That is all now. I write in haste. Sam."

The letter was identified as in Hickory's handwriting, although he denied it, and was admitted under exception on the part of the defendants. Joseph Shade, a witness for the defence, produced a paper on cross-examination, not relevant in itself, which was marked "X," which he testified was in Hick-

ory's handwriting, and which seems to have been put in evidence without objection.

An expert in Cherokee handwriting testified on behalf of the defendants, on comparisons of Exhibits "A" and "X," that they were written by different persons, and that the only resemblance was in the signatures. Another witness testified that "A" was not in Hickory's handwriting, but that "X" was.

Mr. A. H. Garland for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

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

1. Hickory being called in his own behalf, denied that the letter marked "A" was in his handwriting. His counsel offered a paper which Hickory testified he had written at the table in court that day, "to compare with the writing on the document marked 'X,' as produced by Joseph Shade, written previous to this time, and also to compare with the writing marked 'A,' offered in evidence by the district attorney." The court excluded the evidence and the defendant excepted.

According to the general rule of the common law, the genuineness of disputed handwriting could not be determined by the court and jury by comparing it with other handwriting of the party, but among the exceptions to the rule was that if the paper admitted to be in the handwriting of the party or to have been subscribed by him was in evidence for some other purpose in the cause, the paper in question might be compared with it by the jury. *Moore* v. *United States*, 91 U. S. 271; *Rogers* v. *Ritter*, 12 Wall. 317. And this with or without the aid of witnesses. 1 Greenl. Ev. § 578.

By acts of Parliament it is now provided in England, as "to all courts of judicature, as well criminal as others," "that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted

to be made by the witnesses; and such writings and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise of the writing in dispute." 17, 18 Vict. c. 125; 28, 29 Vict. c. 18.

Under these statutes it has been decided that any writings, of the genuineness of which the judge is satisfied upon the proof, may be used for the purposes of comparison, although they may not be admissible for any other purpose in the cause. *Birch* v. *Ridgway*, 1 Fost. & Fin. 270; *Cresswell* v. *Jackson*, 2 Fost. & Fin. 24; and that the comparison may be made either by witnesses or without the intervention of any witnesses at all, by the jury themselves. *Cobbett* v. *Kilminster*, 4 Fost. & Fin. 490; 1 Whart. Ev. § 712. But in the absence of statute, papers irrelevant to the issues on the record were held not receivable in evidence at the trial for the mere purpose of enabling the jury or witnesses to institute a comparison of hands. *Bromage* v. *Rice*, 7 Car. & P. 548; *Doe* v. *Newton*, 5 Ad. & El. 514; *Griffits* v. *Ivery*, 11 Ad. & El. 322; 1 Greenleaf Ev. § 580. The danger of fraud or surprise and the multiplication of collateral issues were deemed insuperable objections, although not applicable to papers already in the cause, in respect of which, also, comparison by the jury could not be avoided.

We do not care to discuss the reasons for the rule or examine the decisions by the courts of the several States, in which there is great want of uniformity, for the question here does not turn on the general rule in relation to comparison of handwriting or the admission of irrelevant papers for the sole purpose of comparison, but on the question of the admissibility of such writings when specially prepared for the purpose; and we are clear that they are not admissible. Undoubtedly circumstances may often arise where a witness may be asked, on cross-examination, to write in the presence of the jury, for the purpose of testing his credibility; but as original evidence, as remarked in *King* v. *Donahue*, 110 Mass. 155, 156, "A signature made for the occasion *post litem motam* and for use at the trial ought not to be taken as a standard of genuineness."

"It would," as was said in *Williams* v. *State*, 61 Alabama, 33, 40, 83, "open too wide a door for fraud, if a witness was allowed to corroborate his own testimony by a preparation of specimens of his writing for the purposes of comparison."

"All evidence of handwriting," says Greenleaf, (1 Ev. § 576,) adopting the language of Patteson, J., in *Doe* v. *Suckermore*, 5 Ad. & El. 730, "except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge." We think, however, there is an obvious distinction between comparison by juxtaposition of an admitted or established writing and the disputed writing, and comparison of the latter with an image in the mind's eye, but in either instance papers prepared for the purpose of having the comparison made are objectionable.

In *Stranger* v. *Searle*, 1 Esp. 14, Lord Kenyon refused to admit the testimony of a witness whose familiarity was derived from seeing him write for the express purpose of qualifying the witness, "as the party might write differently from his common mode of writing through design."

It is only when the paper is written, not by design but unconstrainedly and in the natural manner, so as to bear the impress of the general character of the party's writing, as the involuntary and unconscious result of constitution, habit, or other permanent cause, and therefore of itself permanent, that it furnishes, if otherwise admissible, any satisfactory test of genuineness. Coleridge, J., *Doe* v. *Suckermore*, 5 Ad. & El. 703, 705.

The paper offered was rightly excluded by the court.

2. The admission of the testimony of one Charles H. Snell was objected to upon the ground that his name was not on the indictment, and the objection was overruled because not made until the examination-in-chief was concluded. The record shows no exception taken, though counsel expressed a desire to save the point. Under section 1033 of the Revised Statutes, any person indicted of a capital offence has the right to have delivered to him, at least two days before the trial, a list

of the witnesses to be produced, and it would be error to put him on trial and allow witnesses to testify against him whose names have not been furnished, if he seasonably asserted his right, *Logan* v. *United States*, 144 U. S. 263; but we think he did not do that here, and that the defect was waived. It was suggested by counsel for the defendant that the objection was made as soon as it was discovered that notice had not been given in respect to this witness; but we are of opinion that the discretion of the trial court was properly exercised upon the question. Counsel ought not to sit by and listen to the testimony in chief of a witness before inquiring whether his name has been furnished to the defendants.

3. It is assigned as error that the court did not allow "defendants to show that they were surprised by the testimony of John Johnson, a witness for defendants, and to show previous declarations of said John Johnson to defendants' counsel through an interpreter on several occasions during the preparation of said case contrary to his testimony on the stand, which declarations were favorable to defendants." Johnson was called for defendants and testified that defendant Shade was at his house Tuesday evening, but not again until Friday evening. He was asked if he had not stated to defendants' counsel, through Isaac Shade as interpreter, that Tom Shade was there on Wednesday and Thursday evenings also, but he answered that he had not, and that the interpreter was mistaken. Thereupon Isaac Shade was subsequently asked: "State whether or not in your interpretation of his testimony that he said that Tom stayed at his house Tuesday night, Wednesday night, and Thursday night and Friday night of that week," to which objection was made, which the court sustained, and defendants excepted.

During the trial there was an attempt to show that Wilson survived the shooting, which was on Tuesday afternoon, and that defendant Shade afterwards, and by collusion with Hickory, slew the wounded man with an axe. It is possible that, if the evidence had tended to establish that Hickory and Shade had conspired to compass Wilson's death, testimony in support of Shade's alibi for the two days succeeding Tuesday

(assuming it made out as to that day) might have been material as to Hickory; but upon this record the bearing upon Hickory of Shade's whereabouts on Wednesday and Thursday is extremely slight, and Shade was acquitted.

When a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness. As to witnesses of the other party, inconsistent statements, after proper foundation laid by cross-examination, may be shown; *Railway Company* v. *Artery*, 137 U. S. 507; but proof of the contradictory statements of one's own witness, voluntarily called and not a party, inasmuch as it would not amount to substantive evidence and could have no effect but to impair the credit of the witness, was generally not admissible at common law. Best Ev. § 645; Whart. Ev. § 549; *Melhuish* v. *Collier*, 15 Q. B. 878.

By statute in England and in many of the States, it has been provided that a party may, in case the witness shall in the opinion of the judge prove adverse, by leave of the judge, show that he has made at other times statements inconsistent with his present testimony, and this is allowed for the purpose of counteracting actually hostile testimony with which the party has been surprised. *Adams* v. *Wheeler*, 97 Mass. 67; *Greenough* v. *Eccles*, 5 C. B. (N. S.) 786; *Rice* v. *Howard*, 16 Q. B. D. 681.

Johnson was not a hostile witness, and his testimony was not in itself prejudicial so far as it failed to make out the alibi beyond Tuesday, yet it did contradict defendant Shade, who testified that he was at Johnson's Wednesday and Thursday nights. But the court allowed defendants' counsel to cross-examine Johnson if they chose, and to prove the fact to be otherwise than as stated by him, and we cannot say that error was committed because the court in the exercise of its discretion, under the circumstances, declined to concede any further relaxation of the rule.

4. Defendants took certain exceptions to parts of the charge, the first of which was to: "The court's criticism on circumstantial evidence, denouncing persons who are slow to act on circumstantial evidence as fools and knaves." Referring to the necessity of determining the condition of the mind, the court said: "Some say we cannot do it by circumstantial evidence, because it is cruel and criminal, they say, to convict a man upon circumstantial evidence. This is a declaration of either fools or knaves, sympathetic criminals or men who have not ability enough to know what circumstantial evidence is, or to perform the ordinary duties of citizenship. When you consider that these two mental conditions, the fact that the act was done wilfully, and done with malice aforethought, can never in any case be found in any other way than by circumstantial evidence, you can see the potency in every case of that class of testimony. Circumstantial evidence means simply that you take one fact that has been seen, that is produced before you by evidence, and from that fact you reason to a conclusion." The exception gives a color to this part of the charge which it will not bear, namely, that it amounted to a denunciation of persons "who were slow to act on circumstantial evidence," whereas the court was inveighing against the declaration that it is cruel and criminal to convict a man upon circumstantial evidence, and that the condition of the mind cannot be found in that way. This was done with great vigor, perhaps induced by the arguments of counsel, but that does not strengthen an exception otherwise destitute of merit.

5. The second exception to the charge was as follows:

"Because the court instructed the jury that the defendant, Downing, or the party who invokes the law of self-defence, at the time of the difficulty puts himself in the place of the judge that lays down the law, of the jury who passes upon the facts and enters up judgment, and of the marshal who executes the sentence, and has centred in himself the whole power of the government or people, without telling them that he is not required to look at the case and the occurrences with the same coolness and deliberation that a court and jury would do in investigating the charge against him, and that, if in this

case, as claimed by him, the officer Wilson fired off his pistol in the first place when his back was to him, and led defendant, Downing, to believe that the officer was assaulting him, or the officer did then and afterwards assault him, then all the circumstances of excitement, agitation, apparent or real peril that surrounded him, and that may have caused him to misjudge as to the purpose of Wilson, or as to the assault, or to misconceive as to his exact rights and duties, are all to be taken into consideration."

Hickory's defence was that the homicide was committed in self-defence, that is, that he was assaulted by Wilson upon a sudden affray, and killed him because he was in imminent and manifest danger either of losing his own life or of suffering enormous bodily harm; or that he was under a reasonable apprehension thereof, and the danger, as it appeared to him, was so imminent at the moment of the assault as to present no alternative of escaping its consequences, except by resistance.

The experienced trial judge told the jury that the mere fact that a killing is done wilfully does not necessarily make it murder; that it is also done wilfully when done in self-defence; and explained the characteristics of that malice the existence of which is the criterion of murder, defining malice in the ordinary acceptation of the term, and malice aforethought, malice express and malice implied, and pointing out that the requisite malice exists when the act is perpetrated without any provocation or any just cause or excuse, not only on special motive or through special malevolence, but also at the dictates of a heart regardless of social duty and deliberately bent on mischief; and, saying that such malice imported premeditation, thus continued: "The doing of the act which kills must be thought of beforehand. But how long, you will inquire in this case? A minute, or a day, or an hour, or a year? Why, not at all. If it is thought of at a period, practically speaking, cotemporaneous with the doing of the act, it is premeditated, it is thought of sufficiently long. Especially is that the rule applicable in this day, when a man with the rapidity almost of the batting

of an eye or a flash of light may execute a purpose to kill. He may conceive a purpose, and instantly with its conception draw his deadly weapon and execute his purpose before you can bat an eye; the purpose is conceived and executed, and the man is dead, but yet it is premeditated, as shown in a case of that kind by the very drawing and presentation and firing of the gun. The law says, as I will read to you presently, that the deliberate selection and use of a deadly weapon is evidence of the existence of malice aforethought, provided the party had no right to use that weapon, or provided there is an absence of mitigating facts when he did use it." That is to say, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any definite period before the fatal act.

The learned judge then quoted from the charge in *United States* v. *King*, 34 Fed. Rep. 302, (Lacombe, J.,) as follows:

"'It imports premeditation. Therefore there must logically be a period of prior consideration; but as to the duration of that period no limit can be arbitrarily assigned. The time will vary as the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvellous rapidity. Men have sometimes seen the events of a lifetime pass in a few minutes before their mental vision. Thought is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human mind can form a deliberate purpose to do an act; and if the intent to do mischief to another is thus formed, as a deliberate intent, though after no matter how short a period of reflection, it none the less is malice.'"

Manslaughter was defined, and the distinction between that and murder; and the right of self-defence invoked by counsel in the case was then explained. The first proposition as to the justifiable exercise of that right was laid down generally to be that when a man, "in the lawful pursuit of his business, is attacked by another, under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent

the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power;" and the second proposition, that "when from the nature of the attack there is reasonable ground to believe that there is a design to destroy his life or to commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended."

And in this connection, the learned judge charged among other things as follows:

"You see a man is required to discharge certain great duties under all circumstances, and especially is this law of duty incumbent upon him when he is put in that position, in the position of a judge sitting on the bench deliberating upon what the law is, and of a jury sitting in the jury box listening to the facts, and finding as coolly, deliberately, and dispassionately as possible under the circumstances, what the facts are. When a party is in such a condition he is the judge upon the bench and the jury in the box, and not only that, but he is the executioner. He finds what the facts are as a jury, and he makes an application of the law that he finds as a judge to these facts that he finds as a jury, he enters up a judgment, and he then and there as a marshal kills in the furtherance of the judgment. Suppose that the judge of this court had that power, how long would the people of this land permit him to sit on this bench? Suppose that you, as twelve dispassionate citizens, had that power, how long would the people of this land permit that system to exist? Suppose that the chief executive officer of this government, the President of the United States, presumably a discreet, wise, and just man, having no other purpose than the good of the people, had that power, how long would these people permit one man to exercise a power of that kind? Exercise it, too, when he wasn't confronted with acts that inflamed him, or that infuriated him, but exercised it when he was an intelligent man, and just man, as our Presidents have always been, and a fair-minded man. We have divided this power when it comes to be executed deliberately. We have a court that performs one office

and the jury another and the executive arm of the government another. Yet the law of self-defence puts all of these mighty elements of power into the hands of one man, and it may be in a given case that he is not a very intelligent man, either; it may be in a case where he has sought to make application of it, that he is not a very discreet man, or that he is not a very dispassionate man, either, yet if the law applies to his case, if there is an application of that kind that can be correctly made to that condition, it is to be made, although there is a concentration of these mighty powers that would not be concentrated in any department of the government alone, but these great powers in a proper case are properly in the hands of the citizens. . . .

"He is required to avoid the necessity of killing if he can with due regard to his own safety. He must do that. If there is a condition where the other party at the time of the killing is doing an act of violence upon him, and he is in the right, and that would take his life unless he avoided it, and he can avoid it otherwise than by killing, and he does not do it, that is a case where he would be guilty of manslaughter, because that is a failure to observe his duty and a use of the law of self-defence hastily. He must not forget that he is judge, jury, and executioner when he is sitting in that tribunal out in the woods or country. He is therefore required to comprehend what this law is. He is required to know what the facts are that confront him and to make a correct application of that law to these facts, and if he does not do that, when he might do it, he makes a mistake in that regard, and he would be guilty of manslaughter."

Having shown that premeditation may exist in the twinkling of an eye, the learned judge thus treats of the act of self-defence as involving, at least in kind, the deliberation of a judge, a jury, and an executioner. If the jury, thus admonished, believed the exercise of the right of self-defence involved the same deliberation as their own grave consideration of a verdict upon which a human life might depend, it is easy to see that they might well confound the distinction between such deliberation and instantaneous conclusions under sudden

attack, or in the presence of apprehended or imminent danger. The charge was open to the construction that, while premeditation may exist in a criminal sense upon the conception of an instant, the conclusion to kill in self-defence must be arrived at upon more serious deliberation, or it furnishes no excuse. If, in the language of the Court of Appeals of New York in *People* v. *Clark*, 7 N. Y. 385, "there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow or whether it be contemplated for months;" then in the matter of self-defence, the deliberation of the slayer in respect of the greatness of the necessity to protect himself from death or great bodily harm, if material, would also be sufficient although the conclusion to kill was arrived at instantaneously. The swiftness of thought in the latter case would no more exclude the element of deliberation than in the former, and whether the act was excusable or not could only be determined by all the facts and circumstances disclosed by the evidence.

In short, whether or not a particular homicide is committed in repulsion of an attack, and, if so, justifiably, are questions of fact, not necessarily dependent upon the duration or quality of the reflection by which the act may have been preceded.

The gravest deliberation would not absolve under all circumstances, though it might mitigate the offence under some; and if the facts justified the act, the extent of deliberation would be immaterial.

To enlarge upon the magnitude of the power of slaying in defending against an attack, as being a power which in itself would not be tolerated in the Chief Executive of the country or in the judge then passing upon the issues of life and death; and to advise the jury to inquire, not into the existence of defendant's belief or the reasonableness of the grounds on which it rested, but into the character of the deliberation which accompanied it tested by the standard of that of the judge, the jury, and the executioner, in the discharge of their appropriate duties, manifestly tended to mislead. Nor does

this view impute a want of intelligence in the jury. They might find a verdict in disregard of the instructions of the court, but this is not to be presumed, and if that strict attention to judicial direction were paid which the due administration of justice requires, we are constrained to the conclusion that such instructions as those under consideration could not but have a decided influence upon their action.

As was said in *Allen* v. *United States*, 150 U. S. 551, we do not think that the doctrine is practicable which tests the question whether a defendant was entitled to excuse on the ground of self-defence, or exceeded the limits of the exercise of that right, or acted upon unreasonable grounds, or in the heat of passion, by the deliberation with which a judge expounds the law to a jury, or the jury determines the facts, or with which judgment is entered and carried into execution.

However improbable Hickory's story may have been, and however atrocious his conduct, he could not be deprived of making the defence he put forward, and these instructions of the court were erroneous as they stood unqualified.

The rule in relation to exceptions to instructions is that the matter excepted to shall be so brought to the attention of the court before the retirement of the jury as to enable the judge to correct error, if there be any, in his instructions to them, and this is also requisite in order that the appellate tribunal may pass upon the precise question raised without being compelled to search the record to ascertain it. And it is also settled that where several distinct propositions are given, and the exception covers all of them, if any one of them is correct, the exception cannot be sustained. The exception here is not obnoxious to objection as violating the rule in these regards. The trial judge could not have been in doubt as to the particular part of the charge objected to, and, as his attention was called to the matter before the jury retired, could have modified or withdrawn it, if he had thought it necessary to do so; and the portion excepted to is indicated with sufficient precision so far as this court is concerned. Nor did the exception embrace other than the specified statements objected to. Again, the exception was not to the omission of the court to

charge upon a particular point, in which case, in the absence of request that that should be done, it would not have been well taken, *Texas & Pacific Railway Co.* v. *Volk*, *ante*, 73, although, even in that view, the exception might be held equivalent to a request for the qualification; but the objection really was to the giving of the instructions unqualified, and counsel signified out of abundant caution what in their judgment would remove their ground of complaint. We hold, therefore, that the point was sufficiently saved.

Judgment reversed and cause remanded with a direction to grant a new trial.

MR. JUSTICE BREWER dissented.

MR. JUSTICE BROWN took no part in the consideration and decision of this case.

CRESCENT MINING COMPANY *v.* WASATCH MINING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 180. Argued December 21, 1893. — Decided January 22, 1894.

A. commenced an action against B. in Utah, to recover possession of a tract of mining land. C., desiring to purchase the disputed tract, agreed with B. to purchase it, a part of the purchase money to be paid at the signing of the agreement (which was done), and the balance to be paid on delivery of the deed, after determination of the action in favor of B., C. to go into possession at once, but not to remove any ores until delivery of the deed. A., on his part, then sold the disputed premises to C. By a subsequent agreement C. agreed to pay the consideration therefor to A. in a year, if the suit should be determined in favor of A. in that time, and if not then determined, to pay the purchase money into court in the action of A. against B. By the same agreement the property was mortgaged by C. to A. to secure its performance. The money not having been paid into court under the last agreement, A. brought a suit to foreclose the mortgage in which it was alleged that the action by A. against B. was still pending and undetermined, and that C. had not paid the amount into court, and by which was prayed a decree for such payment

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and for foreclosure and sale. The defendant demurred, and, the demurrer being overruled, answered, setting up an alleged fraudulent conspiracy, whereby the most valuable parts of the lands agreed to be conveyed by A. to C. had been omitted from the deeds. The answer also set up that C. had commenced a suit against A. to compel a reformation of the deed, in which a decree for reformation had been made below, and that the suit was pending in this court on appeal. Issue being taken on this answer, it was decreed that A. was entitled to have the amount of the mortgage debt, with interest, paid into court in the suit between A. and B., and for a decree of foreclosure. This decree, on appeal to the Supreme Court of the Territory, was modified by allowing thirty days for the payment of the money before advertising the property for sale, and by providing that the money should be paid into court in the foreclosure suit, instead of in the action of A. against B., until an order could be obtained in that case for the deposit of the money. *Held*, that in all this there was no error.

In the year 1883 the Wasatch Mining Company, a corporation under the laws of Utah Territory, brought an action in the District Court for the Third Judicial District of that Territory, against William and Joseph A. Jennings, to recover possession of a certain tract of mining land, situated in Uintah mining district, Summit County. That action was, at the time of the events subsequently narrated, and still is, pending and undecided.

The Crescent Mining Company, likewise a corporation organized under the laws of Utah Territory, desiring to purchase said disputed tract of land, on March 8, 1883, entered into an agreement in writing with Jennings, whereby, after reciting the fact that the action was pending between the Wasatch Mining Company and Jennings, it was agreed that the Crescent Mining Company should purchase the said tract, and pay therefor $50,000, of which $7500 were paid at the time of the signing of the agreement, and the balance when the deed was delivered, which latter event was to take place when the said action should be determined, and if the same should be decided in favor of Jennings; that, in the meantime, the deed should be deposited with the Deseret National Bank of Salt Lake City; that the Crescent Mining Company should forthwith go into possession, but until the delivery of the deed should not remove, out of the premises described in the deed, any metal

or ores of value. It was also provided that the Crescent Company might at any time, at its option, pay the balance of the purchase money into the said bank, and lift the deed.

On July 9, 1886, the Crescent Mining Company entered into an agreement, in writing, with the Wasatch Mining Company, whereby the latter sold and conveyed to the former company the premises in dispute, and the latter agreed to pay therefor $42,500; and, on September 1, 1886, a further agreement, in the nature of a mortgage, was entered into between the two companies, referring to the pending litigation between the Wasatch Company and Jennings, and providing that the Crescent Company would pay to the Wasatch Company the said sum of $45,000 in one year from the date thereof — absolutely, if at said time the said suit should be determined in favor of the said Wasatch Company; but if said action should still be pending undetermined, then said purchase money should be paid into said court in said action, recognized by order thereof, to be disposed of as follows: to be paid to the Wasatch Company on the final determination of said suit in their favor, and subject to be repaid to the Crescent Mining Company, on its request, if said action should be finally and on its merits determined adversely to the Wasatch Company; and in case default should be made in the payment of said purchase money, then the Wasatch Company were authorized to sell the said premises, in the manner prescribed by law, and out of the proceeds to pay said purchase money, with costs and a reasonable attorney's fee for collection, the surplus, if any, to be paid to the Crescent Mining Company.

The present suit was brought to foreclose this mortgage, the complaint alleging that the suit of *Wasatch Company* v. *Jennings* was still pending and undetermined, and that the Crescent Mining Company had not paid the amount into court, and asking for judgment for $42,500, with interest from one year after the date of said mortgage, with attorney's fee, and for a decree of foreclosure and sale.

The defendant demurred to this complaint on the ground that it did not allege that the plaintiff had obtained an order for the payment of the purchase money into court, or that

such order had been made and that defendant had then refused, or that any demand had ever been made upon defendant for payment, and that it appeared on the face of the complaint that defendant, not being a party to the suit of the *Wasatch Company* v. *Jennings*, could not appear in that case and ask for an order permitting the payment into court.

This demurrer was overruled, and the Crescent Company answered and alleged that the mortgage sued on had been given to secure the purchase money of certain described mining grounds; that owing to a fraudulent conspiracy between the defendant's manager and certain agents of the plaintiff the most valuable part of the lands purchased had been omitted from the deed; and then added the facts showing that the Crescent Company could not, of itself, obtain an order to pay the purchase money into court, and that the Wasatch Company had never obtained such an order and had never made any demand.

The answer further averred that on January 3, 1887, the Crescent Company had commenced an action, in the same court, against the Wasatch Company, to compel a reformation of the deed, so as to make said conveyance embrace all the ground, and that said last-mentioned action had resulted in a decree commanding a reformation of the deed as prayed for; that said decree had been appealed from into the Supreme Court of the Territory of Utah, which latter court had, on August 27, 1888, affirmed said decree, from which said last-mentioned decree an appeal had been taken to the Supreme Court of the United States, where said appeal was pending. The record of that appeal in the Supreme Court of the United States discloses that the decision of the court below has been affirmed.

The cause was brought on for trial before the court sitting without a jury, and resulted in certain findings of fact, substantially the same as alleged in the complaint, and in findings of law as prayed for by the complainant, viz., that said plaintiff, the Wasatch Company, was entitled to have said mortgage debt, $42,500, paid in that court, in said action pending between Wasatch Company and Jennings, together with

interest thereon at 10 per cent per annum, from the 1st day of September, 1887, until the same shall have been so paid into court, together with costs and $1000 for an attorney's fee. It was decreed that the plaintiff was entitled to a decree foreclosing said mortgage and directing a sale of the premises covered by said mortgage, and to have so much of the proceeds of sale paid into court as might be necessary to pay said purchase money, interest, and costs as aforesaid.

From this decree an appeal was taken to the Supreme Court of the Territory of Utah, and on June 12, 1890, an opinion and decree of that court were filed, affirming the decree of the District Court in substantial respects, but modifying the same by decreeing that thirty days should be allowed the defendant in which to pay the money before the property should be advertised for sale, and also providing that the money should be paid into court in the case between the companies instead of the case of the *Wasatch Company* v. *Jennings*, until an order should be obtained in that case for the deposit of the money.

The record further discloses that the Crescent Mining Company entered into possession of the property, and has been engaged, during the pendency of the litigation, in mining and converting to its own use the ores and metals contained therein.

From the decree of the Supreme Court of the Territory of Utah the present appeal was taken.

Mr. R. N. Baskin for appellant.

Mr. A. B. Browne for appellee. *Mr. J. G. Sutherland* filed a brief for appellee.

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

Our examination of this record fails to disclose any error in the decree appealed from.

The proceedings in the District Court of the Territory of Utah, to enforce the mortgage given by the Crescent

Mining Company to the Wasatch Mining Company, were certainly in pursuance of the terms of that instrument. The defence raised by demurrer, that the Crescent Company could not pay the purchase money into the court until an order of the court permitting such payment had been procured, and that the Crescent Company, not being a party of record, could not procure such order, was not sound, because that reason, namely, that the Crescent Company was not a party of record, equally prevented the Wasatch Company from procuring such order. It is true that the Wasatch Company was a party of record; but, of course, the court could not, on the application of that company, have granted an order on the Crescent Company, not a party and not represented in court, to pay money into court.

It is obvious that the contract, in that particular, required the coöperation of the parties. Hence, when, by the terms of the mortgage, the time had arrived for the payment of the money, it was the duty of the Crescent Company to have signified its readiness to pay and to unite with the Wasatch Company in procuring the necessary order of the court. Not having so done, a right to enforce the mortgage at once arose.

Nor do we think that the defence set up in the answer, that the deed executed by the Wasatch Company and deposited, as provided for in the agreement, in the Deseret National Bank, did not contain all the parcels of land to which the Crescent Company was entitled, was sufficient, because the answer itself disclosed that the Crescent Company had availed itself of its remedy by direct proceedings against the Wasatch Company to reform the deed. Such proceedings would necessarily result in a decision that the deed in question was correct, or else in a reformation of it.

An election to pursue a remedy by an independent action would not seem to have left the Crescent Company free to resist an enforcement of its express contract in the mortgage by resorting to the same matter. However this may be, it is satisfactory to know that this view of the subject worked no injury to the Crescent Company when we learn from our

own records that the result of that independent proceeding was a decree in favor of the company compelling a reformation of the deed, so as to include all of the lands purchased. *Wasatch Mining Co.* v. *Crescent Mining Co.*, 148 U. S. 293.

Further objection is urged to the decree of the court below in that it called for the payment of interest on the principal sum from the time fixed for payment until the same shall have been paid into court. It is said that the mortgage does not itself provide for interest, and that if the money had been paid into court it would have there remained without interest. But this is not necessarily so. The court would, doubtless, if so requested by the parties in interest, have ordered so large a sum invested. At all events, it is no hardship that the Crescent Company, which had both the use of the money and the receipt of the issues and profits of the mines, should be charged with interest for the period between the maturity of the mortgage and the payment into court.

Another complaint urged to the decree below is because it directs that the money should be paid into the District Court of the Territory in the case between the two mining companies instead of in the case between the Wasatch Company and Jennings. But the decree discloses that this disposition of the money is only temporary, to await the obtaining of an order in the latter case. Such an order, as the case now stands, is a matter of course, and doubtless can be obtained forthwith, so as to dispense with the intermediate payment.

The decree of the court below is

Affirmed.

MAYNARD *v.* HECHT.

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

No. 680. Submitted January 8, 1894. — Decided January 22, 1894.

Under the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, 827, when an appeal or writ of error is taken from a District Court or a Circuit Court in which the jurisdiction of the court alone is in issue, a certificate from the court below of the question of jurisdiction to be decided is an absolute prerequisite for the exercise of jurisdiction here; and, if it be wanting, this court cannot take jurisdiction.

MOTION TO DISMISS. Charles Hecht filed his petition in the Circuit Court of the United States for the District of Nebraska, October 14, 1890, against the plaintiffs in error, alleging that the amount in controversy in the suit exceeded the sum or value of $2000 exclusive of interest and costs, and that he had been damaged in the sum of $2500 by reason of the purchase upon defendants' false and fraudulent representations in writing of certain land for which he paid the sum of $1800, and which turned out to be without value. The petition, among other things, averred that plaintiff had executed a deed of reconveyance of the property in question and formerly tendered the same, and he brought said deed into court, and also a promissory note of the Saline County Nurseries given to him at the time of the purchase as indemnity against a mortgage upon the premises, and prayed judgment for $2500, together with interest and costs. Defendants answered, denying the allegations of the petition, and alleging that the purchase price of the land was paid in horses which Hecht guaranteed to be sound, but which were in fact worthless. To this answer a reply in general denial was filed, and trial having been had, a verdict was returned in favor of Hecht for $1720. Defendants then moved for a new trial, and the same day filed a motion to dismiss the case upon the ground that the Circuit

Court had no jurisdiction, since it appeared from the petition that the amount in controversy was less than the sum of $2000 exclusive of interest and costs, and no evidence was introduced at the trial tending to prove that the amount exceeded that sum. June 10, 1891, the court overruled each of the motions and entered judgment upon the verdict. The writ of error was allowed November 16, 1891. No certificate of question for decision was applied for or granted by the court.

Mr. Walter J. Lamb, *Mr. Arnott C. Ricketts*, *Mr. Henry H. Wilson*, *Mr. Walter H. Smith*, and *Mr. C. W. Holcomb* for the motion.

Mr. C. S. Montgomery opposing.

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

Under section five of the Judiciary Act of March 3, 1891, a writ of error can be taken directly to this court from the Circuit Courts only in the six classes of cases therein mentioned, and the contention is that the writ may be sustained in this case as falling within the first class, described in that section as follows: "In any case in which the jurisdiction of the court is in issue; in such case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." According to that provision the question involving the jurisdiction of the Circuit Court must have been in issue and decided against the party seeking to bring it before this court for determination, and must be certified for decision. And as no such question was certified by the Circuit Court in this case, we are confronted on the threshold with the inquiry whether we can take jurisdiction of the writ, an inquiry controlled by the rule that an affirmative description of the appellate jurisdiction of this court in a suit implies a negative on the exercise of such appellate power as is not comprehended within it.

By the act of February 25, 1889, c. 236, 25 Stat. 693, it was provided: "That in all cases where a final judgment or decree shall be rendered in the 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 judgment or decree 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." The act of 1891 was framed in this regard in view of the former act, and section five restricts the power of this court, in all suits in which its appellate jurisdiction is invoked by reason of the existence of a question involving the jurisdiction of the Circuit Court over the case, to the review of that question only. The act did not contemplate several appeals in the same suit at the same time, but gave to a party to a suit in the Circuit Court where the question of the jurisdiction of the court over the parties or subject-matter was raised and put in issue upon the record at the proper time and in the proper way, the right to a review by this court, after final judgment or decree against him, of the decision upon that question only, or by the Circuit Courts of Appeals on the whole case. *McLish* v. *Roff*, 141 U. S. 661, 668.

And the section under consideration declares in express terms that when the case is brought directly to this court the question of jurisdiction so in issue shall be certified for decision.

The rules in relation to certificates of division of opinion in civil causes under sections 650, 652, 693 of the Revised Statutes were well settled. Each question had to be a distinct point or proposition of law, clearly stated, so that it could be definitely answered without regard to the other issues of law in the case; to be a question of law only, and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment on the weight or effect of testimony or facts adduced in the case; and could not embrace

the whole case, even where its decision turned upon matter of law only, and even though it were split up in the form of questions. *Fire Insurance Association* v. *Wickham*, 128 U. S. 426; *Dublin Township* v. *Milford Savings Institution*, 128 U. S. 510. The same rules were applicable to the certificate of points on division of opinion on the hearing or trial of criminal proceedings under sections 651 and 697. *United States* v. *Hall*, 131 U. S. 50; *United States* v. *Perrin*, 131 U. S. 55. And prior to the act of February 25, 1889, this court had jurisdiction of a case brought up on certificate of division of opinion on the question whether the Circuit Court had jurisdiction of it. *Baltimore & Ohio Railroad Co.* v. *Marshall County Supervisors*, 131 U. S. App. xcix.

By section six of the act of March 3, 1891, c. 517, 26 Stat. 826, 828, it is provided "that in every such subject within its appellate jurisdiction, the Circuit Court of Appeals may at any time certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision."

In *Columbus Watch Co.* v. *Robbins*, 148 U. S. 266, it was held that in order to give this court jurisdiction over questions or propositions of law sent up by a Circuit Court of Appeals for decision, it was necessary that the questions or propositions should be clearly and distinctly certified to, and should show that the instruction of this court was desired in a particular case as to their proper decision. And reference was there made to the rules laid down in reference to certificates on division of opinion above adverted to. So in *Cincinnati, Hamilton &c. Railroad Co.* v. *McKeen*, 149 U. S. 259, it was held that the act of March 3, 1891, does not contemplate the certification of questions of law to be answered in view of the entire record in the cause, although this court may, if it sees fit, order the entire record to be sent up, and thereupon decide the case as if it had been brought up by writ of error or appeal. We think the intention of Congress as to the certification mentioned in both sections is to be arrived at in the light of the rules theretofore prevailing as to certifying from the court below, and since, in the instance of an appeal upon the

question of jurisdiction under the fifth section of the act, a certificate by the Circuit Court presenting such question for the determination of this court is explicitly and in terms required in order to invoke the exercise by this court of its appellate jurisdiction, we are of opinion that the absence of such certificate is fatal to the maintenance of the writ of error in this cause. The narrowness of range in the particular instance can make no difference in the application of the principle.

It appears that the petition for writ of error was filed in this case July 6, 1891, together with a bond for the prosecution thereof, and an assignment of errors, and this petition and the assignment raised the question that the matter in dispute in the cause did not exceed, exclusive of interest and costs, the sum of two thousand dollars; but the trial judge made no endorsement thereon. The writ specifies no particular ground of error, and it is upon the writ that the allowance was entered November 16, 1891, the judge certifying that on that day it was presented to him "for allowance and signature." But in any view the absence of the formal certificate cannot be helped out by resort to these papers. The inquiry is not whether we can ascertain the question sought to be presented, but whether we can exercise jurisdiction under the statute, which we cannot if the certificate is an absolute prerequisite, as we hold it to be. And upon that ground we dismiss the writ without discussing whether the question of jurisdiction indicated could properly be held to have been in issue, or whether, if so, the case would fall within the fifth section.

Writ of error dismissed.

MORAN *v.* HAGERMAN.

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

No. 875. Submitted January 12, 1894. — Decided January 22, 1894.

Following *Maynard* v. *Hecht*, *ante*, 324, this case is dismissed for want of jurisdiction.

MOTION TO DISMISS. Moran Brothers filed their bill of complaint against William Wright, A. A. Watkins, Jerry Schooling, and others, in the Circuit Court of the United States for the District of Nevada, alleging that the Union Trust Company of New York was the mortgagee in trust of the Nevada and Oregon Railroad Company for the benefit of the holders of certain bonds of the said company, and had brought suit in that court to foreclose the trust deed or mortgage, which suit was then pending therein; that the complainants were holders of three hundred and ten of some six hundred bonds of $1000 each, certified and issued by the trustee under said deed, and that the defendants each claimed to hold some of them; that the company had no right to issue the bonds to the defendants, and that as between complainants and defendants the former were entitled to priority in the distribution of the proceeds of the sale of the mortgage bonds. The bill prayed for an injunction against the transfer of the bonds held by defendants and a decree that the defendants were not entitled to participate or share in the money realized from the sale of the road. In the meantime the property was sold under the foreclosure suit and bid in by Moran Brothers. Defendants answered, and on final hearing a decree was passed as prayed for in the bill and applying the proceeds on the complainants' bonds only. From that decree the defendants appealed to this court, which at October term, 1889, dismissed the appeal as to some of the appellants, affirmed it as to others, and reversed it as to Wright, Watkins, and Schooling, and remanded

the case to the Circuit Court for further proceedings to be had therein consistent with the opinion. *McMurray* v. *Moran*, 134 U. S. 150. Thereafter Schooling died, and Hagerman, his administrator, was substituted.

The mandate of this court was issued July 19, 1890, and was filed in the Circuit Court, November 3, 1890, and on February 2, 1891, the Circuit Court entered a decree in the cause, wherein it was adjudged that complainants holding the three hundred and ten bonds, and Wright, Watkins, and Hagerman, administrator, holding thirty-one bonds, "are entitled to have, and do have, their three hundred and forty-one bonds, mentioned in said bill of complaint, and the answer on file herein, paid out of the proceeds arising from the sale of the mortgaged premises, described in the said complaint, if the proceeds so arising are sufficient; and if such proceeds are not sufficient, then that said complainants and said defendants, A. A. Watkins, and J. C. Hagerman as administrator of the estate of Jerry Schooling, deceased, and John Wright, as administrator of the estate of James Webster, deceased, with the will annexed, share in the proceeds of said sale in proportion to the amount of bonds held by them respectively, and upon terms of equality with complainants." The decree then described how the three hundred and ten and the thirty-one bonds were held, and further adjudged that the said three hundred and forty-one bonds "were negotiated and sold to *bona fide* purchasers for value, and are valid and subsisting obligations and are unpaid, and a valid and subsisting charge and lien upon the railroad and property described in said bill of complaint, and are entitled to be paid out of the proceeds arising from the sale of said mortgaged property."

October 24, 1891, Watkins filed notice and petition for an order modifying the decree of February 2, 1891, so that there be inserted a provision to ascertain the amount due on the three hundred and forty-one bonds, and the amount of the proceeds of the foreclosure sale, and the costs of sale and suit, and the proportion of the proceeds properly applicable to the payment of the three hundred and ten bonds owned by complainants, and the thirty-one bonds owned by the defendants;

and a further provision that upon the ascertainment and determination of said matter, the defendants have judgment and execution against complainants for the proportionate amount of the proceeds to which they were respectively entitled. The application was accompanied by affidavits, and the notice stated that the motion "will be made upon the grounds that said matters were omitted from the said decree by oversight, inadvertence, and mistake, and upon the further ground set forth and contained in the petition hereto annexed and served and filed herewith." The various proceedings were severally set forth in the petition, which also averred that after applying the money realized from the foreclosure and sale to the payment of costs of suit and sale the marshal paid the balance of $367,234.55 to complainants, who received and retained the same; and that, in order to enjoy the full fruits and benefits of the decree and of the mandate of the Supreme Court, the Circuit Court should have referred the cause to a master, which, by inadvertence, was omitted from the decree. To the motion and petition complainants filed objections for want of equity; of plenary pleadings; of proper process; and that the term at which the decree of February 2, 1891, was entered had expired before the motion and petition were filed, and that for this reason the court had lost jurisdiction and control of the decree, and had no power to alter or modify the same. The court entertained the application and testimony was taken thereon; and upon hearing, on May 9, 1892, an order was made granting the petition and modifying and amending the decree accordingly, and referring the cause to a master to ascertain and report to the court the matters above mentioned, and reserving the cause for final decree upon the coming in of the report of the master. A bill of exceptions was settled by the judge of the Circuit Court, June 10, 1892, which contained the proceedings on the motion and the exception of complainants to the order of May 9. The master proceeded under the order and filed his report June 6, 1892, and no exceptions or objections having been filed thereto, a decree was entered September 6, 1892, in which the court found that the net proceeds of the sale were

$367,615.31, and were paid to complainants on the day of sale. The court also found the amount due on the bonds held by complainants and defendants and the proportions in which the net proceeds of the sale should be applied, and made application accordingly and gave defendants judgment for the respective amounts to which they were entitled. On November 3, 1892, complainants prayed an appeal to this court from the decree of September 6, 1892, which was allowed that day, and on the same day complainants filed their assignment of errors to the effect that the decree should have been given in favor of complainants and against the defendants "for the reason that the term had elapsed at which said original decree was made, and the said Circuit Court had lost jurisdiction of said suit and had no power or authority to modify or amend said original decree, or to make any order or decree in said suit in any manner affecting the rights of the parties herein."

Mr. W. E. F. Deal, *Mr. Edmund Tauszky*, and *Mr. Horatio C. King* for the motion.

Mr. Wheeler H. Peckham opposing.

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

Complainants below, appellants here, contend that the Circuit Court had no jurisdiction because the decree of February 2, 1891, was a final decree, and the court had no power after the expiration of the term at which it was rendered to entertain the motion and petition and enter the order of May 9, 1892, and the decree of September 6, 1892; and further, that the court had no jurisdiction to render affirmative judgments in favor of the defendants against the complainants, because no cross-bill had been filed and no proceedings had or taken on which such judgments could properly be rendered against the complainants. On the other hand, it is insisted that the questions raised do not involve the jurisdiction of the Circuit Court in the sense in which the term is used in the act

of March 3, 1891. Whether the decree of February 2, 1891, was a final decree; whether the objection that no cross-bill had been filed came too late; whether the court could proceed in a summary way on petition; whether appearance and objection on the merits waived alleged irregularities; and whether these or like matters might bring a case within the first class named in the fifth section of the act of March 3, 1891, c. 517, 26 Stat. 826, 827, we find it unnecessary to consider, as no question of the jurisdiction of the Circuit Court was certified to this court for decision, and therefore, for the reasons given in *Maynard* v. *Hecht*, *ante*, 324, the appeal must be

Dismissed.

MEDDAUGH *v.* WILSON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 10. Argued October 10, 1893. — Decided January 22, 1894.

It is a general principle of law that a trust estate must bear the expense of its administration.

Assignees in bankruptcy, although not in possession of the bankrupt's property, are nevertheless required to look out for the interests of all, and are entitled to compensation, the lack of possession being important only in determining the amount of the compensation.

A corporation in Michigan was the owner of a large and valuable real estate. Three successive mortgages on this property were created, and a large amount of corporation bonds secured by them were issued. Suits being begun for the foreclosure of these mortgages, a receiver was appointed by the court to take possession of and hold all the mortgaged property. The corporation was then adjudged to be a bankrupt. Assignees were appointed, who appeared by counsel in the foreclosure suits and contested them. The property remained with the receiver, and never passed into the possession of the assignees. Negotiations took place, looking towards a sale of the property and a reorganization, which contemplated that a certain proportion of shares in the reorganization should be delivered to W. In the course of the negotiations, the amount which the assignees were entitled to receive, and the amount which should be paid to their counsel, were determined, with the assent of all parties. W. agreed to pay this sum to D. for them out of the moneys to be received by him. These negotiations fell through. New negotiations then took

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place, looking towards a different scheme for reorganization. Under these a decree of foreclosure was obtained, under which the property was sold to M. and W. No provision was made in the decree for the payment of the sums agreed to be due to the assignees and their counsel, but the court was informed that satisfactory arrangements had been made therefor. In the reorganization a large amount of stock was allotted to W., but not so much, in proportion to the full amount, as had been allotted to him by the previous arrangement. The claims of the assignees in bankruptcy being transferred to their counsel, the latter filed their bill in equity against W., to charge him as trustee with the payment of the claims of both assignees and counsel, by virtue of his holding the shares which had been allotted to him in the new company. A large amount of proof was taken, much of which is referred to by the court in its opinion, and, as the result of examination, it was *held*,

(1) That W. had assumed the payment of the claims of the assignees in bankruptcy and of their counsel, and that these claims were a lien in equity upon the stock of the new corporation in his hands;

(2) That W., having received in the final arrangement a less amount of stock than was awarded to him when the amount of the claims in litigation was determined, those claims were subject to be scaled down proportionately;

(3) And the majority of the court further held that, under the peculiar circumstances of the case, the plaintiffs should not be allowed interest.

This was a suit brought in the Supreme Court of the District of Columbia by the appellants, seeking to charge the defendant as trustee for them of 897 shares of the capital stock of the Lake Superior Ship Canal, Railway and Iron Company. The bill was filed June 6, 1881; the answer, September 13, 1881. Proofs were taken, and on April 5, 1887, a decree was entered dismissing the bill, which decree was affirmed by the general term on March 3, 1888. From that decree of affirmance an appeal was taken to this court.

The following are the undisputed facts in the case: The Lake Superior Ship Canal, Railroad and Iron Company was a corporation organized under the laws of the State of Michigan. On July 1, 1865, it issued bonds to the amount of $500,000, secured by a mortgage upon its property and franchises. Subsequently, and on July 1, 1868, it issued another series of bonds amounting to $500,000, also secured by mortgage, all of which two series of bonds were outstanding in the hands of *bona fide* holders at the date of the decree hereafter mentioned.

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On the 1st day of July, 1870, it issued a third series of bonds, amounting to $1,250,000, also secured by mortgage; $250,000 of which bonds were retired, and only $1,000,000 thereof were outstanding at the time of said decree. On May 1, 1871, it executed to the Union Trust Company, as trustee, a mortgage deed to secure a further issue of bonds to the amount of $3,500,000, of which, however, only $1,300,000 were issued, and the remainder were in the custody of the Union Trust Company at the time of said decree.

Suits were brought to foreclose these several mortgages. While these suits were pending, and in August, 1872, the company mortgagor was adjudged a bankrupt in the District Court of the United States for the Eastern District of Michigan, and George Jerome and Fernando C. Beaman were appointed assignees, and the plaintiffs, Meddaugh & Driggs, their counsel. These assignees never took possession of any property, for all of it was in the hands of a receiver appointed by the Circuit Court in the foreclosure suits. They, however, through their counsel appeared in and contested the foreclosure suits. They also filed a bill in the nature of a cross-bill. Litigation was carried on for some years. On February 12, 1877, the several suits having been consolidated, a single decree was entered foreclosing all the mortgages. Pending the foreclosure proceedings, as appears from the terms of the decree, the receiver had, under the authority of the court, issued receiver's certificates to the amount of $625,300.

The principal creditors and security holders were J. C. Ayer & Co., J. Boorman Johnston & Co., Theodore M. Davis as receiver of the Ocean National Bank, and James C. Ayer and George C. Richardson, jointly. Certain English capitalists entered into negotiations for the purchase of the property. Don M. Dickinson was acting for the corporation, and interesting himself to bring about a closing of the litigation and a sale of the property to these English capitalists. On September 24, 1875, the four principal creditors above named entered into a written agreement with Dickinson, in which the amounts which each creditor was willing to accept were named; which provided that the parties should consent to a decree of fore-

closure, and an order for the sale of the mortgaged property as an entirety; that the securities should all be deposited with Messrs. S. G. and G. C. Ward, with instructions to deliver them to Dickinson on his making payment of the aggregate amounts due the creditors as provided, this payment to be in four equal parts at intervals of sixty days each — the entire contract being conditioned upon the ability to purchase the property named, which included all the property covered by the mortgages and certain other lands and stocks, at a gross price not exceeding $2,250,000. It is stated that there was on the same day another agreement entered into between Dickinson and the owners of the balance of the property for its purchase, but that agreement is not in evidence. Also on the same day a contract was made between Dickinson and the defendant, by which Wilson agreed to assist in perfecting the title to the property and carrying through the prior agreements, and which, contemplating that by the use of bonds and receiver's certificates the entire purchase might be made at a sum less than that named, $2,250,000, stipulated that whatever of surplus there might be should be paid over to Wilson. The negotiations for the purchase by the English syndicate were continued from time to time, but for reasons not disclosed the matter was never consummated. On February 27, 1877, another agreement was prepared for execution by the creditors aforesaid and Don M. Dickinson which, referring to the prior agreements and also to the fact of a decree having been entered, stipulated that the securities belonging to the creditors should be placed under the control of Albon P. Man, of New York, and the defendant, as trustees; that such trustees should attend the foreclosure sale or sales, and, to the extent of the means furnished them for that purpose, bid in the property; that the title being vested in them, they should organize a new corporation with a capital stock of $8,000,000, to which corporation they should convey the property they had purchased; that the corporation should, besides issuing the $8,000,000 of stock, also issue bonds to the amount of $4,000,000, properly secured by deed of trust, which stock and bonds and deed of trust should be deposited with Drexel, Morgan & Co., with

directions to deliver all to Don M. Dickinson, or such person or persons as he should designate, on his or their depositing on or before the first day of June, 1877, to the credit of the said trustees, the sum of $1,886,251.40, which moneys the trustees were to dispose of, first, in paying the expenses of the sale, purchase, reconveyance, and issue of certificates of stock and bonds and the formation of the corporation; second, in the payment of any moneys that should be furnished them for the purpose of enabling them to perfect the title to said property; third, in the payment of the sums due to the creditors under the agreement of September 24, 1875, amounting to the sum of $1,296,103.41. The fourth stipulation in reference to the disposition of the money was as follows:

"Any balance remaining in the hands of said trustees shall be delivered to Nathaniel Wilson, and his receipt therefor shall be a full discharge to the said Albon P. Man, of all liability therefor, and the said Nathaniel Wilson shall not be liable to account to the parties hereto, or any of them, in respect to the moneys so paid to him as aforesaid, and upon the payment of said moneys to said Wilson the terms and conditions of the trust hereby created shall be considered satisfied."

It was further provided that in case the sum named was not paid on or before June 1, 1877, Drexel, Morgan & Co. should redeliver to the trustees the stocks, bonds, and securities deposited with them by the trustees, and that thereupon the said trustees should transfer and deliver to Dickinson, or to such person or persons as he should direct, in writing, one full tenth part of the stock and bonds, and to the creditors, in such manner as they might in writing appoint and direct, all the residue and remainder of said stock and bonds. That agreement was signed by Man and Wilson, who accepted the trust created by the instrument, and agreed to perform its duties, and also by Dickinson, J. Boorman Johnston & Co., and Theodore M. Davis as receiver, but not by the Ayers. It was, therefore, not a fully executed agreement. It is significant, however, as expressive of the intent of the parties signing, and as showing the relations of Wilson to the transaction. But on April 9, 1877, two contracts were entered into, executed by

all the creditors above named, together with Albert G. Cook, also a creditor, as well as by Dickinson, Man, and Wilson, the first of which contained provisions for the disposition of the moneys in case Dickinson should make the payment to Drexel, Morgan & Co., similar to those found in the contract of February 27, the stipulation as to the payment to Wilson being in these words:

"Fourth. The balance, if any, remaining after the payments aforesaid shall be paid to and retained by said Nathaniel Wilson, his personal representatives or assigns, discharged from this trust, and shall be held, used, and disposed of by him or them without accountability therefor to the parties aforesaid or any of them by reason of anything herein."

The other provided that if Dickinson should not make the payment at the time specified, the trustees should take the bonds and stock, cancel all the former, and issue to Dickinson one-tenth of the shares, and then, after a sale of a portion, should distribute the balance as follows: To the creditors, respectively, in the proportion which the sums of money they would have received, in case the English sale had been consummated, bear to $1,693,311.74, and to Wilson as follows:

"To the said Nathaniel Wilson, his personal representatives or assigns, the same proportion of said shares remaining as aforesaid which the sum of three hundred and ninety-five thousand dollars is of one million six hundred and ninety-three thousand three hundred and eleven dollars and seventy-four cents ($1,693,311.74)."

The agreement contained also this stipulation:

"And the said Wilson, in consideration of the interests secured to him by the said indenture and this agreement, doth hereby agree unto and with the said parties of the first part, and each of them, that, in the event of the purchase of said property by said trustees, (Man and Wilson,) or the survivor of them, he will indemnify said parties of the first part, and each of them, against, and will pay all the charges and expenses of said trustees (Man and Wilson) and their said associates, for and in and about the execution of their said trusts; all lawful charges of the trustees under the mortgages in fore-

closure whereof said property shall be sold; the taxable costs in the suits and proceedings for foreclosure of said mortgages; the charges of the master or masters in chancery, or other officers, in or for the sale of said property; all claims or demands of Alfred Russell remaining unpaid for services and expenses in said suits or proceedings, and for any portion or interest in said property or any shares in the capital stock of said proposed corporation."

The sale of the property was duly made on May 11, 1877. It was bid in by Man and Wilson; the corporation provided for was duly organized under the name and style of the Lake Superior Ship Canal, Railway and Iron Company; the English capitalists failed to make the purchase, and thereupon the stock was distributed to the various parties as named in the last agreement of April 9, 1877.

At the time the decree was prepared and submitted to the court for approval and signature, the circuit judge inquired whether provision had been made for the compensation of the assignees and their counsel, and was told that satisfactory arrangements had been made therefor. The arrangements which had been made were these: Dickinson represented to Meddaugh & Driggs the negotiations which were pending with the English syndicate, and which he was sanguine would be successful, and the fees of the assignees in bankruptcy having been fixed at $13,000, the claim for which was subsequently transferred to plaintiffs, and of their counsel at $25,000, Dickinson agreed to pay those sums out of the moneys which he should receive from the English syndicate, when and if the sale was carried through. And this was the agreement which was pronounced by the plaintiffs to be satisfactory. On February 13, the day after the signing of the decree, he wrote to Meddaugh this letter:

"DETROIT, MICH., *February* 13, 1877.

"E. W. Meddaugh, Esq., Detroit.

"DEAR SIR: I attended a session of the referee's court last night and also this morning from 9 to 12 o'clock, so that I have had no time before to write you on the ship-canal matter.

"I am so entirely confident that I can make an arrangement by which, if the English negotiation now in the hands of Avery is carried out, *that* I can pay out of the $2,250,000 the fees of Meddaugh & Driggs and of the assignees that I am willing to bind myself by the following statement:

"If the English negotiation is consummated, so that the money shall be paid through it for the property and for the discharge of the syndicate indebtedness, I will pay from it to you $38,000.00 as and for fees of Meddaugh & Driggs and of Jerome and Beaman, assignees.

"Yours very truly, DON M. DICKINSON."

On March 7, Dickinson wrote to Davis this letter:

"*March* 7, 1877.

"Theo. M. Davis, Esq., 20 Nassau Street, New York.

"DEAR SIR: Please have the papers signed by Messrs. Man and Wilson and forward to me at your earliest convenience. It is of importance to all of us, as Messrs. M. & D. having learned of my return from New York, are after me for their voucher.

"I wish you would telegraph me on receipt of this when you will send it, so that I can show them the telegram.

"Yours truly, DON M. DICKINSON,
Per A."

To which Davis replied as follows:

"NEW YORK, *March* 10, 1877.

"Don M. Dickinson, Esq., Detroit, Mich.

"D'R SIR: Yours of the 7th inst. came duly to hand.

"I herewith enclose Wilson's agreement duly signed. The other agreement has been signed by Messrs. J. Boorman Johnston & Co. and myself, and will be signed by the Ayer party as soon as a guardian is appointed, its provisions having been approved by Judge Bonney.

"Said agreement has been delivered to Wm. M. Sebrey.

"Yours truly, THEO. M. DAVIS."

The only agreement signed by Wilson in which Meddaugh & Driggs' names appear is the following:

"Referring to the extension agreement of the 'Dickinson contract' this day signed, and under which Albon P. Man and myself are appointed trustees, it is provided therein that certain moneys shall be paid to me for which I shall not be held accountable by any party to said agreement, and in case of the success of what is known as the English negotiations referred to in said agreement and of the consequent payment of the money thereunder as contemplated thereby, in consideration that said Don M. Dickinson has or does agree to pay to Messrs. Meddaugh & Driggs, att'ys of Detroit, as and for cash and expenses (by them and their clients incurred and expenses) amounting to thirty-eight thousand dollars, I do agree to and with said Dickinson to pay to him for said Meddaugh & Driggs that sum out of said money so to be received by me as aforesaid.

"Dated February 27, 1877.

"NATHANIEL WILSON."

Mr. Otto Kirchner and *Mr. George F. Edmunds* for appellants.

Mr. H. H. Wells and *Mr. J. P. Whittemore* filed briefs for same.

Mr. W. D. Davidge and *Mr. John E. Parsons* for appellee.

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

The argument in support of the conclusion reached below is a simple one, and may be briefly stated thus: The only promise made by the defendant looking to a payment to Meddaugh & Driggs was conditioned on a sale to the English syndicate; that failed, and, therefore, the promise failed. The promise made by him in the second of the two agree-

ments of April 9, 1877, — that agreement under which the matter was finally disposed of, — specified certain payments, but among them was none to the plaintiffs. In other words, he received the stock transferred to him burdened with certain express trusts; the plaintiffs were not named as beneficiaries therein, and, therefore, they can claim nothing by virtue of any express promise. In the foreclosure suits their services were antagonistic to the interests of the mortgage creditors, the parties to the agreements with Wilson. Nothing was charged against the property in their behalf in those suits. The mortgagees were under no obligations to them, because in that litigation they represented adverse interests. Thus, neither by express decree nor upon any principle of equity was the property, when purchased for the benefit of the mortgagees, burdened with a charge in their favor. Hence, not only was Wilson under no express promise to or for them upon which an action at law would lie, but also he received the stock free from any express or implied burdens in their favor. There was no trust attached to the property which they could enforce.

While this reasoning is direct and clear, there are considerations many and persuasive which show that equity will not be satisfied, nor will justice be done, unless and until the plaintiffs are admitted to a share in the stock transferred to the defendants. And first must be considered the situation of the parties at the time the decree was entered. The mortgagor had been thrown into bankruptcy, and Beaman and Jerome appointed as assignees. As such assignees they represented not merely the mortgage creditors, but all the creditors and all the stockholders in the company. It was no single interest which was committed to their care, but it was their duty as assignees to look after the interests of all having claims upon the property. Acting in good faith, as it must be supposed that they did, they conceived it their duty to defend the foreclosure suits and to file a cross-bill looking to the administration of the entire assets of the corporation. Their services in this respect not being to any party or parties but in respect to the property itself, and to

secure its proper application among all parties interested, it is clearly in accordance with settled rules of equity jurisprudence, as well as with the practice in bankruptcy proceedings, that compensation for their services, including the pay of their counsel, should be made a direct charge upon the property, and a charge prior in right to the claims of creditors or stockholders. "It is a general principle that a trust estate must bear the expenses of its administration." *Trustees* v. *Greenough*, 105 U. S. 527, 532. It is true that ordinarily the assignees in bankruptcy have possession of the property, and such possession adds to their cares as well as to their compensation. In this case they did not have possession, the property being already in the custody of the court through its receiver. But the lack of possession did not relieve them from all duty, nor destroy their right to compensation. The duty of looking out for the interests of all was as pronounced as though they had the actual possession, and the lack of possession was only to be considered in determining the amount of compensation.

It was in this situation of things that a decree was entered for the foreclosure and sale of the properties without any express provision for their compensation. This decree was entered in pursuance of negotiations which had been for some time pending between the creditors and the representative of the corporation and its stockholders, in which the amount that the creditors would take in cash was agreed upon, and out of the difference between that sum and the amount which such representative was hoping to obtain from a proposed purchaser were to be paid all the expenses of the litigation. The representative was sanguine of the success of his proposed sale. The plaintiffs were doubtless affected with his confidence, and so accepted his promise to pay their compensation out of the moneys received from that purchaser, and waived any incorporation of an express provision therefor into the terms of the decree. But while, as it seems, they were unduly sanguine, is it for a moment to be supposed that they were intending to donate their services in case the proposed sale should not be accomplished, or that the

creditors or defendant understood that they so intended? The question carries its own answer. The case is not such as would arise if these plaintiffs had accepted an absolute promise from Dickinson or defendant in lieu of a charge upon the property provided in the decree. If, for instance, either had promised them absolutely to pay the $38,000, it might have been argued that they wholly waived any right to look to the property; were willing that provision for a charge thereon should be omitted from the decree, and were content to take the responsibility of such promisor. But here the promise was only a conditional one, that, if a proposed sale was accomplished, out of its proceeds payment should be made. Evidently, confidence in the accomplishment of the proposed sale was so great that it was deemed unnecessary to provide for the contingency of its failure. But the unexpected did happen. The sale failed. But their equitable right to have their charges paid out of the proceeds of the property did not cease. They would have been entitled at any time before the final consummation of the foreclosure proceedings to have had the decree modified, or an order entered making their fees a charge upon the property. These mortgage creditors and the defendant knew of the existence of the claims of the plaintiffs, and the amount thereof, and must as a matter of law be presumed to have known that they were properly charges against the property, and could, if need be, by express order be made a prior lien thereon. In this situation the trustees named in the creditors' agreement, one of whom was the defendant, become the purchasers of the property. They purchase it at the master's sale, knowing that these charges of plaintiffs, rightfully existing against the property, were only conditionally provided for. If the condition happened, and the contemplated sale to the English syndicate was made, then defendant, out of the moneys that would come into his hands, would pay their charges. This he had expressly covenanted to do. If the property was bought and the condition never happened, can it be that he took the property free in equity from the burden of such charges?

Suppose that the case was relieved from the embarrassment of conflicting testimony, and that the facts as claimed by the defendant were free from dispute. The decree was entered without any provision for the payment of fees of the assignees or their counsel, such omission being upon the conditional promise of Dickinson and the defendant. Suppose that thereafter, and before the sale under the decree, the creditors, the defendant, and Dickinson, finding that the negotiations with the English syndicate were going to fail, agreed and determined to say nothing to the plaintiffs about such failure, to let the decree stand without any provision for their compensation, to purchase the property in the same way that purchase had theretofore been contemplated, and then to divide it among themselves without making any provision for the plaintiffs, and that all this was carried into effect, the plaintiffs being ignorant of the changed condition of affairs and the altered purposes until after the stock had been distributed — can it be said that under such circumstances equity would be powerless to interfere, that if the plaintiffs were willing to trust the matter of their compensation to the conditional promise, the parties who made it and the parties interested in the property could, upon the failure of that condition, ignore their claims for compensation and secure a title to the property discharged of all liability to them? If that be so, it would seem that equity lies under the imputation of sometimes preferring the form to the substance of things. Suppose that the second of the agreements of April 9 had never been signed, and that the creditors (sharing in the confidence apparently possessed by Dickinson and the plaintiffs in the successful carrying through of the pending negotiations) had stipulated for the purchase of this property by Man and Wilson, and the disposition of it only through the means of the proposed sale to the English syndicate, and that, thereafter, such proposed sale had failed of accomplishment, can it be doubted that Man and Wilson would hold the title in trust for their benefit, and for each of them according to his proportionate interest? Could they say, we took this property with an express promise to dispose of it in a certain way, and because that way has

failed we hold it discharged of all liability? Is the rule any different when these plaintiffs who had a claim of equal equity against the property, come into court, and say that the condition expressly provided for has failed? Have they not the same right to be recognized and paid out of the property? It is a cardinal rule of equity that it assumes that that is done which ought to be done; that it looks rather at the substance of rights than at the forms of proceedings. Unquestionably when Man and Wilson, the trustees, purchased at the master's sale — the time for the completion of the proposed sale to the English syndicate not having then expired — they took the property burdened with an implied obligation to the plaintiffs. It was to be satisfied by the payment of money if the contemplated sale was carried through. This promise of Dickinson and the defendant to the plaintiffs was not a donation, a mere gratuity, something done out of the abundant kindliness of their hearts, but it was in discharge of an obligation equitably resting upon the property, and to relieve it from the burden thereof.

This is not the case of a stranger making a purchase, who might be justified in relying on what appeared upon the face of the record, and upon a purchase take the property free from all liabilities. For here the decree of the court, and the sale in pursuance thereof, were but steps in the schemes originated by the creditors with Dickinson and the defendant for the purpose of securing to themselves an absolute title, and one free from burdens.

But what was really the understanding and intent of the parties, and especially of the defendant? This is his testimony:

"Mr. Dickinson said to me that it might be necessary in order to effect a sale to pay some money to Meddaugh & Driggs, the attorneys for the assignees in bankruptcy, and to the assignees in bankruptcy, for their fees and expenses, which had been considerable, so that he might have to provide for them for the expenses and costs. Whether anything was said about fees as fees I do not recollect. He said if the money came into my hands, as it was anticipated it might, I could

very well afford to pay him whatever he had to pay them. I at first objected, and something was said concerning the amount which he would have to pay, and concerning the amount of their costs and expenses, and finally the sum of $38,000 was mentioned as being the amount of the costs and expenses of all the parties, the assignees, and the attorneys of the assignees, which was as much as he expected in any event to be called upon to pay, and immediately afterwards the same representations and statements were made by Mr. Theodore M. Davis in the same room, and, I think, at the same time. It was in New York; and then I said that I would agree, if the English negotiations went through and the money secured by the agreement was paid to me, that out of that money I would pay to him whatever he had agreed or should agree, or might have to pay to Meddaugh & Driggs and the assignees in bankruptcy for expenses and costs to the extent of $38,000. I do not recollect that anything was said about fees."

This shows that the defendant, at the commencement, understood that $38,000 was part of the costs and expenses of the litigation then pending.

The description of the claim as costs and expenses and not as fees is significant. It interprets the meaning of Wilson's express stipulation in the second of the two contracts of April 9, 1877, for he stipulates to pay "the taxable costs in the suits and proceedings for foreclosure of said mortgages;" not the taxed, but the taxable costs. Strictly speaking, that which is allowed to trustees and counsel, as compensation for their services, is not a part of the taxable costs, and, ordinarily, those sums which they pay out for their personal expenses and other costs of the trial are included with their compensation in a gross allowance. And yet the money which they pay out for such costs and expenses may, if separately stated and charged, be not inaptly called part of the taxable costs. If this were the only matter throwing light upon the understanding of the parties, it might be said that this was a mere refinement as to the meaning of words, but immediately following the stipulation referred to is this language: "Neither of said parties of the first or second parts shall by reason of any-

thing herein be personally liable for or on account of any moneys procured, advanced, or used by said trustees in the purchase of said property, nor for any expenses or charges in or for the execution of the trust herein created."

The trust herein created, as shown by the previous language of the agreement, and that made contemporaneously with it, was the purchase by the trustees, Man and Wilson, of all the property, the securing of a perfect title, the creation of a corporation, the conveyance to it of the property thus purchased, and the distribution of the stock, or, as the duty was expressed in the agreement —

"First. To the payment of the expenses and charges of said sale and purchase of said property, the establishment of said corporation, and the execution by said Man and Wilson and their said associates of the trusts hereby created.

"Second. To the repayment of any moneys by said trustees procured or advanced and used in the purchase of and payment for said property to the extent authorized and limited by said agreement of even date herewith."

"To the payment of the expenses and charges of said sale and purchase of said property." This means, of course, all the expenses and charges. All the express liens had passed into the foreclosure decree, and had been provided for in the agreement by specific appropriations of stock; and the scope of the general language here used was obviously to cast upon Man and Wilson, as trustees, the duty and the burden of removing every charge or incumbrance which in law or in equity could, as a consequence of the legal proceedings, rest upon the property. Such duty and burden passed, by the clear language of the agreement, from Man and Wilson to Wilson, as the recipient of the residuum of the stock.

The parties of the first and second part were respectively the creditors named, and Dickinson. Upon them, by the provision above quoted, none of the expenses or charges of the execution of the trust were to fall. Necessarily it follows that whatever had to be paid was to be paid by Wilson, and out of the stock which was coming to him as his portion. Nor is this strange. The sums which the creditors were to receive, whether

in cash or in stock, by one or the other of the agreements, were for securities of the old corporation, whose form and amount were specified, and which were to be surrendered by them to the trustees, Man and Wilson. In other words, they agreed to receive a certain specified sum for the securities which they turned in, and the figuring as to the amount was, in most cases, carried to the very cent. While the consideration for the one-tenth transferred to Dickinson is not in terms expressed on the face of these contracts, it clearly appears from the testimony that it was the services rendered by him in bringing the litigation to a close, the equity of redemption belonging to the mortgagor corporation, and the satisfaction of claims in behalf of some of the stockholders. As for Wilson, there was no specific statement in detail as to items and amounts of all the consideration for the money or stock to be paid to him. Evidently the odds and ends of closing out this transaction were to be thrown upon him. Dickinson and the creditors were to have so much stock absolutely; he was to take the remainder, pay out of it or its proceeds all that had to be paid, to perfect the title and remove all charges and incumbrances upon the property, and the balance was compensation for his services and risk. So the stipulation was that Dickinson and the creditors should be liable for nothing, and as the scheme involved the entire settlement of the affairs of the corporation, it follows that Wilson was the party upon whom the residuary burden was cast. It is not strange, therefore, that the witnesses, speaking from memory as to what took place in the various negotiations, do not agree as to the items composing this residuum. It is not to be wondered that all the items were not named, or the amounts fixed, and, hence, naturally arises some contradiction in the testimony as to what was said and understood between the parties. The parties all looked to the defendant as the one to relieve them of all liability. He was, as may be said, the residuary legatee of all the burdens and expenses.

With reference to the obligation assumed by him in case the sale to the English syndicate was carried through, when asked what was to become of the balance that would remain

in his hands after paying the creditors, and whether it was intended as a gift or otherwise, he testified:

"Out of that balance, whatever it was, I was to pay for receiver's certificates, for bonds, for trustees' commissions. I was to pay counsel fees to Alfred Russell, whatever they might be, and I was to pay $38,000 under and in pursuance of the agreement I had made with Dickinson of February 27, 1877, in reference to his obligation to Meddaugh & Driggs. Whatever was left was for my own compensation."

And further, with reference to the same matter, appear these questions and answers —

"Q. In case there was a deficiency and the balance which was expected to remain applicable to that purpose should not be sufficient to pay and discharge the whole amount of all of the several claims so provided for, by whom was the remainder to be paid?

"A. By myself. That was a responsibility and risk that I assumed.

"Q. If there should turn out to be an unexpected remainder of said balance after the discharge of all of said claims, what were you to do with such balance; was it to be kept by you for your own benefit, or to whom was it to go?

"A. It was to be my own, for my own benefit."

It is admitted that the written stipulation in the last contract did not express all that he agreed to do in consideration of the stock transferred to him. Thus he testifies, referring to that contract:

"A. I have stated what my liability was under that contract, and there were things undoubtedly to be provided for not specifically mentioned in that contract. For instance, no mention is made of receiver's certificates, or of bonds, or of stock. The trustees' commissions were provided for, I think; and there was no mention of my compensation."

And again:

"A. There was no other written agreement to which I was a party, but it was understood that I was to pay or take care of certain bonds and receiver's certificates and the claims that

I have enumerated. The charges of the trustees and compensation to them were provided for in the agreement."

And when asked between whom was that understanding and when was it made, he answered:

"A. It was made before the agreement of April 9th, and was between the members of the syndicate, Mr. Davis individually, and myself."

The written promise was, therefore, by his own admission not the full measure of his obligations.

In 1880 there was a Congressional investigation, having reference mainly to the transactions of Davis, as receiver of the Ocean National Bank. On that investigation the defendant was a witness, and testified as follows:

"As against the stock still in my hands there are outstanding claims — at least one, and perhaps more — on the part of persons who claim that they were employed by the syndicate and that money is due to them, and that they are to look to me for it. One claim is made by Meddaugh & Driggs, who were counsel in the bankruptcy proceedings. They claim to be entitled to $34,000 ($38,000) for their professional services, and they have threatened to bring suit against me for it. I do not think they are entitled to that under the agreement that was made with them, but if there is any liability to them under that agreement with them which I signed, I am the person on whom it rests. It was for the purpose of providing for these contingencies that this amount was fixed in the way it was."

And again, responding to this question:

"Q. Out of that $395,000 I understand that you were to pay the expenses of litigation, and whatever money was due Mr. Russell under his agreement with those people?"

He answered, "Yes, sir."

And still again, when asked for what he received the stock, after naming some things, he said: "In addition to which was the liability that I came under to pay all the charges that any one had against this syndicate, as it has been called." Could language be used to more clearly affirm that his agreement was, as he understood it, to pay among others this claim of

plaintiffs, which, as we have seen, was equitably a charge upon the property, and of course, therefore, against the syndicate?

Another matter: In the spring of 1878, Alfred Russell, whose name appears in the stipulation signed by the defendant, not having received the payment which he expected, prepared to commence a suit against defendant. The latter was advised of this fact, and on April 1, 1878, he wrote to him a letter, containing this statement:

"My obligation, as I understand it, is to pay to you whatever stock you are entitled to under any agreement that you may have with the so-called syndicate. You and Mr. Davis do not agree as to what that agreement was. I have no knowledge of it except as I learn of it from others. One thing, I believe, is admitted, and that is if the English negotiations had gone through, of the $587,967 which was to come into my hands, $50,000 was to be paid to you in cash. The English negotiations did not go through, and no $587,967 came to me. Instead of that, the conditions of the agreement of April 9, 1877, take its place. Instead of $587,967, I am to receive $395,000, or so much of the capital stock as is the proportion between that sum and $1,600,000 — that is to say, I now have $395,000 to pay to the same persons who were to have been paid $587,967.

"Are you entitled to receive precisely the same sum or amount of stock as if I had $587,967, or should you submit to a *pro rata* reduction, just as I and every one interested in the fund will submit to? My own opinion is that you are fairly entitled to the same proportion of the $395,000 that you were to receive of the 587 M, and should unhesitatingly say that such was your just due. If you were to receive the sum which I have already mentioned, I would not hesitate, on my own responsibility and without the approval of any of the syndicate, to make a declaration of trust in your favor to the effect that you are entitled to the same proportion of the stock which I received as you were to receive under the original agreement — that is to say, your share in the whole capital stock is diminished in the rate that 587 M has to 395 M. This would be easily expressed in figures."

Herein is an express declaration, made within a year of the signing of the last agreement, that out of the stock received under that agreement he was to pay the same persons who were to receive payment out of the moneys which he would have received under the first agreement, and an argument therefrom that, as he was to receive under the latter agreement less than under the former, the parties to receive payment should proportionately scale down the amounts they should be satisfied with.

In the bill filed by Russell was a copy of a memorandum, which he alleged had been made by Davis, the receiver of the Ocean National Bank, who was clearly, as shown by the testimony, a leading spirit in the negotiations, as follows:

"100 bonds and 10 certificates	$30,699 09⅔
Int. acc't since Jan. 1, 1871, and certificates since May 8, 1874, other interests equal cost of	24,470 79⅓
Int. on 50 bonds am't to prin. cost	12,344 63⅓
20 certificates 12,136.16 call, total for both	70,000 00
Certificates par 10%, etc	76,000 00
Bal. certificates and int., int. 10%	63,700 00
Man trustee Hubbell	10,500 00
Frost, Sutherland, Birdseye & McCarter, $5000 each	20,000 00
Over	170,200 00
Forward	170,200 00
Russell	50,000 00
Davis	115,000 00
Meddaugh & Driggs	38,000 00
Sundries, including said Wilson	21,800 00
Total	$395,000 00"

On August 2, 1878, the defendant wrote this letter:

"My Dear Mr. Russell:

"In the memorandum referred to in your bill a sum appears which is to be paid to Meddaugh & Driggs, and which makes up in part the 395 M which was to have been paid to me. I

have rec'd and now enclose a copy obtained from Mr. Dickinson of my agreement with Meddaugh & D., from which you will see that I was to pay them only in the event of the success of the English negotiations and the payment to me of the cash. I send you this to show that the mem. could not have been intended to definitely fix the disposition of the stock that was to be issued to me. If that mem. is conclusive then M. & D. have a right to a portion of the stock which I hold, and that liability I can never admit, because I never assumed it. I am willing to pay and to act upon the assertion of your right to so much of the stock in my hands as I designated in a former letter. Have you anything to offer or suggest as to a method of settlement? Will you state (abate) anything of your first demand? I am very anxious that you should have your stock without any delay. Delay may be injurious to both. . . . Write to me at your convenience. Let us make an effort at adjustment before it is too late."

Do not these letters tend to show that the claim now made that plaintiffs were not to be compensated out of the stock transferred under the last agreement to defendant was an afterthought, springing from the fact that the defendant had noticed, or had his attention called to, the omission of their names in the stipulation in that agreement? How easily the defendant would be led to such a conclusion! His obligation was expressly to the creditor's syndicate (so called) and Dickinson. His promise was to save them harmless. Whatever debt rested against the property, or could be made a personal obligation of theirs, growing out of the transaction, he was to discharge. The less he had to pay in this direction the larger were his own profits. At first he recognized his liability to the plaintiffs, spoke of it in the way that might be expected as one of the things that he had to take care of, but discovering himself, or having his attention called to the omission of plaintiffs' names from the stipulation, he proceeded to insist upon his non-liability for their claim.

Another matter throws light upon this. It appears that the corporation as finally organized had stock of $4,000,000 —

40,000 shares of $100 each. The number of shares transferred to the defendant was 8387 shares. Of these he issued and transferred in satisfaction of various claims which he recognized, including those to Russell, 4640 shares, leaving in his hands 3747 shares, in respect to which he testifies: "The remainder of the stock was owned by me, and I have issued no other shares, except temporarily for use in borrowing money in my own private transactions."

For what was this balance of stock given to Wilson? It must be remembered that these creditors were not claiming any general amounts; they figured to a cent the sums which each except the Ocean National Bank was to receive. Each, evidently, was anxious to secure for himself as much as possible. Negotiations were carried on for months — even into years. All the liabilities, conceded and doubtful, must have been known to them. Davis, the receiver, testifies "we knew how many bonds and receiver's certificates Mr. Wilson had and represented." It is not to be supposed that they would throw away anything, or make generous donations to any one. While of course it was reasonable, and to be expected, that they would leave for the defendant, who assumed the general residuary liability, a margin above all obligations actually known, in order to compensate him for the risk as well as to pay him for his services, it is not to be supposed that they were so ignorant of the situation, so misunderstood the real obligations growing out of their negotiations and foreclosure proceedings and all the litigation, as to give to him stock amounting, according to the value then placed upon it, to the sum of $175,000 and over. Evidently they understood, and he understood, that that surplus stock represented other obligations than those he has provided for. And while he testifies to having purchased some receiver's certificates and bonds with his own money, he shows no investment in excess of a few thousand dollars. Indeed, the significance of the testimony in this respect is chiefly in its indefiniteness and omissions. As a witness in this case he testified that Mr. Girard and himself at first bought 40,000 certificates for between $25,000 and $30,000, and that the

money that the two expended and paid into the hands of the receiver for bonds amounted to between $50,000 and $60,000 in cash. In the list of persons to whom stock was issued he names Edwin Girard as receiving 1026 shares. An entry made in his memorandum book at the time the receiver's certificates were purchased shows that one-half of the cash was paid by him and one-half by Girard, and his statement of the manner in which the subsequent purchases were made indicates that such purchases were on their equal account. During the Congressional investigation, he was asked this question: "Q. I want to get at how you came into possession of 3694 shares of this valuable stock. What did you give for it?" To this he replied, "I will give you the figures as nearly as I can. I got possession of that stock by paying, in the year 1874, $25,000, and between $35,000 and $37,000." And then, after one or two intermediate questions — there appearing to have been some interruption — the question was again asked, "For what did you receive this stock," and his reply was, "I am telling you. When you interrupted me I had gone so far as to say that it cost me $37,000, and the costs of the suit were $2000 or $3000 more, in addition to which was the liability that I came under to pay all the charges that any one had against this syndicate, as it has been called."

It may be noticed that the $25,000, which he here says he paid in 1874, was, as shown by the memorandum referred to, paid by Girard and himself in equal proportions.

Again, he testifies that in fixing the amount of $395,000, $10,000 was estimated for his services and $20,000 for those of the trustees, Man and Wilson, and it appears that Man received a certificate of stock of 203 shares as compensation for his services.

He testifies that "the stock to Edwin Girard was for receiver's certificates and bonds which he and I had bought together; $40,000 receiver's certificates, $75,000 of bonds, and $10,000 of stock of the old corporation, my recollection is."

Putting this testimony together, it will be perceived that he retained 3694 shares as his own property. Girard received

1026 shares on account of their joint purchases, and it is to be presumed that on like account he was entitled to the same number. 1026 from 3694 leaves 2668 shares. If Man received 203 shares, he, as co-trustee, would be entitled to the same number, and for his subsequent services, according to his own statement of the estimate, another equal sum, or 406 shares for those two items. Subtracting that, there still remain 2262 shares for which no satisfactory explanation is given.

It is true that when asked what was included within and covered by the $395,000 in the last agreement, he testified as follows:

"A. $90,000, receiver's certificates; $40,000, trustees' commissions; $160,000, stock and bonds; $50,000 to J. Boorman Johnston and Company or Gordon Norrie on account of bonds; $25,000 or $35,000, I do not remember which, to Alfred Russell; $10,000 to defray the expenses provided for in the agreement, and $10,000 for my compensation. That must have made Russell $35,000 if these figures are right."

This shows $300,000 out of $395,000 for bonds, stocks, and certificates, but the application of the stock transferred to him shows no such proportionate disposition thereof for such purposes.

Another item of testimony is a memorandum said to have been made during the negotiations prior to the signing of the last contract, by one who was present, as follows:

"What Davis must pay out of amo. which he receives on failure of English negotiations, viz., to Sept. 1, '75:

"Probable amo. required for Girard's bonds (75 @ 43 M & int.).....				$60,000
"	"	"	" 79 certif., 2d issue, May 8, '74, & int., say.....	89,000
"	"	"	" A. P. Man's trustee bonds (Hubbell), say.....	11,500
"	"	"	" Chs. L. Frost, trustee...	25,000
"	"	"	" other trustees, Birdseye, Sutherland, & McC.'s, 5000 each.....	15,000

Probable amo. required for			Russell claimed	$25,000
"	"	"	" Man & Wilson, trustees.	15,000
"	"	"	" costs of court	10,000
"	"	"	" expenses preparing bonds	4,000
"	"	"	" wagon-road lands, 4700 acres; T. M. Davis' profit	140,500
				$395,000"

The last item therein is significant, especially taken in connection with the testimony given by defendant to the effect that of the $250,000 going to the Ocean National Bank only $150,000 represented stock and bonds, and $100,000 was for compensation of the receiver, Davis.

We must not be misunderstood as imputing to the defendant a lack of truthfulness, or suggesting that his testimony was false. On the contrary, his truthfulness doubtless compelled this very omission and indefiniteness. It does not seem reasonable that a man of the business capacity shown in these transactions by the defendant would have entered into any obligation of this character without knowing exactly, or nearly so, the items and amounts which he was to become charged with, and that if in the settling up of the affairs any item failed, wholly or in part, he would be able to disclose it exactly. And the fact that the testimony is so indefinite and unsatisfactory in these respects is additional reason for believing that it was part of the understanding of the parties that the plaintiffs were to be paid out of this stock transferred to the defendant.

We have in our consideration of the case thus far endeavored to eliminate all matters of conflicting testimony, and to determine what are the fair inferences from the undisputed facts. There is, in addition to this, the direct testimony of witnesses that this claim of plaintiffs was embraced in the matters provided for by this last contract. Still, we do not care to notice in detail that testimony, for it is contradicted by witnesses apparently equally reliable, and upon that conflict-

ing testimony alone it could not be affirmed that the plaintiffs had established their case.

In conclusion on this branch of the case, we think it may be affirmed that the property was in equity chargeable with the claim of plaintiffs; that the charge was not incorporated into the decree by virtue of a reliance upon the conditional promise; that the defendant became one of the purchasers and interested in this property with full knowledge of the consideration and the equitable obligation to the plaintiffs; that the arrangement between the parties in interest and himself resulted in fixing the amounts which they should receive absolutely and under no further liability for expenses or otherwise, while he, for the considerations named, assumed all the liabilities, fixed as well as unsettled, growing out of the perfection of the title to that property; that he at one time recognized this liability to plaintiffs as one of those assumed by him in this arrangement with the creditors and others interested, and that it still remains an undischarged obligation resting upon him, and is in equity a lien upon the stock of the new corporation in his hands.

We have thus far considered only the question of the fact of liability. Upon that is the stress of the case, and to it was devoted most of the testimony, as well as of the argument. Having reached the conclusion that the defendant is under obligations to the plaintiffs, there remains the further question as to the measure of such liability. On the one hand, it may be said that the amount of the plaintiff's claim was by agreement fixed at $38,000, and that that was the sum which the defendant promised to pay in case the English negotiations were carried through. On the other hand, it is said that if those English negotiations had been carried through he was to have received $590,000 in cash, while under the arrangement as finally consummated he received stock representing only $395,000, and that, therefore, to that extent the claim of plaintiffs should be scaled down.

We have heretofore referred to the fact that the evidence is unsatisfactory as to what was intended to be included within and provided for by these two respective amounts. There is

testimony to the effect that in arriving at the latter amount those claims included in the former, which did not represent cash, such as commissions to trustees, were to be reduced, though apparently not by any uniform ratio. Russell, who had a claim for $50,000 under the first arrangement, settled at a much less figure paid in stock. It may fairly be said that the plaintiffs have not proven that their claim was to be exempted from a reduction corresponding to that made in others of like character, and of course the burden is on them to make out their case. If it be said that the amount of $38,000 was agreed upon in the first instance, a sufficient reply is that that agreement was not made with the creditors, and was only in view of the proposed sale to the English syndicate. There is no testimony as to the real value of those services. Equity would seem to say that the claim of plaintiffs should be scaled down proportionately to the amount allotted to Wilson under the two contracts, which, as we figure it, would reduce the sum to $25,440. A majority of the court are of the opinion that in view of the peculiar circumstances of the case the plaintiffs should not be allowed interest.

The decree of the court below must, therefore, be reversed and the case remanded, with instructions to enter a decree in favor of the plaintiffs, awarding to them the sum of $25,440, and adjudging it a lien upon the stock of the Lake Superior Ship Canal, Railway and Iron Company remaining in the hands of defendant.

WERNER *v.* CHARLESTON.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 941. Submitted January 15, 1894. — Decided January 22, 1894.

This case is dismissed on the authority of *Meagher* v. *Minnesota Thresher Mfg. Co.*, 145 U. S. 608, (and other cases named in the opinion,) in which it was held that a judgment of the highest court of a State, overruling a demurrer, and remanding the case to the trial court for further proceedings, is not a final judgment.

MOTION TO DISMISS. The motion stated that "the judgment brought here by writ of error for review, is a judgment of the Supreme Court of the State of South Carolina, which simply affirmed a decision of the lower court overruling a demurrer, and thereby remanded the case to the court below for a hearing on the merits. It is therefore an interlocutory judgment and is in no sense a final decree."

To this the plaintiff in error replied: "The judgment brought here by writ of error for review is the judgment of the Supreme Court of the State of South Carolina holding that a certain act of the General Assembly of the State of South Carolina, entitled 'An act to authorize the City Council of Charleston to fill up low lots and grounds in the city of Charleston in certain cases and for other purposes,' approved on the 18th of December, 1830, is not in violation of the Constitution of the United States, thereby affirming the judgment of the trial court and so ending the constitutional defence interposed by the plaintiff in error.

"An examination of the record will show that the main ground of the demurrer interposed in the court below by the plaintiff in error was the unconstitutionality of the act of 1830. It was claimed both there and in the court above, as well as in this court, to be in violation of due process of law."

Mr. Charles Inglesby for the motion.

Mr. T. Moultrie Mordecai opposing.

THE CHIEF JUSTICE: The writ of error is dismissed. *Meagher* v. *Minnesota Thresher Co.*, 145 U. S. 608; *Rice* v. *Sanger*, 144 U. S. 197; *Hume* v. *Bowie*, 148 U. S. 245.

UNITED STATES *v.* ALGER.

APPEAL FROM THE COURT OF CLAIMS.

No. 885. Submitted January 8, 1894. — Decided January 22, 1894.

Under the act of March 3, 1883, c. 97, 22 Stat. 473, an officer in the Navy, who resigns one office the day before his appointment to a higher one, is only entitled to longevity pay as of the lowest grade, having graduated pay, held by him since he originally entered the service.

THIS was a claim by a professor of mathematics in the Navy for $32.87, alleged to be due him for longevity pay from November 11, 1890, to November 30, inclusive. The petition alleged that during that period he had been allowed and paid at the rate of $2400 per annum, being the shore pay of a professor of mathematics in the first five years after the date of appointment; whereas, as he contended, he should have been paid at the rate of $3000 per annum, being the pay of a professor of mathematics in the third five years from the date of appointment, by reason of his prior service in the Navy from September 22, 1876, to November 10, 1890, by virtue of the provision of the Naval Appropriation Act of March 3, 1883, c. 97, which is as follows:

"And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular Navy in the lowest grade, having graduated pay, held by such officer since last entering the service: Provided, that nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: Provided further, that nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer Army or Navy." 22 Stat. 473.

The petition also alleged, and the Court of Claims found,

the following facts: "Claimant was appointed cadet midshipman September 22, 1876; graduated June 22, 1882, and promoted to midshipman the same day; commissioned ensign June 26, 1884. Resigned November 10, 1890, and resignation accepted to take effect the same day. November 11, 1890, appointed professor of mathematics, to rank from November 1, 1890; accepted the appointment and took the required oath of office the same day. He was given credit, upon his commission as ensign, for his services as cadet midshipman, and as a midshipman, and was paid the pay of an ensign after five years of service, from June 26, 1884, to the date of his resignation. He has not been allowed credit under the act of March 3, 1883, in the lowest grade, having graduated pay, since he entered the Navy as professor of mathematics by appointment as aforesaid."

Upon these facts, the Court of Claims decided, as a conclusion of law, that the claimant was entitled to recover the sum claimed, and gave judgment accordingly. The United States appealed to this court.

Mr. Assistant Attorney General Dodge and *Mr. Felix Brannigan* for appellants.

Mr. John Paul Jones and *Mr. Robert B. Lines* for appellee.

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

The theory of longevity pay was well stated by Chief Justice Drake, speaking for the Court of Claims, in an opinion cited by both parties in this case, in which he said: "There was, no doubt, an underlying principle and purpose in the introduction of longevity pay into the Navy. We think it was intended, first, to induce men to enter the Navy and remain in it for life; second, to remove the depressing influence of long periods of service in one grade without an increase of pay; third, to compensate for increased professional knowledge and efficiency in officers by increasing their pay in advance of

promotion. If these views are correct, the whole basis of longevity pay is the officer's capacity for duty, and his performance of it. In other words, longevity pay is for longevity in actual service." *Thornley* v. *United States*, 18 C. Cl. 111, 117.

Accordingly, a retired officer is not entitled to have active service credited in regulating his pay after his active service has ceased. *Thornley* v. *United States*, 113 U. S. 310, and 18 C. Cl. 111; *Roget* v. *United States*, 148 U. S. 167, and 24 C. Cl. 165.

But every officer in active service is entitled, by the Naval Appropriation Act of March 3, 1883, c. 97, to be credited with the time of his actual service in the Navy in any grade, "as if all said service had been continuous and in the regular Navy in the lowest grade, having graduated pay, held by such officer since last entering the service." 22 Stat. 473.

The whole aim and scope of the act are to give the officer, in the grade held by him after its passage, the benefit of the whole time of his actual service, and to fix the rate of increased compensation by the lowest grade, having graduated pay, held by him "since last entering the service." *Barton* v. *United States*, 129 U. S. 249, and 23 C. Cl. 376; *United States* v. *Foster*, 128 U. S. 435. The act is as applicable to those officers whose actual service has been continuous, as to those who have actually served at two or more distinct periods. If an officer has been twice in the service, the grade, the pay of which is the test of computation, is the lowest held by him since entering the service for the second time. *United States* v. *Rockwell*, 120 U. S. 60, and 21 C. Cl. 332. But if he has entered the service but once, his first entry is to be taken as his last entry, within the meaning of the statute. *United States* v. *Mullan*, 123 U. S. 186; *United States* v. *Green*, 138 U. S. 293.

By section 1556 of the Revised Statutes, fixing the rate of pay of officers in the Navy, the pay of cadet midshipmen or of midshipmen is not graduated by length of service; but the pay of ensigns, as well as of professors of mathematics, is so graduated.

This claimant was continuously in active service from Sep-

tember 22, 1876, to November 10, 1890, first as cadet midshipman, then as midshipman, then as ensign. On November 10, 1890, he resigned the office of ensign, and his resignation was accepted to take effect on the same day. On the next day, November 11, he was appointed professor of mathematics, to rank from November 1, and immediately accepted the appointment and took the oath of office.

There is no doubt that the time, with which he is to be credited, began on September 22, 1876, the date of his appointment as a cadet midshipman. *United States* v. *Hendee*, 124 U. S. 309; *United States* v. *Baker*, 125 U. S. 646; *United States* v. *Cook*, 128 U. S. 254.

The controverted question is as to the grade, by which his longevity pay as a professor of mathematics is to be computed; and this depends upon the question whether the date of his "last entering the service" is the date of his appointment as professor of mathematics, in which case the pay of that office is the test; or the date of his original appointment as cadet midshipman, in which case the test is the pay of an ensign, that having been his lowest grade with graduated pay. The question is, in short, whether his actual service was for two distinct periods, or for a single and continuous period of time.

This court is of opinion that, in substance and in law, it was for one continuous period. His express resignation of the lower office, the very day before his appointment to the higher office, and when he must have known of and counted upon the coming appointment, was evidently tendered with no intention of leaving the service, and was but equivalent to the resignation which the law would have implied from his acceptance of the higher office. The fact is therefore immaterial (which might otherwise be significant) that his new appointment was to rank from a date before his resignation of the old one. If such a formal resignation were sent in for the purpose of eluding the statute and claiming longevity pay on the higher scale, the attempt would be as unbecoming in the officer or his advisers, as it would be ineffectual to charge the United States.

The result is that the longevity pay to which the claimant

is entitled since his appointment as professor of mathematics (as before this appointment) is that of ensign only, that having been "the lowest grade, having graduated pay, held by such officer since last entering the service," within the meaning of the statute.

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

UNITED STATES *v.* STAHL.

APPEAL FROM THE COURT OF CLAIMS.

No. 886. Submitted January 8, 1894. — Decided January 22, 1894.

United States v. *Alger*, *ante*, 362, followed.

In a suit in the Court of Claims for longevity pay, alleged by the claimant, and denied by the United States, to be due him, "after deducting all just credits and offsets," a sum previously paid him for longevity pay to which he was not entitled may be deducted from the sum found to be due him.

THIS was a claim for $1000, alleged to be due for longevity pay as an assistant engineer in the Navy from June 10, 1882, to August 10, 1887. The petitioner alleged that he was entitled to this amount, "after deducting all just credits and offsets." The answer was a general traverse.

The findings of fact by the Court of Claims were as follows: "Claimant entered the Naval Academy, September 14, 1876; graduated June 10, 1880; and was commissioned assistant engineer June 10, 1882. On August 10, 1887, he resigned his commission as assistant engineer. On August 11, 1887, he was duly appointed and commissioned an assistant naval constructor. Claimant has never received any credit upon his commission as assistant engineer for his service in the Navy from his entry into the Naval Academy, September 14, 1876, till the date of his said commission, June 10, 1882. On December 30, 1888, claimant was given credit, for his prior service at the Naval Academy and as assistant engineer, upon the commission then held by him of assistant naval constructor. The amount due claimant is $1000, as unpaid longevity pay."

Upon these facts, the Court of Claims decided, as a conclusion of law, that the claimant was entitled to recover the sum claimed, and gave judgment accordingly. The United States appealed to this court.

Mr. Assistant Attorney General Dodge and *Mr. Felix Brannigan* for appellants.

Mr. John Paul Jones for appellee.

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

The claimant, as is implied in the facts found, and is admitted by the counsel of the United States, was continuously in active service in the Navy from September 14, 1876, to August 10, 1887, first in the Naval Academy as a cadet midshipman, then, it would seem, as a midshipman or a cadet engineer, and then as assistant engineer. See Rev. Stat. §§ 1512, 1521–1525, 1536 *ad fin.* On August 10, 1887, he resigned his commission as assistant engineer; and on August 11, 1887, he was appointed an assistant naval constructor. While the pay of a cadet midshipman, of a midshipman, or of a cadet engineer is not, the pay of an assistant engineer or of an assistant naval constructor is, graduated by length of service. Rev. Stat. § 1536. The claimant's whole service, from the time of his entering the Naval Academy, and notwithstanding his resignation of one commission the day before he received another, must be considered a continuous service, for the reasons stated in the opinion just delivered in *Alger* v. *United States*, *ante*, 362. He has been given credit, for his whole prior service, upon his last commission, upon which he was not entitled to it; and has been allowed no credit upon his commission as assistant engineer, upon which he was entitled to it. The Court of Claims, applying the same rule that it did in *Alger* v. *United States*, apparently considered him entitled to both.

As this court holds him to be entitled to longevity pay as

assistant engineer only, there should be deducted, from the sum due him for such pay, the sum which has been mistakenly and improperly paid to him. *McElrath* v. *United States*, 102 U. S. 426; *United States* v. *Burchard*, 125 U. S. 176.

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

MERCHANTS' COTTON PRESS AND STORAGE COMPANY *v.* INSURANCE COMPANY OF NORTH AMERICA.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 807. Submitted January 8, 1894. — Decided January 22, 1894.[1]

A railroad company agreed with a cotton compress company that the latter should receive and compress all the cotton which the railroad might have to transport in compressed condition, and that it should insure the same for the benefit of the railroad company, or of the owners of the cotton, for a certain compensation which the railroad company agreed to pay weekly. It was further agreed that the compress company, on receiving the cotton, was to give receipts therefor, and that the railroad company, on receiving such a receipt, was to issue a bill of lading in exchange for it. Cotton of the value of $700,000, thus deposited with the compress company for compress and transportation, was destroyed by fire. That company had taken out policies of insurance upon it, but to a less amount, in all of which the compress company was named as the assured, but in the body of each policy it was stated that it was issued for the benefit of the railroad company or of the owners. The various owners of the cotton further insured their respective interests in other insurance com-

[1] The opinion in this case is also entitled in No. 808, National Fire Insurance Company *v.* Insurance Company of North America; No. 809, Mutual Fire Insurance Company *v.* Insurance Company of North America; No. 810, Continental Insurance Company *v.* Insurance Company of North America; No. 811, Fire Association of New York *v.* Insurance Company of North America; No. 812, Liverpool and London and Globe Insurance Company *v.* Insurance Company of North America; No. 813, Royal Insurance Company *v.* Insurance Company of North America. All these cases were brought from the Supreme Court of the State of Tennessee by writs of error, and all were submitted at the same time with No. 807, and on the same briefs.

panies, called in the litigation the marine insurance companies. After the fire the amounts of the several losses were paid to the assured by the several marine companies. In an action in the courts of Tennessee to settle the rights of the parties, the Supreme Court of that State held, (89 Tennessee, 1; 90 Tennessee, 306,) that the companies so paying were entitled to be subrogated to the rights of the owners or consignees against the railroad company under its bills of lading, and that the railroad company was entitled to have the insurance which had been taken out by the compress company collected for its benefit. The railroad company not being party to those suits, the marine insurance companies filed their bill in equity in a state court in Tennessee against the compress company, the several persons who had insured the destroyed cotton for it, and the railroad company, to reach and subject the fire insurance taken out by the compress company for the benefit of the railroad company, and for other relief set forth in the bill. The plaintiffs in the suit were, a corporation under the laws of Pennsylvania, a corporation under the laws of New York, and a corporation under the laws of Rhode Island, on behalf of themselves and of all other companies standing in like position. On the other side were two corporations under the laws of Pennsylvania, two corporations under the laws of Great Britain, a corporation under the laws of New York, certain residents of Rhode Island, certain citizens of New York, certain citizens of Tennessee, two aliens, and forty-four insurance companies of West Virginia, Pennsylvania, New York, Illinois, Louisiana, Wisconsin, Alabama, Connecticut, Ohio, Texas, Indiana, and Great Britain. The defendants petitioned for the removal of the cause to the Circuit Court of the United States, on the ground that the controversy was wholly between citizens of different States, or between citizens of one or more of the several States and foreign citizens and subjects, and that the same could be fully determined as between them. The petition was denied and the cause proceeded to judgment in the state court. In the course of the trial it was attempted to be proved that special rates, rebates or drawbacks had been given in violation of the interstate commerce laws and regulations. A decree being entered for the plaintiffs, giving relief substantially as prayed for in the bill, the Supreme Court of the State, on appeal, affirmed the judgment below, and held that the law making agreements for rebates, etc., void, did not invalidate the contracts of affreightment. A writ of error being sued out to this court, it is now *Held*,

(1) That whether the cause be looked at as a whole, or whether it be considered under any adjustment or arrangement of the parties on opposite sides of the matter in dispute, there was no right of removal, on the part of the several plaintiffs in error, or either of them:

(2) That there is nothing in the interstate commerce law which vitiates bills of lading, or which, by reason of an allowance of rebates, if actually made, would invalidate a contract of affreightment, or exempt a railroad company from liability on its bills of lading.

Argument for Plaintiffs in Error.

THE case is stated at length in the opinion of the court. For the purpose of understanding the brief of counsel, the condensed statement in the head-note is sufficient. There was also a motion to dismiss or affirm.

Mr. T. B. Turley, *Mr. L. E. Wright*, *Mr. C. W. Metcalf* and *Mr. S. P. Walker* for plaintiffs in error.

I. The motion to affirm should not be entertained for the reason that, though it is nominally coupled with a motion to dismiss, such motion to dismiss is colorable only, and manifestly made for the purpose of bringing on the motion to affirm. *Whitney* v. *Cook*, 99 U. S. 607.

The record shows that the question upon which the jurisdiction depends is not frivolous, and that the appeal was not taken for delay.

II. The record presented a case for removal to the Federal court, under the act of Congress in that regard. It showed a separable controversy between citizens of different States, which could be determined without the presence of any of the other parties to the record. *Knapp* v. *Railroad Co.*, 20 Wall. 117; *Barney* v. *Latham*, 103 U. S. 205; *Hyde* v. *Ruble*, 104 U. S. 407; *Harter* v. *Kernochan*, 103 U. S. 562; *Kanouse* v. *Martin*, 15 How. 198; *The Removal Cases*, 100 U. S. 457; *Ayres* v. *Chicago*, 101 U. S. 184; *Shainwald* v. *Lewis*, 108 U. S. 158; *Ayres* v. *Wiswall*, 112 U. S. 187; *Ayres* v. *Watson*, 113 U. S. 594; *Crump* v. *Thurber*, 115 U. S. 56; *Ins. Co. of North America* v. *Delaware Mut. Ins. Co.*, 50 Fed. Rep. 243.

III. The record establishing that the contracts of affreightment between the C. V. & C. Line and Jones Bros. & Co. were made in violation of the interstate commerce law, — such violation making the whole contract illegal under the terms of the statute, — no recovery should have been allowed on the bills of lading issued by the C. V. & C. Line to Jones Bros. & Co.; and the case of the complainant marine companies depending upon the establishment of the liability of the carriers must therefore fail so far as concerns those bills

of lading. *Petrel Guano Co.* v. *Jarnette*, 25 Fed. Rep. 675; *Dent* v. *Ferguson*, 132 U. S. 50; *Hannay* v. *Eve*, 3 Cranch, 242; *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 397; *Miller* v. *Ammon*, 145 U. S. 421; *St. Louis &c. Railroad* v. *Terre Haute &c. Railroad*, 145 U. S. 393.

Mr. John M. Butler, *Mr. Holmes Cummins* and *Mr. William H. Carroll* for defendants in error.

Mr. Justice Jackson delivered the opinion of the court.

The writ of error in each of these seven causes (which were submitted together) presents the same Federal questions, which are, first, whether the Supreme Court of Tennessee erred in sustaining the action of the chancery court of Shelby County of that State, denying the petition of several of the plaintiffs in error to remove the cause to the Circuit Court of the United States for the Western District of Tennessee; and, secondly, in holding that certain alleged special rates, rebates, or drawbacks, allowed by Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo, Vincennes and Chicago Railroad Company, through L. L. Fellows, their agent at Memphis, to Jones Brothers & Company, of that place, on cotton shipped over that line to various points in the east, were not in violation of the interstate commerce acts regulating commerce between States of the Union, and did not render the bills of lading issued by the railroad for cotton transported or to be transported so illegal as to invalidate the same and prevent any recovery thereon against the carrier.

The questions thus presented grew out of the following state of facts: On November 17, 1887, about 14,000 bales of cotton in the West Navy Yard Compress of the Merchants' Cotton Press and Storage Company (hereafter called the compress company) were destroyed by fire. The value of the cotton was about the sum of $700,000. Of the total number of bales thus destroyed, about 9608 bales were covered by bills of lading issued by various transportation companies to the owners or consignees of the cotton. The bills of lading issued by the Cairo, Vincennes and Chicago Railroad Company (hereafter

called the railroad company) covered 5087 bales of the cotton destroyed, valued at $245,733.46.

In May, 1887, a contract had been entered into between the railroad company and its receivers, Anthony J. Thomas and Charles E. Tracy, on the one side, and the compress company on the other, by the terms of which the railroad company and its receivers agreed to give to the compress company all cotton to compress that the railroad company might have to transport out of Memphis in a compressed condition. The compress company, on its part, agreed to properly compress all such cotton, and also to insure the same for the benefit of the railroad company, or owners, for a certain compensation to be paid weekly, which was intended to cover both the service for compressing the cotton and the insurance to be taken out thereon, in good and solvent companies by the compress company. This insurance was to cover any loss while the cotton was under the control of the compress company and until delivered to the railroad company. The contract further provided that the railroad company and its receivers constituted the compress company its agent to receive all cotton intended for transportation over the railroad company's line, and to sign receipts therefor, on the production of which, bills of lading would be issued by the railroad company. This contract was to continue in force until August 31, 1896.

Under and in pursuance of this contract cotton was delivered to the compress company, by the owners or their agents, for transportation over the line of the railroad company from Memphis to points east to the extent of 5087 bales, for which dray tickets or receipts were given by the compress company, and on the production of which the agent of the railroad company issued bills of lading to the several and respective owners or consignees of such cotton.

The railroad company had an all-rail line from Memphis, and also a partly water and partly rail line, the water line extending from Memphis to Cairo, Illinois, at which point the railroad company's rail line commenced and extended by means of its connection eastward,

The compress company had a similar arrangement for insuring cotton with other transportation lines, and in pursuance of its undertaking with the carriers it took out insurance on the cotton deposited with it for compression before being transported, aggregating the sum of $301,750, in forty-four different fire insurance companies, corporations of various States of the Union and of foreign kingdoms. The amount of this insurance fell far short of the value of the cotton deposited with it for compression and which was destroyed by the fire. In all of these policies of insurance taken out under and in pursuance of its contract with the carriers, the compress company was named as the assured, but in the body of each of the policies it was set forth and stated that the insurance on the cotton was for the benefit of the railroads, transportation lines, or owners. The insurance was to attach on receipt of the cotton by the compress company, and to terminate when the same was removed for transportation.

The various owners or consignees of the 5087 bales of cotton covered by the bills of lading of the railroad company, with one or two exceptions, insured their interests in their respective lots of cotton in what is called in the litigation marine insurance companies.

There was $301,750 of insurance thus taken out by the compress company for the benefit of the carriers, and at the same time there was a large amount of insurance taken out by the owners or consignees in the marine insurance companies on the bills of lading issued by the railroad company to the several owners of the cotton.

Soon after the destruction of the cotton various suits were commenced in the state courts by the owners of the cotton destroyed, and the rights of the parties were to some extent settled and adjusted in the cases of the *Lancaster Mills* v. *Merchants' Cotton Press and Storage Co.*, 89 Tennessee, 62, and *Deming & Co.* v. *Merchants' Cotton Press and Storage Co.*, 90 Tennessee, 306, 358.

In this last case the Supreme Court of Tennessee held that the marine insurance companies — most, if not all of whom, had paid the policies issued by them covering the losses of the

owners or the consignees of the cotton — were entitled to be subrogated to the rights of such owners or consignees, as against the railroad company under its various bills of lading, if that company was liable on such bills of lading. The Supreme Court further declared in that case that the compress company held the insurance in the forty-four fire insurance companies taken out by it for the benefit and indemnity of the railroad company or companies which had issued bills of lading on the cotton destroyed, and that to the extent of its proper share or proportion of such fire insurance the railroad company was entitled to have the same collected for its protection and indemnity: but in respect to the liability of the railroad company upon its bills of lading to these marine insurance companies, the court could make no decree, or render any judgment, for the reason that the railroad company was not a party to that cause. It, however, declared the rights of the marine insurance companies and the liability of the compress company, and of the fire insurance companies, and left the former companies to their remedy by way of subrogation against the railroad company upon its bills of lading to be settled and determined by some new proceeding; and it was ordered that $210,224.37 of the fire insurance fund be reserved for the indemnity of the railroad company, if that line should be sued and its liability to the marine insurance companies should be established.

Accordingly, on August 7, 1891, after the decision of the Supreme Court of the State had been rendered in *Deming & Co.* v. *Merchants' Cotton Press and Storage Company*, 90 Tennessee, 306, the Insurance Company of North America of Philadelphia, a corporation by the laws of the State of Pennsylvania; the Atlantic Mutual Insurance Company, a corporation by the laws of the State of New York; the Providence Washington Insurance Company, a corporation by the laws of the State of Rhode Island, on behalf of themselves and all other marine insurance companies standing in like position, who had paid their insurance to the owners of the cotton, filed their bill in the chancery court of Shelby County, Tennessee, against the Delaware Mutual Safety Insurance Company, a corporation by the laws

of the State of Pennsylvania; the Marine Insurance Company, Limited, of London, resident of the United Kingdom of Great Britain and Ireland; the Phenix Insurance Company, a corporation by the laws of the State of New York; R. H. Deming and James H. Foster, partners as R. H. Deming & Co., residents of the State of Rhode Island; the British and Foreign Marine Insurance Company, Limited, of Liverpool, England, resident of the United Kingdom of Great Britain and Ireland; the Cairo, Vincennes and Chicago Line, of Illinois; Anthony J. Thomas and Charles E. Tracy, as receivers thereof, citizens of New York; The Merchants' Cotton Press and Storage Company, a corporation, of Tennessee; S. R. Montgomery, Napoleon Hill, and Thomas H. Allen, Jr., as trustees, citizens of Tennessee, together with six other alien marine insurance companies, and William Watson and E. R. Wood, aliens; and forty-four fire insurance companies of West Virginia, Pennsylvania, New York, Illinois, Louisiana, Wisconsin, Alabama, Connecticut, Ohio, Texas, Indiana, and of the United Kingdom of Great Britain and Ireland.

The bill, in the nature of a creditor's bill, after reciting the facts already presented, set out the various lots of cotton which the complainants and the other marine insurance companies had insured for the owners or consignees thereof, and which were covered by the bills of lading of the railroad company, which insurance they had paid to the owners upon the destruction of the cotton, and further alleged the contract between the compress company and the railroad company, and that the former was to keep the cotton insured for the benefit of the railroad company. The bill then proceeded to charge that, having paid the owners the insurance on the cotton destroyed, the complainants were entitled to be subrogated to the rights of such owners against the railroad company on its bills of lading, and to have the rights of the railroad company enforced against the compress company, and the various fire insurance policies which the latter company had taken out on the cotton for the benefit of the railroad company.

The bill stated that the compress company held the fire insurance as trustee or agent for the railroad company; that the

railroad company, being liable to the owners of the cotton, to whom it had issued bills of lading for the cotton while in the possession of the compress company, and the marine insurance companies having paid the owners for the loss thereof, were entitled to be substituted to the position of the owners of the cotton as against the railroad company, and as against the compress company, and the fire insurance companies, which had issued policies to the compress company for the benefit of the railroad company.

It was further set out in the bill that after the loss occurred the compress company wrongfully assumed to deal with the fire insurance fund by applying a portion thereof, amounting to $52,472.26, for the use of such owners of the cotton as had dray tickets from the compress company, and to whom no bills of lading had been issued, and who had no other insurance; and that each defendant fire insurance company had paid on its respective policies to the compress company about 15½ per cent of the amount of its insurance.

It was claimed in the bill that the compress company wrongfully assumed to thus deal with the fire insurance fund, and in disregard or violation of the decision of the Supreme Court of the State, which had held that the fire insurance collected should be held for the benefit of the transportation lines which had issued bills of lading for the cotton covered therein.

The bill further alleged that the compress company was neglecting its duty to collect the fund, and it and the fire insurance companies were confederating to prevent and avoid the payments by the fire insurance companies of their policies on the cotton represented by the railroad company's bills of lading.

The bill sought to reach and subject, not only the fire insurance taken out by the compress company for the benefit of the railroad company, but also a share or interest of the railroad company in and to certain real estate which the compress company had conveyed after the fire to Napoleon Hill, S. R. Montgomery, and T. H. Allen, Jr., to secure to the persons in contractual relations with it the payment of the contingent

liability of the compress company to any or all of them by reason of the failure to fully insure the cotton for which the carriers were liable.

It also claimed that of the $52,472.26 collected by the compress company and misappropriated to other losses, the sum of $4394.12 of these collections should have gone to the railroad company on account of cotton covered by its bills of lading. The compress company was sought to be held liable for this amount.

It was further claimed that several of the fire insurance policies were lost by reason of the compress company not collecting the same, and that others were not taken out in good and solvent companies, and for those lost the compress company was sought to be made liable in favor of the railroad company.

Among various marine insurance companies which were named as defendants, as standing in like position with the complainants, was the Phenix Insurance Company, a corporation by the laws of the State of New York, which had policies outstanding in favor of the owners of 3609 bales of cotton, of the value of $179,108. The Phenix Insurance Company, together with Deming & Company, on August 12, 1891, filed their answer and cross-bill against the same defendants, setting out that it had paid the loss on that cotton, and claimed the same rights as were sought to be asserted in the bill of the complainants.

On August 7, 1891, the railroad company and Anthony J. Thomas and Charles E. Tracy, receivers thereof, together with the Delaware Mutual Safety Insurance Company, filed their answer and cross-bill in the case against the compress company and the fire insurance companies, which admitted the liability of the railroad company to the Delaware Mutual Safety Insurance Company to the extent of 500 bales, for which it had issued bills of lading; but denied generally its liability to the marine insurance companies on the bills of lading which it had issued.

The prayer of the original bill was that the questions arising upon the matters and things connected with the loss of the

cotton, the insurance thereon, both fire and marine, together with the bills of lading issued by the railroad company to the owners of the cotton which was to be transported by it, and the liabilities of the railroad company on its bills of lading, and of the compress company, might be settled and adjusted, and that the rights of all parties interested therein might be determined in behalf of the complainants and such marine insurance companies as might choose to come in and become parties to the cause; that the railroad company might be declared liable to them, respectively, for the losses in each lot of cotton covered by its bills of lading; that the compress company should be declared as holding the fire insurance policies as indemnity to the railroad company for the benefit of the complainants and other marine insurance companies standing in like position, and that such insurance might be collected for their benefit; "that attachment issue and be levied upon the interest of the Cairo, Vincennes and Chicago Line in the trust fund held by the Merchants' Cotton Press and Storage Company, and by garnishing the defendant fire insurance companies to answer and state what, if anything, they owe upon their respective policies applicable to the liability of the Cairo, Vincennes and Chicago Line, if liability shall be declared herein, or by any court with the parties requisite to the validity of the judgment before such court."

The bill further prayed for publication as to non-resident defendants, "and that upon a final hearing of this cause this court will decree that the C., V. & C. Line is liable to the holders, and through the holders to the plaintiffs, for the value of each of the lots of cotton covered by the plaintiffs' policies and the bills of lading of the C., V. & C. Line, and will apply the insurance effected by the Merchants' Cotton Press and Storage Company uncollected, rendering proper decrees therefor against the Merchants' Cotton Press and Storage Company and the defendant fire insurance companies in exoneration of that liability, giving the proportionate share to the plaintiffs severally, and to such of the defendants as stand in relation to the cotton as the plaintiffs do; that the court will enforce the trust in the Senatobia Street shed for the benefit

of the plaintiffs and others, to the end that the plaintiffs, and others similarly situated as the plaintiffs, may be fully paid the value of the aforesaid cotton covered under their respective policies of insurance, and distribute the residue, if any there be, to the holders of the certificates issued by the compress company, some of which are held by defendants Napoleon Hill and S. R. Montgomery, who are called upon to produce a specimen of them; and that the said Hill is asked to furnish a list of the holders of such certificates, that they may be parties thereto, they belonging to a numerous class, and their names unknown to the plaintiffs. And the plaintiffs pray for such other relief, general and special, as may be consistent with the facts of the case."

The theory of the bill was that the railroad company and its receivers were liable to the holders of its bills of lading for the value of the cotton burned, and which was covered by them; that the marine insurance companies which had insured the cotton and paid the losses thereon to the owners or consignees thereof, were entitled to be subrogated to the rights of such owners as against the carrier; that the railroad company, through its agent, (the compress company,) was entitled to recover against the fire insurance companies under the policies they had issued to the compress company, as its agent, and for its benefit, and that the complainants, and those standing in like position, were entitled to reach the fire insurance fund through the rights of the railroad company, for whose benefit such fire insurance was taken out by the compress company.

On September 5, 1891, the defendants, the Royal Insurance Company, the Continental Insurance Company, the Fire Association, the Home Insurance Company of Louisiana, the Liverpool, London and Globe Insurance Company, and the National Fire Insurance Company, presented their petition for removal of the cause from the chancery court of Shelby County to the United States Circuit Court for the Western District of Tennessee. That petition was defective and was not acted upon. Thereafter, on November 21, 1891, the same defendants filed their joint amended petition for the removal

of the cause, and, after setting out the nature and character of the original and cross-bills, and the steps taken in the cause up to date, and the relief sought by the original and cross-bills, proceeded as follows:

"Petitioners state and show that the Merchants' Cotton Press and Storage Company is a citizen of the State of Tennessee; that the C., V. & C. Line is a citizen of the State of Illinois, and that the petitioners are citizens and subjects of foreign States or of States other than the State of Tennessee or Illinois, the said Royal Insurance Company and the said Liverpool, London and Globe Insurance Companies being citizens and subjects of Great Britain, and the said Continental Insurance Company and said Fire Association being citizens of New York, the said Home Insurance Company being a citizen of Louisiana, and the said National Fire Insurance Company being a citizen of the State of Connecticut, and that the controversy is wholly between citizens of different States or between citizens of one or more of the several States and foreign citizens and subjects, and that the same can be fully determined as between them.

"The Merchants' Cotton Press and Storage Company is the assured in the policies issued by said fire insurance companies, and the sole question, so far as concerns said fire insurance companies, is whether said Merchants' Cotton Press and Storage Company, a defendant upon the record, can recover against said fire insurance companies on their respective policies as set out in the bill of complaint in behalf of the plaintiffs and others in like situation or in behalf of the C., V. & C. Line.

"Petitioners further state and show that the amount in the controversy as between the said plaintiffs and each of the petitioners exceeds the sum of two thousand dollars, exclusive of the interest and cost."

The necessary bond was tendered with the petition. The chancery court denied the application for removal, and the cause then proceeded in that court to a final decree, which granted substantially the relief sought for in the bill, and from that decree certain of the defendants appealed to the Supreme Court of the State of Tennessee. That court affirmed the

decree below upon the merits, and sustained the action of the chancery court in denying the application for removal, on the ground that the real controversy in the cause was between the marine insurance companies and the railroad company and its receivers; that the object of the controversy was to charge the railroad company with the loss sustained by shippers and paid by the marine insurance companies, and incidentally to collect from the fire insurance companies such decree as might be obtained against the railroad company and its receivers, to the extent that the railroad company was a beneficiary in the fire policies taken out by the compress company.

The Supreme Court of the State further held that the fire insurance companies occupied substantially the position of garnishees, and that their indebtedness upon their respective policies might be reached and held subject to such final decree as complainants might obtain against the railroad company, and that the fire insurance companies had no separable controversy in the sense of the judiciary acts which entitled them, or either of them, to remove the cause from the state court to the Circuit Court of the United States for the Western District of Tennessee.

The court further held that, if the complainants and the other marine insurance companies standing in like situation with them should fail to establish liability against the railroad company, then no controversy would remain as to the other defendants, as the marine insurance companies had no right of action against any of the fire insurance companies, except as incidental to their litigation with the carrier; that the fire insurance companies were made parties only in aid of the relief which was asked, and that no relief could be granted against them unless the marine insurance companies obtained a judgment against the railroad company. So that the latter was an indispensable party to the litigation, and the suit was in fact a single cause of action against the carrier, with incidental relief against the compress company and the fire insurance companies, and was not removable by the latter companies under the principles laid down in *St. Louis & San Francisco Railway* v. *Wilson*, 114 U. S. 60; *Crump* v. *Thurber*,

115 U. S. 56, 61; *Fidelity Ins. Co.* v. *Huntington*, 117 U. S. 280, 282.

In this conclusion of the Supreme Court of the State of Tennessee we fully concur. The case made by the bill and the relief sought thereunder in behalf of complainants, and those standing in like situation with them, clearly did not present any separable controversy. The plaintiffs in error, who were the petitioners for removal, put their right of removal mainly upon the ground that the case made by the original and cross-bills was virtually a suit by the compress company against the fire insurance companies; that as the compress company was a citizen of Tennessee, and each of said petitioning fire companies was a citizen of another State, or an alien, the latter had a right to remove the cause. This, we think, is a clear misapprehension of the scope of the bill. It admits of no question that the fire insurance policies taken out by the compress company under its contract with the railroad company were, as expressed on the face of the policies, for the benefit of the carrier, and were intended for its protection and indemnity. The compress company had, therefore, no personal interest whatever in the fire insurance policies as against the railroad company by virtue of the contract between the railroad company and the compress company, and by the terms of the fire insurance policies the railroad company was the beneficiary under those policies to the extent necessary to indemnify it against liability for losses incurred directly to itself, or through its liability on its bills of lading. The railroad company had such an insurable interest in the cotton, and was, to that extent, the owner of the insurance standing in the name of the compress company, or held in trust for it. This is settled by *California Insurance Co.* v. *Union Compress Co.*, 133 U. S. 387, 423.

The compress company, aside from the claims which were sought to be asserted against it personally, as trustee of the fire insurance fund, which was sought to be reached to the extent of the railroad company's interest therein, was a necessary and indispensable party to the suit, under the authority of *Thayer* v. *Life Association*, 112 U. S. 717, and *Wilson* v.

Oswego Township, *ante*, 56, decided at the present term of the court.

It admits of no question that the primary liability, or the right to reach the fire insurance fund, had also to be worked out in favor of the complainants, and other marine insurance companies, through the liability of the railroad company upon its bills of lading. The suit could not have proceeded a step without the presence of the railroad company, and certainly it presents no separable controversy as between the compress company and the several fire insurance companies.

It is further suggested, as to the right of removal, that each of the marine insurance companies had a distinct and separate cause of action against each of the fire insurance companies on their respective policies. This is a misapprehension, for the marine insurance companies had no right of action against the fire insurance companies. Their cause of action was against the railroad company under its bills of lading issued to the owners of the cotton, who were the assured in the marine companies, and whose loss had been paid by those companies. The right of those companies was directly against the railroad company, by way of subrogation, and to enforce its liability under its bills of lading. They could not have proceeded directly against the fire companies without the presence of the railroad company. The latter was an indispensable party to the relief sought, for it was only through this alleged liability that the fire insurance fund could be reached and subjected to the indemnity of the marine insurance companies. If each of these marine insurance companies had filed a separate bill for the same relief sought by their joint suit there could have still been no right of removal on the part of the fire insurance companies on the ground of a separable controversy, even if the fire insurance companies were not garnishees, as held by the Supreme Court of Tennessee, for the reason that the railroad company and the compress company would both have been indispensable parties, and could not have been arranged on the same side with the complainants, inasmuch as the liability of the railroad company to the marine insurance company was the primary question to

be determined. *Louisville & Nashville Railroad Co.* v. *Ide*, 114 U. S. 52; *Pirie* v. *Tvedt*, 115 U. S. 41.

The complainants had a right to join in enforcing the common liability of the railroad company upon its bills of lading, and, in the language of Chief Justice Marshall, in *New Orleans* v. *Winter*, 1 Wheat. 91, "having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite." This ruling has been approved in *Peninsular Iron Co.* v. *Stone*, 121 U. S. 631, 633.

In the present case, as in *Peninsular Iron Co.* v. *Stone*, the rights of each of the complainants and of other marine insurance companies occupying the same position, depend, as against the petitioners for removal, on the alleged right of the marine companies to hold the railroad company liable, by way of subrogation, upon its bills of lading, and, as an incident to that liability, to collect the fire insurance fund to the extent of the railroad company's share therein. "Although, as between themselves, they have separate and distinct interests, they joined in a suit to enforce an obligation which is common to all; . . . and while all the complainants need not have joined in enforcing it, they have done so, and this, under the rule, in *New Orleans* v. *Winter*, 1 Wheat. 91, controls the jurisdiction." The voluntary joinder of the parties has the same effect for purposes of jurisdiction as if they had been compelled to unite.

The right of removal must be determined by the pleadings at the time the petition is filed, *Graves* v. *Corbin*, 132 U. S. 571, 585, and testing the application made in the present case by this rule, we find no dispute or controversy set forth in the bill or in the petition for removal between the compress company and the fire insurance companies. On the contrary, these defendants are charged with confederating together for the purpose of relieving the fire insurance companies from liability on their policies.

The bill seeks to charge the railroad company, and then to reach and subject its equitable rights and interests in the fire insurance fund, taken out by the compress company for its

benefit. There is not in the bill or in the cross-bills any suggestion or intimation that there is any controversy or dispute between the railroad company and the compress company; or between the compress company and the fire insurance companies. Under such circumstances there is manifestly no separable controversy made by the pleadings, such as entitles the fire companies, or either of them, to remove the cause. There is, in fact, no controversy "which can be fully determined as between them," and as stated by this court in *Torrence* v. *Shedd*, 144 U. S. 527, 530, "by the settled construction of this section (referring to separable controversies) the whole subject-matter of the suit must be capable of being finally determined as between them, (the parties seeking removal,) and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit."

It may be, under the Judiciary Act of March 3, 1887, c. 373, 24 Stat. 552, and August 13, 1888, c. 866, 25 Stat. 433, as under the act of March 3, 1875, c. 137, 18 Stat. 470, that the court may disregard the particular position of the parties as complainants or defendants, assigned to them by the pleader, for the purpose of determining the right of removal, *Harter* v. *Kernochan*, 103 U. S. 562, and the matter in dispute may be ascertained by arranging the parties to the suit on opposite sides of the dispute, and if by such an arrangement it appears that those on one side are all citizens of different States from those on the other, the suit may be removed. *Removal Cases*, 100 U. S. 457; *Ayers* v. *Chicago*, 101 U. S. 184.

The plaintiffs in error in the present cases seek to sustain the right of removal by the application of this rule; but it will not avail them, for if the parties are arranged on opposite sides of the primary and controlling matter in dispute, we shall have the three complainants, together with the Phenix Insurance Company, a corporation of the State of New York; the Union Marine Insurance Company, Limited, of London, England; the British and Foreign Insurance Company of Liverpool, England, and the Standard Marine Insurance Company, Limited, of England, on one side, and the railroad company, the compress company, and the fire insurance com-

panies, together with the other defendants, as parties on the other side.

Now, as thus arranged, we have two alien corporations on the side of the complainants, and two alien fire insurance companies (the Liverpool, London and Globe Insurance Company, and the Royal Insurance Company) on the side of the defendants. Under such position, the alien petitioners would not be entitled to removal; besides, it is settled by *King* v. *Cornell*, 106 U. S. 395, that subdivision two of section 639 of the Revised Statutes was repealed by the act of 1875, so that an alien sued with a citizen had no right of removal, and this subdivision two of that section was not restored by the act of March 3, 1887; hence, an alien, in the position of the alien petitioners, in the present case, would have no right to remove the cause on the ground of a separable controversy.

Again, the parties being arranged, as above, according to the matter in dispute, we have the Phenix Insurance Company of New York in the position of plaintiff, with the Mutual Fire Insurance Company of New York, (No. 809,) the Continental Insurance Company, (No. 810,) and the Fire Association, (No. 811,) corporations of the same State, applying for the removal. It is too clear to require the citation of authorities that in this position of the New York corporations, those occupying the position of defendants had no right of removal.

It is further shown by the pleadings that the Phenix Insurance Company in its cross-bill made a defendant of the Newport News and Mississippi Valley Company, a corporation organized under the laws of Connecticut, which was a carrier from Memphis to points east, and had a contract with the compress company like that of the Cairo, Vincennes and Chicago Railroad Company, to insure cotton to be carried over its line, under which arrangement it had issued bills of lading to various parties insured by the Phenix Insurance Company; and that company, after payment of the losses by its cross-bill, sought the same relief against the Newport News and Mississippi Valley Company which was sought against the Cairo, Vincennes and Chicago Railroad Company. So that to the cross-bill of the Phenix Company there were two

Connecticut defendants, viz., the National Fire Insurance Company, (No. 808,) and the Newport News and Mississippi Valley Company, and the relief sought made both of these corporations necessary and indispensable parties. The Connecticut corporations could not in this situation of the parties, if no other objection existed, be entitled to remove the cause.

In respect to the two other plaintiffs in error, the Merchants' Cotton Press and Storage Company, (No. 807,) and the Mutual Fire Insurance Company, (No. 809,) it appears that neither of these parties made application to remove the cause from the chancery court of Shelby County. So that neither of them is in position to assign error as to the action of the court in denying the other parties the right of removal. In *Rand* v. *Walker*, 117 U. S. 340, 345, it was held that the right to take steps for the removal of a cause to the Circuit Court of the United States, on the ground of a separable controversy, was confined to the parties actually interested in such controversy. In that case the court said on this subject: "That neither of the parties to the controversy, if it be separable, a question which we do not decide, have petitioned for removal, and the right to remove a suit on the ground of a separable controversy is, by the statute, confined to the parties actually interested in such controversy."

It is, therefore, we think, clear that whether the cause be looked at as a whole, or whether it be considered under any adjustment or arrangement of the parties on opposite sides of the matter in dispute, there was no right of removal on the part of the several plaintiffs in error, or either of them.

The remaining assignment of error based upon the alleged allowance by the local agent of the railroad company of special rates, rebates, or drawbacks to Jones Brothers & Company which, it is claimed, rendered the bills of lading issued by the railroad company to the owners or consignees of the cotton void, so that the marine insurance companies, who had paid the losses, could have no right upon such bills of lading against the railroad company, or the fire insurance companies, needs but little consideration. The Supreme Court of the State disposed of this question as follows: "This fact of

special rate and rebate is denied, and it is a matter of controversy and conflict of evidence, and it is also insisted in answer to this by plaintiffs that the interstate commerce law does not apply for the reason that the evidence disproves any 'common control' over the river and rail route. We are of opinion, however, and rest our decision upon the ground that if it were assumed that the law was applicable, and the fact of agreement for rebate and special rate proven, it would not prevent liability on the part of the carrier for the freight received and covered by insurance in the hands of the carrier's agent. The law makes such agreements as to rebate, etc., void, but does not make the contract of affreightment otherwise void, and we think there is nothing in the law or the policy of it which requires a construction that would excuse a carrier from all liability when it made such a contract in connection with that for receipt and transportation of freight. Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract as to rebate would be void, and . . . could not be enforced; but we think the shipper could nevertheless recover for loss of his freight through the carrier's negligence and, incidentally, of carrier's insurance. No different construction has yet been put upon the interstate commerce law so far as we are advised, and we decline to give it any other." We concur in the correctness of this conclusion of the State Supreme Court.

Jones Brothers & Company were either the agents of the owners or consignees of the cotton, or the sellers thereof to eastern consignees, and the rebates or drawbacks, which they claimed to have been allowed, if allowed at all, according to the testimony of one of the members of the firm, was a private benefit which the firm secured, and, so far as appears, without the knowledge or consent of the owners or consignees of the cotton. Under such circumstances, if such rebates were paid or allowed to the firm by the agent of the railroad company, it is difficult to understand upon what principle such an allowance would vitiate or render void the bills of lading which the railroad company issued to the owners of the cotton. It is

still more difficult to understand how the compress company, or the fire insurance companies, could avail themselves of the arrangement, even regarding it as illegal, between the agent of the railroad company and Jones Brothers & Company. They were not parties to it, and they were not affected by it in any way, shape, or form.

There is nothing in the interstate commerce law which vitiates bills of lading, or which, by reason of such allowance to Jones Brothers & Company, if actually made, would invalidate the contract of affreightment or exempt the railroad company from liability on its bills of lading.

The principles laid down in *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad*, 145 U. S. 263, fall far short of establishing that the alleged allowance of rebate to Jones Brothers & Company would render the railroad company's bills of lading invalid and defeat the right of the marine insurance companies, who had paid the losses, to subrogation against the railroad company on bills of lading issued to the owners or consignees of the cotton, who are not shown to have known of, or consented to, the railroad company's agent giving such rebates.

We are, therefore, of opinion that the Federal questions presented by the assignments of error were not well taken and are not sustained, and that the judgment of the Supreme Court of the State of Tennessee in all of the cases must be

Affirmed.

CALIFORNIA POWDER WORKS *v.* DAVIS.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 301. Submitted January 8, 1894. — Decided January 22, 1894.

Two parties claiming title to the same land in California, each under a Mexican grant made prior to the treaty of Guadalupe Hidalgo, and each under a patent from the United States, one of them filed a bill in equity against the other in a District Court in San Francisco to quiet

Statement of the Case.

title. The cause was transferred to the Superior Court for that city and county, and being heard there, it was decreed that the defendant's title was procured by fraud, and the relief sought for was granted. On appeal to the Supreme Court of the State the judgment was affirmed, the court saying that the question of the genuineness of each original grant was a legitimate subject of inquiry, when the issue was made by the pleadings, and that on the evidence in the case the finding against the genuineness of the defendant's grant would not be disturbed on appeal. *Held*, that this ruling presented no Federal question for the consideration of this court.

What is necessary to give this court jurisdiction on writ of error to the highest court of a State again stated.

This court does not deem it necessary to examine the question raised under the practice in California, allowing separate appeals to lie from a judgment and from an order granting or refusing a new trial.

This was a suit in equity brought by Isaac E. Davis, for whom his administrator, Willis E. Davis, was duly substituted, and Henry Cowell, against the California Powder Works in the District Court of the Fifteenth Judicial District of California in and for the city and county of San Francisco, and subsequently transferred to the Superior Court of said city and county, to quiet plaintiffs' title to certain lands in Santa Cruz County, California. Both parties claimed title under patent from the United States; plaintiffs, through Pedro Sainsevain, patentee of the rancho Cañada del Rincon en el Rio San Lorenzo; defendant, through William Bocle, patentee of the tract called La Carbonera.

The case having been heard, the Superior Court made special findings of fact, and found as a conclusion of law that the plaintiffs were entitled to a decree according to the prayer of the bill.

From the findings it appeared that Sainsevain's patent was based on a concession of July 10, 1843, the grant being duly approved June 10, 1846; that the archives of the Mexican government contained a full record of the proceedings; that the claim was confirmed January 17, 1854, by the land commissioners of the United States, duly organized under acts of Congress in that behalf, and their decree made final by the dismissal of an appeal therefrom by the District Court of the United States for the District of California; that a survey

was duly had, and that the patent issued June 4, 1858. As to Bocle's patent, it appeared that the grant to him bore date February 3, 1838; that it was confirmed January 23, 1855, and that a patent subsequently issued, (July 7, 1873,) but it was found that the grant had been falsely antedated, and that it was made in the year 1848; that "there is not and never has been any paper, document, writing, or entry in any book or record in the Mexican archives pertaining to California relating to said alleged grant or concession to said Bocle; nor is the same noted in a book called the Jimeno's Index, nor has said purported grant any map or diseño attached to it, nor is any such map or diseño referred to. And at the said date, the 3d of February, 1838, said Bocle was not a naturalized citizen of Mexico, but was a subject of the Kingdom of Great Britain and Ireland;" that the decree of confirmation by the land commissioners of the alleged grant to Bocle was obtained by fraud, "the said fraud consisting of the fact that no such grant was made to said Bocle for said land, and said paper purporting to be such grant was false, simulated and fabricated, and made after the conquest of California by the United States from the Republic of Mexico, and in or about the year 1848, and was fraudulently imposed upon said board of land commissioners as valid and genuine. And the dismissal of the appeal therefrom to the United States District Court was likewise procured by the same fraud and by the concealment of said facts of the fabrication of said pretended grant from the United States authorities acting in that behalf. And said land commissioners and said authorities were each and all ignorant of any such fraud, and of the fact that said alleged grant was false and simulated, and were misled and deceived by the false allegations of the said Bocle in that behalf."

A decree in plaintiffs' favor having been entered, defendant moved for a new trial, which was denied, and an appeal was thereupon taken to the Supreme Court of California from the order denying said motion, by which that order and the judgment were affirmed.

The Supreme Court of California, (84 California, 617,) among other things, held: "Where both parties to an action to quiet

title claim the land in dispute under patents confirming Mexican grants, the question of the genuineness of each original grant is a legitimate subject of inquiry in the action, provided such inquiry is admissible under the pleadings; and it may be shown in such case that the grant bearing the oldest date was not made during the term of office of the Mexican governor whose signature it bears, and that it was fraudulently antedated. When the evidence in such action shows that there is no official paper appertaining to an alleged Mexican grant, nor any record or trace thereof, which appears anywhere in the archives of California when a part of Mexican territory, a strong presumption arises against the genuineness of the grant, which can only be overcome by the clearest proof of its genuineness; and when the oral testimony of witnesses, offered in support of such genuineness, is of an inconclusive or suspicious character, a finding against the genuineness of the grant will not be disturbed upon appeal."

Application for a rehearing was made and overruled, and thereupon a petition for the allowance of a writ of error from this court was presented in which it was set forth that petitioner claimed the land in controversy under the treaty of Guadalupe Hidalgo, and under a certain statute of the United States entitled "An act to ascertain and settle private land claims," approved March 3, 1851; that such lands were ceded to the grantor of petitioner by the Republic of Mexico in 1838; that such concession was confirmed by the government of the United States, and a patent therefor issued to the petitioner's grantor under the laws of the United States; that such concession and the patent thereon issued were attacked by the bill in equity alleging that the concession was not actually made until 1848; that on issue joined on that allegation, trial was had and plaintiffs below secured the entry of a judgment that theirs was the better title; that the decision of the Supreme Court of the State of California in the cause, was and is against a title and right claimed by petitioner under the treaty and the statute of the United States, approved March 3, 1851. The writ of error was allowed and the case came on on a motion to dismiss.

Mr. A. T. Britton, *Mr. A. B. Browne*, *Mr. J. H. McKune*, and *Mr. W. F. George* in support of the motion.

Mr. John Garber, *Mr. John H. Boalt*, and *Mr. Thomas B. Bishop* opposing.

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

It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a State in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented. *Eustis* v. *Bolles*, 150 U. S. 361. It is equally well settled that where our jurisdiction depends upon the denial by a state court of a title, right, privilege, or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed. *Schuyler Bank* v. *Bollong*, 150 U. S. 85, 88. We cannot find that the title or right referred to in argument was specially set up or claimed prior to its assertion in the petition for the writ of error, which forms no part of the record of the court below. *Clark* v. *Pennsylvania*, 128 U. S. 395.

But such special claim, if duly made, would have been unavailing, as the judgment rested upon the proposition that the grant under which the plaintiff in error deraigned title was simulated, and this was a ground sufficient to sustain it

involving no Federal question. The parties claimed under separate private land claims, originating, as alleged, under the Republic of Mexico, and separately confirmed, surveyed, and patented by the authorized officers of the United States.

The eighth article of the treaty of Guadalupe Hidalgo, 9 Stat. 922, 929, provided: "In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."

Upon the acquisition of the country, the rights of the inhabitants to their property were retained, and they were entitled by the law of nations to protection in them to the same extent as under the former government, which protection the treaty also secured. As remarked by Mr. Justice Field in *Beard* v. *Federy*, 3 Wall. 478, 492, "the obligation, to which the United States thus succeeded, was of course political in its character, and to be discharged in such a manner and on such terms as they might judge expedient. By the act of March 3, 1851, c. 41, they have declared the manner and the terms on which they will discharge this obligation." This act created a special tribunal for the investigation of claims to land and the determination of their validity as respected the United States. 9 Stat. 631, 634. By section fifteen it was enacted: "That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

While the confirmation of these claims might be conclusive as against the United States and those claiming under them, such confirmation and patent could have no effect upon the interests of third persons in respect of grants to them from the former sovereign. The state courts were open for the determination between individuals of the priority or validity

of conflicting titles under different grants from the same antecedent source, and the issue as to whether one of the two grants was forged or obtained by fraud did not involve the denial of a right or title set up under the treaty or the statute. The treaty extended no protection to a fraudulent claim, nor did proceedings under the statute to which each was respectively not a party or privy determine any such question as between these private parties, neither of whom claimed under the United States by title subsequent, but both of whom claimed under patents based upon Mexican grants. *Lynch* v. *Bernal*, 9 Wall. 315, 323. The case was the ordinary one of a contest in respect of a forged or fraudulent deed. In *Phillips* v. *Mound City Association*, 124 U. S. 605, 610, it was ruled that the adjudication by the highest court of a State that certain proceedings before a Mexican tribunal, prior to the treaty of Guadalupe Hidalgo, was insufficient to affect the partition of a tract of land before that time granted by the Mexican government, which grant was confirmed under the act of March 3, 1851, presented no Federal question; and Mr. Chief Justice Waite, delivering the opinion of the court, said: "Article VIII of the treaty protected all existing property rights within the limits of the ceded territory, but it neither created the rights nor defined them. Their existence was not made to depend on the Constitution, laws, or treaties of the United States. There was nothing done but to provide that if they did in fact exist under Mexican law, or by reason of the action of Mexican authorities, they should be protected. Neither was any provision made as to the way of determining their existence. All that was left by implication to the ordinary judicial tribunals. Any court, whether state or national, having jurisdiction of the parties and of the subject-matter of the action, was free to act in the premises." The case is in point and is decisive. *Martin* v. *Hunter*, 1 Wheat. 304, is not to the contrary, for there the plaintiff claimed under the treaty of 1783, and the state court decided against the title thus set up.

We have not deemed it necessary to examine the question raised under the practice in California allowing separate

appeals to lie from a judgment and from an order granting or refusing a new trial, and for the purposes of this case have treated the judgment of the Supreme Court, which not only affirmed the order of the Superior Court overruling the motion, but the judgment as well, as the last and final judgment in affirmance of a final decree in equity in the court below.

Writ of error dismissed.

POINTER *v.* UNITED STATES.

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

No. 759. Submitted October 19, 1893. — Decided January 22, 1894.

The provision in Rev. Stat. § 1024, that "when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts; and if two or more indictments are joined in such cases, the court may order them to be consolidated," leaves the court to determine whether, in a given case, a joinder of two or more offences in one indictment is consistent with settled principles of criminal law, and also free to compel the prosecution to elect under which count it will proceed, when it appears from the indictment or from the evidence, that the prisoner may be embarrassed in his defence, if that course be not pursued.

When an indictment contains two counts charging the commission of two murders, committed on the same day, in the same county and district, and with the same kind of instrument, the court is justified in forbearing at the beginning of the trial, and before the disclosure of the facts, to compel an election by the prosecutor between the two charges.

When, in the case of such joinder, it is developed in the course of the trial that the accused was not confounded in his defence by the union of the two offences in the same indictment, and that his substantial rights will not be prejudiced by the refusal of the court to compel the prosecutor to elect upon which of the two he will proceed, the court is justified in such refusal.

All the panel of jurors were examined as to their qualifications, and thirty-seven were found not liable to objection for cause. The defendant was

in court during this examination, was face to face with the jurors so examined, and had an opportunity to participate in the examination to such extent as was necessary for him to ascertain whether any of them were liable to objection for cause, and was at liberty to strike from the list of those thus found to be qualified the names of the persons, not exceeding twenty, whom he did not wish to serve on the jury. *Held*, that, the prisoner having been thus brought face to face with the jury during these proceedings, the proceedings were regular.

Lewis v. *United States*, 146 U. S. 376, adhered to and distinguished from this case.

The mode of designating and empanelling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions prescribed by Congress, and to such limitations as are recognized by settled principles of criminal law to be essential in securing impartial juries for the trial of offences.

A prisoner on trial in a Federal court under indictment for murder is not entitled as of right to have the government make its peremptory challenges before he makes his, although it is within the discretion of the court to direct it; and when the laws of the State in which the trial takes place prescribe such a course, the court may pursue that method or not as it pleases.

It is not indispensable to conviction for murder that the particular motive for taking the life of a human being shall be established by proof to the satisfaction of the jury.

When the record in a criminal case shows fully the crime for which the prisoner was indicted and all the proceedings thereon, through trial and verdict up to conviction and sentence, the failure in the sentence to name the crime for which the prisoner is sentenced may be supplied by reference to the rest of the record.

Whether a court of the United States, in the absence of authority conferred by statute, has the power, after passing sentence in a criminal case, to suspend its execution indefinitely, and until the court in its discretion removes such suspension; *Quære.*

The case is stated in the opinion.

Mr. S. B. Maxey and *Mr. Jacob C. Hodges* for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

Mr. Justice Harlan delivered the opinion of the court.

At the February term, 1892, of the Circuit Court of the United States for the Western District of Arkansas, the grand

jury returned an indictment against John Pointer for the crime of murder.

In the first count it was charged that the defendant, on the 25th of December, 1891, at the Choctaw Nation, in the Indian country, within the above district, did, with an axe, feloniously, wilfully, and of his malice aforethought, "strike, cut, penetrate, and wound" upon the head one Samuel E. Vandiveer, a white man and not an Indian, inflicting thereby a mortal wound, from which death instantly ensued. The second count charged the same offence, and differed from the first only in using the words "beat, bruise," in place of "cut, penetrate."

In the third count the defendant was charged, in the words of the first count, with having, in the same manner, on the 25th of December, 1891, feloniously, wilfully, and of his malice aforethought, at the Chocktaw Nation, in the Indian country, within the same district, killed and murdered one William D. Bolding, a white man and not an Indian. The fourth count differed from the third only as the second count differed from the first.

The defendant pleaded not guilty. On a subsequent day of the term he moved to quash the indictment upon various grounds, one of which was that it charged two distinct felonies. That motion was overruled.

The defendant called the attention of the court to the fact that he had been served some time before with a list of thirty-seven jurors, and, subsequently, with an additional list. He objected to that mode of serving lists of jurors by "piecemeal." To this the court replied: "In the first place, the list of thirty-seven was served; and it always happens that some of the original thirty-seven cannot serve, by reason of incompetency or sickness, and, out of abundance of precaution, we had the additional list served on the defendant, so that there will be a sufficient number served to go on with the trial of the case, without waiting for two days' service on the defendant when the case is called for trial. It is not a service by piecemeal, but service of additional talesmen."

The entire panel of the petit jury was called and the jurors were examined as to their qualifications, and, the journal entry

states, thirty-seven in number were found to be generally qualified under the law, that is, in the words of the bill of exceptions, "qualified to sit on this case." The defendant and the government were then furnished, each, with a list of the thirty-seven jurors thus selected, that they might make their respective challenges, twenty by the defendant and five by the government, the remaining first twelve names, not challenged, to constitute the trial jury. The defendant at the time objected to this mode of selecting a jury: "1st, because it was not according to the rule prescribed by the laws of the State of Arkansas; 2d, because it was not the rule practised by common law courts; 3d, because the defendant could not know the particular jurors before whom he would be tried until after his challenges, as guaranteed by the statutes of the United States, had been exhausted; 4th, because the government did not tender to the defendant the jury before whom he was to be tried, but tendered seventeen men instead of twelve, and made it impossible for defendant to know who the twelve men before whom he was to be tried were until after his right to challenge was ended."

At the time this objection was made the defendant's counsel saved an exception to the mode pursued in forming the jury, and said: "The point we make is, that the government must offer us the twelve men they want to try the case." The court observed: "They offered you thirty-seven." "We understand," counsel said, "but we want to save that point."

Before the case was opened to the jury for the government, the defendant moved that the district attorney be required to elect on which count of the indictment he would claim a conviction. That motion having been overruled, he was required to go to trial upon all the counts.

Upon the conclusion of the evidence the defendant renewed the motion that the government be required to elect upon which count of the indictment it would prosecute him. This motion was overruled. After an elaborate charge, by the court, the jury retired to consider their verdict, and returned into the court the following: "We, the jury, find the defendant John Pointer guilty of murder as charged in the first

count of the indictment. F. M. Barrick, Foreman. We, the jury, find the defendant John Pointer guilty of murder as charged in the third count of the indictment. F. M. Barrick, Foreman."

A motion for a new trial was made and overruled, and on the 30th of April, 1892, the court sentenced the defendant to suffer the punishment of death.

1. The motion to quash the indictment and the motion to require the government to elect upon which count it would try the defendant, present the question whether two distinct charges of murder can properly be embraced in one indictment.

It is provided by section 1024 of the Revised Statutes — following, substantially, the words of the act of February 26, 1853, c. 80, 10 Stat. 161, that "when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts; and if two or more indictments are joined in such cases, the court may order them to be consolidated."

Although the two murders in question are alleged to have been committed by the defendant on the same day, and in the same county and district, it does not affirmatively appear from the indictment that they were the result of one transaction, or that they were "connected together." But the indictment does show upon its face that the two offences are of the same class or grade of crimes, and subject to the same punishment. Could both crimes properly be joined in one indictment, in separate counts? The statute does not solve this question, but leaves the court to determine whether, in a given case, a joinder of two or more offences in one indictment against the same person is consistent with the settled principles of criminal law. If those principles permit the joinder of two or more felonies in the same indictment, in separate counts, then the joinder in question here was proper.

In *People* v. *Gates*, 13 Wend. 311, 322, 323, Chief Justice Savage, speaking for the court, said: "The first question arising upon the trial was whether the court should have compelled the district attorney to elect which count he would go upon. In *Young* v. *The King*, 3 T. R. 106, Buller, Justice, says that where different felonies are included in the same indictment, the judge may quash the indictment, lest it should confound the prisoner in his defence; but these are only matters of prudence or discretion. This court has recently said in the case of *People* v. *Rynders*, 12 Wend. 425, that there is no impropriety in trying a prisoner for different offences, at the same time, if the offences are charged in the same indictment and are of the same grade, and subject to the same punishment." Substantially to the same general effect are the decisions of other American courts: *United States* v. *O'Callahan*, 6 McLean, 596; *Kane* v. *People*, 8 Wend. 203, 211; *Calloway* v. *Commonwealth*, 5 Met. 532, 534; *Commonwealth* v. *Gillespie*, 7 S. & R. 469, 476; *Commonwealth* v. *Hills*, 10 Cush. 530, 533; *Campbell* v. *State*, 9 Yerger, 333, 335; *Burk* v. *State*, 2 H. & J. 426, 429; *Storrs* v. *State*, 3 Missouri, 7; *Baker* v. *State*, 4 Pike, 56, 58; *Wright* v. *State*, 4 Humph. 194, 196; *Johnson* v. *State*, 29 Alabama, 62, 67; *Weinzorpflin* v. *State*, 7 Blackford, 186, 188; *State* v. *Hazard*, 2 R. I. 474, 482; *Hoskins* v. *State*, 11 Georgia, 92, 95. See, also, *Logan* v. *United States*, 144 U. S. 263, 296.

The rule in England is not materially different. In 1 Chitty's Criminal Law, 252, 253, it is said: "In cases of felony, no more than one distinct offence or criminal transaction at one time should regularly be charged upon the prisoner in one indictment, because, if that should be shown to the court before plea, they will quash the indictment lest it should confound the prisoner in his defence, or prejudice him in his challenge to the jury; for he might object to a juryman's trying one of the charges, though he might have no reason so to do in the other; and if they do not discover it until afterwards, they may compel the prosecutor to elect on which charge he will proceed." "But," the author adds, "this is only matter of prudence and discretion which it rests with the judges to ex-

ercise." The rule is thus stated by Archbold (Crim. Pl. Pr. 95, c. 3, 8th ed.): "If different felonies or misdemeanors be stated in several counts of an indictment, no objection can be made to the indictment on that account in point of law. In cases of felony, indeed, the judge, in his discretion, may require the counsel for the prosecutor to select one of the felonies, and confine himself to that. This is what is technically termed putting the prosecutor to his election. But this practice has never been extended to misdemeanors." In Roscoe's Criminal Evidence, 8th Am. ed., 206, the author, after observing that there was no objection in point of law to inserting, in *separate* counts of the same indictment, several distinct felonies of the same degree and committed by the same offender, and that such joinder was not a ground for arrest of judgment, says: "In practice, where a prisoner was charged with several felonies in one indictment, and the party had pleaded, or the jury were charged, the court in its discretion would quash the indictment, or if not found out till after the jury were charged, would compel the prosecutor to elect on which charge he would proceed."

The question of election between distinct charges has always seemed to depend on the special circumstances of the case in which it has arisen. For instance, in *Regina* v. *Trueman*, 8 Car. & P. 727, which was an indictment for arson, containing five separate counts, each charging the firing of a house of a different owner, it appeared from the opening by the prosecutor that the houses in question constituted a row of adjoining houses, and that the fire was communicated to four of them from the one first set on fire. As the burning of each house was a distinct felony, the prisoner asked that the prosecutor be put to his election. Erskine, J., said: "As it is all one transaction, we must hear the evidence, and I do not see how, in the present stage of the proceedings, I can call on the prosecutor to elect. I shall take care that, as the case proceeds, the prisoner is not tried for more than one felony. The application for a prosecutor to elect is an application to the discretion of the judge, founded on the supposition that the case extends to more than one charge, and

may, therefore, be likely to embarrass the prisoner in his defence."

While recognizing as fundamental the principle that the court must not permit the defendant to be embarrassed in his defence by a multiplicity of charges embraced in one indictment and to be tried by one jury, and while conceding that regularly or usually an indictment should not include more than one felony, the authorities concur in holding that a joinder in one indictment, in separate counts, of different felonies, at least of the same class or grade, and subject to the same punishment, is not necessarily fatal to the indictment upon demurrer or upon motion to quash or on motion in arrest of judgment, and does not, in every case, by reason alone of such joinder, make it the duty of the court, upon motion of the accused, to compel the prosecutor to elect upon what one of the charges he will go to trial. The court is invested with such discretion as enables it to do justice between the government and the accused. If it be discovered at any time during a trial that the substantial rights of the accused may be prejudiced by a submission to the same jury of more than one distinct charge of felony among two or more of the same class, the court, according to the established principles of criminal law, can compel an election by the prosecutor. That discretion has not been taken away by section 1024 of the Revised Statutes. On the contrary, that section is consistent with the settled rule that the court, in its discretion, may compel an election when it appears from the indictment, or from the evidence, that the prisoner may be embarrassed in his defence, if that course be not pursued.

In the present case, we cannot say from anything on the face of the indictment that the court erred or abused its discretion in overruling the defendant's motion to quash the indictment or his motions, for an election by the government between the two charges of murder. The indictment showed that the two murders were committed on the same day, in the same county and district, and with the same kind of instrument. These facts alone justified the court in forbearing, at the beginning of the trial, and before the facts were disclosed,

to compel an election by the prosecutor between the two charges of murder. When, however, the evidence was concluded — indeed, as soon as the defendant testified in his own behalf — the wisdom of the course pursued by the court became manifest; for it appeared that the two murders were committed at the same place, on the same occasion, and under such circumstances, that the proof in respect to one necessarily threw light upon the other. The accused and the two men alleged to have been murdered were companions in travelling, and were together, in camp, at the place where the killing occurred. The killing of Vandiveer immediately preceded that of Bolding. There was such close connection between the two killings, in respect of time, place, and occasion, that it was difficult, if not impossible, to separate the proof of one charge from the proof of the other. It is, therefore, clear that the accused was not confounded in his defence by the union of the two offences of murder in the same indictment, and that his substantial rights were not prejudiced by the refusal of the court to compel the prosecutor to elect upon which of the two charges he would proceed.

It is appropriate to say that we lay no stress upon the circumstance that the motions in question were not made until after the defendant had pleaded not guilty. We have already said that, if in the progress of the trial it appeared that the accused might be embarrassed or confounded in his defence, by reason of being compelled to meet both charges of murder at the same time, and before the same jury, it was in the power of the court, at any time before the trial was concluded, to require the government to elect upon which charge it would seek a verdict. It is, also, proper to say that we have not regarded as part of the record that which appears in the brief of counsel for the defendant purporting to be an order made in the court below, on the 2d day of October, 1893, amendatory and explanatory of the order of March 23, 1892, relating to the empanelling of the jury that tried this case. The object of this amendatory order was to show more fully, than was done by the order of March 23, 1892, how the trial jury was empanelled. The motion of defendant to strike from the

record a copy of that order was unnecessary, because the government has not moved that it be treated as part of the record, and disclaims any purpose to ask that it shall be considered on this writ of error. Under these circumstances we have not considered whether the alleged order of October 2, 1893, was within the power of the court to make, nor have we based our conclusions upon anything contained in it.

2. The next question to be considered relates to the empanelling of the jury that tried the defendant. It is contended that the action of the court below in that respect was substantially that condemned in *Lewis* v. *United States*, 146 U. S. 370. But this contention cannot be sustained. The decision in that case proceeded upon the ground that it did not appear affirmatively from the record that the prisoner, when required to make his challenges, was brought face to face with the jurors whose names appeared upon the list of thirty-seven qualified jurymen that was furnished, by direction of the court, to the accused and the government. This court said: "It does, indeed, appear that the clerk called the entire panel of the petit jury, but it does not appear that when the jury answered to said call they were present so that they could be inspected by the prisoner; and it is evident that the process of challenging did not begin until after said call had been made. We do not think that the record affirmatively discloses that the prisoner and the jury were brought face to face at the time the challenges were made, but we think that a fair reading of the record leads to the opposite conclusion, and that the prisoner was not brought face to face with the jury until after the challenge had been made, and the selected jurors were brought into the box to be sworn. Thus reading the record, and holding as we do that making of challenges was an essential part of the trial, and that it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made, we are brought to the conclusion that the record discloses an error for which the judgment of the court must be reversed."

The record before us discloses a wholly different state of facts. It shows that the jurors were all examined as to their

qualifications, and that thirty-seven were found to be qualified to sit in the case, that is to say, not liable to objection for cause; that the defendant was in court during this examination, was face to face with the jurors so examined, and had an opportunity to participate in the examination to such extent as was necessary to ascertain whether any of them were liable to objection for cause; and that he was at liberty to strike from the list of those thus found to be qualified the names of those, not exceeding twenty, whom he did not wish to serve on the jury. If it did not appear affirmatively from the record of this case that the accused was, in fact, brought face to face with all the jurors who were examined as to their qualifications, and whose names were on the list of thirty-seven furnished to him, or that he was not present during such examination, or that they were not all in his presence when he exercised his right of challenge, the judgment would be reversed for the reasons stated in *Lewis* v. *United States*. We adhere to the decision in that case, as based upon sound principle.

The objection that the jurors were not selected in the particular mode prescribed by the laws of Arkansas, cannot be sustained. By section 800 of the Revised Statutes of the United States, it is provided, substantially, in the words of the act of July 20, 1840, c. 47, 5 Stat. 394, that jurors to serve in the courts of the United States, in the several States, shall have the same qualifications — subject to the provisions contained in other sections, and which have no bearing upon this case — and be entitled to the same exemptions, as jurors of the highest courts of law in the respective States may have, and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they are required to be "designated by ballot, lot, or otherwise, according to the mode of forming such juries then practised in such state court, so far as such mode may be practicable by the courts of the United States or the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and empanelling of juries, in substance, to the laws and usages relating to juries in the state courts, from time to time in such State." And by the act of June 30,

1879, c. 52, § 2, 21 Stat. 43, 44, all jurors, grand and petit, in any court of the United States, including those summoned during the session of the court, are required to be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in § 800 of the Revised Statutes, which names shall have been placed in the box by the clerk of court and a commissioner appointed by the judge, who shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and the commissioner each to place one name in said box alternately, without reference to party affiliations. That act further provides that nothing contained in it shall be construed to prevent any judge from ordering the names of jurors to be drawn from the boxes used by the state authorities in selecting juries in the highest courts of the State, and that "no person shall serve as a petit juror more than one term in any one year, and all juries to serve in courts after the passage of this act shall be drawn in conformity herewith: *Provided*, That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color, or previous condition of servitude."

There is nothing in these provisions sustaining the objection made to the mode in which the trial jury was formed. In respect to the qualifications and exemptions of jurors to serve in the courts of the United States, the state laws are controlling. But Congress has not made the laws and usages relating to the designation and empanelling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard. *United States* v. *Shackleford*, 18 How. 588; *United States* v. *Richardson*, 28 Fed. Rep. 61, 69. In the absence of such a rule or order, (and no such rule or order appears to have been made by the court below,) the mode of designating

and empanelling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed, and, also, to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offences.

There is no claim, in the present case, that the jurors for general service in the court below during the term at which the defendant was tried were not selected in accordance with law. The record shows that he was duly served with a full and complete list of the petit jurors selected and drawn by the jury commissioners of the court. Nor is it contended that the jurors who were examined as to their qualifications before the list of thirty-seven qualified jurors was furnished were not properly selected for general service during the term. The complaint by the accused is that the particular mode in which the jury that tried him was empanelled was illegal. It is true that mode was not in conformity with the statutes of Arkansas. But that objection, as already suggested, cannot avail the accused. So that the inquiry must be whether the jury was organized in violation of any settled principle of criminal law relating to the subject of challenges.

The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused. "The end of challenge," says Coke, "is to have an indifferent trial, and which is required by law; and to bar the party indicted of his lawful challenge is to bar him of a principal matter concerning his trial." 3 Inst. 27, c. 2. He may, if he chooses, peremptorily challenge "on his own dislike, without showing any cause;" he may exercise that right without reason or for no reason, arbitrarily and capriciously. Co. Lit. 156*b*; 4 Bl. Com. 353; *Lewis* v. *United States*, 146 U. S. 376. Any system for the empanelling of a jury that presents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned. And, therefore, he cannot be compelled to make a peremptory challenge until he has been brought face to face, in the presence of the court, with each proposed juror, and an opportunity

given for such inspection and examination of him as is required for the due administration of justice.

Were his rights in these respects impaired or their exercise embarrassed by what took place at the trial? We think not. The jurors legally summoned for service on the petit jury were, as we have seen, examined in his presence as to their qualifications, and thirty-seven were ascertained, upon such examination, to be qualified to sit in the case. Both the accused and the government had ample opportunity, as this examination progressed, to have any juror who was disqualified rejected altogether for cause. A list of all those found to be qualified under the law, and not subject to challenge for cause, was furnished to the accused and to the government, each side being required to make their challenges at the same time, and having notice from the court that the first twelve unchallenged would constitute the jury for the trial of the case. It is apparent, from the record, that the persons named in the list so furnished were all brought face to face with the prisoner before he was directed to make, and while he was making, his peremptory challenges.

Was the prisoner entitled, of right, to have the government make its peremptory challenges first, that he might be informed, before making his challenges, what names had been stricken from the list by the prosecutor? In some jurisdictions it is required by statute that the challenge to the juror shall be made by the State before he is passed to the defendant for rejection or acceptance. Such is the law of Arkansas, and the court below was at liberty to pursue that method. Mansfield's Digest, § 2242. And such is regarded by some courts as the better practice, even where no particular mode of challenge is prescribed by statute. *State* v. *Cummings*, 5 La. Ann. 330, 332. But as no such provision is embodied in any act of Congress, it was not bound by any settled rule of criminal law to pursue the particular method required by the local law. The uniform practice in England, as appears from the observations of Mr. Justice Abbott, afterwards Lord Tenterden, in *Brandeth's case*, 32 Howell's St. Tr. 755, was to require the accused to exercise his right of challenge before

calling upon the government. He said: "Having attended, I believe, more trials of this kind than any other of the judges, I would state that the uniform practice has been that the juryman was presented to the prisoner or his counsel, that they might have a view of his person; then the officer of the court looked first to the counsel for the prisoner to know whether they wished to challenge him; he then turned to the counsel for the crown to know whether they challenged him." p. 771. In the same case, Lord Chief Baron Richards said that he conceived it to be clear that "it is according to the practice of the courts that the prisoner should first declare his resolution as to challenging." p. 774. Mr. Justice Dallas expressed his concurrence in those views. pp. 774, 775. But the general rule is, that where the subject is not controlled by statute, the order in which peremptory challenges shall be exercised is in the discretion of the court. *Commonwealth* v. *Piper*, 120 Mass. 185; *Turpin* v. *State*, 55 Maryland, 464; *Jones* v. *State*, 2 Blackford, 475; *State* v. *Hays*, 23 Missouri, 287; *State* v. *Pike*, 49 N. H. 406; *State* v. *Shelledy*, 8 Iowa, 477, 480, 504; *State* v. *Boatwright*, 10 Rich. (Law), 407; *Shufflin* v. *State*, 20 Ohio St. 233.

In some jurisdictions the mode pursued in the challenging of jurors is for the accused and the government to make their peremptory challenges as each juror, previously ascertained to be qualified and not subject to be challenged for cause, is presented for challenge or acceptance. But it is not essential that this mode should be adopted. In *Regina* v. *Frost*, 9 Car. & P. 129, 137, (1839,) the names of jurors were taken from the ballot-box, and each was sworn on the *voir dire* as to his qualifications before being sworn to try. When the government peremptorily challenged one who had been sworn on the *voir dire* as to his qualifications, it was objected that the challenge came too late, because the juror had taken the book into his hand to be sworn to try. In disposing of this objection Chief Justice Tindal said: "The rule is that challenges must be made as the jurors come to the book and before they are sworn. The moment the oath is begun it is too late, and the oath is begun by the juror taking the book,

having been directed by the officer of the court to do so. If the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby." These observations, it is apparent, had reference only to the question whether a peremptory challenge could be permitted after the juror had, in fact, taken the book into his hand for the purpose of being sworn to try. At most, in connection with the report of the case, they tend to show that the practice in England, as in some of the States, was to have the question of peremptory challenge as to each juror, sworn on his *voir dire* and found to be free from legal objection, determined as to him before another juror is examined as to his qualifications. But there is no suggestion by any of the judges in Frost's case that that mode was the only one that could be pursued without embarrassing the accused in the exercise of his right of challenge. The authority of the Circuit Courts of the United States to deal with the subject of empanelling juries in criminal cases, by rules of their own, was recognized in *Lewis* v. *United States*, subject to the condition that such rules must be adapted to secure all the rights of the accused. 146 U. S. 379.

We cannot say that the mode pursued in the court below, although different from that prescribed by the laws of Arkansas, was in derogation of the right of peremptory challenge belonging to the accused. He was given, by the statute, the right of peremptorily challenging twenty jurors. That right was accorded to him. Being required to make all of his peremptory challenges at one time, he was entitled to have a full list of jurors upon which appeared the names of such as had been examined under the direction of the court and in his presence, and found to be qualified to sit on the case. Such a list was furnished to him, and he was at liberty to strike from it the whole number allowed by the statute, with knowledge that the first twelve on the list, not challenged by either side, would constitute the jury. And after it was ascertained, in this mode, who would constitute the trial jury, it was within the discretion of the court to permit them to be again examined before being sworn to try. But no such course was sug-

gested, and the record discloses no reason why a further examination was necessary in order to secure an impartial jury. The right of peremptory challenge, this court said, in *United States* v. *Marchant*, 12 Wheat. 480, 482, and in *Hayes* v. *Missouri*, 120 U. S. 68, 71, is not of itself a right to select, but a right to reject, jurors.

It is true that, under the method pursued in this case, it might occur that the defendant would strike from the list the same persons stricken off by the government. But that circumstance does not change the fact that the accused was at liberty to exclude from the jury all, to the number of twenty, who, for any reason, or without reason, were objectionable to him. No injury was done if the government united with him in excluding particular persons from the jury. He was not entitled, of right, to know, in advance, what jurors would be excluded by the government in the exercise of its right of peremptory challenge. He was only entitled, of right, to strike the names of twenty from the list of impartial jurymen furnished him by the court. If upon that list appeared the name of one who was subject to legal objection, the facts in respect to that juror should have been presented in such form that they could be passed upon by this court. But it does not appear that any objection of that character was made, or could have been made, to any of the thirty-seven jurors found, upon examination, to be qualified.

Thus, in our opinion, the essential right of challenge to which the defendant was entitled was fully recognized. And there is no reason to suppose that he was not tried by an impartial jury. The objection that the government should have tendered to him the twelve jurors whom it wished to try the case, or that he was entitled to know before making his challenges the names of the jurors by whom it was proposed to try him, must mean that the government should have been required to exhaust all of its peremptory challenges before he peremptorily challenged any juror. This objection is unsupported by the authorities, and cannot be sustained upon any sound principle.

3. We come now to examine some of the exceptions taken

by the defendant to the charge of the court. Among other observations made by the court to the jury were these: "At this point it becomes necessary for us to ascertain what is meant by these expressions, wilfully and with malice aforethought, because they are the characteristics that enter into the crime of murder; they must exist as a part of that crime; there can be no crime of this kind without them. It is necessary, therefore, for us to understand correctly, and to understand with precision and accuracy, exactly what the law means by them, because they have a legal meaning, they have a meaning that is peculiar to the law, and it is by the application of that meaning to the facts of the case, or the truth of the case, that you, as intelligent, impartial, and dispassionate citizens, are able to arrive at a just and correct and honest conclusion. In finding their existence, it is not necessary that the proof should show that a motive for the act done existed."

The defendant insists that the reverse of this was the law; that proof of malice ought always to show some motive for the homicide. What was in the mind of the court, when the above observations were made, is apparent by the following clauses of the charge that immediately follow those to which exception was taken: "There is always a motive for every human act that is done by an individual who is sane, but sometimes it is undiscoverable; sometimes it cannot be fathomed; sometimes because of its inadequate character, because of its utter insignificant nature compared with a great offence of that kind, honest men, whose minds and hearts have not been corroded by the commission of crime, overlook it, they pass it by. The law does not require impossibilities. The law recognizes that the cause of the killing is sometimes so hidden in the mind and breast of the party who killed, that it cannot be fathomed, and as it does not require impossibilities, it does not require the jury to find it. Yet, if they do find it, it simply becomes an item of evidence in the case, which is only evidentiary at best — that is, it is only an item of evidence going to show whether a particular party may have committed an act, and sometimes going to show the character-

istics of that act; the law says, however, that wherever motive can be found, though it is not required to be found, it is the duty of the jury to find it, though when they do find it they are not to expect that it will ever be adequate; that it will be in proportion to the act done, because there is nothing on this earth that is in proportion to the crime of wilfully and deliberately taking human life; there is no motive adequate to it; there is nothing that can be weighed upon the one side of the scale with the crime of deliberate and wicked murder upon the other side of it, and be pronounced by honest men as equal in weight to the crime committed. The law says that motive need not be proportionate to the heinousness of the crime."

We do not perceive any substantial error of law in what the court said upon the subject of motive. While, as stated, a motive exists for every act done by a person of sound mind, it is not indispensable to conviction that the particular motive for taking the life of a human being shall be established by proof to the satisfaction of the jury. The absence of evidence suggesting a motive for the commission of the crime charged is a circumstance in favor of the accused, to be given such weight as the jury deems proper; but proof of motive is never indispensable to conviction. 1 Bishop's Cr. Pro. § 1107, and authorities there cited. Malice may be presumed from the mere fact of killing, nothing further being shown. *Commonwealth* v. *York*, 9 Met. 93, 114; *Commonwealth* v. *Hawkins*, 3 Gray, 463; 1 Greenl. Ev. § 34. The charge being murder, if the facts constituting that offence were established beyond a reasonable doubt, it was the duty of the jury to have found the defendant guilty as charged, although it may have been impossible to discover any adequate motive for the killing. As said in *Clifton* v. *State*, 73 Alabama, 473: "The presence or absence of a motive for the commission of the offence charged is always a legitimate subject of inquiry, . . . but it is not in any case indispensable to a conviction. It is not an element of the burden of proof the law devolves upon the prosecution whether the agency or connection of the accused is manifested by direct and positive evidence or only by circumstantial evidence, that a motive or inducement to commit

the offence should be proved. The criminal act and the connection of the accused with it being proved beyond a reasonable doubt, the act itself furnishes the evidence that to its perpetration there was some cause or influence moving the mind." So in *McLain* v. *Commonwealth*, 99 Penn. St. 86, 99: "It was further urged that no adequate motive was shown to induce the accused to commit the crime charged. The court well said the Commonwealth was not bound to establish an adequate motive for the alleged crime, and declared, in the words of this court, 'the fact of murder being established, the inability to discover the motive does not disprove the crime.'"

There was evidence before the jury tending to show that the murders in question were committed in order that the defendant might appropriate certain property of inconsiderable value in the possession of the murdered men. Under the circumstances, the inquiry would naturally arise in the minds of jurors whether murder would be committed for reasons so trivial. The court, after observing that all persons were apt to act on inadequate motives, and that the history of crime showed that murders were generally committed from motives comparatively trivial, said: "So also for the smallest plunder murders have been deliberately executed. We have an illustration of this in the trial of Muller, in England, in 1873, for the murder of Briggs. Briggs' watch was seen by Muller in a railway car; Briggs was asleep; the watch was exposed, and Muller killed Briggs by a sudden attack and succeeded in making his escape; he was afterwards arrested, convicted on circumstantial evidence, and before execution confessed the crime with the murder. Until the confession, the justice of the conviction was largely criticised on the ground that the stealing of a watch was not a motive that could explain a murder so bold, so cruel, and the chances of exposure so great." But the court added in the same connection: "But the reply to this is obvious. Crime is rarely logical. Under a government where the laws are executed with ordinary certainty, all crime is a blunder, as well as a wrong. If we should hold that no crime is to be punished except such as is rational, then there would be no crime to be punished, for no crime can be found

that is rational; the motive is never correlative to the crime, never accurately proportioned to it. Nor does this apply solely to the very poor; very rich men have been known to defraud others even of trifles, to forge wills, to kidnap and kill so that an inheritance might be theirs. When a powerful passion seeks gratification it is no extenuation that the act is illogical, for when passion is once allowed to operate, reason loosens its restraints."

Reference was also made to a portion of a charge delivered by a judge in New York upon the subject of motive for the commission of crime, in which it was said that a small sum of money, a word spoken in anger, an insult, wrongs, real or imaginary, revenge, jealousy, hatred, envy, and malice, often lead to the commission of the crime of murder. In that connection, the court below said: "Therefore, in finding the existence of these elements that go to characterize a killing so as to make it murder, you may find their existence, though you do not find any motive."

The defendant excepted to that part of the charge referring to the circumstances of the murder case in England as an exaggerated statement of another case in a manner well calculated to influence the minds of the jurors against the prisoner and to convict without sufficient evidence and hope for a confession from the prisoner to prove the correctness of their verdict. We do not think the exception well founded. Although the practice of alluding to the details of other cases given in the books, while a jury is being charged upon the facts of the particular case on trial, is by no means to be commended, we cannot say that the jury in this case were misled by the reference made to what appeared, or was said by judges, in other cases. It must be assumed, if the contrary does not appear, that jurors understand that these allusions to other cases are made only for purposes of illustration. It is impracticable to prescribe the particular mode in which a judge shall express to jurors his views of the case about to be determined by their verdict. That must, of necessity, be left to his discretion. If in charging a jury a judge chooses to employ the words of others in order to convey the exact

thought in his own mind, or if he prefers, for purposes merely of illustration, to read from the opinions or judgments of other courts, we cannot hold that such practice, although not to be encouraged, is, in the absence of a statute prescribing a different rule, ground for the reversal of the judgment of the trial court. If a judgment should in any case be reversed upon such ground, it should only be where it appears that the jury has been misled by the particular mode in which they were charged to the prejudice of the substantial rights of the accused.

4. It is said that the record fails to show that all things were done in the court below that were necessary to be done before the sentence of death was pronounced, in this: First, the record nowhere states that the verdict was received and recorded; second, there is no record of any judgment declaring plaintiff in error to be guilty of murder.

In respect to the first of these objections it is sufficient to say that it appears from the journal entries of the trial, as well as from the bill of exceptions, that the verdicts of guilty on the first and third counts, respectively, were returned into and were recorded by the court, in the presence of the accused; whereupon the jury were discharged from the further consideration of the case, and the defendant remanded to the custody of the marshal to await the final sentence.

The second of the objections above stated is based upon the following order, under the caption of the United States *v.* John Pointer, Indictment for Murder, No. 37, and made April 30, 1892:

"On motion of William H. H. Clayton, Esq., attorney for the Western District of Arkansas, the said defendant John Pointer was brought to the bar of this court in custody of the marshal of said district, and it being demanded of him what he has to say or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause on the 26th day of March, 1892, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

"Whereupon the premises being seen, and by the court well

and sufficiently understood, it is considered by the court that the said marshal of the district aforesaid cause the said John Pointer to be taken hence and him, the said John Pointer, safely and securely keep from the date hereof until Tuesday, the 28th day of June, A.D. 1892, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said John Pointer to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Tuesday, the said [28th] day of June, in the year of our Lord one thousand eight hundred and ninety-two, cause the said John Pointer to be hanged by the neck until he is dead.

"And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

"And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same."

The specific objection to the sentence is that it does not state the offence of which the defendant was found guilty, or that the defendant was guilty of any named crime. This objection is technical, rather than substantial. The record of the trial preceding the sentence shows an indictment returned into court by grand jurors duly selected, empanelled, sworn, and charged to inquire in and for the body of the Western District of Arkansas, in which, in separate counts, they, upon their oaths, charge the defendant with having within that district on a named day killed and murdered Samuel E. Vandiveer and William D. Bolding. The indictment itself is given, and it appears that the defendant was brought into court upon it; that he was arraigned and pleaded not guilty to the charges contained in it; that he was tried upon the same indictment before a petit jury lawfully empanelled and sworn;

and that a verdict of guilty of murder as charged in the first and third counts, respectively, of that indictment was returned into court March 26, 1892, and was received and incorporated into the record of the trial. When, therefore, the defendant was brought into court and asked what he had to say "why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause, on the 26th day of March, 1892, shall not now be pronounced against him," all doubt as to the offence of which he was found guilty, and on account of which he was sentenced to be hanged, is removed. The sentence itself is in the record, and the record shows everything necessary to justify the punishment inflicted. While the record of a criminal case must state what will affirmatively show the offence, the steps, without which the sentence cannot be good, and the sentence itself, "all parts of the record are to be interpreted together, effect being given to all, if possible, and a deficiency at one place may be supplied by what appears in another." 1 Bishop's Cr. Pro. §§ 1347, 1348. For these reasons the objection last stated is not sustained.

5. Some reference should be made to an order entered on the same day, but after the sentence was passed, in these words: "Ordered by the court, that sentence be suspended on the third count of the indictment, on which the defendant was tried and convicted by the jury for the killing of William D. Bolding." The record does not state the grounds upon which this order was based. Its object, we suppose, was to restrict the sentence to one of the two charges of murder embraced in the indictment, although the defendant had been tried and found guilty upon both. Be this as it may, that order constitutes no reason in itself for the reversal of the judgment. It did not prejudice the substantial rights of the accused, because it did not prevent this court, upon the present writ of error, from reversing the judgment in its application to all the charges contained in the indictment. This court having reached the conclusion that the judgment must be affirmed, any question as to the propriety or legality of the order suspending the sentence as to the court charging the murder of Bolding, is immaterial. It is necessary, however, in order to

avoid any misapprehension, to say that this court must not be understood as expressing any opinion upon the question suggested by the words of that order, whether a court of the United States, in the absence of authority conferred by statute, has the power, after passing sentence in a criminal case, to suspend its execution indefinitely, and until the court in its discretion removes such suspension. A decision of that question is not necessary to the disposition of this case upon its merits.

There are assignments of error other than those above examined, but they are without merit, and, therefore, need not be noticed in this opinion.

We perceive no error in the record to the prejudice of the substantial rights of the plaintiff in error.

Judgment affirmed.

GARNER *v.* SECOND NATIONAL BANK OF PROVIDENCE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

No. 43. Argued October 19, 1893. — Decided January 22, 1894.

In Rhode Island a married woman holds the real and personal estate, owned by her at the time of her marriage, to her sole and separate use after marriage, and may permit her husband to manage it without affecting that use; and if the husband, without her knowledge and consent, invests a part of her property in real estate, taking title in his own name, and, on this coming to her knowledge after a lapse of time, she requires it to be conveyed to her, and such conveyance is made after a further lapse of time, the husband being at the time of the conveyance insolvent, her equities in the estate may be regarded as superior to those of the husband's creditors, if it does not further appear that the creditors were induced to regard him as the owner of it, by reason of representations to that effect, either by him or by her.

This appeal brings up for review a final decree dismissing a bill filed to obtain an injunction against the appellees, the Second National Bank, a national banking association having

its place of business in Providence, Rhode Island, Christopher A. Shippee, and Samuel W. K. Allen, from selling and conveying by deed or otherwise certain real property situated in that State, and from all attempts by actions at law or otherwise to oust Mary J. Garner, formerly Mary J. Graeffe, one of the appellants, from the peaceable and quiet enjoyment and possession of such property.

The case made by the bill is, substantially, as follows: In the winter of 1879 and 1880 Albert J. Graeffe, of New York, conceived the purpose of forming a joint stock company for manufacturing textile fabrics of wool and cotton. Having heard that there was certain mill property in Warwick, Rhode Island, that could be purchased and utilized at a moderate expense, he proposed to his wife, Mary J. Graeffe, who had considerable estate in her own right, that this mill property, together with other real estate and water rights adjacent and appurtenant thereto, known as the American Mills estate, be purchased, and equipped for manufacturing purposes. The husband represented to the wife, at the time, that the property could be rented to a company he proposed to form, and that such an investment of her money would be safe and remunerative. When the investment was proposed, the husband was the agent and trustee of the wife, having the care, custody, and management of her property. The wife, confiding in his representations, as well as in his judgment and good intentions, gave her assent to the proposed investment. But she expressly directed — and it was so understood between herself and her husband — that the property when purchased should be conveyed to her in fee and appear upon record in her individual name. The proposed purchase was made, the amount due for each parcel being paid out of the money of the wife which was in the hands of the husband as her agent and trustee, and was her sole and separate property. Contrary to the understanding with the wife, without her knowledge or consent, and in violation of her express directions, the husband caused the deeds and instruments of writing to be made out in his name, as if the fee was absolutely vested in him. In conformity with the original purpose, the property was equipped

for manufacturing purposes, the money expended to that end belonging to the wife. The result was that $48,910.94 of her money, in the hands of the husband, were expended in the purchase and equipping of this property. When the deeds were executed the wife believed that the property had been conveyed to her as her sole and separate estate, in accordance with her directions to, and understanding with, her husband, at the time of the proposed investment. She never heard that this understanding had been violated, until the summer of 1880, when she ascertained from her husband that the property stood in his name. She thereupon requested him to have it conveyed to her, without further delay. This he promised, but neglected, at the time, to do.

On the 16th of October, 1880, the premises having been put in condition for manufacturing purposes, were leased for the term of four years to the American Mills Company, a New York corporation, of which the husband was a stockholder, and the treasurer. In February, 1881, the company became financially embarrassed. Its condition having become known to William H. Garner, a brother of Mrs. Graeffe, he informed her that, in case of its insolvency, the property, standing in her husband's name, was liable to be taken for its debts. The husband was thereupon again requested by the wife to convey the property to her. In accordance with that request, he conveyed to Garner, by warranty deed, dated March 1, 1881, and recorded March 3, 1881. The latter, by deed, dated March 1, 1881, and recorded August 13, 1881, conveyed to Mrs. Graeffe. The consideration recited in each of these deeds was $48,910.94, the amount of the wife's money that had been expended by the husband in and about the property.

An execution was issued November 7, 1881, upon a judgment rendered in one of the courts of Rhode Island, in favor of the Fourth National Bank of New York against Albert J. Graeffe. This execution was levied November 15, 1881, on all the estate, right, title, interest, and property he had, on March 5, 1881, (the date of the attachment in the case,) in and to the property described in the deeds to him, Garner, and Mrs. Graeffe. At a sale at public auction under this execution, the

Statement of the Case.

interest of Albert J. Graeffe, so levied upon, was purchased, February 28, 1882, by Christopher H. Shippee, for $499, and he received a deed from the sheriff. Mrs. Graeffe, by her attorney, forbade the sale, and gave notice that the property was her sole and separate estate. Subsequently, Shippee, by quit-claim deed, conveyed an undivided half of the estate purchased by him, as above stated, to Samuel W. K. Allen, one of the appellees.

On the 7th day of January, 1882, at public sale, under an execution upon a judgment rendered in one of the courts of Rhode Island, in favor of the Second National Bank of Providence, that bank became the purchaser, for $525, of all the right, title, and interest of Albert J. Graeffe in the above real estate and premises, on the 16th of March, 1881, and received a deed from the sheriff.

The Second National Bank, Shippee, and Allen having threatened to eject Mrs. Graeffe from the possession and enjoyment of the property, this suit was brought against them in the name of Graeffe and wife. A part of the relief sought was a decree cancelling the deeds under which they respectively claimed, and thereby removing the cloud created by them upon her title.

The answers controvert all the allegations of the bill that tend to show an equity in favor of Mrs. Graeffe as against the judgment creditors of her husband. The special grounds of defence were sustained by the court below, and are sufficiently indicated in the following extract from the opinion of the Circuit Judge, made part of the record:

"This is a case as disclosed by the evidence where a wife for years allowed her husband to do as he pleased with her property, calling him to no account whatever, and where no action is taken by her until he has become insolvent, and is about to make an assignment. Property is permitted to stand in his name for months after his wife has knowledge of the actual condition of the title, and credit is given the husband on the faith that he is the real owner. Where a wife thus permits her money or property to pass into her husband's hands and possession to manage as he sees fit, without any

promise by him to repay it, and persons are, for this reason, induced to give credit to the husband, it neither becomes impressed with a trust in her favor, nor does she become his creditor in respect of it so as to sustain a conveyance by him to her upon the eve of his insolvency as against his general creditors" — citing *Humes* v. *Scruggs*, 94 U. S. 22; *Wortman* v. *Price*, 47 Illinois, 22; *Hockett* v. *Bailey*, 86 Illinois, 74; *Besson* v. *Eveland*, 26 N. J. Eq., (11 C. E. Green,) 468.

Shippee and Allen by cross-bill asked a decree cancelling the deeds made to Garner and Mrs. Graeffe as clouds upon their title. By the final decree the original bill was dismissed, and the relief asked by the cross-bill was given.

It is stated in the brief of appellant's counsel that, pending the action below, she obtained a divorce *a vinculo* from her husband, and by a judgment of the Supreme Court of New York had resumed her maiden name.

Mr. Alexander Thain for appellant.

Mr. J. Langdon Ward for appellees.

The bill proceeds solely on the theory of a trust in A. J. Graeffe for his wife's benefit, and the consequent validity of the conveyance to her. The bill must fail therefore, if no trust be established.

It is true that in the answer to the cross-bill the complainants in the original bill have shifted their ground and claim that Graeffe was a debtor to his wife and that the conveyance to her was a conveyance in payment of the debt owing from him to her, and that in thus preferring one creditor over another Graeffe simply did that which the law permitted him to do. It is respectfully submitted, however, that in so far as the affirmative relief sought by the bill is concerned, this allegation, even if true, would be of no avail since nothing of the kind is alleged in the bill.

But were this otherwise, and were it proved that Mrs. Graeffe's money had been invested in this estate in such way as to be within the allegations of this bill, it would furnish no ground for relief upon it, for:

Opinion of the Court.

1. It is well settled that where a wife permits her money or property to pass into her husband's hands and possession to manage as he sees fit, without any promise by him to repay it, it neither becomes impressed with a trust in her favor, nor does she become his creditor in respect of it so as to justify and sustain as against his general creditors a conveyance by him to her upon the eve of his insolvency, in alleged repayment of it. *Humes* v. *Scruggs*, 94 U. S. 22; *Wortman* v. *Price*, 47 Illinois, 22; *Wilson* v. *Loomis*, 55 Illinois, 352; *Patton* v. *Gates*, 67 Illinois, 164; *Hockett* v. *Bailey*, 86 Illinois, 74; *Miller* v. *Payne*, 4 Ill. App. 112; *Grover &c. Sewing Machine Co.* v. *Radcliff*, 63 Maryland, 496; *Besson* v. *Eveland*, 26 N. J. Eq., (11 C. E. Green,) 468; *Roy* v. *McPherson*, 11 Nebraska, 197.

2. It being admitted that this estate in question was purchased with Mrs. Graeffe's full knowledge and consent at the time, for the purpose of enabling her husband to carry on business upon and with it, and that she learned as early as August, 1881, that the title stood in his name, but allowed it so to remain, and these debts to be contracted in that business until he became utterly insolvent, she is estopped from now claiming the estate as against these creditors. Their equities are superior to hers. *Sexton* v. *Wheaton*, 8 Wheat. 240; *Spaulding* v. *Drew*, 55 Vermont, 253; *Knowlton* v. *Mish*, 17 Fed. Rep. 198.

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

In the court below it was contended in behalf of the plaintiffs that even if there were no agreement that the property in question should be taken in the name of the wife, there was nothing illegal or inequitable in preferring her to the amount of the husband's debt to her. Upon this point the court said: "The question of the legality of a preference under Rhode Island laws does not arise in this case; for our decision rests upon the principle that Mrs. Graeffe, by her own conduct or acts, by what she permitted to be done, or neglected to do,

is estopped in a court of equity from claiming this estate as against the general creditors of her husband."

We are of opinion, after a careful examination of the evidence, that there was nothing in the conduct or acts of Mrs. Graeffe that precluded the court from granting the relief sought by her. The case made by the bill was in all material particulars sustained by the proof. We do not see how this conclusion can be avoided, except by disregarding altogether the testimony of Mrs. Graeffe and her husband. And that we do not feel at liberty to do. In our judgment what they have said under oath touching the vital issues in the case must be taken as substantially true.

Mrs. Graeffe inherited from her father and uncle property, principally real estate, worth from $100,000 to $125,000. When the estates of the uncle and father were settled up, the moneys and securities belonging to her came into the husband's hands under a power of attorney, which authorized him to receive them for her. There is no claim, as under the evidence there could not be, that the wife made a *gift* of this property to her husband. On the contrary, it remained in his hands to be controlled for her, although he was allowed a large discretion in its management. The husband informed his wife that she could buy the property in question, stating that it could be purchased cheaply, and that a very fair return could be derived from it if improved and leased to the Mills Company. When it was concluded to make the purchase, the husband told the wife that he "would buy the property for her," and that "the title was to be vested in her." It is beyond question that she relied upon his assurance that the property would be secured to her. She certainly understood at the time, as was quite natural, that it was to be her property. The purchase was made in March, 1880. The husband, without the knowledge of the wife, and in violation of the assurances he had given her, took the title in his own name. The price paid was about $6000. Immediately after the purchase improvements costing about $40,000 were put upon the premises. The moneys paid for the property, and that expended for its improvement, belonged entirely to Mrs. Graeffe.

In August, 1880, the improvements being then in progress, she discovered, in the course of a conversation with her husband, that the property stood in his name. She grew excited about the matter, and insisted upon his making a conveyance to her at once. This he agreed to do. He promised that he would attend to it at once, but neglected to perform his promise. To these facts the husband testified, and we are not at liberty, upon a close scrutiny of the evidence, to doubt the substantial accuracy of his statements. Other testimony by him was to the following effect: "Q. After this interview in August, and before the conveyance, on the first of March following, had you any conversation with Mrs. Graeffe in which she was informed as to where the required title of the property was? A. What do you mean by that? Q. How did she know that it had not been conveyed to her? A. She questioned me from time to time and I was forced to make acknowledgments to her that I had not as yet attended to the transfer. Q. When did she first question you, after the interview of August, 1880? A. In that fall of 1880 and also in the spring. Q. When was it that you first told her that you had not transferred the title to her? A. August, 1880. Q. And then you told her you were going to do it? A. Yes. Q. After that when did you tell her you had not; or, did you tell her anything about it? A. Yes; I told her later, with a promise to do it, and failed to do it. Q. When next, prior to March first, 1881? A. Some time in February; I cannot tell the date, but it was at the moment when I was borrowing money from her to pay some drafts that were maturing. She then again learned that I had not made this transfer. I told her then, and she was very much excited about it."

Mrs. Graeffe testified to the following effect: "Q. At the time he had these conversations with you, was there anything said as to who was to take the property? A. I understood that it was to be my property. Of course, I understood it was to be my property. Q. Did you learn from time to time that purchase had been made of the property? A. Yes, Graeffe told me, and told me the price he could get, but I don't remember the figures at all. Q. What did you say

about purchasing? A. I left it to him. Q. What did you say to him? A. I expected that he would purchase, and talked to that effect. Q. When did you first learn that the title to the property was not in your name? A. About August of that year, I think. I think it was some time during the summer and we were talking about the property, and he gave me to understand it was not in my name. I then insisted upon it, and he said it should be put in my name. I know we had quite a little controversy at the time. He said if that would satisfy me, it should be put in my name. Q. When next did you have any conversation with Mr. Graeffe after this interview in August on the subject of the title to this property? A. I don't think we ever spoke of it again to speak of the title until he was about to fail. About that time I spoke to my brother about it, and that was the first I knew that it had not been put in my name. Q. What did you say to your brother? A. I asked him to look out for my interest, and get my money. He asked if it was mine. I said I thought it was. I then spoke to Graeffe, and he said it had not been put in my name. My brother said immediately it must be done. I think it was he who took charge of the affair. Q. Immediately after this conversation, the transfer was made? A. Yes, I think it was the next day — just as soon as I could possibly make arrangements."

The brother of Mrs. Graeffe here referred to was William H. Garner, to whom the property was conveyed by Graeffe, and by whom it was immediately conveyed to the wife. He testified: "Some few days before the actual transfer Mrs. Graeffe, my sister, told me of the fact that this property belonging to her had been transferred to her husband, and asked me to insist on its being retransferred to her, and I did so." Under the deed from her brother, Mrs. Graeffe claims the property as against those who obtained sheriff's deeds under attachments issued and levied after the title was vested in her. These attachments, we have seen, were levied on the right, title, and interest of the husband in the property.

The proof fails to show that Mrs. Graeffe ever stated to any one that her husband owned the property, or that any

one in her presence ever spoke of him as its owner. There is some conflict in the evidence as to whether the husband represented to any creditor that he owned the property. He denies that he ever did, and we do not think the evidence authorizes us to assume that he made or intended to make any representations of that character. In any event, it must be taken that his creditors were not induced to regard him as the owner of the property by reason of any representations to that effect by, or with the knowledge of, Mrs. Graeffe.

The only omission charged against her in respect to the property is that she relied upon her husband's assurance that it would be put in her name, and did not, immediately upon learning in August, 1880, that he had deceived her, take steps to have the property conveyed to her, and thereby place herself before the public as holding the legal title. But is that omission sufficient to justify a court of equity in denying the relief asked? Let this question be examined first with reference to the law of the State where these transactions occurred.

It is provided by the statutes of Rhode Island that "the real estate, chattels real and personal estate, which are the property of any woman before marriage, or which may become the property of any woman after marriage, or which may be acquired by her own industry, shall be absolutely secured to her sole and separate use; neither the same nor the rents, profits, or income of the same, nor any part thereof, shall be liable to be attached or in any way taken for the debts of the husband, either before or after his death, and upon the death of the husband, in the lifetime of the wife, shall be and remain her sole and separate property;" further, "in case of the sale of any such property, the proceeds of such sale or any part of the same may be invested in the name of the wife, in any property, and be secured to and holden by the wife in the same manner and with the same rights and effect as the property sold." Pub. Stat. R. I. c. 166, §§ 1 and 2, p. 422. And, in that State, preferences of *bona fide* debts are permitted, except when they are assailed under the insolvent laws of that State, within the time limited by those laws. Pub. Stat. R. I. c. 237, §§ 14 and 15, p. 660.

In *Steadman* v. *Wilbur*, 7 R. I. 481, 486, which involved the validity, as against the husband's creditors, of a purchase alleged to have been made by the wife, with her separate estate, of property belonging to the husband, the court said: "If the title conveyed to the wife were a mere equitable one, resting in executory contract, a court of law could not set it up against a legal title by execution acquired by purchase from a creditor's levy and sale; but where, as in this case, the wife's legal title has been perfected by deed, a court of law would deal, and ought to deal, with the wife's right to purchase, for a fair consideration, from her husband, precisely in the same way that a court of equity would. If this be so by the general law, how much more in this State, where, by statute, not only the wife's rights to her property are secured against her husband and his creditors, but her legal identity with respect to it, as a person distinct from her husband, is recognized, and her power to act and contract in the disposal of it, in the modes permitted by law, is acknowledged by legislative enactments." Observing that if the wife may contract with her husband at all for the purchase of his property with hers, it must be, in regard to his creditors, upon the same principle of good faith, and the giving of equivalent consideration, that any other purchaser might, and that if she loans him money, it must be with the same right to expect and receive security or repayment out of his estate, and even preferences of payment, that any other creditor has, the court proceeded: "She cannot, indeed, when her husband becomes insolvent, convert into debts, as against creditors, former deliveries to him of her money or other property, or permitted receipts by him of the income or proceeds of sale of her separate estate, which at the time of such delivery or receipt were intended by her as gifts, to assist him in his business, or to pay their common expenses of living; and, considering the relation between them, the law would not, merely from such delivery or receipt, imply a promise on his part to replace or repay, as in case of persons not thus related; but would require more, either in express promise or circumstances, to prove that in these matters they had dealt with each other as debtor and

creditor. It is not, however, as supposed, a rule of law that *at the time* of each delivery or receipt of the separate property of the wife by the husband, the latter must expressly promise to repay the former, or to secure her out of his estate, to constitute the relation of debtor and creditor between them in regard to it. Such a promise, made before such transactions, and looking forward to and covering them, would, at law as in common sense, avail as well to prove the character of them, precisely as it would between other parties who were dealing with each other on credit and in confidence. Nor is it true that an *express* promise to secure or repay out of the estate of the husband is requisite, in such a case, to prove that her husband received her separate property as a loan, and was therefore entitled, as against his creditors, thus to secure and repay her. Neither at law nor in equity is inferential proof to be rejected upon such a subject, more than upon any other, although, as suggested, what are proper inferences may be modified or altered by the relation between the parties."

In *Hodges* v. *Hodges*, 9 R. I. 32, 35, it was decided that husband and wife, if they choose to do so, could treat each other as lender and borrower, and that such a contract would carry with it the usual incident of interest, the same as with other parties. And it was held, in that case, that the wife was entitled to be credited in the account between her and her husband with the proceeds of the sale of her property, although they had been applied to defray family expenses with her consent and approval. In *Elliott* v. *Benedict*, 13 R. I. 463, 466, it was held that, subject to the limitations prescribed by the insolvent laws of Rhode Island — which limitations do not affect the present case — a debtor has the right to apply the whole of his property, subject to attachment, to the payment of any one of his debts in preference to others. The court said: "At common law it is no fraud for a debtor to pay in full any debt which he owes, out of any property he has, whether attachable or not, though the result, and even the *proposed* result, of the payment may be that other debts will have to go unpaid. And the common law in this regard is not affected by the statute of fraudulent conveyances."

And in *Franklin Savings Bank* v. *Greene*, 14 R. I. 1, 3, it was held that, in Rhode Island, a wife might acquire by purchase or gift from a third person the note of her husband, and enforce payment thereof as such third person might have done, she suing, if suit became necessary, by next friend in equity, or through a trustee of her estate appointed by the court on her petition under the statute. Alluding to the rule at common law declaring that the transfer of a note of the husband to the wife extinguished the debt, the court said: "The enactment, however, of statutes recognizing the separate existence of a married woman by securing her property to her exclusive use, as against the husband and his creditors, and by conferring upon her to a greater or less extent the power of entering into contracts respecting her property and of disposing of it independently of her husband, has changed the common law in this respect, where such statutes prevail. They two are no longer one, and *he* that one."

The general principles thus announced by the Supreme Court of Rhode Island are in accord with the decisions of this court. In *Magniac* v. *Thomson*, 7 Pet. 348, 397, this court said that, among creditors equally meritorious, a debtor may conscientiously prefer one to another, and it can make no difference that the preferred creditor is his wife. So in *Bean* v. *Patterson*, 122 U. S. 496, 500, which related to a conveyance of real estate by a husband for the benefit of his wife, and which conveyance was alleged to have been made in good faith to secure debts due to her for sums previously realized by him from sales of her individual property, the court said: "If, therefore, there had been no other consideration for the deed than a desire to secure for his wife provision against the necessities for the future, it could not be sustained. . . . That the property in Pennsylvania, deeds of which are mentioned above, was used for his benefit, and to pay and secure his debts, is sufficiently established. The amount realized therefrom, as we read the evidence, was greater than the sum named in the trust deed as due to her. That deed for her security stands, therefore, upon a full consideration. Had it been given to a third party for a like debt it would not be

open to question that it would have been unassailable. The result is not changed because the wife is the person to whom the debt is due and not another. While transactions by way of purchase or security between husband and wife should be carefully scrutinized, when they are shown to have been upon full consideration from one to the other, or, when voluntary, that the husband was at the time free from debt and possessed of ample means, the same protection should be afforded to them as to like transactions between third parties." To the same general effect are numerous cases: *Jewell* v. *Knight*, 123 U. S. 426, 434, and authorities cited; *Stickney* v. *Stickney*, 131 U. S. 227, 238, 240. In the latter case it was said that "whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit in the absence of any direct evidence that she intended to make a gift of it to him."

Applying the principles recognized by this court, as well as by the highest court of the State in which the property in question is situated and where the transactions in question occurred, we hold that Mrs. Graeffe is entitled to a decree cancelling the deeds under which the defendants claim the property described in the deed to her. That her husband was without any means of his own and had in his possession, substantially, the entire estate of his wife, controlling and managing it for her; that the property in question was purchased and improved wholly with her money under an explicit assurance by him, before the purchase was made, that it would be put in her name; that she relied upon his compliance with that promise; that the husband, on the 1st of March, 1881, owed her a larger sum than the amounts expended in purchasing and improving the property; that the conveyance to Garner, in order that he might convey to Mrs. Graeffe, was made in good faith, for the purpose, and only for the purpose, of satisfying, to the extent of the value of the property conveyed, the debt due to the wife; and that no one became a creditor of the husband in consequence of any representation made by her, or with her knowledge, that he owned the prop-

erty, are all facts clearly established by the evidence. Why should not the wife be protected under these circumstances? If the husband, in fact, had owned this property, and, in order to prefer a part of his creditors, had, in good faith, sold and conveyed it to them, with the intent to give a preference over other creditors, the right of such grantees to hold it, unless the case was brought within the insolvent laws of the State, could not be questioned. No different rule should be enforced in this case against a wife who has received a conveyance of property purchased with her money, and which should have been put in her name when so purchased. By no act or word, upon her part, was the husband discharged from the performance of his agreement to put the property in her name. The conveyance to Garner, followed by his conveyance to her, was executed for the purpose of discharging the husband's obligation to the wife, and was made before any creditor acquired a lien upon the property by attachment. As between the husband and wife, a court of equity would have compelled him to secure this property to her. If, before any rights of attaching creditors intervened, he did voluntarily what the law made it his duty to do, the transaction is not subject to impeachment by his creditors, unless the wife has been guilty of such fraudulent conduct as ought, in conscience, to estop her from claiming the property as against such creditors. If the wife had herself been guilty of deception, or if she had contributed to its success by countenancing it, she might, with justice, be charged with the consequence of her conduct. *Sexton* v. *Wheaton*, 8 Wheat. 229, 240. But the evidence furnishes no ground for the imputation of fraud against her. That she relied upon the husband's promise to purchase the property for her and invest her with the title, and that she again relied upon his assurance, given in August, 1880, that he would have the property conveyed to her, are circumstances that do not affect the substance or good faith of the transaction. She acted with all the diligence that could reasonably have been expected or required under the circumstances. She supposed that he kept an accurate account of all transactions involving her estate as managed by him, and had no purpose to give

him a false credit before the world. As subsequent developments showed, she erred in relying upon the assurances and promises of her husband as much as she appears to have done. But, as fraud cannot be imputed to her, a court of equity ought not, for such an error, to deprive her of that which is justly hers.

The cases cited in the opinion of the court below rest upon a state of facts wholly different from those here presented. For instance in *Humes* v. *Scruggs*, 94 U. S. 22, 27, 29, which was a suit by an assignee in bankruptcy to set aside a conveyance of real estate made by a bankrupt to his wife as being in fraud of the rights of creditors — the wife alleging in her answer that the land was purchased by the husband with her money and that she believed for years that the title had been taken in her name — the court found that the proof showed a state of case the reverse of that claimed by the wife. It said: "Neither the husband nor the wife testified that there was any agreement that the husband should hold these sums as and for the estate of his wife, or that when the property in question was purchased it was agreed to be held as her estate. On the contrary, the moneys were held and used by the husband for nearly fifteen years as his own property, and mingled with his personal and partnership affairs. . . . But it is probably untrue, in fact, that this land was bought for her, as she alleges in the answer, or that she believed at any time that the title was taken in her name. . . . If the money which a married woman might have had secured to her own use is allowed to go into the business of her husband and be mixed with his property, and is applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in business, and is thus used for a series of years, there being no specific agreement when the same is purchased that such real estate shall be the property of the wife, the same becomes the property of the husband for the purpose of paying his debts. He cannot retain it until bankruptcy occurs and then convey it to his wife. Such conveyance is in fraud of the just claims of the creditors of the husband." The observations of the court in *Humes* v. *Scruggs* have no application to the facts

that we consider to be established by the proofs in the present case. The difference of opinion between this court and the Circuit Court arises chiefly from the conclusions of fact to be drawn from the testimony.

In our judgment, the court should have dismissed the cross-bill and given to Mrs Graeffe the relief asked by the bill.

The decree is reversed and the cause remanded for further proceedings, in conformity with this opinion.

MR. JUSTICE BROWN was not present at the argument, and took no part in the decision of the case.

LINCOLN *v.* POWER.

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

No. 505. Submitted November 28, 1893. — Decided January 29, 1894.

This court cannot take notice of an assignment of error that the damages found by the jury were excessive and given under the influence of passion and prejudice.

An error in that respect is to be redressed by a motion for a new trial.

The evidence in this case was conflicting and would not have warranted the court in directing a verdict for the defendant.

It is not reversible error to permit a plaintiff, suing a municipality to recover for injuries received by reason of defects in its streets, to prove a bill or statement of the claim which had been served on the city council before commencement of the action.

The plaintiff in such an action may put in evidence sections of the municipal code.

The question whether the plaintiff was walking upon one part of the sidewalk rather than another was properly left to the jury.

In such an action it would be error to instruct the jury that "where a dangerous hole is left in a sidewalk in a public street of a city, over which there is a large amount of travel, the author will be liable for an injury resulting from the act, although other causes subsequently arising may contribute to the injury."

An assignment of error cannot be sustained because the judge expresses himself as impressed in favor of the one party or the other, if the law is

correctly laid down, and if the jury are left free to consider the evidence for themselves.

Judges of Federal courts are not controlled in their manner of charging juries by State regulations, such part of their judicial action not being within the meaning of section 914 of the Revised Statutes.

This was an action brought, at January Term, 1891, in the Circuit Court of the United States for the District of Nebraska, by Margaret J. Power, a citizen of the State of Iowa, against the city of Lincoln, a municipal corporation of the State of Nebraska, for personal injuries which the plaintiff incurred while passing along a street of said city, and which she alleged had been occasioned by the carelessness and negligence of the municipal authorities in permitting a hole or broken grating to remain in a sidewalk after having been notified of its existence.

The cause was tried before the District Judge, sitting as circuit judge, and a jury, and resulted in a verdict and judgment in favor of the plaintiff for the sum of fifty-seven hundred dollars. The defendant, alleging error in the action of the court below in admitting certain matters in evidence offered in behalf of the plaintiff, and in rejecting others offered in behalf of the defendant, and in certain instructions to the jury, brought a writ of error to this court.

Mr. Lionel C. Burr for plaintiff in error.

Mr. T. M. Marquett for defendant in error.

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

The plaintiff in error complains that the damages found by the jury were excessive, and appear to have been given under the influence of passion and prejudice.

But it is not permitted for this court, sitting as a court of errors, in a case wherein damages have been fixed by the verdict of a jury, to take notice of an assignment of this character, where the complaint is only of the action of the jury.

Thus it was said in *Parsons* v. *Bedford*, 3 Pet. 433, 447, 448, per Story, J., commenting on that clause of the Seventh Amendment which declares "no fact tried by a jury shall be otherwise reëxaminable, in any court of the United States, than according to the rules of the common law," that "this is a prohibition to the courts of the United States to reëxamine any facts tried by a jury in any other manner. The only modes known to the common law to reëxamine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings."

In *Railroad Company* v. *Fraloff*, 100 U. S. 24, 31, this court said: "No error of law appearing upon the record, this court cannot reverse the judgment, because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefor rested with the court below, under its general power to set aside the verdict. But that court, finding that the verdict was abundantly sustained by the evidence, and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for a new trial. Whether its action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a reëxamination of facts which have been tried by the jury under instructions correctly defining the legal rights of the parties."

But where there is no reason to complain of the instructions, an error of the jury in allowing an unreasonable amount is to be redressed by a motion for a new trial.

In the present case such a motion was ineffectually made, the court below evidently regarding the verdict as justified by the evidence. And, apart from the question of our power to consider the subject, we find nothing presented in this record that seems to show that the jury, in the particular complained

of, acted against the rules of law, or suffered their prejudices to lead them to a perverse disregard of justice.

Error is assigned to the refusal of the court to charge the jury that, under all the evidence and the law in the case, the defendant was entitled to the verdict.

Our examination of the evidence does not enable us to see error in the refusal of the court to so charge. The issues before the jury were very plain. Were the injuries of the plaintiff caused by her falling into a hole in the sidewalk? Was the existence of this hole or imperfection in the sidewalk known to the defendant in circumstances and for such a length of time as to have made it the duty of the defendant, as a municipal corporation having control over its streets, to repair the defect, or be responsible for a failure to do so? Was the plaintiff herself guilty of negligence in overlooking the hole in the walk, or in walking upon a portion of the walk where she had no right to go?

The evidence adduced by the plaintiff certainly tended to establish her side of the issue in all these questions, and if not successfully contradicted by the defendant's evidence, warranted the jury in finding a verdict in her favor. The defendant's evidence, though contradictory, in some particulars, of that put in by the plaintiff, did not make out a case so clear and indisputable as would have justified the court in giving the peremptory instruction requested.

If, then, no errors were committed by the court below in the admission or exclusion of evidence, or in its charge to the jury, the verdict and judgment must be permitted to stand. Such errors are, however, assigned, and will now receive our attention.

The court permitted the plaintiff to put in evidence a bill or statement of her claim against the city, which she had served on the city council, and to this the defendant excepted.

It is not easy to see what purpose was served by this evidence. The judge stated, in the charge to the jury, that such a notice is required by the law before an action is commenced, and as this assignment is not pressed in the plaintiff-in-error's brief we do not feel constrained to give it much importance.

To permit the plaintiff to show that she made such a claim, or gave such a notice, whether required so to do by the law or not, would not seem to be reversible error.

We see no error in permitting the plaintiff to put in evidence certain sections of the municipal code. It thus appeared that the mayor and city council had the care, supervision, and control of all public highways, bridges, streets, alleys, public squares, and commons within the city, and were to cause the same to be kept open and in repair, and free from nuisances. An inspector of sidewalks and street crossings was therein provided for, whose duty it was to see that the sidewalks and street crossings were kept in good repair. It is likewise made the duty of all policemen to take note of all defects in sidewalks, and to give notice of want of repair. One of the sections also contains provisions regulating the construction of cellar ways and entrances to the basement in or through any sidewalk.

Why this evidence was not pertinent we are not told. These provisions of the municipal code only express and provide for what was the plain duty of the city.

Complaint is made of the first instruction given to the jury in that it is said that it made the city the insurer of the absolute safety of its sidewalks, and liable in damages for injuries caused by any defect therein, regardless of the question of negligence. This instruction is, perhaps, liable to the criticism made, and, if it stood alone, it might be fairly claimed that the jury were misled by it; but the court immediately added a further instruction, in which the jury were told to inquire whether the city officers were notified of the dangerous condition of the sidewalk, occasioned by the hole or excavation therein, before this accident happened, and whether the city, through its officers, neglected to repair the defect, or cover or protect the hole after it knew of its unsafe condition; and the right of the plaintiff to recover was made dependent on the jury finding the defendant negligent in those particulars. Read together, as the jury must have understood them, we think the instructions contained a fair exposition of the law.

It is further contended that the court erred in refusing to

give instructions prayed for by the defendant, and numbered seven, nine, and twelve.

Instructions seven and nine impute negligence to the plaintiff in walking on the sidewalk too near to the building line, and on what is termed the area space. The court left it to the jury to find whether the plaintiff was negligent in walking on that part of the walk, and instructed them that if they found that the plaintiff was not negligent, and if the defendant knew of the defect, and permitted it to remain so that the plaintiff was injured, the latter was entitled to recover. Whether the plaintiff was guilty of negligence in walking upon one part of the sidewalk rather than upon another, was certainly not a question of law, and was properly left to the jury.

By the twelfth prayer the court was requested to instruct the jury that where a dangerous hole is left in a sidewalk in a public street of a city, over which there is a large amount of travel, the author will be liable for an injury resulting from the act, although other causes subsequently arising may contribute to the injury.

Such an instruction might be proper enough in an action against the person who committed the wrongful act; but the court was right in refusing it, in the present action, as irrelevant. If it was intended to mean that, because there was a liability to the plaintiff on the part of the actual wrongdoer, the city might not also be liable, it would have been plain error in the court to have given the instruction.

Error is assigned to the action of the court in referring to the Carlisle Tables as enabling the jury to find the plaintiff's prospect of life, and the force of the objection is in the allegation that those tables had not been introduced in evidence. There is high authority for the proposition that courts can take judicial notice of the Carlisle Tables, and can use them in estimating the probable length of life, whether they were introduced in evidence or not. *McHenry* v. *Yokum*, 27 Illinois, 160; *Jackson* v. *Edwards*, 7 Paige, 387; *Estabrook* v. *Hapgood*, 10 Mass. 313.

But it is not necessary for us, at this time, to consider

whether those tables are the subject of judicial notice, because the record fails to show any exception taken at the time, and we have a right to presume that the tables were in evidence, and that the court acted regularly in referring them to the jury as a mode of enabling them to estimate the prospect of duration of the plaintiff's life.

The plaintiff in error complains of the tone of the oral charge of the court to the jury as hostile, and calculated to unduly inflame the minds of the jury.

It must be admitted that some of the expressions used by the learned judge were scarcely decorous, and showed a bias in favor of the plaintiff. But, as has often been said, an assignment of error cannot be sustained because the judge expresses himself as impressed in favor of the one party or the other, if the law is correctly laid down, and if the jury are left free to consider the evidence for themselves. *Vicksburg & Meridian Railroad* v. *Putnam*, 118 U. S. 545; *Simmons* v. *United States*, 142 U. S. 148.

The statutes of Nebraska require that all instructions of the court to the jury shall be in writing, unless the so giving of the same is waived by counsel in the case in open court, and so entered in the record of said case, and it is argued that, by virtue of section 914 of the Revised Statutes of the United States, such provisions of the Nebraska laws is made obligatory on the Circuit Court of the United States for that district, and that hence it was reversible error in the court below to give oral instructions.

But we are of opinion that the judges of the Federal courts are not controlled in their manner of charging juries by the state regulations. Such part of their judicial action is not within the meaning of section 914.

Thus in *Nudd* v. *Burrows*, 91 U. S. 426, where a state statute required a judge to instruct a jury only as to the law of a case, and provided that the written instructions of the court should be taken by the jury in their retirement and returned with the verdict, and where the Circuit Court judge charged the jury upon the facts, and refused to permit them to take to their room the written instructions given by the

court, it was held that this was not error, because the personal conduct and administration of the judge in the discharge of his separate functions were not practice or pleading, or a form or method of proceeding, within the meaning of those terms in the act of Congress. A similar ruling was made in *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291. There a state statute prescribed that the judge should require the jury to answer special interrogatories in addition to finding a general verdict. This court held that such a state regulation did not apply to the courts of the United States. The doctrine of these cases was approved and applied in *Chateaugay Iron Co., Petitioner*, 128 U. S. 544, where it was held that the practice and rules of the state court do not apply to proceedings taken in a Circuit Court of the United States for the purpose of reviewing in this court a judgment of such Circuit Court, and that such rules and practice, regulating the preparation, settling, and signing of a bill of exceptions, are not within "the practice, pleadings, and forms and modes of proceeding" which are required by section 914 of the Revised Statutes to conform "as near as may be" to those "existing at the time in like causes in the courts of record of the State."

Upon the whole, we are of opinion that the court below committed no error, and its judgment is, accordingly,

Affirmed.

CHAPMAN *v.* HANDLEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 206. Submitted January 17, 1894. — Decided January 29, 1894.

Under the statutes of the Territory of Utah relating to the distribution of the personal property of a deceased person among those entitled to share in the distribution, the claims of the distributees are several, and not joint; and when the claims of each are less than the amount necessary to give this court jurisdiction, two or more cannot be joined, in order to raise the sum in dispute to the jurisdictional amount.

THE case is stated in the opinion.

Mr. J. G. Sutherland for appellants.

Mr. E. D. Hoge and *Mr. Arthur Brown* for appellees.

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

Ruth A. Newsom, *née* Handley, Benjamin T. Handley, Harvey L. Handley, and Sarah A. Chapman filed their petition in the probate court of Salt Lake County, Utah Territory, in the matter of the estate of George Handley, deceased, setting forth the death of said George Handley, May 25, 1874, intestate; the appointment and qualification of Elizabeth, his widow, as administratrix of his estate, April 12, 1888; the expiration of the time for the presentation of claims after publication of notice; the filing of the inventory of said estate describing certain real property; the sale of a portion under order of court and payment of the account for which the money obtained through such sale was needed, leaving a balance on hand; the filing of a final account and the fixing of a day for hearing thereon; and proceeding thus:

"Said George Handley died, leaving him surviving the said Elizabeth Handley, his widow, and his eight children and heirs-at-law, named, respectively, John Handley, William F. Handley, Charles T. Handley, Emma Handley, Ruth A. Newsom, Benjamin T. Handley, Mary F. Handley, and Harvey L. Handley. The four first named are the children of said deceased and said Elizabeth, his lawful wife, and the last four were children of said deceased and your petitioner, Sarah A. Chapman, his plural wife according to the tenets and rites of the Mormon Church; that all said children are now living except Mary Handley, who died, without issue or having been married, on the 28th day of September, 1879; that all said children are of age except said Harvey Handley, who is sixteen years of age.

"Your petitioners therefore pray that they may be recog-

nized as heirs-at-law of said George Handley, deceased, equally with said four children of said deceased first above named, your petitioner, Sarah A. Chapman, as mother in place and as representative of said Mary Handley, deceased, and that after the hearing upon said account of said administratrix that the said estate may be divided among and distributed to said heirs-at-law according to their respective interests; that one-half of said estate may be apportioned to your petitioners."

The record does not contain the order of the probate court on this petition, but it otherwise appears and is conceded that the prayer of the petitioners was denied. Thereupon an appeal was taken therefrom by petitioners to the District Court for the Third Judicial District of the Territory and the county of Salt Lake, by which special findings of fact and conclusions of law were filed, and it was ordered that the petition be dismissed.

The petitioners appealed to the Supreme Court of Utah Territory, and the judgment of the District Court was affirmed. The pending appeal was then taken to this court.

The total value of the estate in controversy was found to be $25,000, and counsel for appellants thus states his case: "George Handley died May 25, 1874, leaving Elizabeth Handley, who was his lawful wife, and their four children, (the respondents,) and four children by a plural wife, one of whom died in infancy, her interest, now represented by her mother as heir, (the appellants). The court below distributed the entire estate to the lawful wife and her four children, holding that the children of the plural wife were not entitled to inherit. A statute enacted by the legislative assembly of Utah, in 1852, provided: 'Section 25. Illegitimate children and their mothers inherit in like manner from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children' (Compiled Laws Utah, 1876, § 677);" that the Supreme Court held that this legislation was disapproved and annulled by the act of Congress of July 1, 1862, c. 126, 12 Stat. 501, and that this was error.

The application to the probate court was, in legal effect, for distribution only, and can be given no wider scope, notwithstanding the language used in the prayer of the petition; and as the distributive shares, if the petitioners were included, could not reach the sum necessary to give this court jurisdiction, we are obliged to dismiss the appeal.

It is true that there are cases where there are several plaintiffs interested collectively under a common title where jurisdiction may be maintained, but this case does not fall within that category.

The claims of distributees are several and not joint, and a joint application for distribution can only result in judgments in severalty. By sections 4261 and 4262 of the Compiled Laws of Utah, 1888, vol. 2, p. 529, it is provided that upon the final settlement of the accounts of an executor or administrator, on his application or that of any heir, legatee, or devisee, the court shall proceed to distribute among the persons by law entitled thereto; and that in the order or decree the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand and sue for and recover their respective shares, in any court of competent jurisdiction.

It is the distinct and separate share of each distributee that is involved in the proceeding, and although in this instance, if the children of the plural wife had been admitted to share they would have obtained, and an amount in excess of five thousand dollars would have been withdrawn, from the other children, the gain on the one side and the diminution on the other would have been proportionately as to each, and not in the aggregate as to all.

Under such circumstances it is the settled rule that the writ of error or appeal cannot be sustained. *Gibson* v. *Shufeldt*, 122 U. S. 27; *Miller* v. *Clark*, 138 U. S. 223; *Henderson* v. *Carbondale Coal Co.*, 140 U. S. 25; *New Orleans Pacific Railway* v. *Parker*, 143 U. S. 42.

Appeal dismissed.

MAMMOTH MINING COMPANY *v.* SALT LAKE FOUNDRY AND MACHINE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 181. Submitted December 21, 1893. — Decided January 29, 1894.

When the Supreme Court of a Territory, in a suit in the nature of an equity suit, determines that the findings of the trial court were justified by the evidence, this court is limited to the inquiry whether the decree can be sustained on those findings, and cannot enter into a consideration of the evidence.

The admission of evidence, under exceptions, complained of did not constitute reversible error.

TAYLOR and another brought suit against the Mammoth Mining Company in the District Court of the First Judicial District of Utah Territory to foreclose a mechanics' lien under the statute of Utah in that behalf, and the Salt Lake Foundry and Machine Company, having been made a party defendant, filed its cross complaint therein against its codefendant, the Mammoth Mining Company, for the enforcement of a similar lien for materials furnished and work done in and about the construction of certain buildings of the mining company, and situated on its land and premises. The Mammoth Mining Company did not deny that the materials were furnished and the work done, but insisted that this was not under any contract between it and the foundry company or at its request. The cause was heard by the court, without a jury, which made the following findings of fact and conclusions of law:

"1. That at all the times hereinafter stated the said Salt Lake Foundry and Machine Company and the said Mammoth Mining Company were corporations, organized and existing under the laws of Utah Territory.

"2. That on the — day of January, A.D. 1883, the said Salt Lake Foundry and Machine Company contracted with the said Mammoth Mining Company, through its agents, to furnish to

said Mammoth Mining Company castings, to construct and repair machinery at current prices, and to do other work within the scope of said machine company's business, all of which was to be used and was used by the said mining company in the erection and construction of the refineries, mills, brick kilns, and smelters of the said defendant mining company, which said refineries, mills, brick kilns, and smelters were situate upon the southeast quarter of the northeast quarter of the southeast quarter of section twenty-one (21) and the northwest quarter of section twenty-two (22) in township eleven (11) south of range three (3) west of Salt Lake meridian in Juab County, Utah.

"3. That in pursuance of said contract, the said foundry and machine company from time to time from said — day of January, A.D. 1883, until the 26th day of March, A.D. 1883, furnished castings, made and repaired machinery, worked for and furnished material to the said Mammoth Mining Company to be used in the construction of the buildings, etc., above referred to at the special instance and request of said company.

"4. That the total value of the materials furnished, and work done so as aforesaid was thirty-six hundred and six and $\frac{4}{100}$ dollars at the prices agreed upon between the said mining company and the said foundry and machine company.

"5. That no part of said sum has been paid excepting the sum of five hundred (500) dollars and the balance thereof to wit the sum of $3106.04 *dollars* remains due and unpaid, together with interest thereon at the rate of ten (10) per cent per annum from the said 26th day of March, A.D. 1883.

"6. That on the 27th day of March, A.D. 1883, the said Salt Lake Foundry and Machine Company caused to be recorded in the office of the county recorder of Juab County, Utah, their claim for a lien on the premises above described, containing a statement of its demand after deducting all just credits and offsets, with the name of the owner, to wit, the said Mammoth Mining Company, and a statement of the time given, terms and conditions of the contract and a description of the premises sought to be charged with the lien, the facts stated

in said notice of lien being in all respects the facts set forth in the foregoing findings of facts.

"7. That this action was brought to foreclose said lien within the time allowed by law for that purpose.

"From the above findings of facts the court finds the following conclusions of law:

"1. That the said Salt Lake Foundry and Machine Company is entitled to a judgment against the said Mammoth Mining Company in the sum of three thousand one hundred and six and $\frac{4}{100}$ ($3106.04) dollars with interest thereon, from March 26, 1883, at the rate of ten per cent per annum, amounting in all to the sum of five thousand and eleven and $\frac{54}{100}$ ($5011.54) dollars, and for costs of this suit and that execution issue therefor.

"2. That said Salt Lake Foundry and Machine Company is also entitled to a decree establishing the said judgment as a lien upon the premises mentioned in the complaint and findings heretofore filed, and foreclosing the same according to the law and practice of this court."

Decree having been entered accordingly, the case was carried by appeal to the Supreme Court of the Territory, where errors were assigned to the sufficiency of the evidence to sustain the special findings, and to the admission of certain evidence, and the allowance of certain questions against defendant's objection. The Supreme Court held that the evidence justified the findings, and that there was no error in the rulings in relation to the testimony, and affirmed the decree. 6 Utah, 351.

Thereupon an appeal was taken to this court, and like errors assigned here.

Mr. C. W. Bennett and *Mr. J. G. Sutherland* for appellant.

Mr. Arthur Brown for appellee.

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

Opinion of the Court.

1. This proceeding to enforce a mechanics' lien under the statute of the Territory of Utah was in the nature of a suit in equity, and was tried by the court without a jury. The Supreme Court, in affirming the judgment, has determined that the findings of the trial court were justified by the evidence, and, apart from exceptions duly taken to rulings on the admission or rejection of evidence, our examination is limited to the inquiry, without reference to the weight of evidence or its sufficiency to support the special findings, whether the decree can be sustained upon those findings. *Idaho & Oregon Land Company* v. *Bradbury*, 132 U. S. 509, 515; *Stringfellow* v. *Cain*, 99 U. S. 610; act of April 7, 1874, c. 80, 18 Stat. 27. Of this there can be no doubt. Defendant contended that the material was furnished to and the work done for one Butler Johnstone, or Johnstone and one Bowers, and not to or for the defendant, or upon its credit. And the question was whether Johnstone and Bowers (either or both) were authorized to contract for and in the name of the defendant, or had such apparent authority as to justify plaintiff in the belief that they had authority in fact, and that it delivered the material and did the work, relying in good faith thereon. *United States Bank* v. *Dandridge*, 12 Wheat. 64; *Bronson's Executor* v. *Chappell*, 12 Wall. 681; *Mining Company* v. *Anglo-Californian Bank*, 104 U. S. 192. Under the special findings the conclusion of liability followed, whether resting on one ground or the other.

2. It is urged that the principal error of the courts below consisted in ignoring the operation of certain written contracts, introduced in evidence, dated January 7 and November 1, 1882, between stockholders of the company and Bowers, and assigned in part to Bowers. The first of these contracts provided for the sale of something over three hundred and ninety-two thousand of the four hundred thousand shares constituting the capital stock of the defendant corporation, to Bowers, and the second was a modification of the first. By these contracts, Bowers agreed, among other things, to build smelting furnaces and refining works and machinery at his own expense, and it is claimed that under them Bowers and Johnstone obtained

possession of the company's properties and a right to work its mines, but upon their own sole credit and not that of the company. The contract of January 7 was shown to have been assented to and the transfer of the property authorized by the company, and without entering upon an examination of the contracts themselves, it is enough that the findings involve the conclusion that the plaintiff had no notice of their existence, and was not, therefore, bound by any limitations therein contained. The question remained the same, did plaintiff furnish the materials and labor to persons acting in the name of the company and upon the belief that its contract was with the company, and as the trial court found that, it necessarily found that plaintiff was unaffected by these contracts. The Supreme Court held to this effect, and said that "if this were a private agreement between certain stockholders of appellant as to who should pay for improvements made on its property, made in its name and for its benefit, it will not avail to defeat the claims of the respondent, unless notice of this agreement was given to respondent before the material was furnished and labor done; that it would not be liable for this material and labor, although done in its name. On this point the evidence is conflicting, and the court below found for respondent, or it could not have given judgment in its favor." Although we are bound by the findings as made, we deem it not improper to yield to the argument for appellant so far as to express our concurrence in this view.

3. As to the errors assigned in that court to the admission of evidence, the Supreme Court observed: "These errors are not available in a case in equity, for the chancellor is supposed only to act on proper evidence. There is no question of law involved, only questions of fact; and if the proper evidence justifies the decree, the judgment ought to be affirmed, and we think it does." In its assignment of errors here, appellant specifies substantially the same exceptions to the admission of evidence, including the overruling of defendant's objections to questions. The evidence thus objected to was cumulative in its character and not of controlling importance, and if excluded, it is sufficiently clear that the result would not have been other-

wise than it was. All the evidence is in the record, and we have carefully examined it, and, as we are of opinion that the rulings complained of, if erroneous, did not constitute reversible error, we need not pass upon their correctness, though we are not to be understood as intimating that the objections should in any instance have been sustained.

Decree affirmed.

IMPERIAL FIRE INSURANCE COMPANY *v.* COOS COUNTY.

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

No. 204. Submitted January 17, 1894. — Decided January 29, 1894.

A policy of fire insurance containing a provision that it should become void if without notice to the company and its permission endorsed thereon "mechanics are employed in building, altering, or repairing" the insured premises, becomes void by the employment of mechanics in so building, altering, or repairing; and the insurer is not responsible to the assured for damage and injury to the assured premises thereafter by fire, although not happening in consequence of the alterations and repairs.

This was an action of assumpsit upon a five thousand dollar policy of insurance issued by the plaintiff in error November 21, 1882, insuring the court-house of the defendant in error at Lancaster, in the county of Coos, New Hampshire, against loss by fire, for a period of five years, from the date of the policy.

The premises insured were a two-story building, having on the first floor the offices of register of deeds and probate, clerk of court, and county commissioners. The court-room was on the second floor. At the date of the policy there were two brick vaults, one, 8 by 13 feet, for the use of the probate office, and the other, 16 by 13 feet, for the use of the offices of the register of deeds and clerk of court, there being a partition in the centre separating the part used by the register from that used by the clerk.

Statement of the Case.

The fire which destroyed the insured premises occurred about two o'clock in the morning of November 4, 1886.

The policy in suit contains the following: "Payment in case of loss is upon the following terms and conditions."

Among the terms and conditions are the following:

"This policy shall be void and of no effect if, without notice to this company and permission therefor in writing endorsed hereon, . . . the premises shall be used or occupied so as to increase the risk . . . or the risk be increased . . . by any means within the knowledge or control of the assured, . . . or if mechanics are employed in building, altering, or repairing premises named herein, except in dwelling-houses, where not exceeding five days in one year are allowed for repairs."

In August, 1886, the plaintiff, without the written consent of the defendant and without its knowledge, employed wood carpenters and brick masons, and reconstructed and enlarged the vaults, making that of the office of the register of probate 12 by 13 feet instead of 8 by 13 feet, as it was at the date of the policy, and making those of the offices of the register of deeds and clerk of court 22 by 13 instead of 16 by 13 feet, as at the date of the policy. The foundations were also reconstructed and enlarged to correspond with the enlargement of the vaults. The reconstruction and enlargement of the vaults necessitated the cutting of the floors and ceilings of the respective offices in which they were, so as to extend the vaults.

The time during which these mechanics were employed in the reconstruction and enlargement of the foundations and vaults was about five or six weeks. Some painting was also done incident to the above changes, but the extent did not distinctly appear.

In addition to the foregoing the plaintiff below also changed the method of heating the offices of the register of probate and clerk of court, placing a hot-water coil in the furnace in the basement, from which ran pipes through the floors and were attached to radiators in those offices. This work was commenced November 2, and completed about midnight,

November 3, 1886. No permission to make this change in the method of heating was either obtained or requested, and the defendant had no knowledge of its being done. In the evening of November 3 a fire was built in the furnace to test the heating apparatus, and heat the radiators so they might be bronzed, and the fire was left burning at about midnight, when the mechanics and some of the county officers left the building.

From the time work began upon the vaults, early in August, until the fire, the papers and records of the offices of the clerk of court and registers of probate and deeds were in the court-room or in the respective offices, unprotected by any safes or vaults.

The expense of the labor and raw material of the foregoing alterations was about $3000.

The defendant contended that the foregoing alterations, rebuilding, and repairs were extraordinary and not ordinary repairs, such as were necessary in the use of the premises insured, and such as might have been contemplated by the parties when the contract was made, and the following request for a ruling was made to the presiding judge, viz.:

"The defendants request the court to rule that the building, altering, and repairing of the premises to the extent of tearing down several partitions, cutting away a portion of the floors in several rooms, tearing down the vault and enlarging and rebuilding it, and the changing the method of heating a portion of its building by putting in piping and radiators for hot water or steam — all at the expense of several thousand dollars, for the labor of mechanics, for raw materials — was a building, altering, or repairing of the premises which increased the risk, and the policy thereby became void."

The court declined to rule as requested, and the defendant excepted.

Upon the conclusion of the testimony, which proved the foregoing facts, the defendant made the following motion that a verdict be directed, viz.:

"The defendants move that a verdict be directed for them on the ground that there is no evidence competent to be sub-

Counsel for Plaintiff in Error.

mitted to the jury that the building, altering, and repairing shown by the evidence was not such building, altering, and repairing as avoided the policy."

The motion was denied by the court, and the defendant excepted.

The defendant requested the court to instruct the jury —

"That if the work done by the mechanics, as disclosed by the evidence, increased the hazard while such work was being done, then the plaintiff is not entitled to recover."

The court refused to give this instruction, and the defendant excepted.

The court in the course of its charge to the jury instructed them as follows:

"The identical question before you is whether at the time the fire took place what the county of Coos had done in the way of alterations and repairs increased the risk at that time — that is, at the time of the fire — that is, on the night of November 4 — that the county of Coos had done in the way of repairs, changing the vaults, putting in additional heating apparatus — did those things increase the risk at that particular time? Not whether mechanics two days previously or three days previously or a week previously had worked in that building. What was the condition of the building on the night of the fire? Had what the county of Coos did in making those repairs increased the risk or had it not? Were the repairs ordinary or necessary and accompanied by no increase of risk, or were they of such an extraordinary and material character upon that particular night — that is, the condition in which the building was upon that particular night — that the risk was increased, and therefore the assured, the county, violated this condition in the policy, and consequently the defendant company should not be held liable?"

To this instruction the defendant excepted. There was a verdict and judgment for the plaintiff below for the sum of $5505, and this writ of error was prosecuted to reverse that judgment.

Mr. Harry Bingham for plaintiff in error.

Argument for Defendant in Error.

Mr. S. R. Bond and *Mr. Fletcher Ladd* for defendant in error.

The finding of the jury establishes the fact that the risk was not increased by the alterations and repairs beyond what it was when the policy was first executed. This was a question of fact, which the court below properly left to the jury to determine. *Rice* v. *Tower*, 1 Gray, 426; *Cornish* v. *Farm Buildings Fire Ins. Co.*, 74 N. Y. 295. The question upon which the case turns is therefore this: did the repairs and alterations made by the defendant in error upon its courthouse, though not resulting in an increase of risk, though completed at the time when the fire occurred, and though not in any way the cause of the fire, nevertheless have the effect of avoiding the policy, under the condition therein contained declaring that "this policy shall be void and of no effect, if without notice to the company and permission therefor in writing endorsed hereon . . . mechanics are employed in building, altering, or repairing the premises named herein?"

The court will not stick in the letter of this condition, if by so doing the unmistakable general purpose of the contract is defeated. This principle of construction, which is of general application, has peculiar force as applied to contracts of insurance, which are construed liberally in favor of the insured. *Crovsillat* v. *Ball*, 3 Yeates, 375; *Insurance Companies* v. *Wright*, 1 Wall. 456, 468; *National Bank* v. *Ins. Co.*, 95 U. S. 673, 679; *Harper* v. *Albany Mut. Ins. Co.*, 17 N. Y. 194, 198. The loss not having been occasioned by the making of the alterations and repairs, and the risk not having been permanently increased by them, it would be a purely technical construction of the condition in question which should give it the effect of depriving the defendant in error of the indemnity for which it contracted, and for which it has paid the consideration required from it by the company.

James v. *Lycoming Ins. Co.*, 4 Cliff. 272, 276, 278, 280, 283, 284, is a direct adjudication upon facts similar in every respect to those in the case at bar. In that case a new boiler had

been put into a steam mill, and other extensive changes and repairs had been made on the premises, and in an action on the policy the company defended under a condition identical with that upon which the plaintiff in error relies here. In an exhaustive opinion by Clifford, J., the conclusion is reached that the condition in question, fairly construed, did not prohibit the making of reasonable and necessary changes and repairs, and that what had been done upon the insured premises came within that category. In the course of the opinion he says: "Attempt is made in argument to maintain that the structure erected to cover the projecting end of the new boiler, and the fireplace, and the man who feeds the boiler, is a greater change in the premises than the law of insurance will allow; but the agreed statement affords a complete and decisive answer to that suggestion, as it shows that the change made did not increase the risk, and that the structure erected was reasonable, necessary, and proper for the purpose. . . . Whether regarded as a condition subsequent, or as a mere promissory warranty, the condition in question, it is clear, is not one where a literal compliance with its terms is required. Such a construction would be absurd, as it would render the policy void if the insured employed a mechanic to take out a broken slate and put in a new one, or to replace a broken pane of glass, or to stop a leak in a chandelier, or other gas fixture, or in a cistern, or to mend a defective chimney, stove-pipe or furnace. . . . Such a condition, however, must receive a reasonable construction in view of the agreed facts in the case, and that construction must be one not repugnant to the nature and purpose of the contract, nor one inconsistent with the due and customary use and enjoyment of the property. . . . Insurable property is intended for use, and it is not the intent of a policy of insurance to impair the right of use nor to deprive the owner of the customary enjoyment of the property. . . . But the effect of that concession [that small repairs may be made] is to admit that the condition in question is subject to a reasonable construction not repugnant to the nature and purpose of the contract, nor inconsistent with the due and customary use and enjoyment of the property." Other author-

ities to the same general effect are: *Franklin Fire Ins. Co.* v. *Chicago Ice Co.*, 36 Maryland, 102; *Kern* v. *South St. Louis Mut. Ins. Co.*, 40 Missouri, 19.

The case of *London & Liverpool Fire Insurance Co.* v. *Crunk*, 91 Tennessee, 376, presents an instance where an insurance company sought to escape liability for a loss, under a condition which, if construed literally, had taken effect to avoid the policy. The condition was as follows: "If the building, or any part thereof, fall, except as the result of fire, all insurance by such policy on such building or its contents, shall immediately cease." The building had been struck by a cyclone, and the roof of the two front upper rooms and a part of the walls blown away. The court below charged the jury as follows: "The exclusion clause in question is not to be literally understood, so as to avoid the policy if an atom, or some minute portion of the material in the insured building, should fall. It means some functional portion of the structure, the falling of which would destroy its distinctive character as such. So that, if the proof in this case shows that the roof was blown from a part of one of the buildings mentioned in the policy sued on, and one of the upper rooms was uncovered and one of the walls thereof partially blown away, but leaving more than three-fourths of the building intact, and suitable for a dwelling-house, and that in this condition it was burned, the clause in the policy as to the falling of the building, or any part thereof, would not exempt defendant from liability, if otherwise liable, as before explained, unless you should believe from the proof that the falling was the direct cause of the fire. If the proof shows that the fire was scattered on the floor in one of the rooms of one of the insured houses by the wind; that some of it ignited the carpet and some of the furniture in the room, and a strong wind blew the roof and a portion of the building upon it, and after smoldering a time it broke out and consumed the building; that the wind, and not the falling building, or a part thereof, caused the fire; that the fire and not the falling of the building, was the proximate and direct cause of the loss, you should find for the plaintiff, if defendant is otherwise liable, as before explained."

Argument for Defendant in Error.

In the court above on error these instructions were held correct, and Snodgrass, J., speaking for the whole court said: "The circuit judge drew the correct distinction. The falling of 'any part' of a building in such a contract manifestly could not apply to any minute or fragmentary portion, as it might literally import. If so, the clause would be void as unreasonable, and defeating, without merit, the contract for indemnity. It cannot have such a technical or literal construction. Literalism being disregarded, the clause must have a fair and reasonable interpretation and construction, and that which is most favorable to indemnity — the object of the contract. Not having a literal meaning, and not definitely designating what material part of the building must fall before the fire to exempt the insurer from liability, it must, like all ambiguous clauses, be construed most favorably to indemnity, and against the insurer. It should therefore not have been construed as meaning any fragment or portion of a part of the building, but an integral part of the entire building, as was done by the circuit judge."

The very recent case of *First Congregational Church* v. *Holyoke Fire Insurance Co.*, 158 Mass., 475, is another instance in which the court read into a condition very similar to that here in question a qualification imperatively demanded by common sense and common justice, but unwarranted by any express language contained in the policy. There the policy sued on provided that "this policy shall be void if . . . without the assent in writing or in print of the company . . . the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risk; or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal oil may be used for lighting," etc. The property insured was a church edifice built of wood. A painter used a naphtha torch for several weeks to burn off the old paint on the building preparatory to repainting it, and finally the building caught fire where the torch had just been used, and was consumed. The report does not show precisely

how the questions discussed in the opinion were raised, but Knowlton, J., with the concurrence of the rest of the court, says on the point to which we here cite the case: "On the undisputed facts as stated in the bill of exceptions, the only ground on which the plaintiff could fairly ask to present a question to the jury is upon its contention that the use of naphtha and the change in conditions affecting the risk occurred through making ordinary repairs in a reasonable and proper way, and that in the provisions quoted from the policies there is an implied exception of what is done in making ordinary repairs. It is generally held that such provisions are not intended to prevent the making of necessary repairs, and the use of such means as are reasonably required for that purpose. *O'Niel* v. *Buffalo Insurance Co.*, 3 Comst. (3 N. Y.) 122; *Dobson* v. *Sotheby*, Mood. & Malk. 90; *Franklin Insurance Co.* v. *Chicago Ice Co.*, 36 Maryland, 102; *Billings* v. *Tolland County Insurance Co.*, 20 Connecticut, 139; *Mears* v. *Humboldt Insurance Co.*, 92 Penn. St. 15; *Williams* v. *New England Ins. Co.*, 31 Maine, 219; *Putnam* v. *Commonwealth Insurance Co.*, 18 Blatchford, 368. Both parties to a contract for insurance must be presumed to expect that the property will be preserved and kept in a proper condition by making repairs upon it. Policies on buildings are often issued for a term of five years or more. The making of ordinary repairs in a reasonable way may sometimes increase the risk more or less while the work is going on, or involve the use of an article whose use in a business carried on in the building is prohibited by the policy. In the absence of an express stipulation to that effect, a contract of insurance should not be held to forbid the making of ordinary repairs in a reasonably safe way, and provisions like these we are considering should not be deemed to apply to an increase of risk or to a use of an article necessary for the preservation of the property. We are therefore of opinion, that if the use of naphtha at the time and in the manner in which it was used was reasonable and proper in the repair of the building, having reference to the danger of fire as well as to other considerations, it would not render the policies void."

Opinion of the Court.

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

In the view we take of the case it will be necessary to notice only the exceptions based upon the refusal of the court to instruct the jury, as requested by the defendant, "that if the work done by the mechanics, as disclosed by the evidence, increased the hazard while such work was being done, then the plaintiff is not entitled to recover;" and the exception to the instruction given, to the effect that the question was whether the work and repairs done upon the building increased the risk at the time of the fire.

It is contended on behalf of the plaintiff in error that these exceptions present the following legal propositions:

(1) The court should have instructed the jury that if the work done by the mechanics increased the hazard, while the work was in progress, then the assured would not be entitled to recover, because when the hazard was increased and the risk changed, by the acts of the assured, and without the knowledge or consent of the insurer, in that event the contract came to an end by virtue of its own expressed, unambiguous terms.

(2) The assured, the county of Coos, having made extensive repairs upon the insured premises, and having neither notified the plaintiff in error, the insurer thereof, nor obtained its consent in writing therefor, the conditions of the policy were violated, and, by its terms, the contract terminated.

(3) It was error to instruct the jury that it was immaterial what had occurred to increase the hazard during the repairs, unless such increased hazard existed at the time of the fire.

On behalf of the defendant in error it is claimed that under a proper construction of the policy, the question on which the case turns is, did the repairs and alterations, made by the defendant in error upon its court-house, and completed when the fire occurred, result in an increase of risk at that time, or were they in any way the cause of the fire? The proposition is that unless such repairs and alterations had the effect of either causing the fire, or of increasing the risk at the time it occurred,

then there was no breach of the condition, contained in the contract, that "this policy shall be void and of no effect, if, without notice to the company, and permission therefor endorsed hereon, . . . mechanics are employed in building, altering, or repairing the premises named herein."

Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfilment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated, or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made.

It is settled, as laid down by this court in *Thompson* v. *Phenix Ins. Co.*, 136 U. S. 287, that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that con-

struction will be adopted which is most favorable to the insured.

But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense.

It is entirely competent for the parties to stipulate, as they did in this case, "that this policy should be void and of no effect, if, without notice to the company, and permission therefor endorsed hereon, . . . the premises shall be used or occupied so as to increase the risk, or cease to be used or occupied for the purposes stated herein; . . . or the risk be increased by any means within the knowledge or control of the assured; . . . or, if mechanics are employed in building, altering, or repairing premises named herein, except in dwelling-houses, where not exceeding five days in one year are allowed for repairs."

These provisions are not unreasonable. The insurer may have been willing to carry the risk at the rate charged and paid, so long as the premises continued in the condition in which they were at the date of the contract; but the company may have been unwilling to continue the contract under other and different conditions, and so it had a right to make the above stipulations and conditions on which the policy or the contract should terminate. These terms and conditions of the policy present no ambiguity whatever. The several conditions are separate and distinct, and wholly independent of each other. The first three of the above conditions depend upon an actual increase of risk by some act or conduct on the part of the insured; but the last condition is disconnected entirely from the former, whether the risk be increased or not. This last condition may properly be construed as if it stood alone, and a material alteration and repair of the building beyond what was incidental to the ordinary repairing necessary for its preservation, without the consent of the insurer, would be a violation of the condition of the policy,

even though the risk might not have been, in fact, increased thereby. The condition that the policy should be void and of no effect if "mechanics are employed in building, altering, or repairing the premises named herein," without notice to or permission of the insurance company, being a separate and valid stipulation of the parties, its violation by the assured terminated the contract of the insurer, and it could not be thereafter made liable on the contract, without having waived that condition, merely because in the opinion of the court and the jury the alterations and repairs of the building did not, in fact, increase the risk. The specific thing described in the last condition as avoiding the policy, if done without consent, was one which the insurer had a right, in its own judgment, to make a material element of the contract, and, being assented to by the assured, it did not rest in the opinion of other parties, court or jury, to say that it was immaterial, unless it actually increased the risk.

If the last stipulation had been so framed as to require the element of an increased risk to be incorporated into the condition that if "mechanics are employed in building, altering, or repairing the premises named herein," without notice to the company and its permission in writing endorsed on the policy, then there would have been presented a question of fact for the jury whether such alterations and repairs constituted an increase of the risk. But this condition, being wholly independent of any increase of risk, its violation without the consent of the insurer, or waiver of the breach, annulled the policy.

This being the proper construction, as we think, of the terms and conditions of the policy, and it being shown that the insured in August, 1886, without the knowledge or written consent of the insurer, employed carpenters and brick masons, and reconstructed and enlarged the vaults and offices of the court-house — reconstructing the foundations corresponding to the enlargement of the vaults, which necessitated the cutting of the floors and ceilings of the different offices — and that this work occupied five or six weeks; and in connection therewith necessitated painting, and a new method of

heating the offices of the register of probate and the clerk of the court, (this change in the method of heating being completed about midnight of November 3, 1886, and the fire which destroyed the building occurring some two hours thereafter,) clearly entitled the plaintiff in error to the instruction requested, that "if the work done by the mechanics, as disclosed by the evidence, increased the hazard while such work was being done, then the plaintiff is not entitled to recover." This instruction, which the court declined to give, presented the question of fact whether there had been any violation of the condition that the premises should not be so used or occupied as to increase the risk, or that the risk should not be increased by any means within the knowledge or control of the assured.

The court not only refused this instruction, but in its charge to the jury so construed the condition that if "mechanics are employed in building, altering, or repairing the premises named herein," without the consent of the insurer, as to make it mean that such alterations and repairs must be shown to have increased the risk in point of fact, and that such increase of risk must have existed at the time of the fire.

If the mechanics were employed in altering and repairing the building in a manner beyond what was required for its ordinary repair and preservation, and in such a material way as constituted a breach of the condition of the contract, it is difficult to understand upon what principle the charge of the court can be sustained. The condition which was violated did not, in any way, depend upon the fact that it increased the risk, but by the express terms of the contract was made to avoid the policy if the condition was not observed. The instruction of the court gave no validity or effect to the condition and its breach, but made it depend upon the question whether the acts done in violation of it, in fact, increased the risk, and whether such increased risk was operative at the date of the fire.

The court below proceeded upon the theory that the fire having occurred after the employment of the mechanics had ceased, such employment, and the making of the alterations

and repairs described, did not constitute a breach at the time of the fire; that the increased risk, which was necessary to render the policy void, must be found to have existed at the time of the fire, and not at any preceding date.

But aside from the error of the court in refusing to give the specific charges requested, and in the general charge, as given, it appears, by the bill of exceptions, that upon the conclusion of the testimony establishing the foregoing facts, and about which there is no controversy, the defendant made the following motion: "That a verdict be directed for it on the ground that there is no evidence competent to be submitted to the jury that the building, altering, and repairing shown by the evidence was not such altering and repairing as avoided the policy." This motion was denied by the court, and the defendant excepted. Under the construction we have placed upon the last condition, above quoted, we are of opinion that the defendant was entitled, on the conceded facts, to have a verdict directed in its favor on the ground that the employment of mechanics to make such material alterations and repairs as were made, without the knowledge or consent of the plaintiff in error, was in and of itself such a violation of the terms of the policy as rendered it void, without reference to the question whether such alterations and repairs had increased the risk or not. The principles of law applicable to this question are stated and illustrated in the following authorities:

In *Ferree* v. *Oxford Fire and Life Ins. Co.*, 67 Penn. St. 373, the policy of insurance contained the provision that it should not "be assignable without the consent of the company expressed thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company in virtue of said policy shall thenceforth cease." The assured assigned the policy, and the court held that the condition was a perfectly legal one, and that the company was not liable, although the plaintiff had redeemed the policy previously assigned, and was the holder thereof at the time of the suit.

In *Fabyan* v. *Union Mutual Fire Ins. Co.*, 33 N. H. 203,

207, the policy provided that procuring other insurance without the consent of the company would avoid the policy. Other insurance was procured, and the court held "that by the terms of the policy, this discharged the defendant from liability — their promise contained in the policy to pay the plaintiff in case of loss, being upon the condition that in case of such double insurance their assent thereto should be endorsed on the policy."

In *Moore* v. *Phœnix Ins. Co.*, 62 N. H. 240, the policy contained, among other provisions, the following conditions: "If the above-mentioned premises shall become vacant and unoccupied for a period of more than ten days . . . without the assent of the company endorsed hereon, . . . then, and in every such case, this policy shall be void." At the time the premises were destroyed they were occupied, but for a period of at least three months prior to that time they were unoccupied, although without the knowledge of either the assured or the insurer. The court held that the conditions of the policy had been broken by the unoccupancy of the premises, and that "the contract being once terminated could not be revived without the consent of both of the contracting parties. It is immaterial, then, whether the loss of the buildings is due to unoccupancy or to some other cause."

In other New Hampshire decisions it is held that a departure from the conditions, without the written consent of the insurer, avoided the policy and terminated the contract. *Shepherd* v. *Union Mutual Ins. Co.*, 38 N. H. 232; *Gee* v. *Cheshire M. F. Ins. Co.*, 55 N. H. 65; *Sleeper* v. *N. H. Ins. Co.*, 56 N. H. 401; *Hill* v. *Ins. Co.*, 58 N. H. 82; *Baldwin* v. *Phenix Ins. Co.*, 60 N. H. 164; *Crafts* v. *Union Mutual Ins. Co.*, 36 N. H. 44; *Dube* v. *Mascoma Mutual Ins. Co.*, 64 N. H. 527.

It is competent for the parties to agree that this or that alteration or change shall work a forfeiture, in which case the only inquiry will be whether the one in question comes within the category of changes which by agreement shall work a forfeiture. May on Insurance, (1st ed.,) sec. 223, citing *Lee* v. *Howard Fire Ins. Co.*, 3 Gray, 583; *Glenn* v. *Lewis*, 8 Exch. 607.

In *Frost's Detroit Lumber Works* v. *Millers' Mut. Ins. Co.*, 37 Minnesota, 300, 302, the court was called upon to construe a contract of insurance which contained the following provision: "Such ordinary repairs as may be necessary to keep the premises in good condition are permitted by this policy; but if the buildings hereby insured be altered, added to, or enlarged, due notice must be given and consent endorsed hereon." The building insured was subsequently materially enlarged, and the court held, inasmuch as notice was not given to the company, that under the construction given to the clause the policy was avoided, although the risk was not increased by the alterations which had been made to the building.

In *Mack* v. *Rochester Ins. Co.*, 106 N. Y. 560, 564, the policy contained a condition similar to the one in the policy in this case, providing that the working of mechanics in building, altering, or repairing any building covered by the policy, without the written consent of the company endorsed thereon, would cause a forfeiture of all claim under the policy. Mechanics were at work making changes in the building at the time of the fire, without the consent of the insurer, and the court held that this effected an avoidance of the policy. The court said that "certain conditions are very generally regarded by underwriters as largely increasing the hazards of insurance, and they, unless corresponding premiums are paid for extra risks, are usually intended to be excluded from the obligation of the policy. Such are the conditions in reference to unoccupied houses, changes in the occupation from one kind of business to another more hazardous, the use of inflammable substances in buildings, and their occupation by carpenters, roofers, etc., for the purpose of making changes and alterations. These conditions, when plainly expressed in a policy, are binding upon the parties and should be enforced by the courts, if the evidence brings the case clearly within their meaning and intent. It tends to bring the law itself into disrepute, when, by astute and subtle distinctions, a plain case is attempted to be taken without the operation of a clear, reasonable, and material obligation of the contract."

The principle announced in the last-cited case was also

enunciated in *Lyman* v. *State Mut. Ins. Co.*, 14 Allen, (Mass.,) 329.

In *Kyte* v. *Commercial Union Assurance Co.*, 149 Mass. 116, 122, a policy was sued upon containing the provision that it should become void if the circumstances affecting the risk should be altered so as to increase the risk; or, if articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law. When the premises were insured they were used as a common victualling place, and subsequently intoxicating liquors were sold illegally. The judge before whom the case was tried instructed the jury in substance that if that illegal use was temporary, not contemplated at the time when the policy was taken by the plaintiff, and ceased before the fire, then the fact that he had made an illegal use of the premises during the time covered by the policy would not deprive the plaintiff of the right to maintain the action; and that his right under the policy, if suspended while the illegal use of the building continued, would revive when he ceased to use it illegally. The Supreme Judicial Court of Massachusetts, in considering this instruction, said: "The question is thus presented whether the provision of the policy that it shall be void in case of an increase of risk means that it shall be void only during the time while the increase of risk may last, and may revive again upon the termination of the increase of risk." "The contract of insurance depends essentially upon an adjustment of the premium to the risk assumed. If the assured, by his voluntary act, increases the risk, and the fact is not known, the result is that he gets an insurance for which he has not paid." And again: "An increase of risk which is substantial, and which is continued for a considerable period of time, is a direct and certain injury to the insurer, and changes the basis upon which the contract of insurance rests; and since there is a provision that in case of an increase of risk which is consented to, or known by the assured and not disclosed, and the assent of the insurer obtained, the policy shall be void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the continuance of such increase of risk."

The decision of the Supreme Court reversed the lower court, which had proceeded exactly upon the same theory adopted by the Circuit Court in the case under consideration. The principles laid down in this and the other cases cited clearly establish that the general instruction to the jury complained of in the present case was erroneous.

Judgment reversed and case remanded with instructions to set aside the verdict and to order a new trial.

Mr. Justice Brewer dissented.

COLUMBUS SOUTHERN RAILWAY COMPANY *v.* WRIGHT.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 753. Argued January 15, 1894. — Decided January 29, 1894.

The provision in the law of October 16, 1889, of the State of Georgia, (Laws of Georgia, 1889, No. 399, p. 29,) distributing for taxation purposes the rolling stock and other unlocated personal property of a railway company, to and for the benefit of the counties traversed by the railroad, does not violate the provision in the Fourteenth Amendment to the Constitution, that no State shall deny to any person within its jurisdiction the equal protection of its laws.

The case is stated in the opinion.

Mr. William A. Wimbish for plaintiff in error.

The court declined to hear argument for defendant in error. *Mr. Clifford Anderson* and *Mr. J. M. Terrell* filed a brief for same.

Mr. Justice Jackson delivered the opinion of the court.

The question presented by the record in this case is whether an act of the legislature of Georgia, approved October 16,

1889, entitled "An act to provide a system of taxation of railroad property in each of the counties of this State through which said railroads run, and to provide a mode of assessing and collecting the same, and for other purposes," Laws of Georgia, 1889, No. 399, p. 29, violates that clause of the Fourteenth Amendment to the Constitution of the United States which declares that "no State shall deny to any person within its jurisdiction the equal protection of its laws."

The act complained of provides as follows:

"SECTION I. *Be it enacted by the General Assembly of this State, and it is hereby enacted by authority of the same*, That hereafter in each and every year, on or before the first day of May, each and every railroad company in this State shall make an annual return to the comptroller-general of this State, for the purposes of county taxation in each of the counties through which said road runs, in the following manner: Said return shall be under the oath of the president or other chief executive officer, and shall show the following facts as they existed on the first day of April preceding, to wit: First, showing the aggregate value of the whole property of said railroad company; second, showing the value of the real estate and track bed of said company; third, showing the value of the rolling stock and all other personal property of said company; fourth, showing the value of the company's property in each county through which it runs.

"SEC. II. *Be it further enacted, etc.*, That, whenever the amount of the tax levy of any county through which the said railroad runs is assessed by the authority of such county, it shall be the duty of the ordinary thereof to certify the same and transmit such certificate to the comptroller-general; and the property of such railroad companies shall be subject to taxation in each and every county through which the same passes to the same extent and in the same manner that all other property is taxed, in the manner hereafter set out.

"SEC. III. *Be it further enacted, etc.*, That, whenever such certificate is received by the comptroller-general, it shall be his duty to proceed to assess the amount of each and every railroad company's property, in each and every of said coun-

ties, in the following manner: First, it shall be assessed upon the property located in each county upon the basis of the value given by the returns required by section first of this act; second, the amount of tax to be assessed upon the rolling stock and other personal property is as follows: As the value of the property located in the particular county is to the value of the whole property, real and personal, of the said company, such shall be amount of rolling stock and other personal property to be distributed for taxing purposes to each county. These two, the value of the property located in the county and the share of the rolling stock and personal property thus ascertained and apportioned to each of such counties, shall be the amount to be taxed to the extent of the assessment in each county.

"SEC. IV. *Be it further enacted*, That should the property of any railroad company in this State be not subject to taxation, as hereinbefore provided, but taxable upon its net income, such railroad company shall report to the comptroller-general the entire length of its road, the different counties through which such road runs, and the number of miles in each county, which report shall be made at the time that railroad companies are required to return their property for taxation. When the income of such road is returned to the comptroller-general, he shall estimate the amount of income for each county through which such road runs, upon which shall be levied for such county a tax to be ascertained in the following manner: In the proportion that the road in each county bears to the whole length of the road, in that proportion shall the income returned by said road be taxed by each county through which it passes. Such income shall be taxed at the rate fixed by the charter of such railroad company, which tax shall be assessed and collected by the comptroller-general, and by him paid over to the county entitled to such tax. If any railroad company refuses to pay such tax, the comptroller shall issue execution for the amount of said tax due to each county, which shall be levied on any property of said company. The railroad company may resist such tax as is herein provided in case of tax on property of railroad companies.

"SEC. V. *Be it further enacted, etc.*, That whenever the comptroller-general shall ascertain and levy in the manner specified in the preceding section, the amount of tax due by such company to each of such counties, it shall be his duty at once to notify the president and treasurer of such railroad company of the amount due in each of said counties for county taxes of said railroads, and each and every road is hereby required, within sixty days from the receipt of such notice, to pay to the tax collector of each county through which the railroad runs the amount mentioned by the comptroller-general, as the tax due to such county.

"SEC. VI. *Be it further enacted, etc.*, If any railroad company shall refuse to pay, within sixty days, the amount thus ascertained and due by it, to the tax collector of any county to which the same is due and payable, it shall be the duty of the comptroller-general to at once issue a *fi. fa.* in the name of the State of Georgia, against such railroad company, for the same; to be issued, levied, and returned in the same manner as tax *fi. fas.* are issued for state taxes due in the State by said companies.

"SEC. VII. *Be it further enacted, etc.*, If any railroad company shall dispute the liability to such county tax, it may be done by an affidavit of illegality, to be made by the president of said railroad in the same manner as other affidavits of illegality are made, and shall be returned for trial to the Superior Court of the county of Fulton, where such cases shall be given precedence for trial over all other cases, except tax cases, in which the State shall be a party.

"SEC. VIII. *Be it further enacted, etc.*, That all laws and parts of laws in conflict with this act be, and the same are hereby, repealed."

By an act approved in 1874, (Act of February 28, 1874, No. 107, p. 109, Laws of 1874,) provision was made for the taxation of railroad property for state purposes, but this act of 1889 was the first statute enacted providing for the taxation of railroad property for county purposes.

The plaintiff in error is a corporation organized and existing under the laws of the State of Georgia, having its principal

office or domicil in the city of Columbus, Muscogee County, in that State, with its line of railway extending through the counties of Chattahoochee, Stewart, Terrell, Webster, and Lee, to the city of Albany in the county of Dougherty. With the exception of its right of way, road-bed, superstructure, depots, and usual appurtenances along the line of its road, the undistributed property of the corporation, such as its choses in action, etc., is situated in Muscogee County.

Under the provisions of the first section of the act set out above, the railroad company made return of its property for the year 1890. Upon the basis of that return the comptroller-general of the State assessed and levied taxes for the benefit of the several counties through which the railroad extended, (after such counties had certified to him their respective tax rate and levies,) and on October 27, 1890, notified the company that the taxes so levied must be paid to the respective tax collectors of the several counties within sixty days from the date of that notice.

The tax rate upon the property thus assessed, as stated in the notice of the comptroller-general, was different in the different counties. For Muscogee County it was 2½ mills; for Chattahoochee it was 8 mills; for Stewart it was 5 mills; for Terrell it was 5.34 mills; and for Webster County it was 3.47 mills, these rates of taxation being imposed by the respective counties on other property situate therein, and subject to taxation.

Before the expiration of the sixty days, within which the railroad company was required to make payment of the taxes thus assessed, it filed its bill, or equitable petition, in the Superior Court of Fulton County against William A. Wright, comptroller-general, for an injunction and relief against the payment of these county taxes.

In the petition it was alleged that the act was repugnant to the constitution of the State of Georgia, for various reasons: First, that it was inconsistent with that provision of the constitution which required that "all taxation shall be uniform upon the same class of subjects and *ad valorem* on all property subject to be taxed within the territorial limits of the

authority levying the tax;" second, that the act was a special one, whereas the constitution required that all taxes should be levied and collected under general laws; third, that the act provided for a tax to be levied and collected by the State for the benefit of the counties, when the State had no authority under the constitution to tax for such a purpose; fourth, that the act embraced two subjects-matter, viz., the "property of certain railroads," and also the "net incomes as to certain other railroads," while the constitution declares that "no law or ordinance shall pass which refers to more than one subject-matter;" fifth, because the affidavit of illegality which a railroad company was authorized to file against an execution to collect the taxes authorized by the statute was required to be filed and tried in the Superior Court of Fulton County without reference to the domicil of the company, thereby conferring upon that court a greater jurisdiction than the constitution allowed; and, sixth, that the act violated the Constitution of the United States, in that it conflicts with the clause of the Fourteenth Amendment, which declares that "no State shall deny to any person within its jurisdiction the equal protection of its laws."

The defendant interposed a general demurrer to the petition, which the Superior Court of Fulton County sustained, and dismissed the petition, holding that the act was not repugnant to the provisions of either the State or the Federal Constitutions in any of the respects alleged. From that judgment the railroad company prosecuted a writ of error to the Supreme Court of the State, which court fully reviewed and considered the questions, and in affirming the judgment of the court below held that the act of 1889 in no way violated the constitution of the State and in no way discriminated against the railway company so as to deny it the equal protection of the laws, and was not, therefore, repugnant to the Fourteenth Amendment of the Constitution of the United States. 89 Georgia, 574. The present writ of error was sued out to reverse this judgment.

Upon this writ of error we cannot, of course, review the construction which the Supreme Court of the State has placed

upon its own constitution and the act in question. The Federal question sought to be raised by the plaintiff in error is embodied in the two general propositions that "the rolling stock and other unlocated personal property owned by the railway company is, by the provisions of the act, distributed for taxation purposes to and for the benefit of the several counties traversed by the railroad, while personal property of all other persons and companies is taxed in and by the county in which the owner resides; and, secondly, that the unlocated, intangible personal property of railroad companies is distributed for taxing purposes to the several counties, while the intangible personal property of all other persons follows the domicil of the owner, and is there taxable."

These two objections embody substantially the single proposition that the act in question discriminated against the railroad company in not taxing its unlocated or intangible personal property at the place of the railroad company's domicil or principal office; in other words, in the county of Muscogee. This proposition was disposed of by the Supreme Court of the State as follows, pp. 593–595:

"The next objection made by the petition is that the requirement of the constitution as to uniformity in taxation is violated, because certain personal property of railroads is taxed for the benefit of counties, though not situated therein, while as to other corporations and individuals county taxation is imposed, so far as any particular county is concerned, only on property within its territorial limits. This objection is disposed of by what has already been said. We have shown that in each county its rate of taxation is applied to the property of the railroad actually located therein, and that it is perfectly just and proper to distribute the unlocated personalty of the road for taxing purposes in fair proportion among the several counties, the corporation residing *sub modo* in all the counties along its line of road, and therefore in one as much as in another.

"In the next place, it is contended that the same paragraph of the constitution is violated because the act prescribes a different rate of taxation in each of the several counties through

which a railroad passes. The obvious answer to this objection is that the act does not thus impose any tax substantially different from the county taxes imposed on all other taxpayers. Certainly it does not, in any view of the question, impose any tax for state purposes. It merely provides a means for the county to apply to railroad property its own rate of taxation and collect the tax for county purposes. The vital thing is the rate, and the State has nothing to do with fixing it in any county beyond general regulations restricting its amount and the like. It is entirely immaterial whether mere ministerial acts and calculations, which when correctly done and made can have but one possible result, are the work of the comptroller-general or of the county authorities. If the act provides, as we think it does, a constitutional scheme of taxation, what possible difference can it make whether the amounts upon which taxes are to be paid are arrived at by one officer or another, such amounts being necessarily the same in either event? As the tax is for the exclusive benefit of the county, and it fixes the rate, it is *a county tax*, and so long as a county taxes all property within its jurisdiction *ad valorem* and at the same rate, the uniformity required by the constitution is observed, and this is true no matter what functionary acting by law for the county does the necessary ministerial acts. The question is all the more free from difficulty because under our system each taxpayer values his own property for taxation and makes his own returns. So under the present law the railroad can and does make returns to the comptroller-general, which serve the same purpose as if it made separate returns to the tax receivers. It fixes the amounts on which it must pay taxes, and each county fixes its own rate. Hence under this law a railroad would not have to pay more tax than if each county by its own officials attended to the whole business. Not being therefore really injured, the railroads have in this respect no ground of complaint. Indeed, *under this law* these corporations have one advantage over other taxpayers. Returns made to tax receivers are overlooked by the grand juries, and a system is provided for increasing the valuation of a taxpayer's property

when he undervalues it. Code, §§ 923 (b) *et seq.* No such rule is applied to railroads by this act, but their returns stand as they make them, whatever may be the law as to their returns for state taxation. We will only add that as the act allows corporations, whose property is taxable under it, to designate in their returns what part of their property (real and personal) is located in a particular county, there is no ground for the complaint that the law *may* subject property located in one county to the rate of taxation prescribed by some other county. If, for example, the plaintiff in error returns a switch engine as a part of its property located in Muscogee county, it will be taxed at the rate prescribed by the authorities of that county, and none other."

This decision of the Supreme Court of the State establishes, what is conceded by plaintiff in error, that the rate of taxation and the mode of valuing the railroad property for assessment was in all respects the same as the rate and mode prescribed for other taxpayers. So, that, the only difference between the county taxation upon railroad property, real and personal, and that of other persons or companies consisted in the method of distributing the transitory or unlocated personal property of the railroad company, as valued by itself, among the several counties entitled to share therein, for the purposes of taxation. In other words, the question is whether the railroad company has any constitutional right to have its transitory property assessed for taxation alone in Muscogee County, and whether the distribution, among the several counties, of such property is such a discrimination against the railroad as denies to it the equal protection of the laws?

This is hardly an open question. Various modes of taxing railroad property are adopted by the different States. In some, railroad companies are taxed upon their property as a unit. In others, the road and the property in each county are separately assessed, and in still other States, the whole road is assessed, and then the assessment apportioned among the several counties and towns. These and all similar modes of taxation are subject to the legislative discretion of the respective States, and do not ordinarily present any Federal question

whatever. But the mode of distribution of the unlocated or transitory personal property is a matter of regulation by the state legislature, which in no way involves a violation of the Fourteenth Amendment.

In *Kansas City &c. Railroad* v. *Severance*, 55 Missouri, 378, 388, the Supreme Court of Missouri, in dealing with this question, said: "The proposition is undoubtedly true, that where a corporation has its residence, there the property of this description is liable to assessment and taxation if the law has prescribed no different rule on the subject. This notion of the *situs* of personal property following the personal residence of the corporation is a legal fiction, but is not an unbending and uncontrollable principle of law. It may be modified by the legislature. The rolling stock of a railroad company has no more local existence in one county than another. . . . This machinery by which the road is operated is constantly passing from one terminus to the other of the entire road, and to save all cavil and dispute in respect to it, it was perfectly competent for the legislature to say that it should become a part of the road itself and become property the same as the road, and that for the purpose of taxation it should be equally distributed through the counties, cities, or towns through which it passed in proportion to its length in these respective localities."

The principle here announced is repeated in the well-considered case of *Franklin County* v. *Railroad Co.*, 12 Lea, (Tenn.,) 521, 537, 538, 539, which involved substantially the same question of the *situs* for the purpose of taxation of the rolling stock and personal property of railway companies. It was there said by the Supreme Court of Tennessee: "The property of a railroad company for purposes of taxation consists of its realty, its local personalty, its rolling stock, its choses in action, and its franchise. The franchise is the privilege conferred by the charter of incorporation, namely, the right to exercise all the powers granted in the mode prescribed for the purpose of profit. It is a unit, not confined to any one county in which it may be exercised. The principal part of the franchise is the right to charge for freight and pas-

sengers, the charge being limited within a prescribed or reasonable rate for carriage in the proportion of the distance of transportation. Obviously, after ascertaining the value of the entire franchise in the State as a unit, no more approximate or just division of this value can be made for purposes of taxation than to allot it among the counties through which the track runs in the proportion of the length of track in the county to the entire length of road in the State. And this is what was done by the acts under consideration. The choses in action of a corporation, its rolling stock, and personal property, according to the principles of the common law, have their *situs* at the domicil or place of business of the company. *Mayor, etc., of Gallatin* v. *Alexander*, 10 Lea, (Tenn.,) 475; *Nashville* v. *Thomas*, 5 Cold. (Tenn.,) 607; Cooley on Taxation, 273. But the legislature may change the *situs* of such property for purposes of taxation. *McLaughlin* v. *Chadwell*, 7 Heis. (Tenn.,) 389, 406; *Bedford* v. *Nashville*, 7 Heis. (Tenn.,) 409; *State Railroad Tax Cases*, 92 U. S. 575, 607; Cooley on Taxation, 274. . . . The rolling stock of a corporation, used in transporting passengers and freight over any and all parts of its line of road, cannot be said to have a *situs* which would give a preference to any county through which the road may run over any other county in like situation. The choses in action of a railroad company, created by the exercise of its franchises, on every part of its track, may be equally said to be without a *situs* so as to give a preference. The legislature might well treat them as the franchise itself, for, or by, the exercise of which they are created, and proportion the general valuation among the counties through which the road may run according to the length of road in each county. The roadway itself of a railroad depends for its value upon the traffic of the company, and not merely upon the narrow strip of land appropriated for the use of the road, and the bars and cross-ties thereon. The value of the roadway at any given time is not the original cost, nor, *a fortiori*, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway as-

sessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road."

The principle set out in the above quoted authorities is clearly sanctioned by this court in the *State Railroad Tax Cases*, 92 U. S. 575, 607, where the same objection to the system of taxation by the State, as here presented, was made that the rolling stock, etc., was personal property, and that it and other personal property had a *situs* at the principal place of business of the corporation, and could be taxed in no other county but the one where it was situated. This court met that objection by saying: "It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the State which recognizes it. . . . Like all other laws of a State, it is, therefore, subject to legislative repeal, modification, or limitation, and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation. Whether allowing the rule to stand as to taxation of individuals, and changing it as to railroads or other corporations, it violated any rule of uniformity prescribed by the constitution of the State, we will consider when we come to the constitutional objections to the statute."

In its further consideration of that case the court held that changing the *situs* of such unlocated property of a railroad

company, and distributing it to the counties through which the road extended, in no way violated the rule of uniformity or discriminated against the railroad company. In that case, as in this, there was no claim that the rate of taxation levied by any county on the assessed value of the property within its limits was greater than on other property; nor was the valuation different from that placed upon other property. In the present case the railroad company, like other property owners, placed its own valuation upon the property. It was also held, in the case just cited, that taxes are uniform when the rate of taxation is the same on assessments ascertained by the same method.

Without reviewing authorities on this subject, the principle involved in the case under consideration is not distinguishable from the principle involved in *State Railroad Tax Cases*, 92 U. S. 575; and in *Kentucky Railroad Tax Cases*, 115 U. S. 321, 339; *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26; and in *Charlotte, Columbia & Augusta Railroad* v. *Gibbes*, 142 U. S. 386.

The whole complaint made by the plaintiff in error is that it had a constitutional right to have its rolling stock, and other unlocated personal property, taxed in the county of Muscogee, where it had its principal office, and to give such property a different *situs*, under the act complained of, by distributing it among the counties through which the road extended, was an unjust discrimination, and violated its constitutional rights. This proposition cannot be entertained for a moment, for the reason already stated, that it was clearly within the province of the legislature of Georgia, to give such personal property a different *situs*, for purposes of taxation, from that of the company's principal office. The act in question having apportioned the transitory and unlocated property of the railroad company among the several counties through which the road extends for the purpose of taxation, and having subjected such property to the same rate of taxation imposed upon all other property in the respective counties, the fact that the rate of taxation varied in the different counties, according to their respective wants and necessities,

involved no discrimination against the railroad company. The State having the undoubted authority to fix the *situs* of such property, and having lawfully distributed it proportionately between the several counties traversed by the road, it thereby became subject to the same rate of taxation as other property in the respective counties. This involved no inequality, and violated no provision of either the state or Federal Constitution. It certainly did not involve a failure to extend to the plaintiff in error the equal protection of the laws.

The Federal question involved in the case was correctly decided by the Supreme Court of the State, and the judgment of that court is therefore *Affirmed.*

DE ARNAUD *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 550. Submitted January 8, 1894. — Decided January 29, 1894.

A receipt signed by a claimant against the United States for a sum less than he had claimed, paid him by the disbursing agent of a department, "in full for the above account," is, in the absence of allegation and evidence that it was given in ignorance of its purport, or in circumstances constituting duress, an acquittance in bar of any further demand.

A claim against the United States whose prosecution in the Court of Claims was barred by the statute of limitations, was presented to the Treasury for adjustment and payment. The Secretary of the Treasury transmitted it to the Court of Claims under the provisions of Rev. Stat. § 1063. *Held*, that it was barred by the statute of limitations.

THIS was an appeal from a judgment of the Court of Claims, dismissing the petition of Charles de Arnaud, in which he sought for a judgment in his favor against the United States for the sum of $100,000, for services the petitioner alleged he had rendered as a "military expert," employed for "special and important duties," by General Fremont for and on behalf of the United States.

The facts of the case, as found by the court below, were as follows:

Statement of the Case.

The claimant is a native subject of Russia, residing in the United States. The following is a translation of the provisions of the law of Russia, according to citizens of the United States the right to prosecute claims against such government in its courts:

"SEC. 1292. The decision of the court is announced to both parties according to general rules, but independently thereof a copy of the decision is forwarded to the local government the institution spoken of in section 2084.

"SEC. 1296. In the execution of a judgment against a government institution the claimant presents a certified abstract of the decision to the institution, which is bound to execute the judgment accordingly.

"SEC. 1519. Aliens residing in Russia are subject to Russian laws, as well personally as in regard to property, and enjoy the common defence of safeguards and protection thereof.

"SEC. 1288. Claims of private persons against the government institutions are governed by general rules, and are brought according to the location of the property or according to the place where the loss was sustained by the private person, or according to the place where the government institution or where the government officer is situated or resides who represents the government in court."

The claimant came to this country about the year 1860, and was, prior to that time, an officer in the Russian army, where he served in the Crimean war as lieutenant of engineers, and was serving as such when the armistice was concluded between Russia and the contending allies.

In the year 1861 John C. Fremont was a major-general in the United States Army, in command of the Western Department of Missouri. In the month of August, 1861, he entered into an agreement with the claimant, by which the claimant was employed by him to go within the Confederate lines, make observations of the country in the States of Kentucky, Tennessee, and Missouri, to observe the position of the rebel forces, the strategic positions occupied by them, and advise him (General Fremont) of the movements necessary to be made by the Union forces to counteract the movements of the enemy,

and to facilitate the advance of our troops and aid them in attacking and repulsing the Confederate forces.

In consequence of that arrangement he did go within the Confederate lines, and, agreeably to what he was instructed to do, brought back to General Fremont full information of the kind desired, maps of the country, of various roads, the number of troops, their stations, condition, and, as far as he could judge and find out, their projected movements.

He was absent on that business a number of days, came back, and reported in St. Louis about the 12th of August, 1861, to General Fremont, who was so satisfied with the information that he brought, with the intelligence and sagacity he displayed in collecting it, and the usefulness of his information, that he (Fremont) then made an arrangement for him to continue in the service of the department. About the 12th of the month of August, 1861, he again left for the country occupied by the Confederate forces to collect information. The most important part of the services rendered by him was in the beginning of the next month, September, when, with the information that he had collected, he was returning to report to General Fremont a movement of the Confederate forces upon Paducah. On reaching Cairo he found that he had only time to report to Fremont by telegraph, and reported forthwith personally to General Grant, informing him that troops were advancing upon Paducah, and that it was necessary to move immediately in order to occupy the place. General Grant did move instantly and took possession of Paducah, Kentucky, solely on information given by the claimant, and to the effect that the rebels were moving upon that city with a large force.

The claimant was paid $600 on the following orders and receipts:

"HEADQUARTERS WESTERN DEPARTMENT,

"CAMP NEAR JEFFERSON CITY, *Oct.* 6, 1861.

"Major PHINNEY, U. S. A., Paymaster, etc.:

"Will pay to Charles de Arnaud the sum of three hundred dollars ($300) for secret service. J. C. FREMONT,

"*Major General.*"

Statement of the Case.

"Received, Warsaw, Mo., October 23, 1861, of Major Jas. H. Phinney, paymaster U. S. A., the sum of three hundred ($300) 'for account of secret service rendered to the U. States' by special order of Major-Gen'l Fremont, dated near Warsaw, Mo., Oct. 23, 1861. CHAS. DE ARNAUD."

"IN THE FIELD,

"HEADQUARTERS WESTERN DEPARTMENT, *Oct.* 23, 1861.

"Major Phinney will pay to the bearer, Mr. Charles de Arnaud, three hundred dollars for secret service to the United States. J. C. FREMONT,

"*Major General Comm'n'd'g.*"

"Received, Jefferson City, October 6, 1861, from Major J. H. Phinney, three hundred dollars for secret service, as per special order of Major-Gen'l J. C. Fremont of this date. $300.

"(Signed duplicate) CHAS. DE ARNAUD."

On January 6, 1862, the claimant presented his claim to the War Department, and it was reported upon by the quartermaster as follows:

"No. 22. — The United States to Charles de Arnaud, Dr.

"January 6, 1862. — For special services rendered to United States government in traveling through the rebel parts of Kentucky, Tennessee, etc., and procuring information concerning the enemy's movements, etc., which led to successful results (as per certificate hereunto appended), $3600.

"Q. M. GEN'L'S OFFICE, *9th Jan'y*, 1862.

"In view of the certificate of Gen. Grant of 30th Nov. and the more general certificate of Maj.-Gen. Fremont of 2d Jan'y, herewith, covering all of Mr. Arnaud's services, the sum of thirty-six hundred dollars appears to me to be a not unreasonable compensation. I state this at Mr. Arnaud's earnest request. M. C. MEIGS,

"*Q. M. Gen'l.*"

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On the 13th of January the claimant went to President Lincoln and laid before him his claim with the following letters:

"CAIRO, ILL., *January* 6, 1862.

"Hon. A. LINCOLN, President U. S. A.:

"The bearer, Charles de Arnaud, has to my knowledge rendered important services to the government. He, at the risk of his life, gave information which led to our capture of Paducah, Ky., in advance of the rebels; thereby he saved the country thousands of lives and millions of dollars. I fully indorse his certificate of Maj. Gen. J. C. Fremont. He is entitled to the largest remuneration the government pays for such services.

"Respectfully, etc., A. H. FOOTE,
"*Flag Officer.*"

"HEADQUARTERS DISTRICT SOUTHEAST MISSOURI,
"CAIRO, *November* 31, 1861.

"CHAS. DE ARNAUD:

"SIR: In reply to your request, and the note from Major-General Halleck presented me by yourself, I can state I took possession of Paducah, Ky., solely on information given by yourself, and to the effect that the rebels were marching upon that city with a large force. This information I afterwards had reason to believe was fully verified: First, because as we approached the city secession flags were flying and the citizens seemed much disappointed that Southern troops expected by them were not in advance of us. It was understood that they would arrive that day. I also understood afterwards that a force of some four thousand Confederate troops were actually on their way for Paducah when taken possession of by my order. A point through which many valuable supplies were obtained for the Southern army was cut off by this move, and a large quantity of provisions, leather, etc., supposed to be for the use of the Southern army, captured. For the value and use to which these were put I refer you to

General Paine, whom I left in command. Only remaining in Paducah a few hours, and being busily engaged with other matters during that time, I can make no estimate of the cash value of the stores captured.

"Yours, etc., U. S. GRANT, *Brig. Gen.*"

"ASTOR HOUSE, NEW YORK, *January* 2, 1862.

"This is to certify that Mr. Charles de Arnaud was employed by me from about the first of August in traveling throughout the rebel parts of Tennessee and Kentucky, with the object of ascertaining the strength, condition, and probable movements of the rebel forces. He made under my directions many such journeys, reporting fully and in detail upon the force of the various encampments and the condition and strength of garrisons and various works in Tennessee and along the Mississippi River. He obtained this information at much personal risk and with singular intelligence, and performed the duties entrusted to him entirely to my satisfaction. He continued on this duty until the termination of my command in the western department. His services were valuable to the government, and I consider entitled to the largest consideration that the government allows in such cases or to such agents.

J. C. FREMONT,
"*Maj. Gen'l, U. S. A.*"

President Lincoln folded the letters together and wrote on the back of General Grant's letter the following:

"I have no time to investigate this claim; but I desire the accounting officers to investigate it, and if it be found just and equitable to pay it, notwithstanding any want of technical legality or form.

"Jan. 13, 1862. A. LINCOLN."

Thereafter, on the next day, January 14, the Secretary of War made the following endorsement on said claim:

"I have considered this claim, and cannot bring my mind to the conclusion that the sum charged is not exorbitant. I

am willing to allow $2000 in full of the claim, and the dis. clerk, War Dep't, is authorized to pay Charles de Arnaud that sum.

"War Dept., Jan'y 14, 1862.

"SIMON CAMERON, *Sec. War.*"

The claimant was thereupon paid, under protest, by said disbursing clerk of the War Department, out of appropriation for "contingencies of the army," $2000, and gave the following receipt:

"The United States to Charles de Arnaud, Dr.

"JANUARY 14, 1862.

"For services and expenses as special agent of the gov't, $2000.

"Received, Washington, January 21, 1862, from John Potts, disbursing clerk for the War Department, two thousand dollars, in full, for the above account. CHAS. DE ARNAUD."

At the time of giving the receipt in full, January 14, 1862, he was not in a state of dementia, and was able to comprehend the terms of the receipt; but the effects of his wounds in the head were beginning to affect him mentally, and he was in a condition of nervous apprehension, and naturally desirous of securing his personal safety by getting out of the country, and he accepted the money paid by the War Department in order that he might do so.

While engaged in the military service of the government, as aforesaid, he received a wound in his head in the fall of 1861, from which afterwards, in the same year, he became insane, and did not recover prior to February, 1886.

About September 4, 1886, the claimant presented his claim to the Treasury Department, without naming the specific amount claimed, but incidentally claimed $50,000, because he was told by General Fremont that during the Mexican war one McGoffin, a secret agent, had been paid that sum. The Auditor reported to the Second Comptroller as follows:

"Act of July 17, 1861, appropriated $200,000 'for contingencies of the army' (12 Statutes, 263).

"This claim was paid out of above fund.

"Accounting officers have no jurisdiction to open up a settlement made by War Dep't from secret service fund and determine unliquidated damages."

The Second Comptroller made the following endorsement thereon:

"JUNE 29, 1888.

"The within recommendation is approved. De Arnaud seems to have rendered unmistakably valuable services as a secret agent, and there appears to have been provision made for the payment of services of that nature. But this claim must be rejected pursuant to the recommendation of the 2nd Auditor, because payment in full seems to have been made and accepted years ago, and because this office has no means or jurisdiction to consider so plain a case of unliquidated damages.

"That the officer was not paid commensurately with his services, and deserves recognition at the hands of Congress, seems to be amply evidenced by President Lincoln's memorandum and by the testimony of Generals Grant and Fremont.

"SIGOURNEY BUTLER.

"*2nd Comptroller.*"

The claimant was informed of the action of the Comptroller by the following letter:

"WASHINGTON, D. C., *July* 10, 1888.

"Captain CHARLES DE ARNAUD, Washington, D. C.:

"SIR: I have the honor to inform you that your claim for compensation for services as a military expert in 1861 has been disallowed by the Second Comptroller, without prejudice, because payment in full seems to have been made and accepted years ago, and because the accounting officers have no means or jurisdiction to consider so plain a case of unliquidated damages. . . . WILLIAM A. DAY, *Auditor.*"

Statement of the Case.

On the 20th of October, 1888, the claimant renewed his application to the Treasury Department, and asked that the case be referred to the Court of Claims. This communication was endorsed by the Second Comptroller as follows:

"JANUARY 9th, 1889.

"Respectfully referred to the Second Auditor.

"The application of the claimant, Charles de Arnaud, seems to have merit. This case is plainly beyond the jurisdiction of the accounting officers, but it bears upon its face distinct marks that should give it a fuller consideration than can be accorded by the accounting officers. Furthermore, there is no adequate machinery in the accounting officers for properly sifting the very extraordinary evidence in this case. This can only be done by the Court of Claims.

"With your reply, which the claimant asks be made special, stating your views on this case, please forward all the papers pertinent thereto. SIGOURNEY BUTLER, *Comptroller.*"

On January 12, 1889, the Second Auditor transmitted all the papers on file in his office to the Second Comptroller, stating that his views had been fully expressed in previous communications hereinbefore set out. The Comptroller made a recommendation to the Secretary of the Treasury that the case be transmitted to the Court of Claims, which was accordingly done by the following letter of transmission:

"TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,

"WASHINGTON, D. C., *January* 25, 1889.

"To the honorable the Chief Justice and judges of the Court of Claims:

"Under the provisions of section 1063 of the Revised Statutes of the United States I transmit herewith to your honorable court, upon the recommendation and certificate of the Second Comptroller, the claim of Charles de Arnaud for services as military expert, now pending in the department and involving disputed facts and controverted questions of law,

with all the vouchers, papers, and documents pertaining to said claim, for trial and adjudication by your honorable court, as provided by law.

"Respectfully yours, HUGH S. THOMPSON,
"*Acting Secretary.*"

Mr. H. O. Claughton and *Mr. Horatio J. Lauck* for appellant.

Mr. Assistant Attorney General Dodge and *Mr. Conway Robinson* for appellees.

MR. JUSTICE SHIRAS delivered the opinion of the court.

The court below, passing by other grounds of defence, dismissed the petition upon the proposition that it disclosed a case within the ruling of this court in the case of *Totten, Administrator*, v. *United States*, 92 U. S. 105.

That was a case where one Lloyd asserted that, under a contract with President Lincoln, he was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts, and gain such other information as might be beneficial to the government of the United States, and report the facts to the President; for which services he was to be paid $200 a month.

The Court of Claims found that Lloyd had performed the services mentioned, but the members of that court being equally divided in opinion as to the authority of the President to bind the United States by the contract in question, the court decided against the claim and dismissed the petition.

On appeal, this court found no difficulty as to the authority of the President in the matter. As commander-in-chief of the armies of the United States he was undoubtedly authorized to employ secret agents to enter the rebel lines and obtain information respecting the strength and movements of the enemy; and it was also said that contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control.

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But the court was of opinion that the service stipulated for in the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. And the court held that a secret service, with liability to publicity in a suit subsequently brought against the government, would be impossible; that, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award; that the secrecy which such contracts impose precludes any action for their enforcement; that the publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery.

The counsel of the appellant do not impugn the doctrine of the *Totten case*, but they contend that the Court of Claims erred, in the present case, in treating the contract and services of Arnaud as being of a character that brings the case within such doctrine. It is denied that Arnaud's functions were those of a spy, but were those of a "military expert."

If it were necessary for us to enter into the question thus suggested, it might be difficult for us to point out any substantial difference in character between the services rendered by Lloyd and those rendered by Arnaud; but the record discloses other defences so plainly applicable that we are relieved from considering whether the new-fangled term "military expert" is only old "spy," "writ large."

On January 6, 1862, after the claimant had performed all the services described in his petition, he presented a claim to the War Department, in the following form:

"No. 22. — The United States to Charles de Arnaud, Dr.

"JANUARY 6, 1862.

"For special services rendered the United States government in traveling through the rebel parts of Kentucky, Tennessee, etc., and procuring information concerning the enemy's

movements, etc., which led to successful results, (as per certificate hereto appended,) $3600."

On this claim the Quartermaster General, on January 9, 1862, endorsed the following:

"In view of the certificate of General Grant of 30th Nov. and the more general certificate of Major-General Fremont, of 2d January, herewith, covering all Mr. Arnaud's services, the sum of thirty-six hundred dollars appears to me a not unreasonable compensation. I state this at Mr. Arnaud's earnest request.

"M. C. Meigs, *Q. M. Gen'l.*"

Thereafter, on January 14, 1862, the Secretary of War made the following endorsement on said claim:

"I have considered this claim, and cannot bring my mind to the conclusion that the sum charged is not exorbitant. I am willing to allow $2000 in full of the claim, and the dis. clerk, War Depart. is authorized to pay Charles de Arnaud that sum.

"Simon Cameron, *Sec. War.*"

The claimant was thereupon paid by said disbursing clerk of the War Department $2000, and gave the following receipt:

"The United States to Charles de Arnaud, Dr.

"January 14, 1862.

"For services and expenses as special agent of the gov't, $2000.

"Received, Washington, January 21, 1862, from John Potts, disbursing clerk for the War Department, two thousand dollars, in full, for the above account. Chas. de Arnaud."

In the absence of allegation and evidence that this receipt was given in ignorance of its purport, or in circumstances constituting duress, it must be regarded as an acquittance in bar of any further demand. *Baker* v. *Nachtrieb*, 19 How. 126; *United States* v. *Childs*, 12 Wall. 232, 243.

No further or other claim was made by the petitioner until September 4, 1886 — a period of twenty-four years. Even, therefore, if the claimant was not effectually barred by his voluntary acquittance, his claim was assuredly barred by the statute of limitations, which provides that every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition, setting forth a statement thereof, is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues. Rev. Stat. § 1069.

In *Finn's case*, in many respects resembling the present one, this court construed and applied that statute in the following terms:

"In any view this claim belonged to the class which, under the express words of the act of 1863, Rev. Stat. § 1069, were 'forever barred,' so far, at least, as the claimant had the right to a judgment in that court against the United States. The duty of the court, under such circumstances, whether limitation was pleaded or not, was to dismiss the petition; for the statute, in our opinion, makes it a condition or qualification of the right to a judgment against the United States that — except where the claimant labors under some one of the disabilities specified in the statute — the claim must be put in suit by the voluntary action of the claimant, or be presented to the proper department for settlement, within six years after suit could be commenced thereon against the government. Under the appellant's theory of the case the Second Comptroller could open the case twenty years hence, and upon the claim being transmitted by the Secretary of the Treasury to the Court of Claims, that court could give judgment upon it against the United States. We do not assent to any such interpretation of the statute defining the powers of that court.

"The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive

such a defence, either expressly or by failing to plead the statute, but the government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by the statute upon suits against the United States in the Court of Claims." *Finn* v. *United States*, 123 U. S. 227, 232, 233.

The claimant cannot avail himself of the saving clause in the statute suspending its operation in favor of idiots, lunatics, insane persons, and persons beyond the seas, because such suspension is only in favor of those laboring under the specified disabilities at the time the claim accrued; and it is conceded that plaintiff's mental incapacity did not begin until after his claim had accrued.

Nor can it be successfully claimed that a disability subsequently arising would suspend the operation of the statute. See *Bauserman* v. *Blunt*, 147 U. S. 647, and cases therein cited.

In no view that we can take of this case can we find any just foundation for a claim against the government, and the judgment of the court below, dismissing the claimant's petition, is accordingly

Affirmed.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY *v.* GONZALES.

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

No. 158. Argued December 11, 1893. — Decided January 29, 1894.

A domestic corporation, incorporated under the laws of Texas, a State divided into more than one Federal district, is, under the State law, and the Federal laws as to the bringing of suits and actions in Federal courts, a citizen and inhabitant of that district in the State within which the general business of the corporation is done, and where it has its headquarters and general offices.

A railway company, incorporated under the laws of Texas in which there is more than one Federal district, and having its headquarters and prin-

Statement of the Case.

cipal offices in one of those districts, is an inhabitant of that district, and cannot be said to be an inhabitant of the other Federal district in the State, although it operates its line of railroad through it, and maintains freight and ticket offices and stations in it.

If an alien desires to commence an action or bring a suit against a citizen of the United States, he must resort to the domicil of the defendant in order to bring it.

In re Hohorst, 150 U. S. 653, distinguished from this case.

Southern Pacific Company v. *Denton*, 146 U. S. 202, and *Mexican Central Railway* v. *Pinkney*, 149 U. S. 194, followed in holding that a statute of a State which makes 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 jurisdiction by reason of non-residence, is not applicable, under Rev. Stat. § 914, to actions in a Circuit Court of the United States held within the State.

This was an action at law instituted in the Circuit Court for the Western District of Texas at El Paso by the defendant in error, Victor Gonzales, alleged to be "a citizen of the State of Chihuahua, in the Republic of Mexico," against the Galveston, Harrisburg and San Antonio Railway Company, to recover damages to the amount of $4999 for personal injuries.

The petition alleged the plaintiff to be "a citizen of the State of Chihuahua, in the Republic of Mexico, and that the defendant is a corporation duly incorporated under the laws of the State of Texas and is a citizen thereof, operating and running cars on the Galveston, Harrisburg and San Antonio railway track from the city of Houston to the city of El Paso in the State of Texas, and is a common carrier of freight and passengers for hire, . . . and has and keeps an office and an agent in the said city of El Paso, Texas, for the transaction of its business, with W. E. Jesup as its local agent in said El Paso." The petition further alleged that "on and prior to the 29th day of July, 1889, and ever since that time, the defendant has been engaged in propelling trains and cars on said railway track for the transportation of freight and passengers for hire, as aforesaid, from the city of Houston, in the State of Texas, into and through the county of Jeff Davis, in said State, and through the county of El Paso into the city of El Paso, Texas." The petition further alleged as the cause of plaintiff's action that after having paid his fare to an agent

Counsel for Plaintiff in Error.

of the defendant, and entered as a passenger on its train from Valentine station to El Paso, he was forcibly and violently ejected from the train while moving at the rate of fifteen miles an hour, thereby causing him to fall to the ground with such force that his leg was broken, and he was thereby crippled for life; for which he prayed judgment in the sum of $4999.

Defendant appeared specially for the purpose of objecting to the jurisdiction of the court, and pleaded in abatement "that nevertheless, while it admits that defendant operates a line of railway through the county where this suit is pending, and maintains a ticket and freight office and depot, and has an agent on whom process, under the laws of Texas, may be served there, the said defendant is not an inhabitant of the judicial district in which the suit is pending; that it is a corporation duly incorporated and existing under the laws of Texas, having its principal office, habitat, and domicil in the city of Houston, Harris County, Texas, and beyond and not within this judicial district, but within the Eastern District of Texas." Wherefore the defendant prayed judgment whether the court had jurisdiction, etc.

Plaintiff demurred to this plea, setting up that the defendant was an inhabitant of the Eastern District of Texas.

The case came on to be heard upon this plea in abatement and demurrer, and the court, being of the opinion that the law was for the plaintiff, and that the court had jurisdiction, sustained the demurrer, proceeded to a trial of the case upon the merits, and submitted it to a jury, who rendered a verdict for the plaintiff in the sum of $900.

Defendant sued out this writ of error under the authority of the act of February 25, 1889, c. 236, 25 Stat. 693, authorizing this court to review questions of jurisdiction of the Circuit Court without reference to amount.

Mr. J. Hubley Ashton, (with whom was *Mr. Charles H. Tweed* on the brief,) for plaintiff in error.

No appearance for defendant in error.

Opinion of the Court.

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

This case raises the question whether a railway company, incorporated under the laws of a certain State, and having its principal offices within one district of such State, can be said to be an inhabitant of another district of the same State, through which it operates its line of road and in which it maintains freight and ticket offices and depots.

We have no doubt of our authority under the act of February 25, 1889, to review the decision of the court below sustaining its jurisdiction over the case; and we have already held that the provision of the Texas statute which gives 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, is not binding upon the Federal courts in that State. *Southern Pacific Railway* v. *Denton*, 146 U. S. 202; *Mexican Central Railway* v. *Pinkney*, 149 U. S. 194.

By section 1 of the act of August 13, 1888, c. 866, 25 Stat. 433, revising the jurisdiction of the Circuit Courts, it is enacted that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant;" and by Rev. Stat. § 740, "when a State contains more than one district, every suit not of a local nature, in the Circuit or District Courts thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides." The above provision of the act of 1888 is manifestly a restriction upon the jurisdiction conferred by the act of March 3, 1875, c. 137, 18 Stat. 470, which contained a similar provision, but with the additional privilege of bringing such suit within any district "in which he," the defendant, "shall be found at the time of serving such process or commencing such proceeding."

It will be noticed that in this as well as in prior acts regulating the jurisdiction of the Circuit Courts, a distinction is made between citizens of States and inhabitants of districts. This distinction has been carefully observed in all the principal adjudications upon the construction of these statutes, and, for the purpose of determining the habitancy of a railway corporation, it is pertinent to refer to some of these cases. In one of the earliest, viz., *Picquet* v. *Swan*, 5 Mason, 35, 46, a suit was begun by trustee process or writ of garnishment sued out by an alien against a defendant, described as "now commorant of the city of Paris in the kingdom of France, of the city of Boston in the Commonwealth of Massachusetts, one of the United States of America, and a citizen of the said United States." The process was served by the attachment of a lot of land in Boston belonging to the defendant, and by summoning his agent to appear and show cause. The defendant never appeared as a party to the suit; and it was contended that the plaintiff was entitled to consider him in default, and to have judgment. It was held, however, by Mr. Justice Story, that where a party defendant was a citizen of the United States, but resident in a foreign country, having no inhabitancy in any State of the Union, the Circuit Courts had no jurisdiction over him in a suit brought by an alien, though his property were attached in the district. The case involved the construction of that clause of the eleventh section of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, 78, which provided that "no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." It will be noticed that the words used are "inhabitant of the United States," not "inhabitant of a district," and, in speaking of these words, Mr. Justice Story said: "I lay no particular stress upon the word 'inhabitant,' and deem it a mere equivalent description of 'citizen' and 'alien' in the general clause conferring jurisdiction over parties." That he meant the word "inhabitant" as "inhabitant of the United States" is evident from what follows: "A person

might be an inhabitant, without being a citizen; and a citizen might not be an inhabitant, though he retain his citizenship. Alienage or citizenship is one thing; and inhabitancy, by which I understand local residence, *animo manendi*, quite another. I read, then, the clause thus: 'No civil suit shall be brought before either of said courts *against an alien or a citizen*, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found, at the time of serving the writ.' It cannot be presumed that Congress meant to say, that if an alien or a citizen were not an inhabitant of, or commorant in, the *United States*, a suit might be maintained against him in any district, and process served abroad upon him, or judgment given against him without any notice or process served upon him." There is nothing here which indicates that Mr. Justice Story confounded citizenship of a State with inhabitancy of a district.

In *Shaw* v. *Quincy Mining Company*, 145 U. S. 444, a citizen of Massachusetts sought to maintain a bill in equity in the Circuit Court for the Southern District of New York against the Quincy Mining Company, a corporation organized under the laws of Michigan, and having a usual place of business in the city of New York, and the question arose whether the court had jurisdiction over such a suit. It was held that it did not. In the opinion of the court it was said that the word "inhabitant" in the act of 1789 was apparently used, not in any larger meaning than "citizen," but to avoid the incongruity of speaking of a citizen of anything less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in one State.

In construing the acts of 1887 and 1888 it was held that they could not be considered as giving jurisdiction to a Circuit Court held in a State of which neither party was a citizen, and that "in the case of a corporation, the reasons are, to say the least, quite as strong for holding that it can sue and be sued only in the State and district in which it has been incorporated, or in the State of which the other party is a citizen." It was further held that the domicil, the home, the habitat, the residence, the citizenship of a corporation, could only be in

the State by which it was created, although it might do business in other States whose laws permitted it; and it was finally decided that under these acts of Congress "a corporation incorporated in one State only, cannot be compelled to answer, in a Circuit Court of the United States held in another State in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different State."

In the *Southern Pacific Company* v. *Denton*, 146 U. S. 202, it was further held that a citizen of Texas, and a resident of the Eastern District of Texas, could not maintain a suit in the Western District of Texas against a railroad incorporated under the laws of the State of Kentucky. It was said to have been long settled that an allegation that a party is a "resident" does not show that he is a "citizen" within the meaning of the Judiciary Acts, and to hold otherwise in this case would be to construe the petition as alleging that the defendant was a citizen of the same State as the plaintiff, and thus utterly defeat the jurisdiction. The case was held to be covered by the decision in the case of *Shaw* v. *Quincy Mining Company*. It was contended that the railroad company had consented to be sued in the Western District of Texas by doing business and appointing an agent there, under a statute requiring foreign corporations desiring to transact business in Texas to file with the Secretary of State a certified copy of its articles of incorporation, and authorizing service of process to be made upon any of its officers and agents engaged in transacting its business. This act also forfeited any permit issued to a foreign corporation to transact business which should remove a case into a Federal court on account of its non-residency. It was held, however, that this statute requiring a corporation to surrender a right and privilege secured to it by the Constitution and laws of the United States was unconstitutional and void, and could give no validity or effect to any agreement made by the corporation in obedience to its provisions. The ruling in this case was that the plaintiff should have brought his suit either in Kentucky, of which defendant was a citizen, or in the Eastern District of Texas, of which he, the plaintiff, was a resident; and the fact that the defendant was operating a road

and doing business and having agents in the Western District of Texas was insufficient to authorize a suit to be begun against it there, in the Federal court, although under the laws of the State such action might have been maintained.

In the *Case of Hohorst*, 150 U. S. 653, decided at the present term, it was held that the clause in question, that no civil suit should be brought against any person in any other district than that whereof he was an inhabitant, was manifestly inapplicable to a suit brought by a citizen of one of the United States against an alien, and that the words of the provision evidently looked to those persons, and those persons only, who were inhabitants of some district within the United States. "Their object is to distribute among the particular districts the general jurisdiction fully and clearly granted in the early part of the same section; and not to wholly annul or defeat that jurisdiction over any case comprehended in the grant. To construe the provision as applicable to all suits between a citizen and an alien would leave the courts of the United States open to aliens against citizens, and close them to citizens against aliens. Such a construction is not required by the language of the provision, and would be inconsistent with the general intent of the section as a whole." And hence that an alien or foreign corporation might be sued by a citizen of a State in any district in which valid service could be made upon the defendant. It was further held that a service upon the financial agent of a foreign corporation in the city of New York was a sufficient service upon the corporation.

Neither this case nor any other to which our attention has been called makes any distinction between cases where citizens and aliens are *plaintiffs*, though in *Hohorst's case*, to prevent a manifest failure of justice, in the inability to sue any foreign corporation whatever, it was held that where an alien corporation was *defendant*, it might be sued in any district wherein it might be found. These cases must be regarded as establishing the doctrine that a domestic corporation is both a citizen and an inhabitant of the State in which it is incorporated; but in none of them is there any intimation that, where a State is divided into two districts, a corporation shall be treated as an

inhabitant of every district of such State, or of every district in which it does business, or, indeed, of any district other than that in which it has its headquarters, or such offices as answer in the case of a corporation to the dwelling of an individual.

We are, therefore, compelled to determine the question of the domicil of a corporation either by a resort to general principles of law, or to local statutes fixing such domicil. An individual is almost universally held to be an inhabitant of the place in which he dwells, and though he do business for a long time in another place, he will not be regarded as changing his domicil so long as the *animus revertendi* continues. Thus in *Jopp* v. *Wood*, 34 Beavan, 88; *S. C.* 4 De G., J. & S. 616, it was held that a Scotchman engaged in business in India for twenty-five years did not thereby change his domicil. And in *In re Capdevielle*, 2 H. & C. 985, it was similarly held with regard to a Frenchman who had resided and engaged in business in England for twenty-nine years. In the case of a corporation the question of inhabitancy must be determined, not by the residence of any particular officer, but by the principal offices of the corporation, where its books are kept and its *corporate* business is transacted, even though it may transact its most important business in another place. It is but a corollary of the proposition laid down in the three cases above referred to, that if the corporation be created by the laws of a State in which there are two judicial districts, it should be considered an inhabitant of that district in which its general offices are situated, and in which its general business, as distinguished from its local business, is done.

If there were any doubt upon this subject, it would be removed by reference to the following provisions of the Texas statutes upon the domicil of railway corporations:

"Art. 4115. Every railroad corporation shall have and maintain a *public office* at some place upon the line of its road in this State. (Const. Art. 10, sec. 3; Act August 15, 1876.)

"4115*a*. Sec. 1. Every railroad or other corporation organized or doing business in this State under the laws or authority thereof, shall have and maintain a public office in the locality

where its principal business is carried on in this State for the transaction of its business, where transfers of stock shall be made, where the auditor, treasurer, general traffic manager, and general superintendent of such roads, or where an agent of such corporation, duly authorized to adjust and settle all claims against such corporation for damages, shall have their respective offices, and where shall be kept for the inspection of stockholders of such corporation books in which shall be recorded:

"1st. The amount of capital stock subscribed;

"2d. The names of the owners of the stock, and the amounts owned by them respectively; . . .

"6th. The names and places of residence of each of its officers; provided, that a railroad corporation shall be required to keep such office at some place on the line of its road in this State."

"Art. 4116. All meetings of stockholders and directors of such corporation shall be held at such public office, and all transfers of stock in such corporation shall be made at such office, and the general business of such corporation shall be transacted at such office."

"Art. 4118. Every railroad corporation may change at its pleasure its public office by publishing a notice of such change in some newspaper published on the line of its road, if any there be, and if not, then in some newspaper in the State, and having a general circulation in the State, for four successive weeks prior to such change.

"Art. 4119. Every railroad corporation shall, also, as soon as it has in the first instance established its public office, give notice of such establishment by a like publication, as required in the preceding article.

"Art. 4120. The public office of a railroad corporation shall be considered the *domicil* of such corporation." (2 Sayles' Texas Civil Statutes, articles 4115, 4116, 4118, 4120.)

Language stronger than that used in the last article could scarcely have been chosen to express the idea that a railway corporation should be considered an inhabitant of the place in which its public office is located, and of no other. It is true

that article 1195 provides that "suits against a railroad corporation, or against any assignee, trustee, or receiver operating its railway, may be brought in any county through or into which the railway of such corporation extends or is operated;" but it is manifest that, so far as the Federal courts are concerned, this provision is subordinate to the first section of the act of 1888, requiring civil suits to be brought within the district of which the defendant is an inhabitant. There are doubtless reasons of convenience for saying that a corporation should be considered an inhabitant of every district in which it does business, and so the statutes of the several States generally provide; but the law contemplates that every person or corporation shall have but one domicil, and in the case of the latter, it shall be in that State by whose laws it was created, and in that district where its general offices are located.

This court having held, in the cases heretofore referred to, that a corporation cannot be considered an inhabitant of any State in which it is not incorporated, by reason of the fact that it does business, or in the case of a railroad, that it runs its road through such State, it would seem inconsistent to hold that it is an inhabitant of a district by reason of the same facts, unless the distinction between citizenship and inhabitancy is to be wholly abolished. As said by Mr. Justice Story in *Picquet* v. *Swan*, alienage or citizenship is one thing, and inhabitancy quite another. In the Constitution and laws of the United States citizenship is affirmed of a State, or of the United States; inhabitancy may be affirmed either of the United States, a State, or a subordinate locality. Nor in our view does it make any difference that the *plaintiff* is an alien instead of a citizen. The provision that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, is of universal application, except, that, if the plaintiff be also a *citizen*, he may bring it in his own district, if he can obtain service upon the defendant in that district. The purpose of this is, that the plaintiff may have the same advantage of litigation in his own district that the defendant has. An alien, however, is assumed not to re-

side in the United States, and hence must resort to the domicil of the defendant. On the other hand, if the suit be *against* the alien, he may doubtless, under *Hohorst's case*, be sued in any district wherein he is found. It was not meant or intimated, however, in that case that the clause in question had no application to cases where an alien was plaintiff, but only where he was defendant.

On the contrary, both the decision and the reasoning in that case were carefully limited to a suit brought by a citizen *against* an alien. At the conclusion of the discussion of that question, the point decided was stated to be "that the provision of the existing statute, which prohibits suit to be brought against any person 'in any other district than that whereof he is an inhabitant,' is inapplicable to an alien or a foreign corporation sued here, and especially in a suit for the infringement of a patent right; and that, consequently, such a person or corporation may be sued by a citizen of a State of the Union in any district in which valid service can be made upon the defendant." The provision in terms relates to defendants only; and the reasoning that it could not include an alien defendant, because he was not an inhabitant of any district in the United States, has no application to a defendant citizen, who is confessedly and necessarily an inhabitant of some one of those districts.

Irrespective of any statute, such as that of Texas above referred to, the rulings of the state courts generally favor the position that a corporation can only be considered as resident in the jurisdiction in which its principal offices are located, though it may run a railway and have local agents in other jurisdictions. Thus in *Thorn* v. *Central Railroad Company*, 2 Dutcher, (26 N. J. Law,) 121, 123, it was held that in a suit brought against a railroad corporation the venue should be laid in the county where its principal office was located, that being considered its place of residence within the meaning of the statutes. In that case the corporation ran its railway and exercised its franchises both in Essex County and Somerset County, but its principal office was in the former, while the suit was brought in the latter; and upon a motion to change

the venue the court held that the corporation must be deemed to be a resident of Essex County, and the venue should be changed to that county. "The only question," said the court, "is whether a railroad corporation can be said to *reside*, within the meaning of the act of the legislature, in as many counties as it happens to traverse with its road, or whether, if it can be properly said to have any residence, that residence is not to be taken to be in the county where it keeps its principal office of business. . . . The course of legislation on the subject of corporations would indicate that they are to be considered as having a residence where their office or place of business is located."

In the case of the *Connecticut & Passumpsic Rivers Railroad Co.* v. *Cooper*, 30 Vermont, 476, it was declared that, where a corporation is not located by the terms of its charter, its residence and location are regarded as being in the place where it keeps its principal office and does its corporate business. The fact that the railway ran through another county was regarded as unimportant and not constituting a residence of the corporation. In the case of the *Western Transportation Company* v. *Scheu*, 19 N. Y. 408, a corporation organized to navigate the lakes was declared to have its domicil, for the purposes of taxation, in the city or town in which the principal office for managing the affairs of the company was located, as evidenced by its certificate of organization, although it had an office elsewhere, employing the services of twenty times as many agents, and where a much larger proportion of its moneys was received and disbursed, and where its principal officers resided during the business season. See also *Pelton* v. *Transportation Co.*, 37 Ohio St. 450; *Jenkins* v. *California Stage Co.*, 22 California, 537; *Sangamon & Morgan Railroad* v. *Morgan Co.*, 14 Illinois, 163; and to the contrary, *Sherwood* v. *Saratoga & Washington Railroad*, 15 Barb. 650; *Bristol* v. *Chicago & Aurora Railroad Co.*, 15 Illinois, 436; *Slavens* v. *South Pacific Railroad*, 51 Missouri, 308.

The judgment of the court below must, therefore, be

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

Dissenting Opinion: Jackson, Harlan, JJ.

MR. JUSTICE JACKSON, with whom concurred MR. JUSTICE HARLAN, dissenting.

I cannot concur in the opinion and judgment of the court in this case. The jurisdictional averments set out in the petition are that the plaintiff below was a citizen of the State of Chihuahua, in the Republic of Mexico, and that the defendant was a corporation duly organized under the laws of the State of Texas, and was a citizen thereof, with its railway, on which its cars were run and operated, extending from the city of Houston to the city of El Paso, in that State. These averments brought the case directly within the fifth class of civil suits described in the first section of the acts of March 3, 1887, c. 373, 24 Stat. 552, and August 13, 1888, c. 866, 25 Stat. 433, of "a controversy between citizens of a State and foreign States, citizens, or subjects," the matter in dispute being in excess of $2000, exclusive of interest and costs.

The defendant appeared specially and interposed the following plea in abatement:

"That, nevertheless, while it admits that the defendant operates a line of railroad through the county where this suit is pending, and maintains a ticket and freight office and depot, and has an agent on whom process, under the law of Texas, may be served there, the said defendant is not an inhabitant of the judicial district in which the suit is pending; that it is a corporation duly incorporated and existing under the laws of Texas, having its principal office, habitat, and domicil in the city of Houston, Harris County, Texas, and beyond and not within this judicial district, but within the Eastern District of Texas."

This presents the question whether the fact that the defendant's principal office is located at Houston in the Eastern District of Texas prevents the railway company from being sued by an alien in the United States Circuit Court for the Western District of that State, held at El Paso, the western terminus of the railroad. The opinion of the court answers this question affirmatively, upon the ground that the location of the company's principal office fixes the domicil or residence

of the corporation, so that it cannot be treated or regarded as an inhabitant of any other district in the State of its creation, although by the laws of that State it is liable and subject to be sued in every county through which its lines extend.

This conclusion is rested upon the doctrine announced in *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, and *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, that a corporation, incorporated in one State only and doing business in another State, was not an inhabitant of the latter within the meaning of the Judiciary Acts, and liable to be sued in the Circuit Courts of the United States held therein, if objection is properly made.

The present case is clearly distinguishable from these authorities in two respects: first, that the defendant corporation is a citizen of the State of Texas in which it is sued; and, second, that the parties to the controversy are not citizens of different States of the Union, as was the case in those decisions. In other words, *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, and *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, dealt with cases where the controversy was between citizens of different States, while the present case involves a controversy between an alien and a citizen, and presents the question whether the citizenship of the defendant corporation is coextensive with the line of its road, and the actual exercise of its franchise within the State of its creation, or is limited and restricted to the place where its chief office is located.

Neither the plea in abatement nor the opinion of the court question the fact that the railway company was and is a citizen of the State of Texas, for purposes of Federal jurisdiction at the suit of an alien, but the opinion, in effect, if not in express terms, restricts and confines that citizenship to the county or place in which the principal office of the company is located. There are two serious objections to this conclusion of the court. First, there is no warrant for giving the railway company a domicil or residence confined to one of its termini in the State of its creation; and, second, the present case is not controlled by that provision of the Judiciary Acts of 1887 and 1888, which provide that "where the jurisdiction is

founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or defendant."

In respect to the first objection: While the statute of Texas, Art. 4120, referred to in the opinion, provides that the principal office of a railway company shall be considered the domicil of such corporation, it is also provided by article 1198, subdivision 21, that suits against any private corporation may be commenced in any county where the cause of action arose, or in which such corporation has an agent or representative, and that "suits against a railroad corporation may also be brought in any county through or into which its railroad extends."

In *St. Louis & San Francisco Railway* v. *Traweek*, 84 Texas, 65, the Supreme Court of Texas, in considering this provision of the Revised Statutes, held that a railway company was a private corporation, within the meaning of the act, and that it could be sued in any county through which the road extended, or in which it had an agent for the transaction of its business, thus extending the residence of the corporation and its liability to be sued beyond the place of its principal office.

In *Bristol* v. *Chicago and Aurora Railroad*, 15 Illinois, 436, 437, it was held that "the residence of a corporation, if it can be said to have a residence, is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is located where its franchises are exercised. It is present where it is engaged in the prosecution of the corporate enterprise. This corporation has a legal residence in any county in which it operates the road or exercises corporate powers and privileges. In legal contemplation, it resides in the counties through which its road passes, and in which it transacts its business."

The same principle was announced in *Slavens* v. *South Pacific Railroad*, 51 Missouri, 308, 310, where it was held that "a residence of a railroad corporation is in any county through which its line of road passes, and in which it has an agent upon whom process can be served."

So, in *Locomotive Safety Truck Co.* v. *Erie Railway*, 10 Blatchford, 292, 306, it was held that a corporation, if it can be properly said to reside at all, resides in all of the districts of the State creating it, and that the legal existence of the defendant railroad company under its incorporation by the State of New York was coextensive with the territorial limits of that State.

In *Davis* v. *Central Railroad and Banking Co.*, 17 Georgia, 323, the same question was presented in a somewhat different form. The constitution of Georgia provided that "the inferior courts shall have also concurrent jurisdiction in all civil cases, excepting cases respecting titles to lands, which shall be tried in the county where the defendant resides." By an act passed in 1854, railroad companies of the State were subject to suit in the counties in which injuries to stock, etc., may have been committed. The plaintiff in that case, under this act of 1854, sued the railroad company in the county in which the injury was committed, and the railroad company filed a plea to the jurisdiction, on the ground that the corporation had its principal office and residence in a different county, and was not, therefore, under the constitution, suable in any other county. But, after a full consideration of the question, the Supreme Court of Georgia held that the railroad company was a resident of every county through which its line of railroad extended.

The statute of Texas, however, even if it gave to the defendant corporation in this case a residence confined to the locality of its principal office, does not control the question here presented. The opinion proceeds upon the theory that the question of jurisdiction depends upon the residence of the defendant corporation, and is controlled by the first section of the act of 1887, providing that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or defendant."

This, however, is a misapprehension of the statute. That clause of the act relates alone to suits between citizens of different States of the Union, and has no application to a case

like the present, where the suit is between an alien and a citizen. Suits of the latter character are controlled by the previous portion of the section, as this court has declared in one or more cases.

Thus in *McCormick* v. *Walthers*, 134 U. S. 41, 43, where the court had under consideration that portion of the first section of the acts of 1887 and 1888 which provides, "but no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States suit shall be brought only in the district of the residence of either the plaintiff or the defendant," gave to the provision the following construction: "The jurisdiction common to all the Circuit Courts of the United States in respect to the subject-matter of the suit and the character of the parties who might sustain suits in those courts, is described in the section, while the foregoing clause relates to the district in which a suit may be originally brought. Where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit may be brought in the district in which either the plaintiff or the defendant resides."

This construction, thus placed upon these clauses of the act, was recognized and reaffirmed in *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444.

In the recent case *In re Hohorst*, 150 U. S. 653, where the suit was between a citizen and a foreign corporation, (decided at the present term of this court,) it was expressly held that of the two provisions above quoted, "the latter relates only to suits between citizens of different States of the Union, and is, therefore, manifestly inapplicable to a suit brought by a citizen of one of these States against an alien; and the former of

these two cannot reasonably be construed to apply to such a suit." In that case jurisdiction was maintained against the foreign corporation, which was brought before the court by service upon a resident agent of the State of New York.

Following the provision of the Constitution in reference to the extent of the judicial power of the Federal courts, the acts of 1887 and 1888 conferred upon the Circuit Courts of the United States original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2000 in certain enumerated cases, the fifth class of such cases being "a controversy between citizens of a State and foreign States, citizens, or subjects." This jurisdiction, based upon the alienage of one party and the citizenship of the other, was not intended to be restricted by the subsequent provisions of the act above referred to. This is clearly announced in the *Hohorst case*, which went so far as to declare that the subsequent provision of the statute, providing that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," had no application to a suit between a citizen and an alien.

It cannot be doubted that the first section of the acts of 1887 and 1888, standing alone, gave jurisdiction to the Circuit Courts of a controversy between a citizen of a State and an alien, and that such jurisdiction may be exercised whether the suit is by or against any alien in any Circuit Court of the United States, sitting in any district thereof, before which the defendant may be legally brought by service or process. Jurisdiction of the pending suit of an alien against the Texas railroad corporation cannot be restricted by the laws of Texas to the Circuit Court of the district in which the defendant's principal office is located, unless the last clause of section one, referring to suits between citizens of different States of the Union, is applicable to such a case. But, as already shown, that clause is not applicable, because it has reference only to suits between citizens of different States of the Union.

Dissenting Opinion: Jackson, Harlan, JJ.

The reasoning on which the opinion in the present case proceeds cannot be reconciled with the *Hohorst case*, because the grounds on which the alien is denied the right to maintain this suit against the Texas corporation must govern and control when the suit is against the alien.

If, as held in *Hohorst's case*, the clause that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," has no application to controversies between a citizen and an alien, it is impossible to escape the conclusion that the plea in abatement in the present case presented no valid objection to the jurisdiction of the United States Circuit Court for the Western District of Texas; for the service upon the defendant in the county of El Paso was a valid service, which brought the corporation before the court in a district of the State whereof it was a citizen, within the meaning of the Judiciary Acts; and, being a citizen of the State in which suit was brought by the alien, the Circuit Court for the Western District acquired jurisdiction over the person of the defendant, just as effectually as jurisdiction was acquired over the foreign corporation in *Hohorst's case* at the suit of a citizen.

The opinion of the court attempts to distinguish this from *Hohorst's case*, on the ground that in the latter the suit was by a citizen against an alien, while here the suit is by an alien against a citizen. This is making a purely arbitrary distinction without any substantial difference. The provision of the Constitution and the laws enacted for carrying the grant of judicial power into effect makes no distinction as to the position, whether as plaintiffs or defendants, which may be occupied by either the citizen or the alien. The jurisdiction is given where the alien is a party on one side of the controversy and a citizen of some one State of the Union is on the other side, without regard to which may be plaintiff or defendant. It was never before held or suggested that if the citizen was plaintiff and the alien defendant the jurisdiction would attach, but that if the position of the parties was changed so that the alien would be the plaintiff and the citizen the defendant, the jurisdiction would be defeated.

If the railroad company, in the present case, were an alien corporation, with its line extending from El Paso, in the Western District of the State of Texas, to Houston in the Eastern District of that State, and with its principal office at the latter place, a citizen of that State could have sued the corporation in the Circuit Court of the United States in either the Western or the Eastern District of that State.

So, too, if the position of the parties in this case were changed and the railroad company had sued the alien in the Circuit Court of the United States for the Western District of Texas, and had obtained personal service on him, no question could have been raised as to the jurisdiction of the court. The corporation having a localized existence and citizenship in the Western District of the State, is equally liable to the suit of an alien in that district. It cannot properly be held that the principle which applies to a suit against an alien does not apply to a suit by an alien.

The Judiciary Act, in declaring that Circuit Courts of the United States shall have original cognizance, *concurrent* with the courts of the several States, of all suits of a civil nature, at common law or in equity, between citizens of a State and foreign States, citizens, or subjects, when the matter in dispute exceeds, exclusive of interest and costs, the sum of $2000, means, as I understand its language, that the Circuit Courts of the United States shall have *the same jurisdiction* as the state courts, otherwise it could not be *concurrent*. Now, the state court at El Paso would have had undoubted jurisdiction of the present suit, and although the United States Circuit Court, held at the same place, has *concurrent* (the same jurisdiction) over the subject-matter and the parties, the result of the court's opinion is to deny the jurisdiction of the Federal court. *Postmaster General* v. *Early*, 12 Wheat. 136, 147, 148.

It cannot be questioned that under the authorities of this court, commencing with *Louisville, Cincinnati & Charleston Railroad* v. *Letson*, 2 How. 497, a corporation for the purposes of Federal jurisdiction is not merely a resident, but a citizen of the State of its creation, and such citizenship sub-

jects it to the jurisdiction of the Federal courts in the State of its creation at the suit of an alien.

Corporations have been gradually brought within the provision which extends the judicial power to controversies "between citizens of different States." The ground originally taken by the court was that the corporation's citizenship depended upon, and was determined by, the citizenship of the members of the individual corporators, and while that rule prevailed it was necessary to aver this citizenship of the members on the record.

Thus, as late as *Ohio & Mississippi Railroad* v. *Wheeler*, 1 Black, 286, it was said by this court that "a corporation exists only in contemplation of law, and by force of law, and can have no legal existence beyond the bounds of the sovereignty by which it was created, and it must dwell in the place of its creation." And further, that "a corporation is not a citizen within the meaning of the Constitution, and cannot maintain a suit in the courts of the United States against a citizen of a different State from that by which it was created, *unless the persons who composed the corporate body are all citizens of that State.* In such cases they (the citizen corporators) may sue by their corporate name, averring the citizenship of all the members, and such a suit would be regarded as a joint suit of individual persons, united together in a corporate body, and acting under the authority conferred upon them for the more convenient transaction of business, and consequently entitled to maintain a suit in the courts of the United States against the citizens of another State."

In the subsequent case of *Muller* v. *Dows*, 94 U. S. 444, it was held that where a corporation is created by the laws of a State, *the legal presumption is that its members are citizens of the State in which alone the corporate body has a legal existence.* It was further said in that case that a suit by or against a corporation, in its corporate name, may be presumed to be a suit by or against citizens of the State which created the corporate body, and no averment or denial is admissible for the purpose of withdrawing the suit from the jurisdiction of the courts of the United States. This is now the established rule on the

subject in respect to jurisdiction in suits by or against corporations in the Federal courts.

The laws of Texas, requiring a railroad corporation to have a principal office where its books shall be kept, can in no way affect the jurisdiction of the Federal courts over such corporate body, founded as it is upon the conclusive presumption that the members of such corporation are citizens of the State which created the body corporate. Having a principal office does not restrict the citizenship of the corporation, or of its members, to the particular locality where such office is kept. Neither does it raise any presumption, *prima facie* or conclusive, that the members of such corporation, citizens of the State, reside at that particular place.

The members of a corporation, created by a State, being conclusively presumed to be citizens of the same State, so as to confer upon the Federal courts the jurisdiction to entertain suits by or against the corporate body, upon what theory or principle heretofore ever suggested can it be maintained that the state citizenship of the members of such corporation is to be confined or restricted to the locality of the principal office of the corporate body? There is no presumption that this citizenship, "united together in a corporate body, and acting under the authority conferred upon them for the more convenient transaction of business, and consequently entitled to maintain suits in the courts of the United States," has its separate, or aggregate, residence in the particular locality or place where the corporate body keeps its principal office.

The opinion of the court, while compelled to recognize the presumption of the citizenship of the members of the corporate body, on which the jurisdiction of the court over the corporation rests, or upon which it depends, in effect confines that citizenship to a particular locality within the State creating the corporation, when there is no presumption, either of fact or law, that the citizenship composing the corporate body is so restricted. In other words, the legal presumption that the members of the corporation are citizens of the State under which the corporate body is created, is, by the opinion of the court, restricted, so as to give that citizenship a legal residence

confined to the place where the corporate body has its principal office. I know of no authority or principle upon which this can be done.

But suppose the clause that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," can have no application to the suit of an alien against a citizen, or of a citizen against an alien, what is the meaning of the word "inhabitant," as used in that clause of the act? The word has, of course, a great variety of meanings, dependent upon the connection in which it is used. It is not used in the Judiciary Acts of 1887 and 1888, or in any previous judiciary act, in a sense that was intended to limit and restrict the jurisdiction conferred by the previous clause of section one. Congress did not mean to broadly confer jurisdiction of a controversy between an alien and a citizen in the first clause of the act, and then in the subsequent clause restrict that jurisdiction by the word "inhabitant," so as to limit such jurisdiction to the residence of the alien or of the citizen. The meaning of the word, as used in the Judiciary Act, is to be taken in the sense of "citizen" or "alien."

This was the meaning given to the word as it was used in the eleventh section of the act of 1789. Thus in *Picquet* v. *Swan*, 5 Mason, 35, 46, Mr. Justice Story had occasion to construe the meaning of the word "inhabitant," as used in the first judiciary act, and said: "But I lay no particular stress upon the word 'inhabitant,' and deem it a mere equivalent description of 'citizen' and 'alien' in the general clause conferring jurisdiction over parties."

In *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, Mr. Justice Gray, speaking for the court, said in effect that the word "inhabitant" in the act of 1887 was apparently used in no larger or different meaning than "citizen."

If, as already shown, the latter clause of the first section of the act of 1887, declaring that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant," has no

Counsel for Plaintiff in Error.

application to the present suit; and, if the prior clause, containing the word "inhabitant," is inapplicable to suits between an alien and a citizen, as held in *Hohorst's case*, or if the word "inhabitant" is used in the sense of "citizen," or "alien," then it is clear that the plea in abatement, interposed in the present case by the Texas corporation, is not a valid objection to the jurisdiction of the Circuit Court.

The opinion of the court, holding to the contrary, rests upon grounds which have no application to this case.

Mr. Justice Harlan concurs in this dissent.

HEDDEN *v.* ROBERTSON.

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

No. 212. Argued January 25, 1894. — Decided February 5, 1894.

Woven cotton cloth, the groundwork of which was uniform, and upon which were figures or patterns, woven into it by means of a Jacquard attachment contemporaneously with the weaving of the fabric, and which was known as Madras mull, being imported into the United States in 1886, became subject to the specific duties imposed by Schedule I (paragraphs 319, 320, 321 in the customs enumeration) of the tariff act of March 3, 1883, c. 121, 22 Stat. 488, estimated by the number of threads to the square inch, and not to the *ad valorem* duty imposed by the same schedule on manufactures of cotton not specially enumerated.

This was an action at law against the collector at the port of New York, to recover duties alleged to have been illegally imposed upon importations of cotton cloth. Under direction of the court the jury found a verdict for the plaintiff, on which judgment was entered. To that judgment the defendant sued out this writ of error. The case is stated in the opinion.

Mr. Assistant Attorney General Whitney for plaintiff in error.

Mr. Edwin B. Smith for defendant in error.

Mr. Justice Jackson delivered the opinion of the court.

This was an action brought by William Robertson, the defendant in error, in the United States Circuit Court for the Southern District of New York, to recover from the plaintiff in error, Edward L. Hedden, collector of customs at the port of New York, the sum of $1016.34, alleged to have been illegally exacted in excess of lawful duties on a number of importations of cotton cloths brought into the port of New York in the year 1886 by the defendant in error.

The alleged illegal duties were levied by the collector under the provisions of Schedule I, paragraphs 319, 320, and 321, of the tariff act of March 3, 1883, c. 121, 22 Stat. 483. These paragraphs are similar, so far as concerns the present question, and the language of 320 alone is necessary to be quoted. It reads as follows:

"On all cotton cloth, not bleached, dyed, colored, stained, painted, or printed, exceeding one hundred and not exceeding two hundred threads to the square inch, counting the warp and filling, three cents per square yard; if bleached, four cents per square yard; if dyed, colored, stained, painted, or printed, five cents per square yard: *Provided*, That on all cotton cloth not exceeding two hundred threads to the square inch, counting the warp and filling, not bleached, dyed, colored, stained, painted, or printed, valued at over eight cents per square yard; bleached, valued at over ten cents per square yard; dyed, colored, stained, painted, or printed, valued at over thirteen cents per square yard, there shall be levied, collected, and paid a duty of forty per centum *ad valorem*."

The defendant in error claimed that the cotton cloth imported by him should not be classified under the provisions of either of these paragraphs, but that the goods were dutiable only under paragraph 324, which reads as follows:

"Cotton cords, braids, gimps, galloons, webbing, goring, suspenders, braces, and all manufactures of cotton, not spe-

cially enumerated or provided for in this act, and corsets, of whatever material composed, thirty-five per centum *ad valorem*."

It was shown by the evidence that the difference in the rate of duty exacted by the collector and that claimed by the importer was $983.93.

The goods in question were called Madras mull, and consisted of woven cotton cloth, the groundwork of which was uniform, and upon which were figures or patterns woven contemporaneously with the weaving of the fabric. These figures or patterns were woven into the groundwork by means of a machine called a Jacquard attachment. When the fabric was taken from the loom it was not in a finished state. The threads forming the weft or filling, furnished by the Jacquard attachment — used entirely for the figures or patterns — loosely connected the figures in a horizontal line, and were raised above the smooth service of the groundwork. In order to bring out the figure or pattern more distinctly, the whole fabric was run through a clipping machine two or more times, and the loose threads, together with the raised parts of the pattern, were cut off, so as to make the fabric smooth and even. After stating the method of weaving the cloth, and thereafter clipping it, so as to bring out the figures, the manufacturer, Nicol Paton Brown, a witness of the plaintiff below, thus described the fabric:

"In the groundwork of the fabric as distinguished from the figure or pattern the number of threads to the square inch is uniform throughout the fabric, but when the fabric leaves the loom and before it goes into the clipping machine the count of the fabric as a whole differs from the count after it has been passed through the clipping machine. Before the fabric is put in the clipping machine the number of threads to the square inch in the groundwork of the fabric as distinguished from the colored threads which form the figure is uniform throughout the fabric, so that if in any of these fabrics a square inch is selected for the purpose of the count, in which there is no figure or part of a figure, the number of threads in that square inch will be the number of threads in any

square inch of the groundwork of the fabric. The terms weft and filling are synonymous, and I have so used them in my testimony. The Jacquard machine gives the indication to the threads of the warp which forms the figure, but the loom is instrumental in leaving both the groundwork and the figure. . . . The weft threads make the figure, but require to be woven in by the warp in order to retain them in position in the fabric when being passed through the clipping machine after being woven."

The warp threads, which lock into the weft threads, are continuous from end to end throughout the fabric, but the weft threads, after the fabric has gone through the clipping process, do not extend continuously from side to side or selvage to selvage.

The number of threads to the square inch are counted by the use of a magnifying glass. In the goods in question the number of threads to the square inch was determined by counting the threads in a square inch of the groundwork alone, and there is no dispute that the groundwork of the cloth, independently of the figures, contained the number of threads designated in the provision of the statute which warranted the duty imposed thereon by the collector.

The defendant in error claimed, however, that the goods imported, although composed of cotton and constituting cotton cloth, were dutiable only at the rate of thirty-five per centum *ad valorem* as "manufactures of cotton not specially enumerated and provided for."

The duties imposed by the collector were paid under protest, and the importer thereafter made due and timely appeal to the Secretary of the Treasury, who affirmed the decision of the collector. The importer within the time prescribed by law brought his action against the collector to recover the duties which he claimed to have paid in excess of the amount required by the tariff act of 1883. His complaint set out the fact of the payment of the duties, his protest, and the adverse decision of the Secretary of the Treasury, and that the sum alleged to have been improperly exacted from him had never been repaid.

The answer of the collector denied that the plaintiff had paid anything in excess of the proper and lawful duty.

Upon the hearing of the cause the court directed the jury to return a verdict for the plaintiff below for the sum of $983.93; upon which verdict the court rendered a judgment for that amount, with interest and costs, aggregating the amount of $1044.06. 40 Fed. Rep. 322. From this judgment the defendant below prosecuted his present writ of error.

The court below, while conceding that the goods in question were cotton cloth, within the meaning of that term, held that they did not come within the countable clause of paragraphs 319, 320, 321 of Schedule I, above quoted, for the reason that those provisions of the tariff act of 1883 implied that the cloth should be homogeneous, so that the number of threads per square inch will not differ in different parts of the fabric; and inasmuch as this was not true in reference to the figures of the fabric, the goods did not come within the meaning of the above-mentioned paragraphs, but came within the provision of paragraph 324 of the same schedule relating to "manufactures of cotton not specially enumerated or provided for."

We think this was not a correct view of the subject. The provisions in question are substantially the same as those of Schedule A of cotton and cotton goods, in section 2504, Revised Statutes, which reads as follows:

"Sec. 2504. On all manufactures of cotton, except jeans, denims, drillings, bed-tickings, ginghams, plaids, cottonades, pantaloon stuff, and goods of like description, not bleached, colored, stained, painted, or printed, and not exceeding one hundred threads to the square inch, counting the warp and filling, and exceeding in weight five ounces per square yard; if bleached, five cents and a half per square yard; if colored, stained, painted, or printed, five cents and a half per square yard; and in addition thereto, ten per centum *ad valorem*.

"On finer and lighter goods of like description, not exceeding two hundred threads to the square inch, counting the warp and filling, unbleached, five cents per yard; if bleached, five and a half cents per square yard; if colored, stained,

painted, or printed, five and a half cents per square yard, and, in addition thereto, twenty per centum *ad valorem*."

"Cotton braids, insertings, lace, trimming, or bobbinet, and all other manufactures of cotton, not otherwise provided for, thirty-five per centum *ad valorem*."

In *Newman* v. *Arthur*, 109 U. S. 132, 138, these provisions just quoted came before the court for construction and application. The imported goods were cotton Italians, which were twilled and had upon them different figures and designs made in the weaving. The goods had more than one hundred, and less than two hundred, threads to the square inch, counting the warp and filling. It was contended in that case, as in this, that the goods were not dutiable under the countable clause of the statute, but were dutiable as "manufactures of cotton, not otherwise provided for." This court held, however, that the goods were dutiable under the countable clause, although the number of threads constituting the warp and woof could only be counted by cutting out a square inch of the cloth and counting the unravelled threads. It was sought to show by proof that it was not the custom of merchants to buy and sell such goods, or to determine the value thereof, partially or wholly, by the number of threads to the square inch, as ascertained by means of a magnifying glass or otherwise; but Mr. Justice Matthews, speaking for the court, said that such custom would throw no light whatever on the meaning of the law, "because the law fixes the rate of duty by a classification based on the number of threads in a square inch, without reference to the mode in which the count is to be made. It might be quite convenient for dealers not to count the threads except when they could do so without unravelling, but it is a pure conjecture that Congress intended so to stop the count by collectors at the same limit. There appears to be no difficulty in counting threads no matter how fine the fabric, as long as the goods are plain woven; and the necessity of unravelling for the purpose of counting seems to exist only in case of twilled goods; and yet this very act requires a count of threads in the case of jeans, denims, drillings, bed-tickings, etc., which are twilled, and bases a differ-

ence of duty upon them according to the number of threads to the square inch so ascertained."

There is no such substantial difference between the act construed in *Newman* v. *Arthur* and the provisions of the act of 1883, now under consideration, as would authorize the court to place upon the latter a different construction from that placed upon the former. The practice of determining the number of threads in both cases was the same, and the acts are so nearly alike in their provisions that a different interpretation cannot be given by this court to the last act, which contains no substantial change in phraseology. *McDonald* v. *Hovey*, 110 U. S. 620.

The provisions of the act of 1883, like the provisions of section 2504, fixes the rate of duty by a classification, based on the number of threads in a square inch of cotton cloth, without reference to the mode by which the count shall be made, and without regard to the incidental ornamentation of the fabric.

We have no authority, where the duty is thus specifically declared, to make an exception, based upon something that might be added to the cloth in the way of figures or patterns placed upon the groundwork of the fabric. The groundwork being cotton cloth, within the terms and provisions of the statute, and the threads thereof being countable, the goods were dutiable, by the express language of the statute, at the rate which was exacted by the collector from the defendant in error.

The mode of weaving the goods and of subsequently clipping the fabric so as to bring out the figures, even though that operation did pare the weft or filling at the figures, does not change the character of the fabric so as to make it a manufacture of "cotton, not specially enumerated or provided for." In other words, the ornamentation placed upon the groundwork of the fabric does not change its character as cotton cloth, subject to the countable clause of the statute, and dutiable under paragraphs 319, 320, and 321 of the act of 1883.

We are, therefore, of opinion that there was error in the action of the court below, and that the undisputed facts of

the case establish that a verdict should have been directed for the defendant.

The judgment of the court below is, therefore, reversed, and the case remanded for further proceedings in conformity with this opinion.

MR. JUSTICE BREWER did not hear the argument in this case, and took no part in the decision of the court.

NEWPORT LIGHT COMPANY *v.* NEWPORT.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 1022. Submitted January 22, 1894. — Decided February 5, 1894.

This court must, when its jurisdiction is invoked to review a decision of the highest court of a State, determine for itself whether the suit involves such a Federal question as can be reviewed here under Rev. Stat. § 709.

A gas company contracted with a municipal corporation in a State, to furnish gas in the streets of the municipality, to the exclusion of all others. Before the expiration of the term, the municipal corporation made a similar contract with another company. The first company, by means of a suit in equity against the municipality, begun in the court below and carried by appeal to the highest court of the State, obtained a decree restraining the municipality from carrying the second contract into execution, and enjoining it from contracting with any other person for lighting the streets with gas during the lifetime of the first contract. The municipality then, the first contract being still in full force and unexpired, contracted with an Electric Light Company to light the streets by electricity. Thereupon the first company procured a rule, in the suit in equity, against the municipality and its officers to show cause why they should not be punished for contempt of court for the violation of the decree. On the pleadings to this rule the trial court held that the injunction had been violated, and gave judgment accordingly. On appeal to the highest court of the State, that court reversed the decree below, and directed the lower court to discharge the rule. The case being brought here by writ of error, *Held*,

(1) That the decision of the state court of appeal, which construed the original decree granting the injunction, neither raised nor presented any Federal question whatever;

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(2) That the act of that court in ordering the court below to discharge the rule for contempt was not subject to review here;

(3) Whether such an order was the final judgment of the highest court of the State, *quære.*

When the highest court of a State, construing one of its own judgments, holds that a party thereto is not guilty of contempt, no Federal question is presented, so far as any decision of this court goes, which confers jurisdiction on this court to reëxamine or reverse the decision.

THIS case came before the court on motion of defendants in error to dismiss the writ of error for want of jurisdiction.

In 1880 the board of councilmen of the city of Newport, State of Kentucky, entered into a contract with the Newport Light Company to light the streets and public places of that city with gas for a term of twenty-five years to the exclusion of all others, and it was agreed that the company should also have the exclusive privilege of using the streets and public places for the purpose of laying pipes in which to convey the gas.

In 1885, while the Newport Light Company was in the actual performance of its contract, the city of Newport entered into another contract with the Dueber Light Company, by which the latter corporation agreed to undertake to furnish gas for lighting the city of Newport for a designated period. Before this latter contract was carried into execution, the Newport Light Company instituted suit in the Louisville Law and Equity Court against the city of Newport and the Dueber Light Company to restrain the city, its officers and agents, from carrying into effect the contract with the Dueber Light Company during the existence of the contract between the Newport Light Company and the city of Newport. The court rendered a judgment, which, in substance, enjoined the city from making or carrying into execution a contract with any person for lighting the streets, alleys, public buildings, and public places of the city with gas during the continuance of its contract with the Newport Light Company. The case was carried to the Court of Appeals of the State of Kentucky, and in May, 1886, the judgment of the lower court was affirmed. 89 Kentucky, 454.

In March, 1887, the city of Newport and the Newport

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Light Company entered into a compromise agreement for the settlement of differences between them, one of the provisions of which was that "the amount of gas consumed to be paid for by metre measurement, and that when the city shall determine that a gas post shall be removed from one point to another, or is to be discontinued, the gas company shall remove the same at the expense of the city, and if discontinued, the same, including the requisite fixtures for the posts, shall be purchased by said city at their original cost." The compromise, however, was not to be understood as in any way waiving any existing rights or privileges granted the Newport Light Company by the existing contract.

By an act of the legislature, passed in 1890, the Suburban Electric Illuminating, Heating and Power Company, of Newport, Kentucky, was incorporated. Among other provisions of the incorporating act it was provided:

"SEC. 7. The general nature of the business of the corporation shall be the erecting, operating, and maintaining a general system of electrical dynamos and other apparatus for the purpose of generating, furnishing and selling electricity for light, heat, and power, and for any other purpose that the electric current may be applied in the city of Newport, and furnishing and supplying said city and its inhabitants, and other persons and corporations, and municipal corporations, located in or near said city, with light, heat, and power by the electric current.

"SEC. 8. Said corporation is authorized, subject to the same regulations and restrictions imposed by the city authorities of Newport upon other corporations in said city, to run its wires and conduits for electric power, lighting, and heating, in, under, on, and over the streets, alleys, and by-ways of said city and adjacent thereto: *Provided*, It shall in no way permanently obstruct the use of the same to the public or any individual; and it is hereby required to place in repair any street or highway under which it may lay its conduits, or in which it may erect its poles, or do such other work consistent with the general nature of the business of the corporation; but it may temporarily obstruct the same."

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On April 17, 1890, the legislature amended the charter of the city of Newport as follows:

"The board of councilmen are hereby authorized to contract for lighting the city of Newport and [supplying] its inhabitants in any mode now known or which may hereafter be discovered, and in so doing grant the use of the public places and of the streets of the city for such purposes: *Provided*, That said contract shall not interfere with any existing right or contract.

"SEC. 7. All acts in conflict with this act are hereby repealed.

"SEC. 8. This act shall take effect from and after its passage."

It was assumed by the city of Newport that the act incorporating the Electric Illuminating Company, and the act amending the charter of the city, in connection with the modification of the original contract between the city and the Newport Light Company, operated to suspend or abrogate the injunction granted in the suit of the Newport Light Company against the city of Newport and the Dueber Company; and, acting upon this theory, the city of Newport, after proper resolution had been passed in April, 1891, by its board of councilmen, entered into a contract with the Suburban Electric Illuminating, Heating and Power Company for furnishing the city with electric lights. In connection with this contract the board of councilmen resolved "that the city discontinue the use of the lamp posts now in use for both gas and gasoline, and the gas light thereby furnished, on July 1, 1891, and the city clerk is directed to notify the Newport Light Company thereof, and request that it send the city a statement of the original cost of the lamp posts, including the requisite fixtures thereof."

Thereafter, on July 7, 1891, the Newport Light Company procured a rule from the Louisville Law and Equity Court to issue against the city of Newport and its board of councilmen to show cause why they should not be punished for contempt of court for a violation of the decree in the former suit of the *Newport Light Company* v. *City of Newport and the Dueber Company*.

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The affidavit of the president of the Newport Light Company, upon which the rule issued, set forth that the contract entered into by the city of Newport with the Suburban Electric Illuminating, Heating and Power Company to light the city of Newport by electricity for the term of fifteen years, which went into effect on July 1, 1891, and at which time the Electric Illuminating Company commenced to furnish electric light under the contract, was an attempt on the part of the city of Newport to annul and set aside the contract made June 3, 1880, between the city and the Newport Light Company; and that this, with all other acts attending the making of the contract with the Electric Illuminating Company, was a violation on the part of the city of the injunction granted in the former suit of the *Newport Light Company* v. *City of Newport and the Dueber Company*, and in contempt of the authority of the court.

To this affidavit, on which the rule was issued, a demurrer was interposed by the defendants in error, which was overruled, and a response was then filed thereto, in which it was claimed that by the compromise of 1887 it was agreed that when the city should determine that a gas post was to be discontinued, the same, including the requisite fixtures for the post, should be purchased by the city at their original cost, and that this new modified contract was in force from that date until the doing of the several acts complained of, and was in lieu of the original contract, wherein the injunction was granted, and was a novation of the rights between the said parties as to the lighting and discontinuance of the lamp posts, gas, and gas lights.

The response further stated that, after the decree granting the injunction had been rendered, the general assembly, by an act passed in 1890, had invested the city of Newport with full power to provide for the lighting of its streets and public places with improved lights, and that the Suburban Electric Illuminating, Heating and Power Company was by the general assembly invested with full power to enter the streets of the city of Newport for the purpose of supplying electric lights to all such persons and corporations, including the city of Newport, as might contract for the same.

It also averred that the city entered into its contract with the Electric Illuminating Company under the authority conferred by these two acts of the legislature.

The Newport Light Company interposed its demurrer and exceptions to the response, which were sustained by the court, its ruling being that "the said response is adjudged insufficient, to which said respondents except, and, the respondents to the rule failing to make further response, it is adjudged that the acts set forth in the affidavit herein constitute a violation of the injunction heretofore granted in these causes, to which said respondents except; and the said respondents are allowed until the twenty-fourth day of July, eighteen hundred and ninety-one, to purge themselves of their contempt herein by setting aside and annulling the contract with the Suburban Electric Illuminating, Heating and Power Company, dated April 23, 1891, and ceasing to light or have lighted the streets, lanes, alleys, public buildings, or places of the city of Newport under said contract; and the said respondents are hereby ordered to rescind and set aside, before the said twenty-fourth day of July, eighteen hundred and ninety-one, the resolution passed on the twenty-third day of April, 1891, to discontinue the lamp posts and the light furnished thereby by the Newport Light Company, to which said respondents except; and the city of Newport is ordered to continue to take gas from the said company for the lighting of the places aforesaid as may be required for that purpose according to the contract between said city of Newport and the said company, dated June third, 1880, to which said respondents except."

From this judgment the respondents below appealed to the Court of Appeals of the State, which court on March 4, 1893, rendered a decision reversing the judgment of the Louisville Law and Equity Court. The grounds on which the Court of Appeals rested its reversal of the action of the lower court were that the contract between the Newport Light Company and the city of Newport, which was construed and sustained in 1885, in the suit between those parties, did not preclude the city from making a contract for lighting its streets and

public places with electricity, as long as the contract for furnishing it with gas remained in force; that the legislative enactments, authorizing the city to contract with the Electric Illuminating Company for electric light, did not authorize the violation of the contract between the city and the Newport Light Company, as those acts provided that existing contracts should not be interfered with; that while the Newport Light Company, under its contract, had the right to supply the city with gas, to which alone its contract had reference, it had no unlimited power over the streets for the purpose of lighting them, and had no right to restrict the city in the use of other and superior lights; that its contract with the city authorized it to furnish gas or other light equally as good; that it could not be required to furnish, or the city to receive from it, electric light because its contract had reference to gas only, and could not have been construed in any other way by the court below, or by the Court of Appeals in the suit between the Newport Light Company and the city of Newport, decided in 1886; that the contention between the two corporations in that litigation was as to which gas light company should furnish the gas, the Dueber Light Company or the Newport Light Company; that that decision did not go to the extent of adjudging that no other company should furnish light of a different character, when, in the judgment of the city, the public interest required it.

It was also held that the original decree under which the injunction was made perpetual was in reference to the supply of gas alone, and could only be considered in that light, and the word "otherwise," used in the restraining order, could not be construed as giving the Newport Light Company the absolute right to furnish gas or any other light during the existence of its contract with the city; that the Newport Light Company had its legal remedy, and must resort to that remedy if it shall have sustained damages by reason of the refusal of the city to have its streets and public places lighted by gas.

It was accordingly held by the Court of Appeals "that a court of equity will not interfere to prevent the city from

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lighting the streets and public places with electric lights," and that the defendants in error had not violated the injunction in the original suit of the Newport Light Company against the city of Newport and the Dueber Company, and was not guilty of contempt. The court therefore directed the lower court to discharge the rule against the defendants in error.

At the request of the Newport Light Company, the Court of Appeals certified "that on the trial and hearing of this suit and case in this court the validity of said act of the general assembly incorporating the said Suburban Electric Illuminating, Heating and Power Company, and the authority exercised under the same in making said contract between said appellant and said last-named company as aforesaid, was drawn in question on the ground that the same impaired the obligation of the contract between the appellant and the appellee, before mentioned, and was repugnant to the Constitution of the United States, and that the decision of this the highest court of law and equity of this State in which a decision of this suit could be had was in favor of the validity of said last-mentioned act of the said general assembly and of the authority exercised thereunder by said appellant in making said contract with said Suburban Electric Illuminating, Heating and Power Company."

A writ of error having been sued out from this court to the Court of Appeals, a motion was made by the defendants in error to dismiss that writ on the ground that the case presented no Federal question.

Mr. William Lindsay and *Mr. Charles J. Helm* for the motion.

Mr. William Stone Abert, *Mr. R. W. Nelson*, *Mr. E. A. Ferguson*, *Mr. Lucius Desha*, and *Mr. J. B. Foraker* opposing.

This proceeding is a suit within the meaning of the act of Congress. A suit is a proceeding in a court of justice, whereby a plaintiff seeks from a defendant a remedy for the enforcement of a right or the redress of a wrong.

Argument against the Motion.

In *Weston* v. *The City Council of Charleston*, 2 Pet. 449, 464, by an ordinance passed by the city council of Charleston, stock of the United States was, among other things, made taxable. The plaintiffs, as owners of such stock, applied to the Court of Common Pleas for a writ of prohibition to restrain the city council from taxing that stock, on the ground that the tax would be inconsistent with the Constitution of the United States. The writ of prohibition was granted. The proceedings were removed to the constitutional court, which held that the tax was valid, and reversed the order of prohibition; whereupon a writ of error was brought. One question in the case was, "Is a writ of prohibition a suit?" The court said: "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him. The modes of proceeding may be various, but if a right is litigated between the parties in a court of justice, the proceeding by which the decision of the court is sought is a suit."

Every court of equity has the inherent power to enforce obedience to its orders and judgments by process of contempt. That is the law in Kentucky. *Kaye* v. *Kean*, 18 B. Mon. 839, 844, and *Gorham* v. *Luckett*, 6 B. Mon. 146.

McMicken v. *Perin*, 20 How. 133, and *Callan* v. *May*, 2 Black, 541, two cases cited by counsel for defendants in error, are clearly distinguishable from the case at bar, in this, that they were appeals from judgments of United States courts, taken by persons seeking to interfere with the execution of mandates of this court, and involving no new question which could be properly tried between the same parties; while the plaintiff in error in this proceeding is seeking to enforce obedience to a decree; and the controversy between the parties is as to whether the acts charged constitute violations of the order of injunction, and if so, whether the defendants should be compelled to obey the same; their excuse being, that subsequent legislation authorized the interference with the execution of the decree. See *Daniels* v. *Tearney*, 102 U. S. 415, 417; *Eureka Lake Co.* v. *Yuba County*, 116 U. S. 410; *Upshur County* v. *Rich*, 135 U. S. 467, 474.

The record shows that the defendants in error in their response to the rule to show cause set up and relied upon the act of the legislature of Kentucky, incorporating the Suburban Electric Illuminating, Heating and Power Company and the sixth section of the act amending the charter of Newport, which authorizes the board of councilmen "to contract for lighting the city of Newport and its inhabitants in any mode now known or which may hereafter be discovered," etc., as authorizing them (the defendants) to violate the terms of the injunction, by making the contract with the Electric Company for lighting the streets of the city with electricity, and by passing the resolution to discontinue the taking of gas from the plaintiff. The validity of these two acts, and of the resolution, was drawn in question on the ground of their being repugnant to the Constitution, by plaintiff's demurrer to said response.

The lower court held that these acts of the legislature and the resolution of the city council were invalid, and did not justify the violation of the injunction, and that its judgment should be obeyed. The Court of Appeals decided in favor of the validity of said acts and resolution, and denied to the plaintiff the only remedy which it had for the enforcement of the rights adjudged to it.

The Court of Appeals could not have decided as it did, without deciding in favor of the validity of said acts of the legislature and of the resolution of the city council. The effect of the decision was to impair the obligation of the contract — to take away the remedy which plaintiff would have had but for said acts of the legislature.

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

The above certificate of the Chief Justice of the Court of Appeals of Kentucky, while entitled to respectful consideration, does not in itself establish the existence of a Federal question in this case, and confer jurisdiction upon this court to reëxamine the judgment complained of. This court must

determine for itself whether the suit really involves any Federal question which will entitle it to review the judgment of the state court under section 709 of the Revised Statutes. *Parmelee* v. *Lawrence*, 11 Wall. 36; *Brown* v. *Atwell*, 92 U. S. 327; *Gross* v. *United States Mortgage Co.*, 108 U. S. 477; *Felix* v. *Scharnweber*, 125 U. S. 54; *Roby* v. *Colehour*, 146 U. S. 153; *Powell et al.* v. *Brunswick County*, 150 U. S. 433.

Looking, therefore, as we must, to the record in the cause to ascertain whether any Federal question is really involved, we are clearly of opinion that no such question is presented, and that the writ of error should be dismissed for want of jurisdiction in this court to review the judgment complained of.

It is shown by the record that this was a proceeding in contempt, and the sole question presented in the Louisville Law and Equity Court, as well as in the Court of Appeals, was whether the defendants in error were in contempt for violating the injunction granted in the suit of the Newport Light Company against the city of Newport and the Dueber Company. The judgment in that suit enjoined and restrained the city of Newport, its officers and agents, "from making or entering into any contract with any person, company, partnership, or corporation, for the lighting of the streets, lanes, alleys, public buildings, or places of the city with gas or otherwise, and from discontinuing the taking of gas from the Newport Light Company for the lighting of said places in such quantities as may be required for that purpose until the further orders of the court."

The contract entered into by the city with the Suburban Electric Illuminating, Heating and Power Company for lighting the city with electric lights was held by the Louisville Law and Equity Court to be a violation of the original injunction of that court, and so the city, its mayor, and board of councilmen were adjudged to be in contempt. The Court of Appeals of Kentucky reversed this order and remanded the cause to the lower court, with directions to discharge the rule. In making this order the Court of Appeals placed a construc-

tion upon the original decree granting the injunction, which limited its operation to a restraint upon the city against entering into any contract with other parties for the lighting of the city with gas, and held that the word "otherwise," used in the restraining order, could not be construed as giving to the Newport Light Company the absolute right to furnish gas and any other light during the existence of its contract with the city.

The Court of Appeals of Kentucky had an undoubted right to construe its own decision rendered in the case of the Newport Light Company against the city of Newport and the Dueber Company, and to declare what the judgment rendered therein really meant, and to define the scope thereof. This neither raised nor presented any Federal question whatever.

The contention on the part of the plaintiff in error really comes to this: That the state Court of Appeals erred in ordering the Louisville Law and Equity Court to discharge the rule for contempt. This is, in fact, the only question presented in the case. The reasons assigned by the Court of Appeals for reversing the action of the lower court did not of themselves present any Federal question; nor are they subject to review here. If this court could hold that the plaintiff in error was entitled to reverse the judgment of the Court of Appeals, the result would be that its mandate would issue to the Court of Appeals of Kentucky, directing that court to set aside its judgment of reversal, and thereby affirm the order of the Louisville Law and Equity Court, which would have the effect of holding the defendants in error guilty of contempt, and subject them to punishment as directed by that court.

This court has never gone to the extent of holding that such an order, as is here sought to be reviewed, was either a final judgment of the highest court of a State, or presented a Federal question, such as would entitle a party to have the judgment reëxamined here. The case presented both in the lower court and the appellate court of Kentucky was simply whether the acts of the defendants in error could be properly

considered a violation of the injunction granted in the original cause.

In *McMicken* v. *Perin*, 20 How. 133, the plaintiff in error was attached for contempt in refusing to make a conveyance after a tender and deposit of money in court had been made in compliance with a mandate of this court. He appealed to this court, and it was held that the proceedings in contempt involved no new question or decision, but were the ordinary means of enforcing the original decree, and in no sense was it a final decree upon which an appeal could be sustained. It was, in effect, the same as ordering an execution on a judgment of law which had been affirmed on error and remanded for execution to the Circuit Court.

In *Hayes* v. *Fischer*, 102 U. S. 121, 122, an injunction was granted. Complaint was made against Hayes for a violation thereof, and proceedings were instituted against him for contempt, which resulted in an order by the court that he pay a certain fine, and stand committed until the order was obeyed. To reverse this order, Hayes sued out a writ of error to this court, which the defendant in error moved to dismiss, on the ground that such proceedings in the Circuit Court could not be reëxamined by this court. The court, speaking by Mr. Chief Justice Waite, said: "If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only. If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be reëxamined here either by writ of error or appeal. This was decided more than fifty years ago in *Ex parte Kearney*, 7 Wheat. 38, and the rule then established was followed as late as *New Orleans* v. *Steamship Company*, 20 Wall. 387." The court held that it had no jurisdiction, and dismissed the writ of error.

No decision of this court has gone so far as to hold that the construction which the highest court of a State places upon its own judgment, and under which construction it holds that

a party thereto has not been guilty of contempt, presents a Federal question, such as would confer jurisdiction upon this court to reëxamine or reverse such a judgment.

Again, if we look to the grounds upon which the Court of Appeals reversed the action of the lower court in the matter of contempt, we find that they involve no Federal question. That court held that the amendment of the city's charter did not authorize the violation of its contract with the Newport Light Company. While it was held that the city could contract for electric lights in addition to gas, if it chose to pay for both, it could not dispense with the use of the gas under its contract with the Newport Light Company without violating its contract with that company; and, further, that if the contract for lighting the city by means of electricity had the effect of displacing the use of gas, the city would be responsible in damages for any breach of its contract with the Newport Light Company, just as it would be if it were to discontinue the use of gas without adopting any other means or method for lighting the city. It is clear that no such breach of the city's contract with the Newport Light Company would in any way bring the case within the operation of the Federal Constitution relating to the impairment of the obligation of contracts. It would be simply a violation of contract obligations, such as involved no Federal question whatever.

Furthermore, it is not and cannot be questioned that the legislature of Kentucky had authority to incorporate the Suburban Electric Illuminating, Heating and Power Company, and to authorize it to contract with the city of Newport to light that city by electricity. It is equally clear that the legislature had the right, in amending the charter of the city of Newport, to authorize it to make a contract with the Electric Illuminating Company to light the city by electricity, providing that such contract should not interfere with the rights covered by any existing contract.

Under these two acts the city proposed to make a contract with the Electric Illuminating Company, not in lieu of its contract with the Newport Light Company, but in addition

thereto. Now, whether that contract violated the existing one between the city and the Newport Light Company was a question which could not be decided without the presence of the Suburban Electric Illuminating, Heating and Power Company, and that company was in no sense a party to the original suit, nor to the contempt proceedings had thereon; and the validity of its contract with the city was in no way involved in the contempt proceedings.

Again, the Court of Appeals construed the contract between the city and the Newport Light Company to mean that the latter had the right to supply the city with gas alone, and possessed no exclusive privilege of supplying other and different lights; and, further, that the city was not confined or restricted by that contract to the use of gas for lighting purposes, but had the authority, particularly under the legislation of 1890, to adopt electric lights, that it might, therefore, lawfully contract for the latter description of lights, and that such a contract for a different mode of lighting from that of gas would not, in and of itself, violate its contract with the Newport Light Company. But if that were otherwise, the Newport Light Company would have its claim against the city for damages for adopting such electric lights if they effected the discontinuation of the use of gas. In other words, if the adoption of the electric lights involved a breach of the city's contract with the Newport Light Company, that company had its remedy at law by an action for damages.

It was further held by the Court of Appeals that there was nothing in the legislation of 1890, amending the charter of the city, or incorporating the Suburban Electric Illuminating, Heating and Power Company, which in any way violated the contract between the Newport Light Company and the city, and that if any contract entered into between the city and the Electric Illuminating Company had the effect of abrogating or violating the contract between the city and the Newport Light Company, it did not arise from the legislation of the State, but from the act of the city, which act, at most, could not be anything more than a breach of its contract with the Newport Light Company, for which the latter had its

appropriate remedy by way of damages; that the subject-matter of the two contracts on the part of the city (one with the Newport Light Company and the other with the Suburban Electric Illuminating, Heating and Power Company) related to two different methods of lighting the city; and that the latter contract was not covered by the gas contract.

This court is not called upon to review the correctness or incorrectness of this reasoning on which the Court of Appeals reached its conclusion that the order of the lower court was erroneous. The judgment of the Court of Appeals, whatever may have been the reasons assigned therefor, merely reversed the action of the lower court, declaring that the defendants in error were in contempt, and directed that court to discharge the rule against them.

For the foregoing reasons we think no Federal question is presented by the writ of error, and it is hereby

Dismissed.

UNITED STATES *v.* HUTCHINS.

APPEAL FROM THE COURT OF CLAIMS.

No. 729. Submitted January 8, 1894. — Decided February 5, 1894.

A naval officer, travelling under orders from San Francisco to New York by way of the Isthmus of Panama, is to be considered, under the statutes applicable to the case, as travelling under orders in the United States, and as entitled to eight cents per mile, measured by the nearest travelled route.

This was a petition for mileage from the navy-yard at Mare Island, in the harbor of San Francisco, to New York.

The Court of Claims found the following to be the facts:

(1) The claimant is an officer in the navy, to wit, a lieutenant-commander. He was serving as such on the 22d day of May, 1890, when he was ordered to proceed by steamer from San Francisco to New York *via* the Isthmus of Panama, in charge of a detachment of men.

(2) He did so proceed from San Francisco to New York, a distance of 6186 miles, and paid his own transportation and expenses, which were afterwards refunded to him, in the sum of ninety-seven dollars ($97), but he was not allowed or paid anything on account of mileage.

(3) The distance from San Francisco to New York by the shortest usually travelled route is 3266 miles.

Upon the foregoing facts, the court held as matter of law that claimant was entitled to recover mileage at the rate of eight (8) cents a mile for 3266 miles, deducting therefrom the sum of $97 paid to him for expenses; and a judgment was accordingly rendered in his favor for the sum of $162.28, and the United States appealed.

Mr. Assistant Attorney General Dodge and *Mr. Charles C. Binney* for appellants.

Mr. John Paul Jones, for appellee, submitted on the opinion of the Court of Claims.

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

By Rev. Stat. § 1566, "An allowance of ten cents" (subsequently reduced to eight cents, act of June 30, 1876, c. 159, 19 Stat. 65) "a mile may be made to officers in the naval service, . . . for travelling expenses when under orders," but by the act of August 5, 1882, c. 391, 22 Stat. 286, "officers of the navy travelling abroad under orders . . . shall receive, in lieu of the mileage now allowed by law, only their actual and reasonable expenses," etc.

The same act and every subsequent navy appropriation act provided for the travelling expenses of naval officers under orders in the following words: "For mileage to officers while travelling under orders in the United States, and for actual personal expenses of officers while travelling abroad under orders."

The sole question presented in this case is whether a naval

officer travelling under orders from San Francisco to New York, by the way of the Isthmus of Panama, is to be considered under the acts above cited as travelling *abroad*, for which he is to be entitled only to his actual expenses, or as travelling under orders *in the United States*, for which he is entitled to eight cents per mile. Why officers are allowed by Congress mileage in one case and not in the other is not altogether clear, but probably the view suggested by the court below is correct, viz., that travelling at home is ordinarily for such short distances, and the disbursements therefor are generally for such petty amounts, that to save the necessity of the officer keeping a minute account of each outlay and the accounting officers of the Treasury passing upon the reasonableness of every small item, it was thought better to allow the officer a fixed mileage by the shortest travelled route, leaving him at liberty, under certain circumstances, and where his orders are not to proceed by a particular route, to choose his own. For instance, if he were ordered from Boston to New Orleans, and for his own purposes he elected to travel by way of Chicago, it might be difficult for him to determine what his expenses would have been if he had taken the direct route, whereas the computation of mileage by such route would be an easy matter.

We think the Court of Claims was correct in its conclusion that the question whether travel is abroad or within the United States should be determined by the termini of the journey rather than by the route actually taken. Instances are frequent where an officer ordered from one place to another within the United States is obliged to perform the whole or a substantial part of his journey either upon the high seas or upon foreign soil. If, for example, he were ordered from Buffalo to Detroit, or from New York to Galveston by sea, it would be sticking in the bark to speak of either as "travel abroad," because in one case the most direct route lies through Canada, and in the other the voyage is made upon the high seas. While the voyage in question was not literally "in the United States," it was such within the intent and spirit of the enactment. An officer is to be understood as

travelling *abroad* when he goes to a foreign port or place under orders to proceed to that place, or from one foreign port to another, or from a foreign port to a home port. But where he is ordered to proceed from one place in the United States to another, and the government for its own purpose requires him to proceed by sea rather than by land, he ought not thereby to be disentitled to his mileage by the nearest travelled route. It may be conceded in this case that, if the petitioner had been ordered to Panama, and upon arrival there had found orders awaiting him to proceed to New York, he would have been entitled only to his expenses; but where he is ordered from San Francisco to New York by way of Panama, he should be considered as making but a single journey, and that within the United States. Whether, if his actual expenses in such case had exceeded his mileage by the nearest route, he would have been entitled to such expenses, is not presented by the record in this case, and we express no opinion upon the point.

There was no error in the judgment of the court below, and it is, therefore, *Affirmed.*

LEWIS *v.* MONSON.

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

No. 385. Submitted January 22, 1894. — Decided February 5, 1894.

The Federal courts universally follow the rulings of the state courts in matters of local law, arising under tax laws, unless it is claimed that some right, protected by the Federal Constitution, has been invaded.

When a person acquires tracts of land in Mississippi, designated by numbers upon an official map, which tracts are from year to year assessed according to those numbers, and the taxes paid as assessed, and a new official map is filed without his knowledge, with different divisions and a different numeration, he is not bound as matter of law to take notice of the new map; and if, after its filing, he pays his taxes under a mistake, intending in good faith to pay all his taxes, but fails to pay on a tract by

Statement of the Case.

reason of the changes in the map, and such tract is sold for non-payment of the tax, he remaining in possession, his title will prevail in an action by the purchaser to recover possession of it.

THIS was an action brought by the plaintiff in error, plaintiff below, against David D. Withers to recover possession of a tract of land containing 80 acres, and described as follows: Lots 5 and 6, of section 22, township 3, range 5 west, Wilkinson County, Mississippi. A jury was waived and the case tried by the court. Findings of fact were made and a judgment entered thereon in favor of the defendant, which judgment was brought before this court by writ of error. Since the record was filed in this court, the defendant Withers has died, and the suit been revived in the name of his executor. The facts are these: Plaintiff's title was based on a tax deed, and the single question in the case is as to the sufficiency of that deed, for the defendant was in possession by his tenants, and, as is not disputed, held prior thereto the fee simple title. The tax deed was for the delinquent taxes of the year 1887, which amounted to $4.84, while the land was of the value of $6000. At the time of the entry and patent of these lands in 1833 and 1835 they were included in lots 3 and 4, of section 22, and the whole section, as shown by the tract book of original entries, was subdivided into four lots: Lot 1 containing 88 acres; lot 2, 62 acres; lot 3, 80 acres, and lot 4, 120 acres. And such was the description in all the defendant's muniments of title. In 1884 an act passed the legislature authorizing the board of supervisors to purchase a new and complete set of maps of the several townships of the county. In pursuance of this law and soon after its passage new maps were purchased and deposited in the chancery clerk's office. On the map of this township, section 22 was subdivided into six lots: Lot 1, containing 88 acres; lot 2, 62 acres; lot 3, 40 acres; lot 4, 80 acres; lot 5, 40 acres; and lot 6, 40 acres. The findings do not show the form of the assessment prior to 1875, but in that year, under a special act of the legislature, it was assessed to the defendant as section 22, containing 350 acres. In 1879 it was assessed to him as lots 2, 3, and 4, section 22, etc., containing 262 acres. In 1883, in the same way,

except that the number of acres was stated at 260. In 1887, for the first time, the section was assessed as follows: Lot 1, 88 acres, to S. A. Fetters, agent; lots 2, 3, and 4, 182 acres, to D. D. Withers; and lots 5 and 6, 80 acres, to "Unknown." The pencil memorandum of defendant's lands sent by his agent to the assessor as a return of assessment was not in the form required by the assessment laws of Mississippi, but was accepted as sufficient by the assessor. That memorandum describes the land as lots 2, 3, and 4, and as containing, respectively, 62, 80, and 120 acres. Without the knowledge of defendant or his agents, the assessor, in making up the assessment roll, changed the description to conform to that in the new map. On the roll, as finally prepared, lots 2, 3, and 4 appear as valued at $9 per acre, and lots 5 and 6 at $1 per acre.

The minutes of the board show no order changing the assessment of D. D. Withers, or the acreage of lots 2, 3, and 4, and none in regard to the said lands or lots 5 and 6 of said section, other than the general one receiving and approving the assessment roll of 1887, which describes lots 2, 3, and 4 as containing 182 acres, and lots 5 and 6, 80 acres.

The defendant had no notice of the new subdivision of the section into six lots, or of the procuring of new maps by the board of supervisors, or of the change in the form of description from that previously used in all deeds, in assessments, and in the memorandum of return made by his agent.

In reference to the payment of taxes the court found as follows:

"The defendant's agent and attorney went to the county site of Wilkinson County to pay defendant's taxes, because, upon a statement to defendant by the collector, the amount was much less than in former years and the acreage of his land largely reduced, and for the purpose of clearing up and adjusting the whole matter. He discovered lands of defendant not included in the list furnished to the assessor by Swan, the defendant's agent, and paid on them. He applied to the collector then engaged in attendance on the chancery court, who informed him that he did not think he had paid on all of defendant's lands, and introduced him to a Mr. Miller, his

deputy, there in his office, as one more familiar with the lands in the county than any one else, and requested defendant's agent to make himself at home and use Miller until he got everything straight. In comparing the tax receipts of previous years with the tax receipt then in his possession, said agent noticed the discrepancy in the acreage of lots 2, 3, and 4, and called Miller's attention to it. Miller said he would see about it, stepped to the corner of the room and got the township maps, footed up the acreage of lots 2, 3, and 4, and found it 182 acres. Defendant's agent asked him how he accounted for the acreage, and he replied, Withers had been paying for years on land in the Mississippi River, but added, referring to the maps, these are the latest surveys and are, I suppose, correct.

"Defendant's agent then looked at the map and saw lots 5 and 6 thereon, and asked, Who do lots 5 and 6 belong to? Miller replied, I don't think they belong to Withers. Said agent replied, they are very close to Withers' land, and Miller answered, he did not think they were ever assessed to Withers, and did not know whether they belonged to him or not. Said agent was doubtful about it; went back; made a thorough examination of Withers' muniments of title to see if lots 5 and 6 belonged to him. It was the first time he had ever heard of said lots 5 and 6, and he had no knowledge of the discrepancy nor of the map beyond the fact that said Miller told him it was the latest survey of the particular tract. When he saw a survey of lots 5 and 6, and could find no such lots in defendant's muniments of title, he concluded the land did not belong to Withers, but that they were water lots that belonged to no one, and that there was no land there. Said agent was then and there ready and willing to pay the taxes on lots 5 and 6, but he did not tender the money for the taxes and demand a tax receipt as prescribed by law, because he did not think the lands belonged to Withers. He first ascertained his mistake when this suit was brought."

In addition, it may be noticed that the list of lands furnished by the defendant's agent contained over thirty tracts, aggregating several thousand acres.

Mr. W. L. Nugent for plaintiff in error.

Mr. Thomas J. Carson, *Mr. S. S. Calhoon*, and *Mr. Marcellus Green* for defendant in error.

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

No question is more clearly a matter of local law than one arising under the tax laws. Tax proceedings are carried on by the State for the purpose of collecting its revenue, and the various steps which shall be taken in such proceedings, the force and effect to be given to any act of the taxing officers, the results to follow the non-payment of taxes, and the form and efficacy of the tax deed, are all subjects which the State has power to prescribe, and peculiarly and vitally affecting its well-being. The determination of any questions affecting them is a matter primarily belonging to the courts of the State, and the national tribunals universally follow their rulings except in cases where it is claimed that some right protected by the Federal Constitution has been invaded.

Turning to the decisions of the Supreme Court of Mississippi, we find in *Richter* v. *Beaumont*, 67 Mississippi, 285, 286, a case almost precisely like the one at bar. It is true that the question there presented arose upon the admissibility of testimony, but the views expressed by the court in its opinion, if accepted as controlling, as they must be, are decisive of this case. In that case there was an old and a new map; an old and a new description. The owner in possession paid according to the old, and in ignorance of the new, intending to pay on all the land that he owned. But by the new map and description the number of lots in the section had been increased, and the tract described by the added number was sold for non-payment of taxes. The lot thus numbered and sold was a part of the land belonging to him, and upon which he was intending and attempting to pay all the taxes. The court, by Mr. Justice Campbell, thus disposes of the question: "By the ancient division of the town and designation of lots, lot six embraced the parcel of land sued for in this action, which

parcel is, by the modern map, a part of lot seven. The defendant (appellant) was in 1883, and prior and subsequent thereto, in the actual possession of lot six, and he gave the description of his land to the assessor as lot six, and it was so assessed, he intending and understanding that lot six extended eastward according to the ancient order, so as to include what, by the new map, is part of lot seven. He paid the taxes on lot six, and lot seven, not being paid on, was sold for taxes. It does not appear that the appellant had ever done anything in recognition of the new map, or that he knew that the new map was conformed to by the assessor in assessing lots in Woodville. It may be inferred from the fact of his residence in the town, and the recognition by citizens and officials of the new map, that he was aware of it, and that the assessor was governed by it in assessing. If so, he should not be allowed to defeat the assessment and sale by his secret understanding or purpose. A mental reservation of the owner cannot be permitted to defeat assessment. On the other hand, if, until a recent date, lot six was understood to embrace what, by a new map, is part of lot seven, and the owner and occupant was governed by the former description in giving it in to the assessor, and did not know, and should not have known, that the assessor would deal with it as designated by the new map, he should not lose his land."

Little need be added to this extract from the opinion in that case. The suggestion there made of a mental reservation is out of this case by the finding of the court. That the owner was not bound, as matter of law, to take notice of the new map is shown by that decision, and if he was not bound to know, and did not in fact know, and paid under a mistake, relying upon the ancient descriptions and the old map, and intended in good faith to pay all his taxes, then clearly, within the scope of that decision, the sale was invalid, and the deed fails. Upon the authority of that case the judgment of the court below is

Affirmed.

LEWIS *v.* WILSON.

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

No. 208. Submitted January 17, 1894. — Decided February 5, 1894.

When a party who has obtained a verdict which the court deems excessive, consents to its reduction, and judgment is thereupon entered for the reduced sum, and the plaintiff receives that sum and acknowledges its receipt "in full satisfaction of this judgment," he may not repudiate the whole transaction, and obtain a judgment for the full amount of the verdict, on the ground that the court had no power to disturb the verdict.

A plaintiff may, in open court, consent to a reduction of a verdict, and the noting thereof in the journal entry of the judgment is sufficient evidence thereof.

THE facts in this case were as follows: Plaintiff in error, the plaintiff below, brought suit against the defendants to recover damages for libel. At the December (1887) term and on April 9, 1888, a jury returned a verdict in his favor, assessing the damages at $10,000. On April 16, 1888, the defendants filed a motion for a new trial on the ground that the damages were excessive. After the entry of this motion the following appears of record:

"Edward H. Lewis
vs.
Geo. C. Wilson et al. } December Term, 1887. Libel.

"After the rendition of the verdict of the jury in this action and a motion by the defendants for a new trial on the ground that the damages assessed by the jury were excessive, the court said from the bench that the defendants' motion would be granted unless the plaintiff consents to reduce the verdict from ten to five thousand dollars, as the verdict is clearly excessive if we eliminate all damages which arose out of the claim of the plaintiff for special damages to his business in Texas, and to which he could lay no claim under the pleading and evidence in this case, and which the court withdrew from the consideration of the jury."

Statement of the Case.

"And the court further said if the plaintiff consents to reduce the verdict to five thousand dollars in pursuance of this suggestion, and the defendants decline to pay the judgment for that amount and desire to prosecute a writ of error to the Supreme Court, then, in that event, judgment will be entered up for the sum of ten thousand dollars upon the verdict of the jury.

"And afterwards, to wit, on the 23d day of April, A.D. 1888, comes the plaintiff, by his attorney, and enters his consent to the reduction of the verdict of the jury to the sum of five thousand dollars.

"And then come the defendants, by their attorney, and submit to pay the said five thousand dollars.

"It is therefore considered by the court that the plaintiff, Edward H. Lewis, do have and recover from the defendants Geo. C. Wilson, John N. C. Stockton; Mumby, Stockton & Knight, composed of Frank W. Mumby, John N. C. Stockton, and Raymond D. Knight; Wightman and Christopher, composed of William S. Wightman and John G. Christopher; A. W. Owens, Daniel G. Ambler, George F. Drew, J. M. Lee, C. B. Smith, George Hughes, J. M. Barrs, Samuel Barton, F. P. Fleming, J. R. Tysen, C. E. Garner; John N. C. Stockton, trustee; F. W. Hawthorne, C. P. Cooper, J. S. Smith, Jr., James P. Taliaferro, James M. Fairlie, A. W. Cockrell, Charles W. Da Costa, W. B. Young, J. R. Campbell, T. E. Stribling, Roswell H. Mason, B. M. Baer, A. W. Barrs, J. E. T. Bowden, James M. Kreamer, and Telfair Stockton, the sum of five thousand dollars and his costs, taxed at $644.25.

"Comes now the plaintiff, Edward H. Lewis, by H. Bisbee, his attorney, on this the 27th day of April, A.D. 1888, and acknowledges the receipt of five thousand six hundred and forty-four and $\frac{25}{100}$ in full satisfaction of this judgment.

"H. Bisbee, *Att'y.*"

Thereafter this motion was filed:

Statement of the Case.

"In the Circuit Court of the United States, Northern District of Florida.

"Edward H. Lewis
vs. } Libel. Damages, $100,000.
Geo. C. Wilson et al.

"Comes now the plaintiff, by H. Bisbee, his attorney, and moves the court for a judgment on the verdict of the jury in the case, rendered on the 9th day of April, A.D. 1888, *nunc pro tunc* as of the date when it should have been rendered, according to law and the practice of this court, on the following grounds:

"1st. Because said verdict was and is a legal verdict, duly rendered, and has not been set aside or modified by the court, nor in pursuance of any act or order of the court, or any judge thereof acting within its or his jurisdiction.

"2d. That all proceedings in this suit had and entered on the files of the court, its minutes, dockets, and records, of the date of said verdict are null and void for want of jurisdiction of the court.

"3d. Because the defendants could not make the motion for a new trial, which they did make on the 16th day of April, A.D. 1888, on the ground that the laws of the State of Florida prohibited defendants from making a motion for a new trial after the expiration of four days from the date of the verdict rendered on the 9th day of April, A.D. 1888, and any action had on such motion was not within the jurisdiction of the court.

"4th. Because plaintiff cannot apply to the Supreme Court for a writ of mandamus to order the court to enter judgment upon a verdict until a motion for such judgment has been refused, nor can defendant take a writ of error until a judgment on the verdict is entered up.

"If the court enter judgment *nunc pro tunc* on the verdict for $10,000, plaintiff hereby offers and hereby binds himself to credit upon said judgment the sum of $5000, paid by defendants on plaintiff's claim, April 27th, A.D. 1888.

"Nov. 29, 1889. H. BISBEE, *Att'y for Plaintiff.*

"To Messrs. A. W. Cockrell & Son, of counsel for defendants."

This motion was overruled after argument of counsel, and exceptions taken. Thereupon the record was removed into this court by a writ of error, the writ being signed April 23, 1890, just two years after the date of the judgment.

Mr. H. Bisbee for plaintiff in error.

Mr. Wilkinson Call for defendants in error.

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

This is a most extraordinary case. Nearly two years after a judgment has been formally entered, and after the plaintiff has received payment and acknowledged full satisfaction, he comes in and moves the court to enter a new judgment in double the amount, and on the denial of such motion brings the matter here on error. His contention is that, under the practice in Florida, the court had no power to grant a new trial upon a motion made more than four days after a verdict; that the recital of all that the court said from the bench, as to the amount of damages, and its purpose to grant a new trial unless the plaintiff consented to a reduction, must be disregarded as not properly matter for entry on the journal and not brought into the record by any bill of exceptions, and so a mere memorandum made by the clerk, without any significance in the case, *Young* v. *Martin*, 8 Wall. 354; that no consent to a reduction of the verdict, signed by the plaintiff or his counsel, appears on the record, and that the statement by the clerk is insufficient evidence of the fact. Therefore, the court had no power to enter a judgment for $5000; and the receipt of full satisfaction thereof was only a receipt of half of the amount legally due, and does not prevent the plaintiff from proceeding to recover the other half.

It is unnecessary to express any opinion as to the right of a party to file a motion for a new trial more than four days after the verdict; nor to decide whether the court can or cannot — in the absence of any motion, of its own volition — whenever it sees that a grievous wrong has been done by a

verdict, set it aside. For there is nothing which prevents a party having a verdict from consenting to its reduction; and if he does so, though only for the sake of obtaining immediate satisfaction of his claim and to avoid further delay and further litigation, he may not, after the entry of judgment based thereon, the receipt of payment, and an acknowledgment of satisfaction, repudiate the whole transaction, and obtain a judgment for the full amount of the verdict, on the ground that under the law the court had no power to disturb the verdict. A man may continue litigation and stand on his rights, or he may waive some of his rights for the sake of terminating litigation; and when advised that a new trial will be granted, unless he consents to a reduction of the verdict, he may, although knowing that the court has no power to grant such new trial, and that if it be done an appellate court will correct the error, consent to a reduction and let judgment be entered for the amount of the verdict thus reduced. And if he does so, he is concluded by his action in that respect. Here not only was there a consent on his part to a reduction, but also what amounted to a waiver of errors by the defendants, and a promise to pay the amount of the judgment. There was full consideration for the agreement, and judgment was entered in accordance therewith. Thereafter he received payment and acknowledged full satisfaction. The litigation is at an end by his consent, and he cannot reopen it. There is no force in the contention of the plaintiff that no written consent to the reduction of the verdict, signed by himself or attorney, was filed in the case. None was necessary. A party may in open court consent to such reduction, and the noting of his consent by the clerk in the journal entry of the judgment is sufficient evidence thereof, and cannot be questioned. The judgment will be *Affirmed.*

NEW YORK AND NEW ENGLAND RAILROAD COMPANY *v.* BRISTOL.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

No. 917. Submitted January 8, 1894. — Decided February 5, 1894.

This court has jurisdiction over a decision of a state court that a statute of the State, compelling the removal of grade crossings on a railroad is constitutional, and a judgment in accordance therewith enforcing the provisions of the statute.

The act of the legislature of the State of Connecticut relating to railway grade crossings, (Act of June 19, 1889, c. 220, Laws 1889, 134,) being directed to the extinction of grade crossings as a menace to public safety, is a proper exercise of the police power of the State.

A power reserved by a statute of a State to its legislature, to alter, amend, or repeal a charter of a railroad corporation, authorizes the legislature to make any alteration or amendment of a charter granted subject to that power, which will not defeat or substantially impair the object of the grant or any rights vested under it.

Railroad corporations are subject to such legislative control as may be necessary to protect the public against danger, injustice or oppression; and this control may be exercised through a board of commissioners.

There is no unjust discrimination, and no denial of the equal protection of the laws, in regulations regarding railroads, which are applicable to all railroads alike.

The imposition upon a railroad corporation of the entire expense of a change of grade at a highway crossing does no violation to the Constitution of the United States, if the statute imposing it provides for an ascertainment of the result in a mode suited to the nature of the case.

By section one of the act of the legislature of Connecticut of June 19, 1889, c. 220, entitled "An act relating to Grade Crossings," (Pub. Laws Conn. 1889, p. 134,) it was provided:

"The selectmen of any town, the mayor and common council of any city, the warden and burgesses of any borough within which a highway crosses or is crossed by a railroad, or the directors of any railroad company whose road crosses or is crossed by a highway, may bring their petition in writing to the railroad commissioners, therein alleging that public safety requires an alteration in such crossing, its approaches, the

method of crossing, the location of the highway or crossing, the closing of a highway crossing and the substitution of another therefor, not at grade, or the removal of obstructions to the sight of such crossing, and praying that the same may be ordered; whereupon the railroad commissioners shall appoint a time and place for hearing the petition, and shall give such notice thereof as they judge reasonable to said petitioner, the railroad company, the municipalities in which such crossing is situated, and to the owners of the land adjoining such crossing and adjoining that part of the highway to be changed in grade; and after such notice and hearing, said commissioners shall determine what alterations, changes, or removals, if any, shall be made and by whom done; and if the aforesaid petition is brought by the directors of any railroad company, or in behalf of any railroad company, they shall order the expense of such alterations or removals, including the damages to any person whose land is taken, and the special damages which the owner of any land adjoining the public highway shall sustain by reason of any change in the grade of such highway, in consequence of any change, alteration, or removal ordered under the authority of this act, to be paid by the railroad company owning or operating the railroad in whose behalf the petition is brought; and in case said petition is brought by the selectmen of any town, the mayor and common council of any city, or the warden and burgesses of any borough, they may, if the highway affected by said determination was in existence when the railroad was constructed over it at grade, or if the layout of the highway was changed for the benefit of the railroad after the layout of the railroad, order an amount not exceeding one-quarter of the whole expense of such alteration, change, or removal, including the damages, as aforesaid, to be paid by the town, city, or borough in whose behalf the petition is brought, and the remainder of the expense shall be paid by the railroad company owning or operating the road which crosses such public highway; if, however, the highway affected by such order, last mentioned, has been constructed since the railroad which it crosses at grade, the railroad commissioners may order an amount not exceeding one-half of the whole

expense of such alteration, change, or removal, including the damages, as aforesaid, to be paid by the town, city, or borough in whose behalf the application is brought, and the remainder of the expense shall be paid by the railroad company owning or operating the road which crosses such public highway. The directors of every railroad company which operates a railroad in this State shall remove or apply for the removal of at least one grade crossing each year for every sixty miles of road operated by it in this State, which crossings, so to be removed, shall be those which in the opinion of said directors are among the most dangerous ones upon the lines operated by it, and if the directors of any railroad company fail so to do, the railroad commissioners shall, if in their opinion the financial condition of the company will warrant, order such crossing or crossings removed as in their opinion the said directors should have applied for the removal of under the above provisions, and the railroad commissioners in so doing shall proceed in all respects as to method of procedure and assessment of expense as if the said directors had voluntarily applied therefor."

Section 2 related to alterations of highways, one-fourth of the expense of which was to be paid by the State. Appeal from any decision of the commissioners under the act was specifically provided for.

On September 2, 1890, the railroad commissioners of the State of Connecticut made an order reciting that whereas the directors of the New York and New England Railroad Company had failed to remove or apply for the removal during the year ending August 1, 1890, of any grade crossing of a highway which crossed or was crossed by their railroad; and whereas in their opinion said directors should have applied for the removal of the grade crossing of their road and the highway known as Main Street in the town of Bristol; and directing a hearing upon the matter, with notice to the railroad company, the town, and the owners of land adjoining that portion of the highway. The hearing was had on several days, from September 24, 1890, to February 11, 1891, and the commissioners, being of opinion that the financial condition

of the company warranted the order, and that public safety required it, ordered the crossing removed, and determined and directed the alterations, changes, and removals to be made and done, and that they be executed by the railroad company at its sole expense, including damages occasioned thereby. The company appealed from this order to the Superior Court of the county of Hartford, the petition for appeal setting forth various grounds therefor, which by voluntary amendment and by direction of the court were reduced to these:

"1. On the 2d day of March, 1891, the railroad commissioners of this State made an order to said company, requiring the removal of the grade crossing of its railroad and Main Street in the town of Bristol, a full copy of which, marked Exhibit 'A,' is to be annexed hereto and filed herewith.

"1*a*. Said company is not, and at the date of said order was not of sufficient ability to execute the work of making the changes required by said order, and its financial condition does not, and did not then warrant the making of such an order.

"11. Said company cannot meet the expenses of executing the said order of the railroad commissioners, and have enough income left to pay its fixed charges, including interest on its bonds issued as aforesaid and outstanding, and the dividends on its preferred stock issued as aforesaid, and maintain its railroad in good and proper condition.

"12. If the law under which the proceedings were had, as set forth in said order, justifies said order, then it and said law are void as violating both the Constitution of the United States and the constitution of the State of Connecticut, in that said order impairs the obligation of the contracts made by said company with the holders of its bonds and preferred stock by making it impossible for said company to pay the interest on their bonds and dividends on their preferred stock as agreed between them and said company, and yet maintain and operate its railroad efficiently, and further, in that it takes the property of said company without just compensation and without due process of law, and denies to it the equal protection of the laws.

"16. Said order, herein appealed from, was not an order necessary for the safety of the public.

"17. Said order should have been so made, and proceedings leading up thereto had, if at all, under section 2 of the act of 1889, as that one-quarter of the expense of its execution should be paid by the State."

Paragraph 1 *a* was substituted for paragraphs 2 to 10 inclusive, struck out by the court as mere statements of evidence.

The court, upon hearing the parties, the evidence not being preserved in the record, but it appearing that evidence was adduced by the company as to its earnings, expenses, and property, made findings of fact that the railroad company was of sufficient ability to execute, and that the financial condition of the company warranted, the order of the commissioners for the removal of the grade crossing in question; that the crossing was among the most dangerous upon the line of the railroad, and that the safety of the public required its removal; and affirmed the order appealed from. Thereupon the company prosecuted an appeal to the Supreme Court of Errors of Connecticut and assigned various errors to the rulings of the Superior Court in amendment of the petition on appeal, and in the exclusion and admission of evidence; and afterwards amended its reasons for appeal by adding the following:

"8. Because the court erred in holding that the statute under which said proceedings were had, as set forth in said order of the railroad commissioners, justified said order, instead of holding that it was no law, because contrary to the constitution of this State in that it takes the property of the plaintiff without just compensation and without due process of law.

"9. Because the court erred in holding that the statute under which said proceedings were had, as set forth in said order of the railroad commissioners, justified said order, and in therefore affirming said order, and overruling the plaintiff's claim that said statute was void as violating the Constitution of the United States, in that it impaired the obligation of the contracts made by said company with the holders of its bonds and preferred stock, by making it impossible for said company

to pay the interest on its bonds and dividends on its preferred stock, as agreed between them and said company, and yet maintain and operate its railroad efficiently, and further, in that it took the property of said company without due process of law, and denied to it the equal protection of the law.

"10. Because the court erred in overruling the claim of the plaintiff in the twelfth paragraph of its petition of appeal, that said statute was void, and was no justification of said order, under the Constitution of the United States and the Fourteenth Amendment thereof.

"11. Because the judgment does not meet the issues. There is no general finding of the issues against the plaintiff, and no finding as to issues raised in paragraphs 11 and 17."

The Supreme Court of Errors of Connecticut decided that there was no error in the judgment appealed from, (62 Connecticut, 527,) and thereupon a writ of error was allowed to this court, and errors assigned as follows:

"1. The said court erred in holding that the statute under which were had the proceedings as set forth in the order of the railroad commissioners exemplified in the record of the case justified said order, and in affirming the judgment of the Superior Court in and for Hartford County affirming said order, and in overruling plaintiff's claim that said statute was void as violating the Constitution of the United States in that it impaired the obligation of the contracts made by said company with the holders of its bonds and preferred stock by making it impossible for said company to pay the interest on its bonds and dividends on its preferred stock as agreed between them and said company, and yet maintain and operate its railroad efficiently; and further, in that it took the property of the company without due process of law, and denied to it the equal protection of the law.

"2. The said court erred in overruling the claim of the plaintiff in error in the twelfth paragraph of its petition of appeal from the railroad commissioners to the Supreme Court as set forth in the record, that said statute was void and was no justification of said order under the Constitution of the United States and the Fourteenth Amendment thereof."

Argument against the Motions.

Mr. Henry C. Robinson and *Mr. John J. Jennings* for the motions to dismiss or to affirm.

Mr. Charles E. Perkins and *Mr. Edward D. Robbins* opposing.

It is conceded that in Connecticut the existing grades of both the railroads and the highways crossing them were legally established. When plaintiff's railroad was built through the town of Bristol many years ago, the legislature had enacted a special law giving to plaintiff's predecessor the right to cross highways, but at the same time giving to all persons sustaining damage from interference by the railroad company with a highway the same rights as to a judicial assessment of damages which were given to persons whose land was taken. By a subsequent act of the legislature it was provided that "the locations of the several railroad corporations in this State, of which the New York & New England Railroad Company has become and is a successor, and the construction of said road by and upon its centre line, and as adopted and in use by it, are hereby ratified, confirmed, and approved, and the same shall stand good and be for the use and benefit of the said New York & New England Railroad Company."

That was the condition of the rights of the plaintiff in error when the act of 1889 was passed.

I. The plaintiff in error contends that that act denies it the equal protection of the laws, to which it is entitled under the Constitution of the United States.

If the railroad commissioners and the Superior Court, after a fair hearing of both the plaintiff railroad company and the defendant town, had ascertained the degree of responsibility of each of the parties and had judicially assessed upon each a corresponding share of the expense, the case then presented would differ widely from that at bar. But, although it is admitted that justice would require the town to pay some, and perhaps a large part, of the expense, nevertheless, the town is favored by an exemption from its just share of the burden,

and the other interested party before the commissioners is by the terms of the law required to bear the burden of both. In other words, even in this aspect of the matter, as between it and the town, the railroad company is denied the equal protection of the laws.

II. Plaintiff claims that by virtue of this law and the order made thereunder, its property is taken without due process of law.

The Supreme Court of Connecticut justifies this taking of plaintiff's property by the following reasoning: "This statute is in its operation an amendment to the charter of each of the railroad corporations affected by it. It imposes on the plaintiff, being a corporation of that kind, an obligation which previous to its passage the charter of the plaintiff did not impose; but as that charter contained the provision that it might be altered at pleasure by the legislature, the statute is binding upon it."

The scope of this claim seems wider than that of the claim made in support of the attack by the legislature of New York on the Broadway Surface Railroad Company, yet the New York Court of Appeals held that claim to be contrary to the constitution, in *People* v. *O'Brien*, 111 N. Y. 1. In that case all that was attempted to be affected was a franchise created by an amendable charter. The Supreme Court of Connecticut holds, that because the charter of a corporation may be amended, there is no limitation on the rights of the legislature over the property of that corporation.

The right to amend the charter of a corporation does not include the right to arbitrarily deprive the stockholders of this corporation of what in substance is their property, held by them, it is true, for purposes of management and control, under a corporate organization created by a special law, but being nevertheless private property — not by virtue of any charter, but by force of the most fundamental and general laws of modern society, which from their nature necessarily protect alike and fully, all legitimate acquisitions of the members of the community, no matter whether held by them as individuals, partners, associations, or corporations.

Calling a railroad a highway does not make the person or corporation operating the railroad a piece of governmental machinery like the town; and because a State may lay taxes through the agency of the towns, and so pay for a public service, it does not follow that it may force a private corporation to use up its private property for the same purpose.

There is here admittedly no case of a legal nuisance or of a legal wrong of any kind committed by plaintiff, but the State is dealing in this law and the proceedings of the railroad commissioners thereunder, with crossings which were created in their present form nearly fifty years ago with full legislative authority, and which have received additional legislative sanction, less than fourteen years ago; and in applying to the plaintiff in a case of this kind rules applicable to joint tort-feasors, the State of Connecticut covers with only a thin disguise the taking of plaintiff's property without due process of law.

It is suggested that the plaintiff has had a hearing, and that this is enough to constitute due process of law.

There was a hearing on the question, how the highway should be carried over or under the railroad. There was also a hearing as to whether plaintiff's financial ability warranted the order. But before the hearings began at all, it was settled by the prejudgment of this extraordinary board of three men, that this particular one among the more dangerous crossings was the one to be removed, and, as a necessary consequence under the law, that no matter how much of the danger at the crossing is created by the condition of the adjoining highways for which the town of Bristol is alone responsible — no matter even, if, on investigation, it could be shown that in this case the railroad company is not responsible for any of the danger at the crossing, nevertheless, the railroad company is to pay for the whole work ordered.

Moreover, it should be noted that the railroad company is not required by this order to merely make reasonable changes in the grade of its railroad. Not only is it ordered to move its railroad tracks over to ground now occupied by substantial buildings, owned by private persons, and to build a costly

bridge, but it is also ordered to go entirely outside of its own location and to make safe and comfortable grades not merely on Main Street, but on two other compactly-built-up streets, named in the record at page 9, which do not cross the railroad at all, and is even to pay "the special damages which the owner of any land adjoining the public highways shall sustain by reason of any change in the grade of such highways."

It seems to the plaintiff that, when it is denied a hearing as to all the matters of primary importance, it is a hollow mockery to talk about its having its day in court, because it is allowed to be heard on a question so narrowed as merely to mean whether it can get money to pay this bill, or because its engineers are allowed to suggest modifications of the plans presented, so as to obviate the ordering of impracticable railroad construction.

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

The reasons of appeal to the Supreme Court were filed October 7, 1892, and assigned errors in the action of the Superior Court in dealing with various paragraphs of the petition of appeal from the order of the railway commissioners, and in the admission and exclusion of evidence, but contained nothing questioning the constitutionality of the law under which the proceedings were had until they were amended December 17, 1892, by adding the paragraphs raising that question. This tardiness in bringing the contention forward is perhaps not to be wondered at in view of the repeated adjudications of the Supreme Court of Connecticut sustaining the constitutionality of similar laws, as well as of this particular statute, and of the rulings of this court in reference to like legislation.

A motion to dismiss the writ of error for want of jurisdiction is now made, and with it is united a motion to affirm on the ground, in the language of our rule, (Rule 6, paragraph 5,) "that, although the record may show that this court has jurisdiction, it is manifest that the writ or appeal was taken

for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

We agree with counsel that this court has jurisdiction, but are of opinion that the principles to be applied in its exercise are so well settled that further argument is not needed, and that, this being so, the jurisdiction may be said under the circumstances to rest on so narrow a foundation as to give color to the motion to dismiss and justify the disposal of the case on the motion to affirm.

It must be admitted that the act of June 19, 1889, is directed to the extinction of grade crossings as a menace to public safety, and that it is therefore within the exercise of the police power of the State. And, as before stated, the constitutionality of similar prior statutes as well as of that in question, tested by the provisions of the state and Federal constitutions, has been repeatedly sustained by the courts of Connecticut. *Woodruff* v. *Catlin*, 54 Connecticut, 277, 295; *Westbrook's Appeal*, 57 Connecticut, 95; *N. Y. & N. E. Railroad Co.'s Appeal*, 58 Connecticut, 532; *Woodruff* v. *Railroad Co.*, 59 Connecticut, 63; *State's Attorney* v. *Branford*, 59 Connecticut, 402; *N. Y. & N. E. Railroad* v. *Waterbury*, 60 Connecticut, 1; *Middletown* v. *N. Y., N. H. & Hartford Railroad*, 62 Connecticut, 492.

In *Woodruff* v. *Catlin*, the court, speaking through Pardee, J., said in reference to a similar statute: "The act, in scope and purpose, concerns protection of life. Neither in intent nor fact does it increase or diminish the assets either of the city or of the railroad corporations. It is the exercise of the governmental power and duty to secure a safe highway. The legislature having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the

expense shall be paid by either corporation alone or in part by both; and may enforce obedience to its judgment. That the legislature of this State has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue."

And as to this act, the court, in 58 Connecticut, 552, on this company's appeal, held that grade crossings were in the nature of nuisances which it was competent for the legislature to cause to be abated, and that it could, in its discretion, require any party responsible for the creation of the evil, in the discharge of what were in a sense governmental duties, to pay any part, or all, of the expense of such abatement.

It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Fertilizing Company* v. *Hyde Park*, 97 U. S. 659; *Barbier* v. *Connolly*, 113 U. S. 27; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Mugler* v. *Kansas*, 123 U. S. 623; *Budd* v. *New York*, 143 U. S. 517. And also that "a power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right." *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 476; *Spring Valley Waterworks* v. *Schottler*, 110 U. S. 347; *Pennsylvania College Cases*, 13 Wall. 190; *Tomlinson* v. *Jessup*, 15 Wall. 454.

The charter of this company was subject to the legislative power over it of amendment, alteration, or repeal, specifically and under general law. Priv. & Spec. Laws Conn. vol. 5, pp. 543, 547; vol. 7, p. 466; vol. 8, p. 353; Spec. Laws Conn. 1881, p. 64; Stats. 1875, 278; Gen. Stats. 1888, § 1909; *N. Y. & N. E. Railroad* v. *Waterbury*, 60 Conn. 1.

The contention seems to be, however, that the legislature, in discharging the duty of the State to protect its citizens, has authorized by the enactment in question that to be done which is, in certain particulars, so unreasonable and so obviously unjustified by the necessity invoked as to bring the act within constitutional prohibitions.

The argument is that the existing grades of railroad crossings were legally established, in accordance with the then wishes of the people, but, with the increase in population, crossings formerly safe had become no longer so; that the highways were chiefly for the benefit of the local public, and it was the duty of the local municipal corporation to keep them safe; that this law applied to railroad corporations treatment never accorded to other citizens in allowing the imposition of the entire expense of change of grade, both costs and damages, irrespective of benefits, on those companies, and in that respect, and in the exemption of the town from its just share of the burden, denied to them the equal protection of the laws.

And further, that the order, and, therefore, the law which was held to authorize it, amounted to a taking of property without due process, in that it required the removal of tracks many feet from their present location, involving the destruction of much private property; the excavation of the principal highway and those communicating; and the building of an expensive iron bridge, all at the sole expense, including damages, of the company, without a hearing as to the extent of the several responsibilities of the company and the town, or as to the expense of the removal of this dangerous crossing as compared with other dangerous crossings, or of the degree of the responsibility of the company for the dangers existing at this particular crossing. The objection is not that hearing was

not required and accorded, which it could not well be in view of the protracted proceedings before the commissioners and the Superior Court and the review in the Supreme Court, but that the scope of inquiry was not as broad as the statute should have allowed, and that the particular crossing to be removed was authorized to be prejudged.

It is further objected that the Supreme Court had so construed the statute that upon the issue whether the financial condition of the company warranted the order, no question of law could be raised as to the extent of the burdens, which a certain amount of financial ability would warrant, and thus in that aspect by reason of the large amount of expenditure which might be, and as matter of fact was in this instance, required, the obligation of the contracts made by the company with the holders of its securities was impaired. Complaint is made in this connection of the striking out by the Superior Court of certain paragraphs of the petition on appeal, held by that court and the Supreme Court to plead mere matters of evidence, and the decision by the Supreme Court that all the material issues were met by the findings. Those issues were stated by the court to be whether or not the company's directors had removed or applied for the removal of a grade crossing as required by the statute; whether or not the grade crossing ordered by the commissioners to be removed was in fact a dangerous one which the directors ought to have removed, or for the removal of which the directors ought to have applied; and whether or not the company's financial condition was such as to warrant the order.

And upon these premises it is urged in addition that the right to amend the charter of the corporation was not controlling, because that did not include the right to arbitrarily deprive the stockholders of their property, which, though held by them, for purposes of management and control, under a corporate organization created by special law, was, nevertheless, private property, not by virtue of the charter, but "by force of the most fundamental and general laws of modern society, which from their nature necessarily protect alike and fully all legitimate acquisitions of the members of the com-

munity, no matter whether held by them as individuals, or partnerships, or associations, or corporations."

The Supreme Court of Connecticut held that the statute operated as an amendment to the charters of the railroad corporations affected by it; that, as grade crossings are in the nature of nuisances, the legislature had a right to cause them to be abated, and to require either party to pay the whole or any portion of the expense; that the statute was not unconstitutional in authorizing the commissioners to determine their own jurisdiction, and that, besides, the right of appeal saved the railroad companies from any harm from their findings; that it was the settled policy of the State to abolish grade crossings as rapidly as could be reasonably done; and that all general laws and police regulations affecting corporations were binding upon them without their assent.

We are asked upon the grounds above indicated to adjudge that the highest tribunal of the State in which these proceedings were had, committed, in reaching these conclusions, errors so gross as to amount in law to a denial by the State of rights secured to the company by the Constitution of the United States, or that the statute itself is void by reason of infraction of the provisions of that instrument.

But this court cannot proceed upon general ideas of the requirements of natural justice apart from the provisions of the Constitution supposed to be involved, and in respect of them we are of opinion that our interposition cannot be successfully invoked.

As observed by Mr. Justice Miller in *Davidson* v. *New Orleans*, 96 U. S. 97, 104, the Fourteenth Amendment cannot be availed of "as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." To use the language of Mr. Justice Field, in *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512, 520, "it is hardly necessary to say, that the hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from state legislatures."

Opinion of the Court.

The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression; that the State has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial nor an infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a State, that, in such particulars, a law enacted in the exercise of the police power of the State, is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States. *Nashville &c. Railway* v. *Alabama*, 128 U. S. 96; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174; *Minneapolis &c. Railway* v. *Beckwith*, 129 U. S. 26; *Dent* v. *West Virginia*, 129 U. S. 114; *Charlotte, Columbia &c. Railroad* v. *Gibbes*, 142 U. S. 386; *Minneapolis & St. Louis Railway* v. *Emmons*, 149 U. S. 364.

Judgment affirmed.

UNITED STATES *v.* LA TOURRETTE.

APPEAL FROM THE COURT OF CLAIMS.

No. 1087. Submitted January 22, 1894. — Decided February 5, 1894.

A post chaplain in the Army of the United States, commissioned by the President under the act of March 2, 1867, c. 145, § 7, is entitled, in computing his longevity pay under the act of July 15, 1870, c. 294, § 24, (Rev. Stat. § 1262,) to be credited with his service as a chaplain, employed by the officers composing the council of administration, at a military post approved by the Secretary of War, under the act of July 5, 1838, c. 162, § 18, and the acts supplementary thereto.

THIS was a petition filed in the Court of Claims by James A. M. La Tourrette, and prosecuted after his death by his executrix, to recover the sum of $333.75, for longevity pay as a chaplain in the Army from February 7, 1885, to April 26, 1887, inclusive. The facts found by the Court of Claims were in substance as follows:

On February 6, 1865, the claimant was elected and appointed chaplain for the post of Fort Columbus, New York Harbor, by the council of administration at the post, under the provisions of the act of July 5, 1838, c. 162, § 18; and of the supplementary acts of July 7, 1838, c. 194, § 2; March 2, 1849, c. 83, § 3; and February 21, 1857, c. 55, § 2. 5 Stat. 259, 308; 9 Stat. 351; 11 Stat. 163.

The action of the post council was approved by the Secretary of War; and the claimant's appointment or employment as post chaplain was subsequently announced in a special order of the War Department of May 19, 1866, as follows: "Fort Columbus, New York Harbor, is announced as a chaplain post, to date from February 6, 1865, in place of Fort Wood, New York Harbor, discontinued as such from that date. The Reverend James A. M. La Tourrette is announced as post chaplain to Fort Columbus, New York Harbor, from February 6, 1865. He will, in connection with his present duties at Fort Columbus, perform also those of Fort Wood, as heretofore."

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Under that appointment, he served until April 6, 1867; but received no commission; it did not appear that he was required to take an oath of office; his employment was not for any fixed or definite time; and he was paid for services on the certificate of the post commander.

Under the provisions of the act of March 2, 1867, c. 145, § 7, (14 Stat. 423,) he was nominated by the President to the Senate for appointment as post chaplain, March 18; confirmed by the Senate, April 3; commissioned accordingly by the President, April 6, to rank from April 3; and formally accepted the appointment, April 27, 1867. On March 23, 1890, he was retired from active service as post chaplain, under the act of June 30, 1882, c. 254. 22 Stat. 118.

His service as chaplain under the act of July 5, 1838, together with his service as post chaplain under the act of March 2, 1867, was continuous and uninterrupted from February 6, 1865, to March 23, 1890.

He was not borne on the Army Register before 1867. In the registers from 1867 to 1878, inclusive, his name appears, with the date of "original entry into service," April 3, 1867. The registers from 1879 to 1881, inclusive, refer to that date as "date of commission;" and these registers, as well as those for 1882 and since, record the beginning of his service as chaplain of a post, February 6, 1865, and as post chaplain, April 3, 1867, accepted April 27, 1867.

From April 27, 1867, to March 23, 1890, he was paid his salary, with longevity pay, computed for the most part by crediting him with his service from February 6, 1865; but since February 6, 1885, with his service from April 27, 1867, only. If he is to receive credit for the time from February 6, 1865, to April 26, 1867, the longevity pay due him is the sum of $333.75, more than he has received.

On these facts, the Court of Claims decided, as a conclusion of law, "that the decedent, during his service from February 6, 1865, to April 26, 1867, was in the Army of the United States, within the meaning of the law," and therefore entitled to recover the sum claimed, and gave judgment accordingly.

The United States appealed to this court.

Mr. Assistant Attorney General Dodge and *Mr. Charles C. Binney* for appellants.

Mr. Joseph W. Striker for appellee.

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

This claim for longevity pay is based on the provision of the act of July 15, 1870, c. 294, § 24, reënacted in the Revised Statutes, by which "there shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service." 16 Stat. 320; Rev. Stat. § 1262.

"Service" in this statute evidently, as both parties admit, means military service; and the question is whether the claimant was in that service from February 6, 1865, to April 26, 1867.

This question is best answered by reading the provisions of previous acts of Congress, referred to by counsel, which are as follows, the significant words being printed below in italics:

By the act of July 5, 1838, c. 162, § 18, "it shall be lawful for the officers composing the council of administration at any post, from time to time, to *employ* such *person* as they may think proper *to officiate as chaplain*, who shall also perform the duties of schoolmaster at such post; and the *person so employed* shall, on the certificate of the commanding officer of the post, *be paid* such sum *for his services*, not exceeding forty dollars *per month*, as may be determined by the said council of administration, *with the approval of the Secretary of War;* and *in addition to his pay*, the said chaplain shall be allowed four *rations* per diem with *quarters and fuel*." 5 Stat. 259.

By the supplementary act of July 7, 1838, c. 194, "the *posts at which chaplains* shall be allowed shall be limited to the number of twenty, and shall be first *approved by the Secretary of War*, and shall be confined to places most destitute of instruction." 5 Stat. 308.

By the act of February 11, 1847, c. 8, § 7, "during the war

with Mexico, it shall be lawful for the officers composing the councils of administration of the several regiments constituting a brigade, either regular or volunteer, in the service of the United States, to employ some proper person to officiate as chaplain to such brigade:" "Provided that the *chaplains now attached to the regular army and stationed at* different *military posts* may, at the discretion of the Secretary of War, be required to repair to the Army in Mexico whenever a majority of the men at the posts where they are respectively stationed shall have left them for service in the field; and should any of *said chaplains refuse* or decline to do this when ordered so to do by the adjutant-general, *the office of such chaplain shall be deemed vacant, and the pay and emoluments thereof be stopped.*" 9 Stat. 124.

By § 3 of the act of March 2, 1849, c. 83, entitled "An act to provide for an increase of the medical staff, and for no additional number of *chaplains of the Army of the United States*," the provisions of the act of 1838 "are extended so as to authorize the employment of ten additional *chaplains for military posts of the United States.*" 9 Stat. 351.

By § 1 of the act of February 21, 1857, c. 55, entitled "An act to increase the pay of *officers of the Army*," the pay of commissioned officers of the Army is increased; and by § 2, it is provided "that the Secretary of War be authorized, on the recommendation of the council of administration, to extend the *additional pay herein provided* to any person *serving as chaplain at any post of the Army.*" 11 Stat. 163.

By the act of July 17, 1862, c. 200, § 9, "the compensation of *all chaplains in the regular or volunteer service* or army hospitals shall be one hundred dollars per month and two rations a day when on duty;" "*chaplains employed at the military posts called 'chaplains' posts'* shall be required to reside at the posts; and *all chaplains in the United States service shall be subject to such rules in relation to leave of absence from duty as* are prescribed for *commissioned officers* of the United States Army *stationed at such posts.*" 12 Stat. 595.

By the act of April 9, 1864, c. 53, § 1, "the *rank of chaplain*

without command *in the regular and volunteer service of the United States* is hereby recognized;" by § 2, the pension act of July 14, 1862, c. 166, is "so amended as to include *chaplains in* the regular and volunteer forces of *the Army;*" and by § 3, "it shall be the duty of *chaplains in the military service of the United States to make* monthly *reports* to the adjutant-general of the Army, *through the usual military channels, of the* moral condition and general history of the regiments, hospitals or *posts to which they may be attached.*" 13 Stat. 46.

These acts, all of which were passed before the period in question, unequivocally show that such chaplains as the claimant was during that period — being employed, by the officers composing the council of administration at the post, to officiate as chaplain, and actually serving as such, at a military post of the United States, with the approval of the Secretary of War; receiving monthly for their services a sum approved by him, and allowed, in addition to their pay, rations and quarters; subject to the same rules as to leave of absence from duty as commissioned officers of the Army; required to report monthly to the adjutant-general of the Army through the usual military channels; and called indifferently "chaplains attached to the regular army and stationed at military posts," or "chaplains of the Army of the United States" — should be considered, according to the understanding and intention of Congress, as holding the office and rank of chaplain in the Army, and consequently as in the military service, within the meaning of the longevity pay act.

Moreover, the act of March 2, 1867, c. 145, § 7, (under which the claimant was afterwards commissioned,) by providing that "the post chaplains now in service," as well as those thereafter to be appointed, should be commissioned by the President, distinctly recognized that the former were already in "service," which, in this act, as in the longevity pay act, clearly means the military service of the United States. 14 Stat. 423.

Judgment affirmed.

UNITED STATES *v.* THOMAS.

CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

No. 668. Argued October 20, 1893. — Decided February 5, 1894.

Under the act of March 3, 1885, c. 341, 23 Stat. 362, the Federal court in Wisconsin has jurisdiction to try an Indian charged with murdering another Indian within the limits of section 16 in a township in that State which is embraced within and forms part of the La Court Oreilles reservation for the Chippewa Indians.

A Chippewa Indian being indicted in the District Court of the United States for the Western District of Wisconsin for the murder of another Indian on the Chippewa reservation, it appeared at the trial that the offence took place in township 16, one of the townships set apart for the State as a school reservation. The defendant being found guilty, a motion was made for a new trial. This motion was heard before the District Judge and the Circuit Judge. They differed in opinion on the question of jurisdiction and certified the question here. With it they sent up a transcript of the whole record. *Held,*

(1) That it was irregular to send the entire record with a certificate of division in opinion, and that, generally, there could be no such certificate on a motion for a new trial; but that under the circumstances, this court would consider the question certified;

(2) That the trial court had jurisdiction, and the motion to set aside the verdict and grant a new trial must be denied.

This case came before the court on a certificate of division in opinion between the Judges of the Circuit Court for the Western District of Wisconsin, on the question of its jurisdiction to try the defendant upon the indictment against him. The defendant, an Indian of the Chippewa tribe, was indicted in that court for the murder of one David Corbin, a half breed, of the same tribe, within the limits of La Court Oreilles Indian reservation, in Wisconsin, and was convicted. The evidence tended to show that the offence was committed in section sixteen in a township in Sawyer County of that State, embraced within the reservation; and on that ground the counsel for the defendant moved to set aside the verdict, and for a new

trial, contending that by the provisions of the enabling act by which Wisconsin was admitted into the Union, section sixteen in every township in Wisconsin was ceded to the State for school purposes, and could not, therefore, be subsequently taken by the United States and set off as part of an Indian reservation.

La Court Oreilles reservation, in the State of Wisconsin, was set apart for the Chippewa tribe of Indians, and embraces three townships in area, but by reason of the extension of several meandered lakes, covers about seven townships. The reservation was approved by the treaty of 1854. The survey of the lands of this portion of the State had not then been made, and the townships which compose the reservation were not surveyed until the year 1855, and the lands were not selected until 1859. The State sold, in 1865, section sixteen to parties who cut off the timber, but otherwise made no use of the land except for the erection of a cabin whilst removing the timber. The land had been used by the Indians continuously from time immemorial previous to its reservation, and after it was denuded of timber they continued to hunt and travel over it.

Section 9 of the act of Congress of March 3, 1885, c. 341, 23 Stat. 362, 385, making appropriations for the Indian Department for the fiscal year ending June 30, 1886, provides: "That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny *within any Territory of the United States, and either within or without any Indian reservation*, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person *within the bounda-*

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ries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

The motion to set aside the verdict and for a new trial was argued before the Circuit Judge and the District Judge, composing the court, and they differed in opinion. The Circuit Judge held that the title to the township upon which the offence was committed was in the State of Wisconsin from the time of its admission into the Union, and consequently could not afterwards be used by the United States as a part of an Indian reservation. He was therefore of opinion that the court had no jurisdiction over an offence committed in that township, under the act of Congress upon which it assumes to take jurisdiction of this case. The District Judge, on the contrary, held that the right of occupancy of the Chippewa Indians to the land composing the reservation had never been divested, and that until so divested the title to section sixteen could not vest in the State of Wisconsin under its enabling act; and, further, that, independent of any question of title, it was competent for the United States, having set apart certain lands within the State to be used as an Indian reservation, to provide for the protection of the Indians thereon and for the punishment of offences committed against them, and therefore he was against granting the motion.

The certificate sent to us is as follows: "The motion of the defendant to set aside the verdict and for a new trial, etc., came on to be argued, and was argued by the counsel for the respective parties, and upon the hearing it occurred as a question, 'Whether, as the evidence shows that the murder was committed upon section sixteen, in township forty north, of range eight west, in the State of Wisconsin, said section sixteen being within the outside limits of the said Indian reservation, and having been previously, in 1859, settled, platted, and set apart by the United States as a part and parcel of said reservation and ever after occupied by said Indians as such, though

claimed and sold by the State of Wisconsin as and for a part of the school land previously ceded to said State by act of Congress, such murder was committed within the limits of said reservation within the meaning of section 9 of chapter 341 of the act of Congress, approved March 3, 1885, so as to give the Federal courts jurisdiction of the offence.' On which question the opinions of the judges were opposed, which said opinions are herewith transmitted." And the court added: "The court considering, as the whole case now turns upon the question of jurisdiction in this court and no proceedings can be had until that question is determined, and that the same question would arise in any subsequent trial, that it is not one addressed to the discretion of the court but is proper to be certified to the Supreme Court for its opinion; whereupon, on motion of the United States, by their attorneys and counsel, it is ordered that the point upon which the disagreement hath happened as herein stated under the direction of the judges, including the entire record of proceedings in court, the evidence on the trial, and statement of facts as stipulated by the attorneys herein, also copy of the said indictment, be, and the same hereby are, made a part of the transcript certified under the seal of this court, according to the request of the United States by their counsel, to the Supreme Court, that the matter may be finally decided."

Mr. Solicitor General for the United States.

No appearance for Thomas.

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

The judges of the Circuit Court have sent up with the certificate of their division of opinion the entire record of the proceedings in that court, including the evidence on the trial and the agreed statement of facts by counsel. Such matters outside of the certificate, not constituting part of the pleadings in the case or of the public statutes or treaties bearing upon the point certified, cannot be considered by us in dispos-

ing of the question presented. The division of opinion arose on the motion to set aside the verdict and for a new trial, the judges differing as to the jurisdiction of the court under the act of Congress upon the facts presented. Until this question is disposed of there can be no further proceedings in the case; and as it arises upon the statute as applied to the facts, this court may very properly consider and answer it, although irrelevant matter, which will not be regarded, is also embraced in the certificate.

It is the general doctrine that there can be no certificate of a division of opinion between the judges of the Circuit Court on a motion for a new trial, as such motion usually rests in the discretion of the court, and, therefore, properly presents no questions for our determination. *United States* v. *Rosenburgh*, 7 Wall. 580. But such is not always the case. Sometimes a motion of the kind or of a similar kind may present for consideration a question going directly to the merits and a decision of which may determine the point in controversy. In such instances the court will consider the question submitted on a certificate of division of opinion between the judges of the court below. Thus in *United States* v. *Wilson*, 7 Pet. 150, 160, the question arose between the judges of the Circuit Court whether a person convicted of a capital offence, who had received a pardon, could derive any advantage from it without bringing the same judicially before the court by appeal, motion, or otherwise. Upon this question the judges were opposed in opinion, and it was stated under their direction, and certified to this court and here considered and decided. The court regarded the motion as one going to the merits of his case, having a direct bearing upon the punishment to be imposed, and not a question determinable in the discretion of the court, and held that it could properly consider the question upon a certificate of division in opinion of the judges of the Circuit Court.

Holding, therefore, that we can consider the question certified, disregarding the irrelevant matter accompanying the certificate, we proceed to its examination.

The treaty concluded October 4, 1842, and proclaimed in

March, 1843, 7 Stat. 591, between the United States and the Chippewa Indians, ceded to the United States a large tract of land between Lake Superior and the Mississippi. In article 5 it recited that the whole country between those points had always been understood as belonging, in common, to the Chippewas. In article 2 it declared that the Indians stipulated for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States; and that the laws of the United States should be continued in force, in respect to their trade and intercourse with the whites, until ordered by Congress otherwise. And in article 7 it declared that the treaty should be obligatory upon the contracting parties when ratified by the President and Senate of the United States.

The Indians have never been removed from the lands thus ceded, and no executive order has ever been made for their removal, and no change has taken place in their occupancy of the lands, except as provided by the treaty of September 30, 1854, 10 Stat. 1109. By that treaty the Chippewas ceded a large portion of their territory, previously retained in Wisconsin and elsewhere, and provision was made in consideration thereof for the formation of permanent reservations for their benefit, each to embrace three full townships, and their boundaries to be established under the direction of the President. One of these included the tract comprised in the La Court Oreilles reservation. In the provision for these reservations nothing was said of the sixteenth section of any townships, and it is clear that it was not contemplated that any section should be left out of any one of them. The land reserved was to be, as near as possible, in a compact form, except so far as the meandered lakes were concerned. When the townships composing these reservations were surveyed, the sixteenth section was already disposed of in the sense of the enabling act of 1846. It had been included within the limits of the reservations.

As it will be seen, by the treaty of 1842 ratified in 1843, which was previous to the enabling act, the Indians stipulated

for the right of occupancy to the lands. That right of occupancy gave them the enjoyment of the land until they were required to surrender it by the President of the United States, which requirement was never made. Whatever right the State of Wisconsin acquired by the enabling act to the sixteenth section was subordinate to this right of occupancy for which the Indians stipulated and which the United States recognized. The general rule established by the Land Department in reference to the school lands in the different States is that the title to them vests in the several States in which the land is situated, subject to any prior right of occupation by the Indians or others which the government had stipulated to recognize.

Mr. Justice Lamar, while Secretary of the Interior, had frequent occasion to consider the nature and effect of the grant of school lands, where the title was at all encumbered or doubtful; and on this subject he said (6 L. Dec. 418) that the true theory was this: "That where the fee is in the United States at the date of survey, and the land is so encumbered that full and complete title and right of possession cannot then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfilment of the compact, or it may wait until the right and title of possession unite in the government, and then satisfy its grant by taking the lands specifically granted." And this view he considered "as fully sustained by the decision of the courts and the opinions of the Attorneys General," and cited in support of it *Cooper* v. *Roberts*, 18 How. 173; 3 Opins. 56; 8 Opins. 255; 9 Opins. 346; 16 Opins. 430; *Ham* v. *Missouri*, 18 How. 126.

In *Beecher* v. *Wetherby*, 95 U. S. 517, 525, this court had occasion to consider the nature of the right which Wisconsin took to the sixteenth section in the townships of that State by virtue of her enabling act, which declared that it was an unalterable condition of her admission into the Union that section sixteen of every township of the public lands of the State which had not been sold or otherwise disposed of, should be granted to her for the use of schools. The court said that this compact, whether considered as merely promissory on the

part of the United States, and constituting only a pledge of a grant in future, or as operating as a transfer of the title to the State, upon her acceptance of the proposition, as soon as the sections could be afterwards identified by the public surveys — in either case the lands which might be embraced within those sections were appropriated to the State, subject to any existing claim or right to them; that for many years before Wisconsin became a State various portions of the territory within her limits were occupied by a tribe of Indians, but the right which they had was only that of occupancy. The court held that the fee was in the United States, subject to that right, and could be transferred whenever they chose, but added, "the grantee would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States."

We, therefore, are of opinion that by virtue of the treaty of 1842, in the absence of any proof that the Chippewa Indians have surrendered their right of occupancy, the right still remains with them, and that the title and right which the State may claim ultimately to the sixteenth section of every township for the use of schools is subordinate to this right of occupancy of the Indians, which has, so far as the court is informed, never been released to any of their lands, except as it may be inferred from the provisions of the treaty of 1854. That treaty provided for permanent reservations, which included the section in question. The treaty did not operate to defeat the prior right of occupancy to that particular section, but, by including it in the new reservations, made as a condition of the cession of large tracts of land in Wisconsin, continued it in force. The State of Wisconsin, therefore, had no such control over that section or right to it as would prevent its being set apart by the United States, with the consent of the Indians, as a part of their permanent reservation. So, by authority of their original right of occupancy, as well as by the fact that the section is included within the tract set aside as a portion of the permanent reservation in consideration of the cession of lands, the title never vested in

the State, except as subordinate to that right of occupation of the Indians.

But, independently of any question of title, we think the court below had jurisdiction of the case. The Indians of the country are considered as the wards of the nation, and whenever the United States set apart any land of their own as an Indian reservation, whether within a State or Territory, they have full authority to pass such laws and authorize such measures as may be necessary to give to these people full protection in their persons and property, and to punish all offences committed against them or by them within such reservations.

This subject was fully considered by this court in *United States* v. *Kagama*, 118 U. S. 375. It was contended that the act of Congress extending its protection and jurisdiction over the Indians within the limits of the State encroached upon matters within the exclusive jurisdiction of the State. But the court answered this objection, speaking through Justice Miller, by observing that the act "does not interfere with the process of the state courts within the reservation, nor with the operation of state laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.

"It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They own no allegiance to the States and receive from them no protection. Because of the local ill-feeling, the people of the State where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court whenever the question has arisen. . . .

Syllabus.

"The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

We, therefore, answer the question certified, in the affirmative, that the offence committed was within the limits of the reservation within the meaning of the act of Congress approved March 3, 1885, so as to give the Federal courts jurisdiction of the same, and our answer to that purport will be returned to the court below; and that

The motion to set aside the verdict and for a new trial should be denied.

MAXWELL LAND GRANT COMPANY *v.* DAWSON.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 1065. Submitted January 5, 1894. — Decided February 5, 1894.

It is unnecessary to decide whether under the civil law, as in force in New Mexico in 1868, a written instrument was not necessary for the transfer of real estate, (about which *quære*,) as, if such a provision had previously existed, it had been supplanted at that time by territorial enactments.

Under the most liberal construction of the civil law, a transfer of title to real estate could not be effected without identification of the land, delimitation of the boundaries, and delivery of possession, all of which were wanting in this case.

Certain loose parol statements and certain hearsay evidence are held to be inadmissible in this action of ejectment, either to fix the boundaries of the defendant's deed, or to show the character and extent of his alleged adverse possession.

When the defendant in an action of ejectment sets up title under adverse possession, it is competent for him to show that it was generally known in the neighborhood that he was in possession of the disputed premises, and was generally regarded as their owner.

When the description in the deed through which a plaintiff in ejectment

Statement of the Case.

claims covers a large estate, as a whole, excepting from the grant such tracts, "parts of said estate," warranted not to exceed a stated number of acres, "which the parties of the first part have heretofore sold and conveyed," the burden of proof is on the plaintiff to show that the land in suit does not come within the exception.

The New Mexico statute of limitations as to real actions, Comp. Laws New Mexico, 1884, § 1881, operates when the period of limitation has expired, if set up and maintained by the defendant in an action of ejectment, to extinguish the right of the plaintiff, and to vest a complete title in the defendant.

THIS was an action of ejectment brought by the plaintiff in error in the District Court of the Fourth Judicial District of New Mexico, to recover of the defendant the possession of a large tract of land within what is known as the Beaubien and Miranda, or Maxwell land grant.

The declaration was in the ordinary form of a declaration in ejectment, averring the right of the plaintiff to the possession of the entire Maxwell grant, and the unlawful entry of the defendant into that portion thereof situate in the county of Colfax.

Defendant disclaimed as to all the land described in the declaration, except a certain tract described in his first additional plea, as follows: "All the land in the valley or drainage of the Vermejo River, in the county of Colfax, Territory of New Mexico, within the following boundaries: Commencing at the dam on said river, at the upper end of John B. Dawson's farm; thence running to a high point of rocks on the north side of the Vermejo Cañon; thence following along the top of the divide west of Rail Cañon to the head of Saltpeter Cañon; thence down along the top of the divide east of Saltpeter Cañon, to a point on a line with John B. Dawson's rock fence; thence following the line of said rock fence across the Vermejo to the top of the divide between the Vermejo and Van Bremmer Cañon; thence following the top of said divide to the head of Coal Cañon, and thence along the top of the divide east of Coal Cañon to a point on said divide nearest the place of beginning; thence to the place of beginning." He further pleaded adverse possession of these lands for more than ten years next before the commencement of the suit, and

that the plaintiff's right to sue for the same accrued more than ten years prior thereto.

Plaintiff deraigned title from the original grantees through Lucien B. Maxwell; but in the deed from Maxwell and wife to the Maxwell Land Grant and Railway Company of April 30, 1870, there was the following exception: "Excepting from the operation of this conveyance such tracts of land, part of the said estate hereby warranted not to exceed in the aggregate fifteen thousand acres, which the parties of the first part have heretofore sold and conveyed by deeds duly recorded on or prior to the 25th day of January, one thousand eight hundred and seventy." All the subsequent deeds under which the plaintiff claimed, contained the same exception, though not exactly in the same words.

Upon the conclusion of the plaintiff's case, defendant offered evidence tending to show that he occupied under claim of title, and was generally reputed to own a large tract of land, described in his plea, the lower line of which was the projection, for a distance of about six miles east and west, of a stone fence built by him across the valley of the Vermejo River, and including within its east and west limits the entire of what was known as the Coal and Rail Cañons and the upper waters of the Lacey, Spring, and Saltpeter Cañons, with the lands and drainage incident thereto. The testimony upon the question of adverse possession, of which there was a large amount, showed that defendant made use of the cañons for the purpose of ranging or pasturing cattle, horses, and hogs, and indicated that from the year 1872 to 1883 he had an average of 125 horses, 200 cattle, and some hogs, which were turned loose in the cañons within the tract. He looked after them from time to time, and if cattle belonging to other people were there, he turned them out. There was also evidence tending to show that below him the valley of the Vermejo River was pastured by one Lacey, and below *him* by one J. W. Curtis, and also by Miller and Maulding. The testimony of Maulding himself tended to show that he and Dawson and two others went into possession of the land under a contract of purchase from Maxwell, and that they were virtually tenants in common under this contract;

that after Maxwell put them into possession they divided up the entire tract, which he undertook to sell them, each one taking exclusive possession of his particular part. There seems to have been what the witness termed "a kind of a bond for a deed," to which Maxwell and Curtis were parties, but it was not produced, and testimony of its contents was ruled out.

Defendant himself took the stand and testified that in 1867 Curtis, Maulding, and Miller came on to the Vermejo, and told him "they had a contract," and claimed to have possession of the land from the dam which marked the starting point of his (Dawson's) deed, down the river, to a place known as the O'Donnell farm, with all that drainage and lands the water would flow in, between these points and the Vermejo River; that it included the land claimed by him, the defendant; that they were residing upon a part of the land themselves, and that Maulding and Curtis told him to take possession of the land he claimed, and on the line fixed by them as his lower boundary he built a stone fence across the valley. He also testified that in June, 1868, he had a conversation with Lucien B. Maxwell in regard to the tract of land which he claimed; that Maxwell knew he was in possession of it; that the boundaries of the tract set forth in his plea were pointed out by Maxwell, and that he paid $3700 for the land, though he afterwards stated that he paid the money to Mr. Curtis, who gave it to Maxwell. On cross-examination, he produced a deed from Maxwell and wife to himself, bearing date January 7, 1869, in which, for a consideration of $3700, Maxwell conveyed to him the property admitted in this suit to belong to him, and described as follows: "All the land or ground now suitable for farming or cultivating purposes in the valley or drainage of the Vermejo River, county of Mora, Territory of New Mexico, within the following boundaries, to wit: Beginning at a certain dam at the head of a certain ditch at the right-hand point of rocks, from thence running down on the north side of said river to a certain other pile of rocks, on a knoll or elevation, with some bushes near thereto; thence running very near southward across said river to a piñon tree

to the right of a ridge, near a wash, which tree is marked with a letter 'L;' thence running up said river on the south side to the place of beginning; containing about —— acres, more or less." This deed he claimed to have received by mail some time in 1869, and admitted to have shown to one Morley, who, in 1871, came to his house, under orders from the president of the plaintiff company, to survey the land. He appears to have entered upon the land the year before the deed was given, to have made numerous improvements, such as houses, orchards, and fences, and to have put the land under cultivation by means of irrigating ditches. All these improvements, except some cattle fences, were put upon the land described in the deed. Upon redirect examination, he stated that when he first came on the Vermejo, in the early part of 1868 or 1869, passing through, Curtis and Maulding told him that they had a contract with Maxwell for a piece of land there, beginning at the dam, and running down the river to the lower end of what was known as the O'Donnell farm, with all the drainage, with the water that flowed from between this dam and the lower end of the O'Donnell farm; that they asked him, defendant, if he wanted some of it. "I studied a good while and said, 'If you will let me have the upper part,' which they agreed to do. . . . The contract which they had was for a block of land. . . . Curtis and Maulding told me that they had this whole drainage belonging to this block of land, and this was my part; and I talked with them often about it, and I talked with others." He further testified that when Maxwell pointed out to him the boundaries of the land, they were down at a stage station some four miles away, though they could see the prominent points of the tract from where they were, and that this was six months before he received his deed.

The case was tried by a jury, and a general verdict of not guilty returned, upon which final judgment was entered. The case was then carried to the Supreme Court of the Territory, by which the judgment of the District Court was affirmed. Plaintiff thereupon sued out a writ of error from this court.

Statement of the Case.

The third assignment of error, on which the case turns in this court, will be found in the margin.[1]

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[1] III. In admitting the testimony of J. B. Dawson as to oral statements of Maulding and Curtis touching their contract for purchase of a tract of land as follows, to wit:

"They told me that they had a contract for a piece of land there, beginning at this dam that has been described, running down to the river to the lower end of what is known as the O'Donnell farm, with all the drainage of the water that flowed from between this dam and the lower end of the O'Donnell farm. They asked me if I wanted some of it. I studied a good while and said, 'If you will let me have the upper part,' which they agreed to."

. . . "Curtis and Maulding told me that this whole drainage belonged to this block of land, and this was my part; and I talked with them often about it, and I talked with others. I talked with Maxwell, and Maxwell and myself were frontiersmen at this time when I talked with them at the stage station, and he observed that I did not get as much land."

Also in admitting the testimony of other parties touching Dawson's ownership of and claim to the land in question, to wit: "Q. Have you ever heard the people other than Dawson residing in that vicinity speak of this land as belonging to any one? A. Yes, sir. Q. State the names of the persons that they always spoke of it as belonging to. A. They have always spoken of it as belonging to Mr. John Dawson. Q. How long have you heard the people in that vicinity speak of it in that way? A. Since I have been in the country."

. . . "Q. While you were in the Vermejo for that year or two, did you have any conversation with the people residing in that neighborhood as to who owned this tract of land that I read you the description of? A. Yes, sir. Q. Was that tract of land spoken of as belonging to any one? A. Yes, sir. Q. As belonging to whom? A. Mr. Dawson's, and also of Miller, Maulding, and Curtis. Q. Have you heard them speak of Miller and Maulding's land, too? A. Yes, sir. Q. Where were they with reference to this tract of land I read you the description of? A. They were further down the creek. Q. Did you ever hear the people there speak of Dawson's south boundary line, as to where it was? A. Yes, sir. Q. What was it, according to their statements? A. They said it was above Lacey's ranch, adjoining Dawson's land. At that time it belonged to De Graftenreid. Q. During the time you were there, did you hear the people residing in that vicinity talk about Dawson's south boundary line? A. Yes, sir. Q. What did they speak of as his south boundary line? A. They said he was going to fence in his portion of the land from this stone fence, when it was found he was going to continue the stone fence to the high point to the divide."

. . . "A. He claimed from the dam on the Vermejo above his house to a rock fence below his house, and all drainages from either side."

Counsel for Plaintiff in Error.

Mr. T. B. Catron and *Mr. Frank Springer* for plaintiff in error.

Also the following: "Q. Was that land ever spoken of as the land of any one? A. Yes, sir. Q. Of whom? A. John B. Dawson." . . .

. . . "Q. Have you ever heard the people in that neighborhood other than Dawson speak of any one as being the owner of this tract of land? A. Yes, sir. Q. Of whom did they speak as the owner of the land? A. As Mr. Dawson's."

. . . "Q. Did you hear any neighbors around there speak of this tract of land as the property of any one? A. Yes, sir; I have heard a great many speak of it. Q. They spoke of it as whose property? A. John B. Dawson's."

. . . "Q. Did you ever hear any of these people speak of this land as belonging to any one? A. Yes, sir. Q. They have spoken of it as belonging to whom? A. To Mr. Dawson."

. . . "A. I told them that my father claimed all the drainage of the Vermejo River that was above his lower line, and the heads of the cañons — all the drainage above his lower line that come in on the property of the Horseshoe property, including his own place."

. . . "A. It was the upper tract of this purchase or the upper part of this purchase that Maxwell made to us on the Vermejo River."

. . . "A. I talked with my neighbors and we spoke of his upper tract. We often talked about this piece of land and Dawson owning this piece of land with its drainage."

. . . "Q. While this defendant was in possession of this land in 1868, did Maxwell have actual knowledge of that possession? A. Yes, sir."

. . . "Q. Did you have any conversation with any one in that neighborhood as to who claimed to own this tract of land? A. Yes, sir; I have heard several say who owned it. Q. Who did they speak of as owning it? A. They said Mr. Dawson was the owner of it."

Also the following: "Q. Do you know whether Maxwell knew that Dawson was in possession of this tract of land? A. He knew that he was."

. . . "Q. What land did these people claim to have possession of at that time? A. They claimed to have possession of the land from the dam that now belongs to me down the river to a place known as the O'Donnell farm, to the lower end of the O'Donnell farm, with all the drainage and lands the water would flow in between these points to the Vermejo River."

. . . "Q. Did Maxwell know that you were in possession of that tract of land? A. Yes, sir."

. . . "Q. What was to be the extent of that southern line? A. There was an extension from the east end, across Lacey Cañon, across Saltpeter Cañon to the top of the divide of Saltpeter Cañon and the waters flowing to the east; and the other end, an extension from the rock fence across Lacey Cañon to the top of the divide between Lacey Cañon and the Van Bremmer

Argument for Defendant in Error.

Mr. Andrieus A. Jones for defendant in error, to the third assignment of error.

It is apparent from a reading of the deed that the description is vague and uncertain, unless evidence *aliunde* is permitted to supplement the language used. If this deed had been permitted to remain in evidence without any explanation, it would undoubtedly have prejudiced the defendant's case before the jury. It was therefore essential for the defendant to explain why he did not claim the Van Bremmer Cañon and why he claimed that the deed covered the land in controversy. He could only do this by giving his conversations with Curtis and Maulding in regard to their contract with Maxwell. Whether the contract ever existed, or actually included the land in controversy, was immaterial. If Dawson was informed that it did, believed that it did, and acted upon this belief, proof of anything else was unnecessary. When counsel for plaintiff introduced the deed in evidence, he certainly knew that an explanation of its contents on redirect examination would be necessary, and his act in introducing the deed necessitated the introduction of the very evidence to which objection is now made.

The testimony in regard to the conversations with Maxwell was introduced for the purpose of showing that the then owner of the Maxwell land grant had actual knowledge of Dawson's claim and possession, and that at the time Lucien B. Maxwell conveyed the Maxwell land grant to the Maxwell Land Grant and Railway Company, the land in controversy in this suit was in the adverse possession of the defendant. It is true that this conversation occurred about four miles from the land about which they were talking, but the testimony shows that the prominent points and ridges on Dawson's place could be seen from that place. Dawson's tract of land is in the foot hills, and the country to the south where the stage station was, is an open prairie, and the prominent points on

Cañon. Q. Do you know why that line was established there at all? A. Yes, sir. Q. Why? A. To divide my property from the next property below."

the earth's surface, of which there are many, could be plainly seen not only at the stage station, but for a number of miles further south and east of that place. During this conversation, Maxwell and Dawson certainly had in mind the identical tract now claimed by Dawson, and it was unnecessary that they should have been upon the land talked about in order to establish the boundaries of their respective possessions, but as a matter of fact they were on the larger tract contracted to Curtis, Maulding, and Miller, a part of which was then in the possession of Dawson.

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

The controversy in this case relates to a tract of land within what is known as the Maxwell land grant, to a portion of which, about 1000 acres, described in the deed from Maxwell and wife to Dawson, it is admitted the defendant has a good title. Defendant, however, claims title to about 20,000 acres lying outside of the boundaries of the tract admitted to belong to him, which is the property in dispute. The case is before us upon certain errors assigned to the admission of testimony, and to the charge of the court.

(1) The third assignment of error is taken to the admission of the testimony of Dawson as to the parol statements of Maulding and Curtis touching their contract for the purchase of the land, which included that in controversy. The court below held that there was no error in the admission of this testimony, because, under the civil law, land could be conveyed by parol, accompanied by delivery of possession; and that it was immaterial whether the statements of Maulding and Curtis were properly admitted or not, because Dawson had testified that he had conversations with Maxwell, the party from whom they claimed to have purchased, and that Maxwell pointed out the boundaries of the land he would receive under his agreement with Maulding, Miller, and Curtis, who were then in possession, and so recognized by Maxwell under his sale to them.

We think the court erred in this particular. In the first place, we are not prepared to coincide fully in its opinion that, under the civil law as in force in New Mexico in 1868, no written instrument was necessary for the transfer of title to real estate. To justify us in upholding such a radical departure from the existing methods of land transfer in this country from its earliest settlement, we think that it should clearly appear, not only that no written instrument was required by the usages of the civil law, but that the oral transfer was accompanied by all the customary formalities prescribed by that law for the identification of the land and delivery of possession. The question whether an oral transfer of land was recognized as valid by the law of Mexico was not argued upon the hearing of this case, and may be open to some doubt. There appears to be a diversity of opinion upon the point. Upon the one hand, the Supreme Court of California, which State also inherited the civil law from Mexico, has uniformly held that a conveyance of land resting solely upon parol was void by that law. In *Hoen* v. *Simmons*, 1 California, 119, it is said that by the *Recopilacion de las Indias*, Law 29, Liber 8, Title 13, a code of the sixteenth century, every sale of real estate was required to be made before the *Escribano* (Notary) of the place where the contract was entered into; and if there were no *Escribano*, before the Judge of First Instance; and these officers were required to furnish a copy and statement of the writings and contracts made before them, with the day, month, and year in which they were made, the names of the seller and purchaser, the property sold or exchanged, and the price. In the opinion of the court in that case it is said: "There has never been a time since the adoption of the *Fuero Juzgo*," (a Visigothic code of the seventh century,) "in which lands could be conveyed under Spanish or Mexican law, without an instrument in writing — unless it was, perhaps, in the case of an executed contract, where corporeal possession was delivered at the very time of the sale by actual entry upon the premises, and the doing of certain acts analogous to the *livery of seizin* at common law." The question was again fully considered in the case of *Hayes* v. *Bona*, 7 California,

153. It was contended in that case that the civil law, so far as it required transfers of land to be made in writing, was never extended to California; and even if it were, it never had any force or practical operation there; that the condition of the country, its illiterate population, together with the fact there were no *Escribanos*, or Judges of the First Instance, residing in San Francisco, warranted the assumption that the law was never regarded as authoritative, and that evidence of a custom of conveyance existing for many years, by which these requisitions of the law seem to have been disregarded, was sufficient to warrant the court in holding that contracts for the sale of land were in no way controlled by it. "It may be admitted," said the court, "that there is some doubt whether this law was in force in California. From what we can learn, it was a fiscal law, and extended over all the States and Territories of Mexico. That it fell somewhat into disuse, there is no doubt; but, so far as we are informed, contracts for the sale of land, by the custom of the country, were required to be in writing; and, although all the forms prescribed were not strictly followed, still it was necessary that the instrument should contain the names of the parties, the things sold, the date of the transfer, and the price paid. . . . We have been always willing to extend the greatest liberty to contracts executed before the acquisition of California by the United States, and to uphold them, if possible, where there were any equities existing. But to go further, and extend the rule to verbal contracts for the sale of land, or conveyances like the present, would open the door to stupendous frauds and unsettle every title in the State." See also *Stafford* v. *Lick*, 10 California, 12; *Merle* v. *Mathews*, 26 California, 455.

It will be observed in this connection, however, that the court relies largely upon the extract from the *Recopilacion* which appears to have embodied a system of laws applicable to all the Spanish possessions in the Indies. The law referred to seems to have been a mere fiscal regulation, designed for the purpose of securing to the government its *alcabalá*, or excise tax upon the transfer of land, rather than for the pro-

tection of the parties to such transfer. And as there seem to have been no *Escribanos* or Judges of the First Instance in New Mexico, and no tax upon land transfers, it is very doubtful whether this law was ever enforced there. From Schmidt's Civil Law of Spain and Mexico, published in New Orleans in 1851, three years after the treaty of Guadalupe Hidalgo, under which New Mexico and California were ceded to the United States, (book third, title 3, "Contract of sale,") it would appear that no distinction was made between personal and real property, and by article 596, "the sale is perfect from the moment the parties have agreed as to the thing which is to be sold, the price and other particulars," although by article 598 "the sale is not considered complete, when it is stipulated, at the time of making it, that it shall be reduced to writing, until that stipulation is complied with."

It is also said, in the useful and exhaustive work of Mr. Hall upon Mexican Law, page 489, that there was no statute of frauds in Spain or Mexico, and that a verbal sale of real estate was valid. He also speaks of the public writing, (*escritura publica,*) stated by earlier authors to be essential to the sale of real estate, as being a mere fiscal law, created for the purpose of collecting the *alcabalá*, or tax on sales, and that the law did not declare that sales made otherwise should be null and void. "Sales of real estate or contracts in relation thereto, made in the territory ceded by Mexico to the United States, and subsequent to the concession, could not possibly have been affected by such a fiscal law. There was no law in force in the United States authorizing the collection of an *alcabalá*, and no officer had power to collect such an impost. Such a fiscal law could not have been carried into execution in said Territory." See also *Devall* v. *Choppin*, 15 Louisiana, 566; *Gonzales* v. *Sanchez*, 4 Martin, N. S. 657. Important changes were, however, made in the law of Mexico subsequent to the treaty of Guadalupe Hidalgo, and by the Civil Code of 1871 of the Federal District and the Territory of Lower California, which also seems to have been adopted by many of the Mexican States, it was provided, (art. 832,) that "the division of immovable property is void, if it is not made by

public writing;" and (art. 3056) that "the contract of purchase and sale (*compra-venta*) requires no special formality to give it validity, unless it relates to immovable property." By art. 3057, "the sale of an immovable, whose value does not exceed $500, may be made by private instrument, which has to be signed by the vendor and the vendee before two known witnesses." By art. 3059 this instrument was to be executed in duplicate, one for the vendor and one for the vendee, and if the value of the immovable exceeds $500, the sale shall be reduced to a public writing.

In a subsequent chapter a system of public registration is provided, somewhat similar to our own. These provisions are also carried into the Civil Code of December 14, 1883.

It is unnecessary, however, for the purpose of this case, to express an opinion whether under the civil law a transfer of land was valid without a written instrument, since we are of the opinion that the civil law in this particular had been supplanted by territorial enactments.

While no statute of frauds appears to have been adopted in New Mexico as early as 1868, the Compiled Laws of 1865, art. 18, c. 44, required all conveyances of real estate to be subscribed by the person transferring his title or interest, (sec. 4,) and to be acknowledged and certified by a public officer (sec. 5). Although there is nothing in this chapter saying in so many words that no transfer can be made without an instrument in writing, the careful provisions made for the execution and acknowledgment of conveyances of real estate indicate very clearly that written instruments were considered essential.

But, however this may be, and giving full force and effect to all that is claimed for the civil law in this particular, it is very clear that there was no such identification of the land, delimitation of the boundaries, and delivery of possession as were necessary, under the most liberal construction of the civil law, to convey a title. The testimony as to any contract which Maulding and Curtis may have had with Maxwell with regard to the large "block of land," of which a portion claimed by the defendant was a part, was not only hearsay,

but hearsay of the loosest description. Taking Dawson's own version of it, all it amounted to was that Maulding and Curtis told him they had a contract with Maxwell for the purchase of this property, and that he might take a part of it. Neither the property which they purchased nor that which they allowed Dawson to take appears to have been identified in any way beyond the general statement that it included the drainage of the Vermejo River between certain points. If this testimony as to the contract between Miller, Maulding, and Curtis on the one part, and Maxwell on the other, was entitled to any weight whatever, we think the court should have admitted the deeds from Maxwell and wife to Miller and Maulding and to Joel W. Curtis, showing the lands actually conveyed to them, as having a tendency to contradict, or at least to qualify, their general statements. These deeds appear to have been ruled out upon the ground that defendant could not be bound by recitals in deeds between other parties; but, as both the grantors and grantees in these deeds were the parties from whom Dawson himself claimed title, it was competent to show definitely what land was conveyed by Maxwell to Miller, Maulding, and Curtis, from whom Dawson claimed title. Nor was this error cured by the admissions of counsel as to the contents of these deeds, since the deeds themselves were excluded, and the admission was simply for the purpose of enabling the appellate court to pass upon their relevancy in reviewing the action of the trial court in excluding them.

The court below also held that whether the statements of Maulding, Miller, and Curtis, as to their contract with Maxwell, were or were not properly admitted in evidence, was immaterial, from the fact that defendant Dawson further testified that he had conversations with Maxwell, the party from whom they claimed to have purchased, and that Maxwell pointed out the boundaries of the land he would receive under his agreement with Maulding, Miller, and Curtis, who were then in possession. All this conversation amounted to was that Dawson met Maxwell in June, 1868, at a stage station, some four miles from the land in question; that Maxwell pointed out to him the boundaries of the land he would receive

under his agreement with Maulding, Miller, and Curtis; and that some of the permanent objects on the land in question were visible from the spot where they stood. There was no attempt in this conversation to identify the land, to fix the boundaries, or to deliver possession. All he said in this connection was that "the boundaries were what you read in that description there," meaning thereby his plea. There was nothing in the nature of a livery of seizin, which the Supreme Court of California pronounced to be essential to an oral transfer of lands under the civil law. No weight whatever should be given to testimony of this description in connection with the transfer of lands. It is incredible that any man should have paid $3700 for such an indefinite purchase of real estate. A more probable explanation of the transaction was given by Dawson upon his cross-examination, when he produced a deed from Maxwell and wife to himself, bearing date June 7, 1869, in which, for the consideration of $3700, Maxwell conveyed to him the property admitted in this suit to belong to him.

As the location of the dam mentioned in this deed as the upper boundary of the tract conveyed, is admitted, and the piñon tree, which marked its lower boundary "to the right of a ridge, near a wash," was admitted by Dawson to have been seen by him when he first went there, and was on the southwest side of the Vermejo River, near the travelled road up and down the river, and only a little over a hundred yards from the bank of the river, at the southwest end of the stone fence built by the defendant to mark his lower boundary line, there was, and could have been, no uncertainty as to the upper and lower boundaries of his tract. The "pile of rocks, on a knoll or elevation, with some bushes near thereto," to which the line ran from the dam, Dawson swears he never found, and it must be admitted that the side lines of the tract are very vague, and justify the remark made by Morley, the surveyor employed by the plaintiff, when he was shown the deed from Maxwell and wife to Dawson, that there was not a man in the world who could take the deed and survey the land. From the fact, however, that the line was run from a pile of rocks on a knoll or elevation, which could not have been far

from the dam, southward across the river to a piñon tree, and from this tree up the river on the south side to the place of beginning, it is quite evident that it was never intended to include the vast territory claimed by the defendant in his plea, and that the land probably contemplated by the parties was the immediate drainage of the Vermejo River, between the dam and the piñon tree, including all the land between the watersheds on either side of the river, with perhaps grazing privileges over the surrounding territory, which, according to the custom of the country, seems to have been incident to the ownership of the water. If he had purchased all the land he now claims, it is very improbable he would have accepted a deed with this limited and ambiguous description. If he has any title to the territory claimed in his plea, it must be a title by adverse possession. This was evidently the theory upon which he tried his case, though after the deed was introduced, against his objection, he apparently shifted his ground and endeavored to reconcile his claim with the vague description in his deed. It is impossible, however, under any theory of construction, to give it that effect. While possession of the land under the deed would not absolutely conclude him from showing an adverse possession of the much larger tract claimed by him in his plea, the presumption is against him; and, if his testimony as to such possession were reconcilable with his position as grantee under the deed, the theory that he held under the deed, and not by virtue of an adverse possession, should be adopted. This presumption is strengthened by the fact that he appears always to have claimed under his deed up to the time this suit was begun, when, by the filing of his plea, plaintiff was first apprised of the nature and extent of his claim. His disclaimer of holding under the deed is the more apparent from the fact that he made no mention of it in his examination-in-chief; that he exhibited it to his son as the foundation of his title, and produced it to Morley, the plaintiff's agent, as the basis of a survey, when Morley told him it was impossible to locate the land by it. In another part of his testimony he admits that he frequently claimed that, under the deed from Maxwell, he was entitled to the

drainage of the Vermejo River between the dam and the stone fence.

While defendant may have gained a title by adverse possession for ten years, it is difficult to believe that when he went into possession he claimed anything more than the tract covered by the deed from Maxwell, though, having command of the water for a certain distance, he may have treated this as giving him the control of the grazing privileges over a much larger extent of territory.

Under no theory of the case, however, were the loose talks which the defendant had with Miller, Maulding, and Curtis, or with Maxwell, admissible either to fix the boundaries of the deed, or to throw light upon the character and extent of his alleged adverse possession. They were calculated to prejudice the plaintiff's case and to leave an impression upon the jury that defendant's claim of adverse possession was justified by a contract with Maulding, Miller, and Curtis of which there was no legal evidence. The admission of such testimony would create a most dangerous precedent and open up possibilities of fraud that might operate to the unsettlement of great numbers of titles.

It is insisted, however, that this evidence was admissible to supplement the vague and uncertain language of the deed; that it was essential for defendant to explain why he did not claim the Van Bremmer Cañon, and why he did claim the land in controversy; that he could only do this by relating his conversations with Curtis and Maulding in regard to their contract with Maxwell, and that the question at issue was not the actual contents of this contract, but the good faith of Dawson's claim to the land in controversy. The question, however, was one of actuality and continuity of possession rather than of good faith; and even if the good faith of the defendant had been material to this inquiry, it is difficult to see how loose conversations with parties, who, whatever they claimed, were not shown to have had a contract with Maxwell, tended to throw any light upon this question. The difficulty both with this testimony and with that respecting the conversations with Maxwell is that it was likely to lead the jury to believe that

defendant had a title other than that arising from adverse possession.

(2) There was no error in admitting testimony to the effect that the land claimed by Dawson was generally reputed to belong to him. Claiming as he did by open, notorious, and adverse possession of these lands for a period sufficient under the statutes of New Mexico to give him a good title, it was competent to prove that it was generally understood in the neighborhood, not only that he pastured his cattle upon these lands, but that he did so under a claim of ownership, and that his claim and the character of his possession were such that he was generally reputed to be the owner. While this testimony would be irrelevant in support of a paper title, it had an important bearing upon the notoriety of his possession. *Sparrow* v. *Hovey*, 44 Michigan, 63, 64. It may be that, as the tract upon which Dawson lived was admitted to be his property, and the question was one of boundaries or extent of ownership, the testimony may not have been of much value, but we cannot say it was inadmissible. It was a question for the jury to say not only whether his adverse possession, but whether this repute of ownership extended beyond the property included in his deed from Maxwell.

(3) Plaintiff has no just reason to complain of the instruction of the court that the documents introduced by it were sufficient to vest in it the title to the land in controversy, unless they found from the evidence that the plaintiff had failed to prove that the land in controversy, or some portion thereof, was not the whole or part of the 15,000 acres of land excepted in the conveyances under which plaintiff claimed title; or in the further instruction that the burden of proof was on the plaintiff to show that it had the legal title to, and the right of possession of, all the lands in controversy; and, unless they found from the evidence that the lands in controversy were included in and not excepted from the deeds of conveyance under which plaintiff claimed title, plaintiff could not recover.

Under a certain deed from Maxwell and wife to the Maxwell Land Grant and Railway Company, and in all the subsequent

deeds under which plaintiff claims title, there was an exception of such tracts of land "part of the said estate, hereby warranted not to exceed in the aggregate 15,000 acres, which the parties of the first part have heretofore sold and conveyed," etc., and the question was whether the plaintiff was bound to show that the lands claimed by him in this suit had not theretofore been conveyed, or whether the burden was upon the defendant to show that they had been so conveyed. Ordinarily the burden of proof is upon the party claiming the affirmative of the issue. There are, however, certain exceptions to this general rule. Bearing in mind that the burden was upon the plaintiff to show its title to the identical land claimed by the defendant, it is manifest that, as the plaintiff did not take title to 15,000 acres of the Maxwell land grant by reason of the fact that its grantors had already conveyed this amount of land, it was incumbent upon it to show that the land it sued to recover had not been previously conveyed, and, hence, that it had taken title to it under its deeds.

An exception in a grant is said to withdraw from its operation some part or parcel of the thing granted, which, but for the exception, would have passed to the grantee under the general description. The effect in such cases in respect to the thing excepted is as though it had never been included in the deed. If, for example, a person should convey to another a block of land, excepting therefrom a certain lot previously conveyed, to sustain ejectment for any particular lot, it would be necessary for the plaintiff to show that it was not the lot which had been previously conveyed. There is a general rule, applicable both to conveyances and statutes, that where there is an exception in the general granting or enacting clause, the party relying upon such general clause must in pleading state the general clause, together with the exception, and must also show by the testimony that he is not within the exception. Thus in *United States* v. *Cook*, 17 Wall. 168, it was held that if the ingredients of a criminal offence could not be accurately described, if the exception in the statute were omitted, an indictment founded upon the statute must allege enough to show that the accused was not within the exception; but that, if the

language of the statute defining the offence were so entirely separable from the exception that the ingredients constituting the offence might be accurately defined without reference to the exception, the indictment might omit such reference — the matter contained in the exception being matter of defence, and to be shown by the accused. See also *Steel* v. *Smith*, 1 B. & Ald. 95, 99; *Vavasour* v. *Ormrod*, 6 B. & C. 430; *Commonwealth* v. *Hart*, 11 Cush. 130; *Commonwealth* v. *Jones*, 121 Mass. 57; *State* v. *Abbey*, 29 Vermont, 60, 66; *Myers* v. *Carr*, 12 Michigan, 63; *Lynch* v. *People*, 16 Michigan, 472. But, as said by Chief Justice Cooley of the Supreme Court of Michigan in *Osburn* v. *Lovell*, 36 Michigan, 246, 250: "This is not always a rule of pleading; it is sometimes a rule of evidence only. It goes no further in any case than to require the party relying upon the exception to present the facts in such form as the case requires; and this may or may not be by special pleadings. . . . Whether special pleadings are necessary must be determined by other considerations and by the general rules of pleading."

But the exact question raised by the exception in this case was considered by this court in *Hawkins* v. *Barney's Lessee*, 5 Pet. 457, where a patent was issued for 50,000 acres of land, and by subsequent conveyance the patentee sold small parts of said land, and particularly one parcel of 11,000 acres, within the bounds of the original survey; and it was held, that to sustain an action of ejectment it was necessary for the plaintiff to show that the land he sought to recover was without the limits of the tract shown to have been conveyed away by himself. The court quoted with apparent approval the case of *Taylor* v. *Taylor*, 3 A. K. Marsh. 18, 20, in which the Supreme Court of Kentucky held that a plaintiff in ejectment, claiming under a deed conveying the balance of a tract of 14,000 acres of land, must show what that balance was, and where situated, and that it included the land in contest. Also the case of *Madison's Heirs* v. *Owens*, 6 Littell, 281, where, to recover in ejectment, it was held to be necessary for the patentee to show that the defendant was not within the bounds of certain claims excluded from the language of his patent. See also

Guthrie v. *Lewis' Devisees*, 1 T. B. Mon. 142, in which a similar ruling was made.

These cases are precisely in point, and show that the court was guilty of no error prejudicial to the plaintiff.

Defendant, however, claims that, as the plaintiff made no effort to prove himself without the exception, the judgment of the court ought, irrespective of every other consideration, to be affirmed. It is true that the court may have erred in not granting the motion of the defendant made at the close of the plaintiff's case to direct a verdict for him upon that ground, as there does not seem to have been any testimony offered by the plaintiff, in making his original case, to show that the land in controversy was not within the exception; but the defendant is in no condition now to take advantage of it, as the instruction actually given was given upon the request of the defendant himself. While the plaintiff has no right to complain of this instruction, it does not necessarily follow that defendant is entitled to an affirmance of the judgment because the charge of the court was not sufficiently favorable to him in that particular, when such charge was made upon his own request. In putting in its rebutting testimony plaintiff did put in evidence the deeds of Maxwell and wife to Maulding and Curtis, but they were not offered for the purpose of proving itself without the exception, but for the purpose of contradicting the testimony of defendant as to his conversations with Maulding and Curtis, and it is too late for it now to claim that they were offered for the purpose of proving itself without the exception.

(4) Plaintiff also complained of the instruction of the court upon the subject of the statute of limitation, namely, that if the plaintiff permitted defendant to take possession of the tract, claiming all of it as his own, and to continue such possession adversely under such claim of title for an uninterrupted period of ten years or more, such possession would ripen into a right and title in the defendant, and forever afterwards prevent the plaintiff from taking possession of the property. We think, however, the instruction complained of was justified by the language of the statute, which provides (Comp. Laws New

Mexico of 1884, § 1881) that "no person, or persons, nor their children, or heirs, shall have, sue, or maintain any action, or suit, either in law, or in equity, for any land . . . but within ten years next after his, her, or their right to commence . . . such suit shall have . . . accrued, and that all suits . . . shall be had and sued within ten years next after the title or cause of action, or suits, accrued or fallen, and at no time after the ten years shall have passed." Under similar statutes it has been held by this court that the lapse of time not only bars the remedy, but extinguishes the right, and vests a complete title in the adverse holder. See *Leffingwell* v. *Warren*, 2 Black, 599; *Croxall* v. *Shererd*, 5 Wall. 268, 289; *Probst* v. *Presbyterian Church*, 129 U. S. 182. In the last case this court held, construing the statute of New Mexico here in question, that the defendant was entitled to an instruction that an uninterrupted occupancy of land by a person, who in fact has no title thereto, for a period of ten years adversely to the true owner, operates to extinguish the title of the true owner thereto and vest the title of the property absolutely in the occupier.

But for the error of the court specified in the third assignment, in admitting the testimony of the defendant as to the statements of Miller and Curtis, the judgment of the court below must be

Reversed, and the case remanded with instructions to set aside the verdict and grant a new trial.

SHAUER *v.* ALTERTON.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

No. 174. Argued and submitted December 19, 20, 1893. — Decided February 5, 1894.

An assignment of error, based upon the exclusion by the trial court of an answer given in the deposition of a witness to a particular question, will be disregarded by this court, if the answer or the full substance of it is not set forth in the record in an appropriate form for examination.

Statement of the Case.

In an action brought in South Dakota by the assignee of the stock of goods of an insolvent trader (who had taken the stock in satisfaction of an alleged debt due him from the insolvent) against a sheriff who had seized them on a writ of attachment at the suit of a creditor of the insolvent, the defence being set up that the transfer to the plaintiff was fraudulent and in violation of the statutes of that State, it is competent for defendant to put in evidence a confidential business statement by the insolvent to a commercial agency, concealing the alleged liability to the plaintiff.

The statutes of that State, strictly construed, invalidate any transfer of property, made with the intent, on the part of the owner, to delay or defraud creditors, even when the grantee purchased in good faith; and, when liberally construed, will not permit the grantee, although taking the property in part in satisfaction of his own debt, to enjoy it to the exclusion of other creditors, if the sale was made with intent to delay or defraud other creditors, and if he had, at the time, either actual notice of such intent, or knowledge of circumstances that were sufficient to put a prudent person upon an inquiry that would have disclosed its existence.

Such a transfer must be accompanied by an open and visible change of possession, without which it will be void as to creditors.

The assignor and the assignee to the transfer being brothers, the court may rightfully instruct the jury that this relation makes it necessary to carefully scrutinize the facts, but that their determination must depend upon whether the transaction was honest and *bona fide*.

This action was brought by the plaintiff in error in one of the courts of the Territory of Dakota to recover damages for the alleged unlawful taking by the defendant Alterton of a certain stock of merchandise in a storehouse that had been occupied by Louis S. Shauer, in the city of Mitchell, in that Territory. The defendant justified the taking under attachments in favor of creditors of Louis S. Shauer, which came to his hands as sheriff of the county. There was a verdict in favor of the defendant; and a new trial having been denied, judgment was entered in his favor. That judgment was affirmed by the Supreme Court of the Territory, and the writ of error in this case was directed to the Supreme Court of the State of South Dakota, as the successor of the Supreme Court of the Territory of Dakota, by virtue of the act of February 22, 1889, c. 180, § 22, 25 Stat. 676, 683.

The bill of exceptions shows that there was evidence tending to show the following facts:

In September, 1885, Louis S. Shauer, owner of the merchan-

dise attached, was indebted to his brother Gustave G. Shauer, a druggist of Chicago, in the sum of $8000 and more, for moneys loaned and advanced. While Louis was in Chicago, about September 1, 1885, for the purpose of making fall purchases, Gustave informed him of his intention to buy another drug store, and that he would need the sum Louis owed him. The latter expressed his expectation of being able soon to pay one-half of the amount due from him, and after returning to Mitchell remitted a smaller sum than his brother expected. Gustave, having written for more, and receiving only $200, went to Mitchell, arriving there on Sunday, December 13, 1885. From a conversation with Louis during the evening after his arrival at Mitchell, Gustave concluded that Louis was financially embarrassed, and owed more than he could pay. The following morning he urged his brother to secure him by mortgage on his stock. Louis at first consented to do this, but at a later hour of the same day he declined to give a mortgage. Gustave then proposed that Louis sell him goods to the amount of his debt. This Louis refused to do, unless Gustave would take the entire stock, at fair market prices. After consultation, it was agreed that Gustave should take Louis' stock at 85 cents on the dollar, invoiced at wholesale prices, and, after deducting Louis' debt to him of $6788, pay $2100 in cash, and give his notes for the balance. They commenced that afternoon the taking of an inventory, and were so engaged for a day and a half. The inventory was taken publicly, the storeroom being open while the work was progressing. About ten or eleven o'clock in the forenoon of December 16, 1885, Louis made a bill of sale to Gustave, embracing the goods here in controversy. After its execution, the parties proceeded to the store in which the goods were contained, when Gustave delivered to Louis his check for $2100, and his two notes of $1247 each, surrendering the note he held against his brother. Louis delivered to Gustave the bill of sale and the keys of the store. The transfer was completed about noon of that day.

Immediately after the transfer Gustave opened an account with the First National Bank of Mitchell, and went with

Louis to an insurance office, where the insurance carried by the latter on the stock was assigned to Gustave. They then went to dinner. That afternoon they caused three other policies of insurance to be changed from Louis to Gustave, after which the latter returned alone to the store and directed Louis' clerk to go to dinner. Having returned to the store, and being informed by Gustave of his purchase of the stock, the clerk entered the service of the latter. By direction of Gustave he changed the "show" in front of the store. During the most of that afternoon Gustave remained in the storeroom and waited personally upon customers. He prepared and left for publication at the office of the Republican and Mail, newspapers published at Mitchell, notices announcing the transfer from Louis to himself, and asking for the patronage of the public. These notices appeared in the next issue of each of those newspapers. He also ordered letter-heads to be printed, and a sign for the store with his name painted on it. He filed the bill of sale for record in the office of the register of deeds. During the afternoon of the day of the transfer Louis, on one occasion, at the request of Gustave, came to the store to assist in making the sale of a trunk, with the price of which Gustave was not familiar.

Louis applied the check of $2100 and the two notes of $1247 each in payment of demands held against him by several of his relatives.

The goods in controversy were seized by the sheriff under the attachments about ten o'clock in the evening of December 16, 1885. Louis was present in the store at the time.

The bill of exceptions shows that the plaintiff read in evidence the deposition of H. H. Nash, cashier of the Chicago National Bank, relating to three checks of $650.00, $270.87, and $2100.00, respectively, which were in evidence in the case as exhibits, and showed upon their faces that they had been drawn by G. G. Shauer upon the Chicago National Bank in favor of Louis S. Shauer. The first two checks named, as alleged by the plaintiff, tended to show the payment of money by the plaintiff to his brother Louis, making a part of the indebtedness in question, and the third check of $2100.00 was

the check the plaintiff claims to have passed to Louis in part consideration of the alleged transfer. On the objection of defendant the court refused, upon the ground of its being incompetent, to allow the plaintiff to read the answer of the deponent in response to the following question: "You may state whether or not that check has all the appearance of having passed through the bank in the ordinary course of business." The objection to this question was sustained upon the ground that it appeared in evidence that the check had passed through other banks than that of which the witness was cashier, and it did not appear that the witness was familiar with the course of business of such other banks or their stamp or endorsement thereon, so as to permit him to answer this general question.

To the refusal of the court to allow the answer to be read, the plaintiff duly excepted.

The plaintiff further offered to read in evidence other parts of the deposition of Nash showing what the marks and endorsements on the back of each of the checks indicated, how such marks were made, and by whom. The court refused to allow those parts of the depositions to be read, and to this refusal the plaintiff duly excepted. The objection to this offer was sustained upon the same ground as that last stated.

It appeared that the deposition was taken in Chicago, at the taking of which both parties appeared by counsel, and that Nash was cross-examined at length by counsel for defendant as to his familiarity with the business of the Chicago National Bank, of which he was cashier.

The defendant was allowed under objection by plaintiff, to which ruling the plaintiff duly excepted, to read in evidence a confidential business statement made by Louis, in January, 1885, to Bradstreet's Commercial Agency at Sioux City, Iowa. This statement, the bill of exceptions states, concealed the alleged indebtedness of Louis to his brother, the plaintiff, which existed at that time. It was not shown that this statement was brought to the knowledge of the plaintiff, nor to any of the creditors of Louis. All of the indebtedness against Louis

upon which defendant relies, "was created at and subsequent to September, 1885."

Neither party asked a peremptory instruction to find in his behalf. The plaintiff asked ten instructions, of which only three were given, the plaintiff excepting to the refusal of the court to give each of the others. Six instructions were given, at the instance of the defendant, to the giving of each of which the plaintiff excepted. In addition, the court charged the jury, the plaintiff excepting to six different parts of the charge.

Mr. Henry W. Magee, *Mr. A. E. Hitchcock*, and *Mr. E. W. Adkinson*, for plaintiff in error, submitted on their brief.

I. Plaintiff should have been allowed to read in evidence the deposition of H. H. Nash, cashier of the Chicago National Bank. The duties of a cashier being well defined and the courts assuming that this officer always performs such duties, it follows that a person holding the office of cashier and familiar with the business of the bank, is acquainted with the details of the ordinary transactions falling in the line of his duties, and hence is a competent witness to testify concerning the same. *Merchants' Bank* v. *State Bank*, 10 Wall. 604; *Baldwin* v. *Bank of Newburg*, 1 Wall. 234; *United States* v. *City Bank of Columbus*, 21 How. 356.

II. Under objection by the plaintiff the defendant was allowed to read in evidence a written statement made by Louis S. Shauer to Bradstreet's Commercial Agency of Sioux City, Iowa.

It was not shown that the plaintiff or any of the attaching creditors had knowledge, at any time, of this statement. The statement was made about one year previous to the sale in question. The object of the evidence was to show a false representation on the part of Louis S. Shauer as to his financial condition. The only allegation of fraud charged by the defendant is that on December 16, 1885, Louis S. Shauer being then insolvent, made a fraudulent sale of these goods to the plaintiff, for the purpose of defrauding his (Louis S. Shauer's) creditors. Upon the issue formed by pleading fraud of this

character, admissions made at this remote period would be irrelevant. The act was too remote to have any bearing on this fraudulent sale. Its effect would be to create prejudice in the minds of the jury.

III. The instructions given by the court upon the question of change of possession of the goods embraced in the transfer were not applicable to the state of facts shown by the evidence to have existed.

The plaintiff asked for the following instructions, which were refused: "The acts that will constitute a delivery and change of possession of property sold, so as to protect the parties to the transaction as against the creditors of the vendor, vary in different classes of cases, and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case. It is not demanded that the purchaser, to take possession of the property, go to an unusual expense and do that which is contrary to the usual course of business. If the purchaser takes a possession which places him in that relation to the property which owners usually are to the like kind of property, and does all reasonable acts with such property to inform the public of such purchase, and if such acts are open, public, and notorious, then such purchaser has done all the law requires him to do. You are to take into consideration the surrounding circumstances, the time the purchaser had been in control of the property, the kind of property, and all the elements making up the condition of this alleged sale, and if from these circumstances you find that Gustave G. Shauer took possession of the goods in question accompanied with such plain and unmistakable acts of possession, control, and ownership as a prudent *bona fide* purchaser would do in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property, then you are instructed that he has done all the law required of him in this particular."

On motion of the defendant the court gave these instructions: "You are instructed that a change of the property in controversy in this case must not have been merely nominal and momentary, it must have been real, actual, and open, and

such as could be publicly known; if the property in controversy was permitted to remain in the possession of Louis S. Shauer, then such transfer was fraudulent in law as to the creditors of Louis S. Shauer, notwithstanding the sale may have been to his brother in good faith and for a valuable consideration."

The instructions given state an arbitrary rule, which is in substance that the change in possession must be accompanied by such outward and visible signs that the world may be at once apprised of the change.

No reference is made to the time in which such visible signs may be given, the character of the property transferred, or the circumstances surrounding the transaction.

It was the refusal of the court to qualify this rule by giving the instructions asked by the plaintiff which furnishes the ground of plaintiff's exception. The court in these instructions uses the language of the decision rendered in *Grady* v. *Baker*, 3 Dakota, 296. In this case 12 or 16 days elapsed between the date of sale and time of levy. In the case in controversy this period is represented by a few hours.

The statute of South Dakota is similar to that of California. The case of *Grady* v. *Baker*, *supra*, is based upon the decision of that State. By a well-established line of decisions, the court of California defines the law to be, that no arbitrary rule can be given which will govern all cases; that each case must be guided by the surrounding circumstances. *Stevens* v. *Irwin*, 15 California, 503; *S. C.* 76 Am. Dec. 500; *Lay* v. *Neville*, 25 California, 545; *Godchaux* v. *Mulford*, 26 California, 316; *S. C.* 85 Am. Dec. 178; *Woods* v. *Bugley*, 29 California, 466; *Parks* v. *Barney*, 55 California, 239.

IV. Conceding, for the purpose of argument, that notice to the vendee would charge him with a fraudulent intent of the vendor, then the appellant maintains that actual and not constructive notice of such intent is a necessary element to charge a purchaser for a good consideration. *Foster* v. *Hall*, 12 Pick. 89; *S. C.* 22 Am. Dec. 400; *Gridley* v. *Bingham*, 51 Illinois, 153; *Hatch* v. *Jordan*, 74 Illinois, 414; *Waterman* v. *Donaldson*, 43 Illinois, 29; *Bridge* v. *Eggleston*, 14 Mass. 245;

S. C. 7 Am. Dec. 209; *Splawn* v. *Martin*, 17 Arkansas, 146; *Fifield* v. *Garton*, 12 Iowa, 218; *Brown* v. *Smith*, 7 B. Mon. 361; *Byrne* v. *Becker*, 42 Missouri, 264; *Weisiger* v. *Chisholm*, 28 Texas, 780; *Leach* v. *Francis*, 41 Vermont, 670; *Stearns* v. *Gage*, 79 N. Y. 102; *Parker* v. *Conner*, 93 N. Y. 118.

In this connection we call the attention of the Court to the rule adopted by the Supreme Court of the State of Kansas, from which the instruction complained of was taken. The rule as stated by that court was as follows: "If the circumstances surrounding his purchase are such as would put a prudent man upon inquiry, which, if prosecuted diligently, would have disclosed a fraud, he cannot be deemed a *bona fide* purchaser in good faith." *Phillips* v. *Reitz*, 16 Kansas, 396.

This case cites as authority the earlier case of *Baker* v. *Bliss*, 39 N. Y. 70. In the case of *Parker* v. *Conner*, *supra*, the eminent court ably analyzes the doctrine of *Baker* v. *Bliss*, and shows that it does not apply to cases parallel to the one at bar, nor to the class of cases in which it is applied by the Kansas court.

V. When a transfer is accepted by a creditor with the sole purpose of obtaining satisfaction of his own claim, the intent of the vendor, and the purchaser's knowledge of such intent is immaterial. In such case the purchaser is not a mere volunteer, and the transfer is distinguished by the authorities from a purchase upon a consideration advanced at the time. *Dudley* v. *Danforth*, 61 N. Y. 626; *Dougherty* v. *Cooper*, 77 Missouri, 528; *Frederick* v. *Allgaier*, 88 Missouri, 598.

VI. A creditor in obtaining payment of his claim may purchase property in excess of his debt, if such excess is reasonably necessary for attaining his lawful purpose. *Budlong* v. *Kent*, 28 Fed. Rep. 13; *Young* v. *Stallings*, 5 B. Mon. 307; *Little* v. *Eddy*, 14 Missouri, 160; *Hobbs* v. *Davis*, 50 Georgia, 213; *Reehling* v. *Byers*, 94 Penn. St. 316.

Mr. Morgan H. Beach for defendant in error.

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

1. The refusal of the court to allow the plaintiff to read the answer of the witness Nash to the question, "You may state whether or not that check has all the appearance of having passed through the bank in the ordinary course of business," cannot be assigned as error. The bill of exceptions does not show what answer was made to that question in the deposition of the witness. It does not even state the facts the answer tended to establish. We cannot, therefore, say that the exclusion of the answer was prejudicial to the plaintiff. For aught that appears in the record, the witness may have made an answer that was injurious to the plaintiff, or one that was of no value to either party.

In *Packet Company* v. *Clough*, 20 Wall. 528, 542, one of the assignments of error was the rejection of a deposition. In respect to that assignment, the court said: "It is sufficient to say that we have not before us either the deposition or any statement of what it tended to prove. We cannot know, therefore, that it was of any importance, or that, if it had been admitted, it could have had any influence upon the verdict. A party who complains of the rejection of evidence must show that he was injured by the rejection. His bill of exceptions must make it appear that if it had been admitted, it might have led the jury to a different verdict. This must be understood as the practice in this court, and such is the requirement of our twenty-first rule. By that rule it is ordered that when the error assigned is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. This is to enable the court to see whether the evidence offered was material, for it would be idle to reverse a judgment for the admission or rejection of evidence that could have had no effect upon the verdict." At the date of the trial of that cause in the court of original jurisdiction it was provided, by rule twenty-one of this court, that "when the error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. Any alleged error not in accordance with these rules will be disregarded." 11

Wall. ix. Subsequently, the rule was modified so as to substitute for the words above quoted the following: "When the error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected." 14 Wall. xii. This change of phraseology did not affect the substance of the rule.

The principle announced in *Packet Co.* v. *Clough* was reaffirmed in *Railroad Co.* v. *Smith*, 21 Wall. 255, 261, and *Thompson* v. *First Nat. Bank*, 111 U. S. 529, 535–6. The rule is not the less applicable in the present case, because the trial court excluded the answer to the question upon the particular ground stated in the bill of exceptions. It may, therefore, be regarded as settled, that an assignment of error, based upon the exclusion by the trial court of an answer given in the deposition of a witness to a particular question, will be disregarded by this court if the answer, or the full substance of it, is not set forth in the record in appropriate form for examination.

Nor did the court err in excluding those parts of Nash's deposition showing "what marks and endorsements on the back of each of the checks indicated, how such marks were made, and by whom." The checks themselves were in evidence; and if, as the bill of exceptions states, the witness did not appear to be familiar with the course of business of the banks through which the checks passed, so as to entitle him to speak upon the subject, the exclusion of his answers relating to the subject referred to was not error.

2. The court did not err in allowing the defendant to read, in evidence, the confidential business statement made by Louis S. Shauer to Bradstreet's Commercial Agency, at Sioux City, in January, 1885. That statement, the bill of exception recites, concealed the alleged liability of Louis to his brother, then existing. Why should such concealment have been made? The answer to that question has some, though, perhaps, very slight bearing upon the inquiry whether Louis was, in fact, indebted to his brother to the full extent claimed by the latter.

3. By the statutes of Dakota it is provided that "a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand, in

preference to another;" also, that "every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor and their successors in interest, and against any persons upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor;" further, that "every transfer of personal property other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any person on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer." Civil Code, §§ 2021, 2023, 2024; Compiled Laws of Territory of Dakota, §§ 4654, 4656, 4657.

Other provisions of the statute are to the effect that "actual notice consists in express information of a fact;" that "constructive notice is notice imputed to a person not having actual notice;" and that "every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself." Civil Code, §§ 2107, 2108, 2109; Compiled Laws of Territory of Dakota, §§ 4741, 4742, 4743.

In view of these statutory provisions, and of the facts which the evidence tended to establish, two principal questions were considered by the court in its charge to the jury: first, whether the transfer of the merchandise in question was made with the intent to delay or defraud the creditors of Louis S. Shauer; second, whether the transfer to his brother was accompanied by such immediate delivery of the merchandise and followed

by such actual and continued change of possession as the statute required.

Upon the first of these questions, the court said, generally, to the jury, that an intent upon the part of the debtor to delay his creditors in the collection of their debts was as much within the statute as if the intent had been to cheat or defraud; that while a debtor, in failing circumstances, was at liberty, acting in good faith and openly, to prefer some creditors over others, he could not, as against those not paid, reserve to himself a secret trust in any transfer; that a creditor, thus favored by the debtor, will not be permitted to enjoy the preference given him if he seeks, by the transaction, to cover or protect the remainder of the debtor's property so that it could not be applied to the payment of his honest debts; and that if a creditor seeks to appropriate the debtor's property for a debt, any material part of which was knowingly fictitious, the whole transaction would be held as tainted with fraud and void as to other creditors.

Applying these principles to the facts of this case, the court said: "Therefore, should you find from the evidence that Louis S. Shauer was fairly and honestly indebted to his brother, Gustave Shauer, in the full amount claimed, which I believe is about $6700, you will remember the exact amount, and that with the honest intention of securing such indebtedness he purchased the property in question without notice or knowledge of any fraudulent intent on the part of Louis S. Shauer to delay or defraud his creditors, and without any intent on his own part to secure any interest in said property, present or future, to his brother Louis, and without any intent to delay or defraud the creditors of Louis S. Shauer, then he is entitled to recover whatever may have been the intent of Louis Shauer himself, for the intent of Louis Shauer can affect the plaintiff only in the case that he knew, had notice, or as a prudent man had knowledge sufficient from the circumstances to put him upon inquiry as to his brother's fraudulent intent. On the other hand, should you find that the alleged indebtedness from Louis to Gustave Shauer, and which forms a part of the consideration of the sale, was knowingly false

and fictitious in whole or in a material part, or should you find that the balance of the consideration money or price was paid by Louis to Gustave Shauer with the intent to place the same out of and beyond the reach of the creditors of Louis Shauer, or should you find that Gustave Shauer in making this purchase had any intent not only to secure his own indebtedness, but also the further intent to hinder and delay the creditors of Louis Shauer, or any intent to so dispose of the remainder of the property after the satisfaction of his own debt either that it would be out of the reach of the other creditors or that it would inure in the future to the use and benefit of Louis Shauer, then and in either event the transaction would be tainted with fraud, and the plaintiff cannot recover."

The jury was further instructed, at the instance of the plaintiff, that if they found that Louis Shauer made a sale of these goods to his brother, it would be presumed, in absence of proof to the contrary, that such sale was made in good faith and with honest intentions; that if the evidence was equally balanced, the defendant must fail in respect to the fraud alleged by him; and that if the plaintiff knew of the insolvency of his brother, and that the payment of his debt would deprive other creditors of their claims, "this mere knowledge on his part would not make the sale in question fraudulent."

The plaintiff contends that the instructions of the court upon the question of intent were based upon an erroneous interpretation of the statute, in that they made knowledge that was sufficient, under all circumstances, to put him, as a prudent man, upon inquiry as to his brother's fraudulent intent, equivalent to actual notice or knowledge of such an intent. That the court held this view is made clear by one of the instructions given to the jury at the request of the defendant, in which it was said that "actual knowledge by the purchaser of any fraudulent intent on the part of the seller is not essential to render a sale void;" and that "if the facts brought to the attention of Gustave G. Shauer were such as to awaken suspicion and lead a man of ordinary prudence to make inquiry,

and he fails to make such inquiry, then he is chargeable with notice of fraudulent intent and with participation in the fraud, and it will be your duty to find for the defendants."

It is admitted that if at the time of his alleged purchase the plaintiff had actual notice that his brother intended, by the sale, to delay or defraud his creditors, the sale would have been void against creditors. But the plaintiff denies that anything short of actual notice or knowledge of such fraudulent intent will suffice, under the statute, to invalidate his purchase. The statute of Dakota, strictly interpreted, would seem to invalidate any transfer of property made with the intent, upon the part of the owner, to delay or defraud creditors, even when the transferee purchased in good faith. But it was not thus interpreted by the court below. It was liberally construed so as to protect *bona fide* purchasers for value. Assuming, for the purpose of this case, that this interpretation was correct, we are of opinion that while the plaintiff was not bound to act upon mere suspicion as to the intent with which his brother made the sale in question, if he had knowledge or actual notice of circumstances sufficient to put him, as a prudent man, upon inquiry as to whether his brother intended to delay or defraud his creditors, and he omitted to make such inquiry with reasonable diligence, he should have been deemed to have notice of such fact, and, therefore, such notice as would invalidate the sale to him, if such sale was in fact made with the intent upon the part of the vendor to delay or defraud other creditors. Referring to the statute of Dakota, declaring a conveyance of real property, other than a lease for a term not exceeding one year, void as against any subsequent purchaser or encumbrancer, (including an assignee of a mortgage, lease, or other conditional estate, of the same property or any part thereof,) in good faith and for a valuable consideration, whose conveyance is first duly recorded, the Supreme Court of Dakota, in *Gress* v. *Evans*, 1 Dakota, 387, 399, said: "Actual notice of a prior unrecorded conveyance, or of any title, legal or equitable, to the premises, or knowledge and notice of any facts which should put a prudent man upon inquiry, impeaches the good faith of the subsequent purchaser. There should be

proof of actual notice of prior title or prior equities, or circumstances tending to prove such prior rights, which affect the conscience of the subsequent purchaser. Actual notice, of itself, impeaches the subsequent conveyance. Proof of circumstances, short of actual notice, which should put a prudent man upon inquiry, authorizes the court or jury to infer and find actual notice. Or, to express it exactly, good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. And notice is either actual or constructive."

A less stringent rule cannot be applied to the Dakota statute relating to transfers of property with intent to delay or defraud creditors. The plaintiff had the right, by a purchase of his brother's stock of merchandise, to obtain payment of his claims in preference to the claims of other creditors. But the statute of Dakota, however liberally construed in favor of purchasers from a fraudulent debtor, will not permit him to enjoy, to the exclusion of other creditors, the fruits of his purchase, when the sale was made with the intent to delay or defraud other creditors, if he had, at the time, actual notice of such intent or knowledge of such circumstances or facts as were sufficient to put a prudent person upon an inquiry that would have disclosed the existence of such intent upon the part of the vendor. The plaintiff could not properly have claimed a more favorable interpretation of the Dakota statute than was given to it by the court below. A statute that declares every transfer of property, made with intent to delay or defraud any creditor of his demands, void against all creditors of the debtor, would be wholly defeated in its operation if the rights of the transferee were not subject to the rule that "whatever is notice enough to excite attention and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led." *Wood* v. *Carpenter*, 101 U. S. 135, 141; *Kennedy* v. *Greene*, 3 Myl. & K. 699, 722.

4. Having disposed of the question as to the intent with which the sale in question was made, the court referred to the

provision of the statute, declaring the transfer of personal property — the vendor having at the time possession or control thereof — to be conclusively fraudulent and void, as against creditors, unless such transfer is accompanied by an immediate delivery, and followed by an actual and continued change of possession. The court said to the jury that the statute means, as declared by the Supreme Court of the Territory in *Grady* v. *Baker*, 3 Dakota, 296, 299, that the sale shall be open and public, that the world may be apprised of the change of ownership; and that the change of possession must be actual and continued, and not subject to some secret trust between the buyer and seller. "Some of the cases," the court below observed, "say that the change must be of that character that customers and those accustomed to frequent the premises may be at once advised of the change of possession by the changed appearance of the property or its change of custody. And this is true, whatever may be the good intention or *bona fides* of the transaction; even the law will not tolerate such transfers as against creditors. The change of possession must be open and visible, and if not, as against creditors without knowledge of the transfer, it will be void, though made for a valuable consideration in good faith and without any actual intent to defraud. In such case the law conclusively presumes a fraudulent intent, and the party to such sale will not be heard to prove the contrary."

In addition to what appears in the charge, the court, at the instance of the defendant, instructed the jury that a change of the property in controversy in this case must not have been merely nominal and momentary, but real, actual, and open, such as could be publicly known; and that if the property was permitted to remain in the possession of Louis S. Shauer, then the transfer was fraudulent in law as to his creditors, notwithstanding the sale may have been made to his brother in good faith and for a valuable consideration.

The specific objection made by the plaintiff to these instructions is that they stated an arbitrary rule, namely, that the change in possession must be accompanied by such outward, visible signs as would apprise the world of the change, and

made no reference to the time within which such signs should be given, or to the nature of the property transferred or to the circumstances attending the transaction. The court, it is said, should have qualified the rule as indicated in the instructions asked by him. We cannot sustain this position. The instructions asked by the plaintiff, on this point, did not substantially differ from those given by the court, except they were more elaborate and referred more in detail to the facts. The court told the jury that the statute required not only an immediate change of possession, but one so open that the public would be apprised of it. While the court was at liberty to recall to the minds of jurors all the facts and circumstances bearing upon this issue, we cannot say that it erred in not doing so, or that it erred in leaving to the jury to determine whether, under all the evidence, there was such immediate delivery and such actual change of possession of the property in controversy as was necessary, under the statute as explained, to make the transfer valid against creditors.

In this connection, it is appropriate to say that the interpretation placed by the court below on the Dakota statute, relating to change of possession, accords with the decisions of the Supreme Court of California in respect to a similar statute. In *Stevens* v. *Irwin*, 15 California, 503, 507, it was said: "A reasonable construction must be given to this language, in analogy to the doctrines of the courts holding the general principles transcribed into the statute. The delivery must be made of the property; the vendee must take the actual possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession — not taken to be surrendered back again — not formal, but substantial." See also *Lay* v. *Neville*, 25 California, 545, 553; *Woods* v. *Bugby*, 29 California, 466; *Parks* v. *Barney*, 55 California, 239. There are many other cases to the same effect.

5. Exception was taken to what the court said to the jury

touching the relation of the plaintiff and the vendor of the goods. After observing that the law scrutinizes carefully all transfers of the failing debtor and zealously guards the rights of creditors against fraudulent dispositions of the debtor's property, the court said that it was for that reason that transfers to one's wife or to members of his family are carefully scrutinized, experience having taught that such conveyances are more frequently fraudulent than transactions between strangers or those not intimately connected or acquainted. It is said that this language authorized the jury to infer that the mere fact of the parties being related would cause the good faith of the transaction to be suspected. But this criticism of the charge is met by the next succeeding sentence, in these words: "Yet experience also teaches that honest and *bona fide* sales and transfers of property are made, and that too much stress, or even importance, should not be given to such a fact alone." It is also met by the fact that the court, at the instance of the plaintiff, instructed the jury that if these goods were sold by Louis to Gustave, the law presumed that the sale was made in good faith and with honest intentions; that in absence of proof to the contrary, the validity of the sale could not be questioned; that if the evidence was equally balanced upon that point, the defendant must fail, and that mere knowledge on the part of Gustave that his purchase would deprive other creditors of their debts would not make the sale fraudulent. Again, at the instance of the plaintiff, the court said: "The mere sale by a party of his stock of goods to a relative is not a badge of fraud. If such sales were fraudulent in themselves, it would be impossible for family connections to aid each other in case of financial embarrassment without danger of being placed in a false position and losing the entire sum loaned. Under this rule, if Louis S. Shauer owed his brother, Gustave G. Shauer, a just debt, he had the same right to transfer his property to his brother in payment of this debt as he would have had to transfer the same property to any one of these attaching creditors in payment of his claim."

The jury could not have been induced by anything said by the court to give undue weight to the fact that the transaction

in question was between brothers. If that fact induced them, under the instructions, — as it might properly have done, — to carefully scrutinize the evidence, it must be assumed that they performed their duty without forgetting the injunction that the law presumed the sale, despite the fact of the near relationship of the parties, to have been made in good faith, if accompanied by immediate delivery and followed by actual, continued change of possession.

We are of opinion that it was not error for the jury to be told that the relations of the parties to the transaction made it necessary to carefully scrutinize the facts, but that their determination must, at last, depend upon the inquiry whether the transaction was honest and *bona fide*.

We perceive no ground to doubt that the case was well tried. The jury were fully and properly instructed in respect to every aspect of the case, and we have no authority to set aside their verdict, even if it does not appear to be justified by the evidence. *Railroad Co.* v. *Fraloff*, 100 U. S. 24, 31; *Lincoln* v. *Power*, *ante*, 436.

Judgment affirmed.

BUCKSTAFF *v.* RUSSELL.

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

No. 207. Argued and submitted January 17, 1894. — Decided February 5, 1894.

Where in an action on a contract a counter claim to the amount of $10,000 is interposed by the defendant, and judgment is given for plaintiff for less than $5000, this court has jurisdiction to review that judgment when brought here by defendant below.

When one party contracts to set up a machine for another party, and the other party contracts to pay for it, one-third when the machine is steamed up ready to run, and the balance at a future time, with interest, and it is mutually agreed that the buyer shall satisfy himself before payments are due that the machine works to his satisfaction, and if it does not, that the seller shall within 60 days after notice, comply with the terms

of his contract or the buyer may declare it paid in full, the proper remedy of the seller, after delivery of the machine and refusal of the buyer to accept it, is an action on the contract to recover the contract price, and not an action for breach of the contract by refusal to accept the machine.

The requirement that an assignment of error, based upon the admission or rejection of evidence, must, in the case of a deposition, excluded in whole or in part, state the full substance of the evidence so admitted or rejected, does not apply where the witness testifies in person, and where the question propounded to him is not only proper in form, but is so framed as to clearly admit of an answer favorable to the claim or defence of the party producing him.

When the court in such case does not require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer, the rejection of the answer will be deemed error or not, according as the question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded.

When objection is made to a question to a witness as incompetent, irrelevant, and immaterial, and the objection is sustained, the court may or may not, within its discretion require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer.

THIS was an action in contract. Judgment for plaintiff to which defendant sued out this writ of error. The case is stated in the opinion.

Mr. John H. Ames, for plaintiffs in error, submitted on his brief.

Mr. T. M. Marquett for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

1. It is suggested that the amount in dispute is less than five thousand dollars. This point is not well taken. The amount for which Russell & Co. sued in their original petition was $4206.07, with interest from October 9, 1888. That amount was increased by the supplemental petition to $5882.20. The plaintiffs in error, who were defendants below, denied their liability in any sum, and, by way of counter claim, in accordance with the practice in Nebraska, asked for judg-

ment against Russell & Co. in the sum of $10,000. The verdict and judgment were in favor of the plaintiff and for the sum of $4450. That sum, and the amount sued for in the counter claim, are in dispute upon this writ of error. This court, therefore, has jurisdiction.

2. By an agreement in writing, made June 22, 1888, between Russell & Co., a corporation, and Buckstaff and Utt, the former agreed to furnish and deliver to the latter on cars at Lincoln, Nebraska, three boilers, 60 inch x 14 feet; one automatic cut-off engine, 125 horse power; one automatic cut-off engine, 50 horse power; one Gordon Maxwell duplex pump; one Garfield injector; one heater, and any necessary fittings of sufficient size and dimension to properly run such plant; also two smoke-stacks 32 inch diameter, 60 feet long, made of No. 12 iron, with fancy tops, guy rods and stays. For those articles Buckstaff and Utt agreed to pay four thousand nine hundred and fifty dollars, as follows: One-third cash when the machinery was "steamed up ready to run, the balance in six and twelve months, with interest at the rate of seven per cent per annum from time of erection in Lincoln, providing that, with proper and careful management, said engines, boilers, and pumps are hereby guaranteed to work, and that said engines do give the amount of horse power as herein specified, and to be as economical of fuel and as durable as a Corliss non-condensing engine." "It is also understood and agreed," the contract proceeded, "that said Buckstaff and Utt shall use fair and honorable means to satisfy themselves before payments are due, that said engines, boilers, and pumps are working to their entire satisfaction, and should they not be, then, in that event, the said Buckstaff and Utt are to notify said Russell & Co., and said Russell & Co. must at once comply with the terms of this contract within sixty days, and in the event they do not, the said Buckstaff and Utt may declare this contract paid in full, or said Russell & Co. shall pay back to said Buckstaff and Utt all money paid to them, and said Russell & Co. shall pay said Buckstaff and Utt such damages as shall be declared fair by competent judges, and after paying such damages may remove said machinery without cost to

said Buckstaff and Utt. It is hereby agreed that Russell & Co. shall ship said machinery not later than July 15, 1888."

Attached to and made part of the contract are certain proposals from Russell & Co. to Buckstaff and Utt. One of them is a proposal to furnish three eighty horse power boilers, fully described, and contains this stipulation: "All boilers tested to 150 pounds hydraulic pressure; workmanship and material guaranteed to be first class; plans for setting boilers to be furnished without expense to purchaser." Another is a proposal to furnish one right-hand automatic cut-off engine, fully described, and contains this stipulation: "We guarantee the above engine to be well made, of first class material, and in operation to work as economically as any similar engine in the market." A third is a proposal for another right-hand automatic cut-off engine, accompanied by a similar guaranty.

In the first count of the petition it was alleged that all the machinery covered by the contract was delivered by the plaintiff to the defendants in strict accordance with its terms; that the defendants were to pay for it the sum of four thousand nine hundred and fifty dollars, one-third in cash when the machinery was steamed up ready to run, one-third in six months, and the remaining one-third in twelve months, with interest at the rate of seven per cent per annum from the time of the erection of said machinery; that all of the machinery had been delivered, was set up, put in operation, and commenced running on the 9th day of October, 1888, at which time one-third of the four thousand nine hundred and fifty dollars became due; that another one-third became due on the 9th day of April, 1889; that neither of those amounts nor any part thereof have been paid by the defendants; and that they have refused and neglected to pay the same or any part thereof, although often requested so to do. The second count was for piping and other machinery of the value of $392.86, and the third for grate bars, of the value of $450, alleged to have been sold and delivered by Russell & Co. to the defendants. By a supplemental petition the plaintiff enlarged its claim so as to embrace the last instalment of the $4950 for which the contract stipulated.

At the trial below the defendants objected to the introduction of any evidence in support of the first count of the petition, on the ground that it did not state facts sufficient to constitute a cause of action. This objection was overruled, and to that ruling the defendants excepted.

In support of this exception it is said that if it had been alleged, or indeed proven, that the plaintiff did not "use fair and honorable means to satisfy themselves," before payment was due, that the machinery was "working to their entire satisfaction," or that the refusal to accept was fraudulent, still no action could have been properly maintained for the sale and delivery of the property, because, at all events, there would have been no acceptance, and, in its absence, the contract would have remained executory; consequently, it is argued, the only action maintainable, if any, would have been one to recover damages for fraudulently refusing to accept the machinery and articles furnished. The counsel for the defendants refer to numerous cases which, it is insisted, sustain the construction of the contract upon which this exception is founded. It may be well to refer to some of those cases.

In *Mansfield Machine Works* v. *The Village of Lowell*, 62 Michigan, 546, 552, which was a suit upon a contract with a village for the sale of a steam engine and attachments, and which contract provided that a named sum should be paid "when engine and hose are accepted, balance in equal payments — first, on or before six months; second, on or before eighteen months, with interest at six per cent from date of acceptance," it was held that the contract fairly construed, did not provide for the payment for the engine and machinery until they were tried and accepted; that under its terms the property remained in the vendor until acceptance and after trial of it, the village never becoming the owner of it; and that the remedy of the plaintiff, if any, would be a suit for a breach of the contract and refusal to accept on the part of the defendant.

In *Zaleski* v. *Clark*, 44 Connecticut, 218, 223, which was a suit for the price agreed to be paid for a plaster bust of the deceased husband of the defendant — the agreement being

that she was not bound to take it unless she was satisfied with it — the question was as to the liability of the defendant upon proof that the bust was not only a fine piece of work, and a correct copy of a photograph furnished by the defendant, but that it accurately portrayed the features of the deceased. The court said: "In this case, the plaintiff undertook to make a bust which should be satisfactory to the defendant. The case shows that she was not satisfied with it. The plaintiff has not yet, then, fulfilled his contract. It is not enough to say that she ought to be satisfied with it, and that her dissatisfaction is unreasonable. She, and not the court, is entitled to judge of that. The contract was not to make one that she *ought* to be satisfied with, but to make one that she *would* be satisfied with. Nor is it sufficient to say that the bust was the very best thing of the kind that could possibly be produced. Such an article might not be satisfactory to the defendant, while one of inferior workmanship might be entirely satisfactory. A contract to produce a bust perfect in every respect, and one with which the defendant ought to be satisfied, is one thing; and undertaking to make one with which she will be satisfied is quite another thing. The former can only be determined by experts, or those whose education and habits of life qualify them to judge of such matters. The latter can only be determined by the defendant herself. It may have been unwise in the plaintiff to make such a contract, but having made it, he is bound to it."

In *Brown* v. *Foster*, 113 Mass. 136, 138, which was an action to recover the price of a suit of clothes which it was agreed should be satisfactory to the purchaser, but with which he was not satisfied and for which he refused to pay, the court said: "If the plaintiff saw fit to do work upon articles for the defendant and to furnish materials therefor, contracting that the articles when manufactured should be satisfactory to the defendant, he can recover only upon the contract as it was made; and even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract permits

the defendant to decide himself whether the articles furnished are to his satisfaction. Although the compensation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered."

Among many other cases of the same class are *Singerly* v. *Thayer*, 108 Penn. St. 291; *Goodrich* v. *Van Nortwick*, 43 Illinois, 445; *McCarren* v. *McNulty*, 7 Gray, 139; *Cole* v. *The Common Council of Homer*, 53 Michigan, 438; *Gibson* v. *Cranage*, 39 Michigan, 49; *Krumb* v. *Mersher*, 116 Penn. St. 17; *Ellis* v. *Mortimer*, 4 Bos. & Pul. (1 N. R.) 257.

These authorities do not control the determination of the present case. There is no provision in the contract of June 22, 1888, which either expressly or by necessary implication justified the defendants in withholding payment for the articles furnished on the ground alone that they were not satisfied with them. They agreed to pay in cash one-third of the stipulated price when the machinery was "steamed up, ready to run," the balance in six and twelve months with interest at seven per cent "from time of erection in Lincoln." If, after using fair and honorable means, before the payments became due, to test their efficiency, the engines, boilers, and pumps did not work to their entire satisfaction, then Buckstaff and Utt were entitled to notify Russell & Co. to comply with the contract within sixty days, in default of which, but in that event only, they could have declared the contract "paid in full," or Russell & Co. could have been required to pay back all money paid to them, and, in addition, such damage as was declared fair by competent judges — Russell & Co. having the right to remove the machinery after paying such damage. The plaintiff was entitled to recover the price stipulated, unless it appeared that such means had been used, and that the engines, boilers, and pumps were, in that way, ascertained not to work to the entire satisfaction of the defendants; that due notice thereof was given to the plaintiff; and that plaintiff did not comply with the contract within due time after receiving such notice. But these were matters to be disclosed

in the defence of the action, and need not have been made the subject of specific allegations in the petition. It was not necessary to allege in the petition that the engine, boilers, and pumps were ascertained by the defendants to work to their entire satisfaction. It was sufficient to allege the delivery of the articles, and the expiration of the time limited in the contract for the payments.

In respect to the guaranty of the plaintiff that the engines, boilers, and pumps would work, and that the engines would furnish the stipulated amount of horse power, and be as economical of fuel and as durable as a Corliss non-condensing engine, it need only be said that those were, also, matters to be alleged and proved by defendants in support of their counter claim.

For these reasons we are of opinion that the court properly overruled the motion of defendants to exclude all evidence in support of the first count of the petition.

3. The defendants in their answer deny the material allegations of the petition; and by way of counter claim allege that on or about the twenty-second day of June, 1888, the defendants, as the plaintiff then well knew, were the owners of all the capital stock of the Lincoln Paper Manufacturing Company, a corporation duly organized under the laws of Nebraska for the purpose of manufacturing paper in the city of Lincoln, in that State; and that on or about that date the plaintiff entered into the contract with the defendants, set forth in the first count of the petition, for the furnishing of boilers, engines, and machinery to generate and apply the power with which to drive the machinery to be used by them in said mill for the manufacture of wrapping and straw building board; that the plaintiff then well knew that, if said boilers, engines and machinery were not of the capacity and efficiency specified in the contract, then the defects and inefficiency of such machinery would of necessity cause the defendants great injury, cost, and damage in and about their manufacturing business, by reducing the quantity and degrading the quality of the paper to be manufactured at their mill, and by putting them to great cost and expense for loss of time and for labor, fuel, and material used, lost, and expended above such as

would be required with the use of boilers, engines, and machinery of the kind, power, effectiveness and economy specified in the contract; that the defendants entered into the contract in the expressed confidence, assurance and belief that the plaintiff would furnish for use in their mill boilers, engines, and machinery of the kind, quality, power, and description in the contract set forth; yet the plaintiff, in pretended compliance with the contract, furnished and erected in said mill three boilers of a capacity not exceeding sixty-five horse power each, and one engine of one hundred and twenty-five, and one of fifty horse power, and that said engines and boilers have at all times and still do consume in the performance of the work of which they are capable not less than fifty per cent more fuel than would be consumed in the performance of the same work by a non-condensing Corliss engine; and that plaintiff furnished with said boilers and engines defective and insufficient grates, fixtures, and appliances therefor, so that the same were for a long time less capable and effective than they would otherwise have been.

The defendants further alleged in their counter claim that, at the request of plaintiff, they allowed it, after the date of the erection of said machinery, to consume a long time in the attempt or pretended attempt to adjust the boilers, engines, and machinery, and supply them with grates and fittings so that the same would meet the requirements and descriptions of the contract, all of which attempts, or pretended attempts, have wholly and completely failed; that thereupon, on or about the eleventh day of January, 1889, and the eleventh and twenty-fifth days of February of said year, they duly notified the plaintiff, by letters properly transmitted through the United States mails, that such boilers, engines, and machinery were wholly inadequate, inefficient, and wasteful of fuel as compared with the requirements and descriptions of the contract, and demanded of it to remove the same from said mill and pay defendants the amount of money, to wit, $690.68, paid by them to and for the use of plaintiff under the contract and the damages suffered by reason of the premises, as by the contract it had undertaken to do, with which request

the plaintiff has at all times neglected, and still wholly neglects and refuses to comply; and that by reason of the premises, of the wasteful consumption of fuel and lack of power, said boilers, engines, and machinery, and the consequent loss of time and labor, and the diminution in quantity and deterioration in quality of the output of said mill resulting from the non-compliance by plaintiff with the contract in the respects and particulars set forth, and in the purchase and supplying new grate bars and heater fittings and fixtures for such boilers and engines, the defendants have been damaged in the sum of ten thousand dollars. An account of the moneys so alleged to have been paid was annexed to the counter claim.

The plaintiff, in reply, denies that the machinery, etc., furnished by it, under the contract, was defective, and charges that their inefficiency, if they became inefficient, was due entirely to the unskilful and incompetent management of the defendants, their agents, and servants. While it denies that the defendants were the owners of "all" the capital stock of the Lincoln Paper Manufacturing Company, it does not deny that the machinery, etc., was purchased to be used in the mill of that company.

The defendant Utt was sworn as a witness for the defence, and, as we infer, in support of the counter claim. Having stated that he and Buckstaff, in April, 1888, first commenced negotiations for the purchase of the boilers with Mr. Giddings, representing Russell & Co., the following questions were put, successively, to him: 1. "What conversation did you have with him, if any, about the purpose for which the machine must be used and the necessity for steam capacity in the boilers?" 2. "You may state in what your damages consisted, and the amount in consequence of the defective construction and the failure of this machinery to perform its labor, and the labor required of it by the terms of the contract from the time of its erection up to the first day of March." 3. "You may state what damage you sustained in consequence of the failure of this machinery to do the work at the paper mill." 4. "You may state what loss you suffered in consequence of the defective construction and failure in the machinery." 5. "In

what particular did you and the defendant Buckstaff sustain loss by reason of the defects in the construction and the failure of this machinery?"

Each of these questions was objected to upon the ground that it was incompetent, irrelevant, and immaterial. No one of them was objected to upon the ground that it was a leading question.

In the case of *Shauer* v. *Alterton*, *ante*, 607, just decided, it was held to be the settled construction of the twenty-first rule of this court that an assignment of error, based upon the exclusion of an answer to a particular question in the *deposition* of a witness, would be disregarded here, unless the record sets forth the answer or its full substance. *Packet Company* v. *Clough*, 20 Wall. 528, 542; *Railroad Co.* v. *Smith*, 21 Wall. 255, 262; *Thompson* v. *First National Bank of Toledo*, 111 U. S. 529, 535–6. Our rule, thus construed, is one to which parties can easily conform. Having access to the deposition containing the answer of the witness to the interrogatory, parties, as well as the trial court, are informed of the precise nature of the evidence offered. The requirement that an assignment of error, based upon the admission or rejection of evidence, must, in the case of a deposition, excluded in whole or in part, state the full substance of the evidence so admitted or rejected, means that the record must show, in appropriate form, the nature of such evidence, in order that this court may determine whether or not error has been committed to the prejudice of the party bringing the case here for review.

But this rule does not apply where the witness testifies in person, and where the question propounded to him is not only proper in form, but is so framed as to clearly admit of an answer favorable to the claim or defence of the party producing him. It might be very inconvenient in practice if a party, in order to take advantage of the rulings of the trial court in not allowing questions, proper in form and manifestly relevant to the issues, were required to accompany each question with a statement of the facts expected to be established by the answer to the particular question propounded. Besides, and this is a consideration of some weight, such a statement, in

open court, and in the presence of the witness, would often be the means of leading or instructing him as to the answer desired by the party calling him. If the question is in proper form and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the court, in its discretion, or on motion, may require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer. But if that be not done, the rejection of the answer will be deemed error or not, according as the question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded.

Tested by these views, the court below erred in not permitting the defendant Utt to answer the above questions. Each one of them was relevant to the counter claim, and each admitted of an answer that tended to support it.

After the court below refused to allow the defendant Utt to answer the above questions, he was asked: "You may state in what manner your industry was affected by the failure of this machinery." The witness answered: "When our mill was erected, we made contracts with different parties to put in certain machinery. In cutting straw there is a large amount of steam required. We purchased from Neill patent boilers at an expense of five thousand dollars, to be cooked with steam coming from the boilers. That was the proper way to do it. A lack of steam in the plant that we purchased made it impossible for us to cook this straw in these boilers, so after trying six or eight weeks to do this with this steam and succeeding very poorly, we took steam from the escape system that we had made in connection with the big engine, and since that time we have been using that steam, but it does not cook the straw well because the water condenses in these globe bleachers and has to be let out, and with them the liquor passes out that the straw is cooked in, and it makes an uneven cooking of the straw; it is not uniform. The straw is frequently tough, so that we take it over to the grinding machine, where it is ground up. Instead of grinding it up in two hours and a

half to three hours, it takes from four to four and a half to get it in proper shape."

To this question the plaintiff objected, and moved to strike out the answer as incompetent and irrelevant. The objection and motion were sustained by the court, and the defendants excepted. As we are informed by the bill of exceptions what were the facts intended to be elicited by the question and which, after being detailed, were excluded from the jury, it is competent for this court to inquire whether those facts were competent under the issues in the case, and whether the defendants were prejudiced by their exclusion from the jury. But, as the judgment below must be reversed for the errors already stated, we deem it unnecessary at this time to express any opinion as to the competency of this evidence. We adopt this course because it is not entirely clear that the matters referred to by the defendant Utt in his answer to this question had any connection, in fact, with the counter claim, or that they referred to any defects in the machinery covered by the written guaranty of Russell & Co. This difficulty may be removed at the next trial of the case.

In the brief of counsel for Russell & Co. there is some discussion as to the measure of damages, in the event it was found that the defendants were entitled to recover upon their counter claim. No question of that kind arises upon this writ of error. The only questions now presented for determination are those to which we have referred.

For the error indicated in this opinion, the judgment must be

Reversed and the cause remanded for a new trial.

BRYAN *v.* BOARD OF EDUCATION OF THE KENTUCKY CONFERENCE OF THE METHODIST EPISCOPAL CHURCH, SOUTH.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 134. Argued and submitted December 6, 1893. — Decided February 5, 1894.

The citizens of Millersburg, Kentucky, raised a fund for the purpose of establishing a collegiate institute in that place or its vicinity, and invited the Kentucky Annual Conference of the Methodist Episcopal Church, South, to take charge of it when established. The invitation was accepted, and the legislature of the State incorporated the institute by an act, one provision in which was a reservation to the legislature of the right to amend or repeal it. Large additions were then made to the fund from other sources, and in 1860 another act was passed incorporating the Board of Education of that Conference of the Methodist Church. In this act, after reciting the raising of the money, and the establishment of the institution at Millersburg, the control of the college and the disposition of the sums raised were placed in the hands of the Conference. This act, also, was passed subject to the right of the legislature to amend or repeal. In 1861, the legislature passed another act, in which, as construed by the courts, power was conferred upon the Conference to remove the college from Millersburg to any other place within the bounds of the Kentucky Annual Conference. *Held*, that the latter act did not impair any contract created by the former statutes and proceedings.

The *Pennsylvania College Cases*, 13 Wall. 190 require the affirmance of the decree in the court below in this case.

The plaintiffs in error, suing on behalf of themselves and other shareholders of the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, South, and of the Millersburg Male and Female Collegiate Institute, brought this suit in equity in the Circuit Court of Bourbon County, Kentucky, against the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, South, and others, to obtain a decree perpetually restraining the defendants from selling or disposing of certain lands and buildings of the above-named Institute, commonly known as the Kentucky Wesleyan College, located at Millersburg, Kentucky, or from removing that college, its capital or property, from that place to Winchester in the same Common-

wealth, or from using the capital or fund of the Institute for any purpose or at any place, except in its conduct and management at Millersburg.

Upon final hearing the bill was dismissed, and that decree was affirmed by the Court of Appeals of Kentucky, the highest court of the Commonwealth. The present writ of error questions the correctness of the decree of affirmance upon the ground, among others, that it gives effect to legislative enactments which, it is alleged, impair the obligation of a contract, in which the plaintiffs and those in whose behalf they sue have an interest, for the permanent location and maintenance of the college at Millersburg.

The facts relating to the alleged contract, and to the Federal question suggested by the legislation referred to, will sufficiently appear in the following statement:

At a meeting of the citizens of Millersburg, held on the 4th day of January, 1858, these resolutions were adopted:

"Whereas it is proposed to purchase ground and erect buildings for an institution of learning and boarding-house, the whole to cost about fifteen thousand dollars; and whereas it is believed to be indispensable to the success of educational enterprises that they may be under the supervision of some denomination: Therefore,

"*Resolved*, That we promise and pledge ourselves for the amount subscribed to secure a male and female collegiate institute in Millersburg or its immediate vicinity, on the following basis, to wit: 1, that it be an Institute for the Covington district, Kentucky Conference, and be under the control of the Methodist Episcopal Church, South; 2, the trustees and building committee be appointed by the Quarterly Conference of the Millersburg station, the former to be subject to the approval of the Kentucky conference; 3, it shall be upon the joint stock plan, the shares to be $25 each, and to be subject to sale or transfer, but not to bear interest; 4, in case the said church fail to sustain the Institute, and it shall from any cause be discontinued, then the property is to revert to the stockholders *pro rata;* 5, the stock subscribed shall be paid to the building committee on the following terms: one-

third when the buildings are put under contract, one-third when they are covered in and floors laid, and one-third six months thereafter."

For the purpose of accomplishing these objects, the Millersburg Male and Female Collegiate Institute was incorporated by an act of the legislature of Kentucky, approved February 16, 1858, Laws Ky. 1858, c. 689, the preamble of which recited that "divers citizens in and near the town of Millersburg, in the county of Bourbon, have subscribed a considerable sum of money for the purpose of erecting in or near said town a seminary of learning, to be under the control and supervision of the Kentucky Annual Conference of the Methodist Episcopal Church, South, to the extent hereinafter provided." The act made certain trustees and their successors in office capable of purchasing and holding any lands, tenements, goods, chattels, and money, not exceeding $50,000 in value, that should be purchased, granted, or devised to the use of the institution. It was provided that the trustees might receive additional subscriptions and donations in aid of the seminary, and should be selected, from time to time, by the Kentucky Annual Conference of the Methodist Episcopal Church, South, upon the nomination of the Millersburg station of that church. The fourth section of the act is as follows: "All persons who shall subscribe twenty-five dollars or more in aid of said Institute shall be deemed stockholders therein, said sum to constitute a share. And if the said Methodist Church shall ever relinquish or surrender, or cease to exercise a control over said Institute, then, and in that case, its control and management shall revert to and vest in said stockholders, who may, at a meeting for that purpose called, proceed to elect a board of trustees; and if said corporation shall cease to exist, or be dissolved, or its charter surrendered or repealed, all its property of every kind or description shall vest in said stockholders."

This act, it was declared, should take effect from its passage, "but the legislature reserves the right to amend or repeal the same."

At the meeting of the Kentucky Annual Conference, held

in Millersburg, in September, 1858, the trustees of the Institute presented a memorial, stating that it had secured a charter for a collegiate institute to be held and controlled, as in its charter provided, by that Conference; had obtained a subscription of $7500; and had purchased a suitable piece of land, and taken steps to have all necessary buildings erected on it. The Conference having been asked to accept the subscription, grounds, etc., upon the terms set forth in the charter of the Institute, the memorial was referred to a committee, which reported as follows: "1, that we accept the Institute upon the terms set forth in the charter; 2, that we request the presiding bishop to appoint the preacher of Millersburg station agent to raise the sum of $10,000 for our educational fund; 3, that the sum of $10,000, when secured, be subscribed as the stock of this Conference in the Institute; 4, that we, the members of this Conference, being deeply impressed with the sense of our educational necessities, do hereby pledge ourselves personally to the support of this institution, and we will afford every facility in our power to the agent in raising the above $10,000."

The Conference approved the report of the committee. But having expressed its belief that harmony of action in that body would be secured if the charter of the Institute were amended so as to make it exclusively a male school, with college privileges, a meeting of the stockholders and friends of the Institute was held, at which it was resolved: "1, that we, as stockholders in the Institute, will unite in application to the legislature to so amend the charter as to make it a first-class male college; 2, that we will raise our subscription to $10,000, and that we will use our best efforts to advance and sustain the enterprise, upon the condition that the Kentucky Annual Conference of the Methodist Episcopal Church, South, will appoint a special agent to raise an additional sum of $10,000; and further, that said Conference, in good faith, pledges itself to aid in the erection of suitable buildings, and to take the proper steps to endow the college as soon as practicable." These proceedings were approved by the Conference.

On the 30th day of September, 1858, at a meeting in L[illegible]

ington, Kentucky, of the Board of Education, which had been constituted by the Conference at its meeting in Millersburg, but had not then become incorporated, it was resolved: "1, that we believe that $200,000 will be ultimately required to establish and sustain in the best manner a first-class college, and that we proceed at once to raise one-half of that amount; 2, that no part of the capital raised for the educational fund shall ever be appropriated to the payment of the salaries of the professors and other teachers, or for any contingent expenses whatever, and that only $10,000 of that fund, as already pledged by the Conference, shall be appropriated toward the erection of the college buildings; 3, that no part of the proceeds of the capital shall be used for any purpose whatever until, in the judgment of the Board of Education and the trustees of the college, it is annually sufficient to support three professors; 4, that we issue scholarships of the value of $500 each, to be perpetual and transferable, and to entitle the holder to tuition in either the preparatory department or the college proper, in any studies necessary to graduation; 5, that we issue scholarships of the value of $100 each, to terminate in fifty years from the time of the opening of the college, not to be transferable, and to entitle the holder to tuition only in the college proper, and in such studies only as may be necessary to graduation — in other respects, they are to be similar to the scholarships of Asbury University, of Greencastle, Indiana; 6, that we issue scholarships to the value of $50 each, entitling the holder to five years' tuition at any time within fifty years from the time of the opening of the college, in any of the classes of the college, in the studies necessary to graduation, but not to be transferable; 7, that if the original stockholders of the Millersburg Male and Female Collegiate Institute will raise in Bourbon County, and in that portion of Nicholas County lying in the vicinity of Millersburg, $10,000 in addition to the $10,000 pledged by them, the entire amount of $20,000 thus raised to be invested in the erection of the buildings, we will issue scholarships for the said $20,000 on the same terms as to others, provided that their amount of stock in that case be surrendered, in lieu of said issue of scholarships, to the Ken-

tucky Annual Conference of the Methodist Episcopal Church, South, to be held by said conference as part of the educational fund; 8, that the treasurer of the educational fund be instructed to pay over moneys coming into his hands, as they may be needed, so soon as the $10,000, already pledged by the stockholders, shall have been secured, provided that he shall, in so doing, be governed by the action of the conference and the other part of these proceedings; 9, that any individual who shall endow a professorship shall have the privilege of naming it."

The above proposition was acceded to by stockholders at a meeting held in October, 1858, to consider the subject, and scholarships were issued to those making subscriptions or donations. A certificate of perpetual scholarship recited that the person to whom it was issued had, by payment of the sum therein named "to the treasurer of the Educational Fund of the Kentucky Annual Conference of the Methodist Episcopal Church, South, purchased" the same "in the college or university to be established by said conference at Millersburg, Kentucky," under certain specified limitations. The certificate of a fifty-year scholarship contained similar recitals, accompanied by numerous conditions, that need not be here repeated. The notes executed for the scholarships were in the following form: "$500. Bourbon County, Kentucky, ———, 18—. —— year after date I promise to pay to the order of ———, treasurer of the Educational Fund of the Kentucky Annual Conference of the Methodist Episcopal Church, South, five hundred dollars, this being the ——— note in ——— payment for a scholarship in the college or university to be established by said Conference." Some of the notes had in them these words: "In the college or university now established by said Conference." Upon delivery by donors or subscribers of their notes, the agent executed a receipt in the following form: "Received of (William M. Miller), five hundred dollars ($500), and his note for five hundred dollars ($500), payable in one year from the —— day of ——— 18—, to ———, treasurer of the Educational Fund of the Kentucky Annual Conference of the Methodist Episcopal Church, South, which, when paid,

will entitle him to two perpetual scholarships in the college or university established by said Conference. ——— County, Kentucky, ———, 18—."

While certificates of scholarships were being issued, the buildings were in process of erection at Millersburg, and by November 23, 1859, nearly $60,000 had been donated in cash and notes, of which about $20,000 had been expended on the buildings, leaving only a small sum to be applied for their completion.

On the 12th of January, 1860, the legislature of Kentucky passed an act entitled "An act to incorporate the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, South," 1 Laws 1860, c. 39, the preamble reciting that "the Kentucky Conference of the Methodist Episcopal Church, South, have resolved to form an Educational Fund and establish a college for the promotion of literature, science, morality, and religion within the limits of said Conference; and having, in fact, secured the sum of fifty-seven thousand dollars in cash and in good and reliable notes, and located an institution at Millersburg, Bourbon County, which is now ready for occupancy: now, in order to give full and complete legal effect thereto," etc. This act authorized the Board to make by-laws and ordinances for the proper conduct and government of the college, to elect its president and faculty, to establish, change, or abolish professorships as the exigencies of the college might require, and to perform all acts, not inconsistent with the constitution or statutes of the State, that were necessary or expedient in sustaining the Educational Fund of the Conference, and for the proper conduct of the college. The board was required to meet at the time of the commencement of the college at Millersburg, and at such other times as it might determine. The money paid into the hands of the treasurer, as the Educational Fund, was directed to be invested in Kentucky state bonds, county bonds, or safe and profitable stocks, as the board might determine, except the amount necessary "to pay for the present college building." By the 11th section, the act incorporating the Millersburg Male and Female Collegiate Institute, approved February

Counsel for Defendants in Error.

16, 1858, was repealed. And, by the 12th section, the right to amend or repeal the act of 1860 was reserved.

By an act of the Kentucky legislature, approved September 17, 1861, amendatory of the act incorporating the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, South, it was provided: "§ 1. That it shall and may be lawful for the trustees of Millersburg Male and Female Collegiate Institute, who were in office on the 12th day of January, 1860, when the act incorporating said institute was repealed, or their survivors, to convey, by deed, to the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, South, the property held by said trustees in and near the town of Millersburg, for the purpose of carrying into effect any contract made by said trustees or stockholders of said institute with said board, and their conveyance, recorded in the proper office, shall be effectual to pass the title of said property to said board and their successors. § 2. Nothing contained in the act of the general assembly incorporating said board, approved January 12, 1860, shall be construed so as to prevent or hinder said board, or their successors, from removing the seat of the college from Millersburg to any other place in the bounds of the Kentucky annual conference. § 3. This act to be in force from its passage." Laws 1861, 2, 3; Private Laws, c. 8, p. 4.

This act was accepted by the Annual Conference by formal action taken September 25, 1861, and on the 4th day of November, 1861, nearly twenty-seven years before this suit was brought, the trustees of the Millersburg Male and Female College conveyed to the Board of Education, and their successors in office, the grounds on which the college buildings were erected, "for the benefit of the Educational Fund of the Kentucky Conference of the Methodist Episcopal Church, South, forever, to be held and used and disposed of in such way as the charter of said Board of Education may direct."

Mr. Thomas F. Hargis, for plaintiff in error, submitted on his brief, in which he cited, to the point that there was a contract between the founders of the college and the conference,

to keep and maintain the institution at Millersburg: *Hascall* v. *Madison University*, 8 Barb. 174; *Chambers* v. *Baptist Education Society*, 1 B. Mon. 215; *Louisville* v. *University of Louisville*, 15 B. Mon. 142; *State* v. *Adams*, 44 Missouri, 570; *Allen* v. *McKeen*, 1 Sumner, 276; *Philips* v. *Bury*, 2 T. R. 345; *Murdock's Appeal*, 7 Pick. 303; *Sage* v. *Dillard*, 15 B. Mon. 340, 356; *Kean* v. *Johnson*, 1 Stockton, (9 N. J. Eq.) 401.

Mr. D. M. Thornton and *Mr. J. M. Wilson*, (with whom was *Mr. Samuel Shellabarger* on the brief,) for defendants in error.

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

The plaintiffs contend that, notwithstanding the act of 1858 reserved the right to amend or repeal the charter of the Millersburg Male and Female Collegiate Institute, the 11th section of the act of 1860 repealing the act of 1858, incorporating the Millersburg Male and Female Collegiate Institute, was repugnant to that provision of the constitution of Kentucky, then in force, declaring that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title." Art. II., § 37. This contention was sustained by the Court of Appeals of Kentucky, upon the ground that the subject of the repeal of the charter of 1858 was not expressed in the title of the act of 1860. And, in our consideration of the principal question in the case, we will assume, without discussion, that the charter of the Institute was not repealed by the act of 1860.

But the court below further said, in the same connection, that the repeal of the charter of the college "was not actually necessary, because the corporation created by it practically ceased to exist after the contract made between the original stockholders and Board of Education, whereby the latter acquired for use of the Kentucky Wesleyan College possession of and equitable title to all property of the Millersburg Male and Female Collegiate Institute, and the trustees thereof were deprived of their function and divested of every right except

the naked legal title; and as section 1 of the act of September 17, 1861, merely empowered those trustees to convey that property to the Board of Education, which they might have been coerced to do by a court of equity, no injury resulted from it." But plaintiffs in error insist that the first section of the act of 1861 impaired the obligation of the contract in question.

The view taken by the court below upon this point is, in our judgment, entirely sound. From the inception of the scheme to establish an educational institution at Millersburg, it was intended that it should be under the control of the Methodist Episcopal Church, South, represented by its Kentucky Annual Conference. This purpose was distinctly recognized in the charter of the Institute, which gave authority to that Conference, upon nominations by the Millersburg station of that Church, to select the trustees of the Institute from time to time, and declared that if the Methodist Church should ever relinquish or surrender, or cease to exercise a control over, the Institute, then its control and management should revert to and vest in its stockholders, who were authorized, at a meeting called for that purpose, to elect trustees. The trustees of the Institute, therefore, acted within the authority conferred upon them, when, in September, 1858, they asked the Conference to accept the subscription, grounds, etc., that had been obtained for the Institute. The Conference did formally accept the Institute upon the terms set forth in its charter, and by such acceptance acquired full control of the college. The court below correctly held that after the control of the Institute had been thus transferred to the Conference, the trustees had no other functions to perform, in respect to the property of the college, except to hold the naked legal title. Why, then, was it not competent for the General Assembly to invest the trustees of the Institute — as was done by the first section of the act of 1861 — with authority to convey to the Board of Education the property held by them for the purpose of carrying into effect any contract made by them or the stockholders of the Institute with that Board? It must be remembered that the right to amend or repeal was reserved to the General Assembly in the charter of the Institute granted in 1858. The

transfer of the naked legal title from the trustees of the Institute to the Board of Education did not take from the Institute any substantial right, but was in execution of the purpose to put the college and its property wholly under the control and management of the Kentucky Annual Conference of the Methodist Church, South. The deed from the trustees stated that the college buildings had been erected for the benefit of the Educational Fund of the Kentucky Conference of the Methodist Episcopal Church, South, forever to be held, used, and disposed of in such way as the charter of that Board might direct. That charter, we have seen, was granted to give legal effect to the purpose of the Conference, previously avowed, to form an Educational Fund and establish a college for the promotion of literature, science, morality, and religion within its bounds, to which end a large sum in cash and notes had been secured, and an institution located at Millersburg, then ready for occupancy. If the first section of the act of September 17, 1861, had contemplated any diversion of the property and funds of the Institute from the purposes for which they were acquired, and for which, by its charter, they could be used, a different and more serious question would have arisen.

This brings us to the examination of the second section of the act of 1861, which provided that nothing in the charter of the Board of Education "shall be construed so as to prevent or hinder said Board or their successors from removing the seat of the college from Millersburg to any other place within the bounds of the Kentucky Annual Conference." The contention of the plaintiffs is that there was and is a contract, the benefits of which they can rightfully claim, that the Institute should remain permanently at Millersburg; and that, if the second section of the act of 1861 contains a grant of power to remove the Institute from that town, it was void as impairing the obligation of the contract.

Literally interpreted, the second section of the act of 1861 would be held to do nothing more than prescribe a rule for the interpretation of a previous legislative enactment; and, so interpreted, it would be inoperative as an act of legislation under those provisions of the constitution of Kentucky, then

in force, confiding the powers of government to three distinct departments, legislative, executive, and judicial, and declaring that no person or collection of persons, being of one of those departments, should exercise any power properly belonging to either of the others, except in the instances expressly directed or permitted. Art. I, §§ 1, 2. But the Court of Appeals of Kentucky, regarding substance rather than form, held that the intention of the General Assembly, by the second section of the act of 1861, was to confer upon the Board of Education a power not expressly granted by the act of 1860, namely, the power of removing the seat of the college from Millersburg to any other place in the bounds of the Kentucky Annual Conference. We assume that the act means what the court below said it meant, in view of the constitution of the State. It must, therefore, be taken, in our examination of the question as to the repugnancy of the second section of the act of 1861 to the Constitution of the United States, that it was intended by the General Assembly of Kentucky to give the Board of Education authority to remove the college and its capital and funds from Millersburg to some other place within the bounds of the Kentucky Annual Conference. Did the act, thus interpreted, impair the obligation of any contract that the plaintiffs in error had in reference to that college? It certainly did, if the alleged contract forbade the removal of the Institute from Millersburg, except with the assent of the plaintiffs and those in whose behalf they sue. So that it is necessary to inquire as to the existence and effect of the alleged contract. And that question must be determined by this court upon its own judgment, independently of any adjudication by the state court. *Jefferson Bank* v. *Skelly*, 1 Black, 436, 443; *Wright* v. *Nagle*, 101 U. S. 791, 794; *Louisville & Nashville Railroad Co.* v. *Palmes*, 109 U. S. 244, 254, 257; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697; *Vicksburg &c. Railroad Co.* v. *Dennis*, 116 U. S. 665, 667. If there was no such contract, as is alleged, then no right, secured by the National Constitution, has been denied by the decree below.

The argument in support of the existence of the alleged contract rests upon the words of various documents, showing

that the original purpose of those who were instrumental in establishing this Institute was to have it located at Millersburg. Undoubtedly, those persons were moved to act, in some degree, by the belief that the seat of the proposed college would be at Millersburg. That belief is disclosed in the resolutions adopted by the citizens of Millersburg at the meeting of January 4, 1858. It is also expressed in the charter of the Institute granted in the same year, reciting that money had been subscribed for the purpose of erecting in or near said town a seminary of learning. It is again expressed in the certificates of perpetual scholarships issued under the authority of the Conference. It is further expressed in the charter of the Board of Education of 1860, referring to the college as having been "located" at Millersburg, with buildings then ready for occupancy. And it is equally manifest that when that charter was granted, the Conference believed that the ends proposed to be accomplished by the establishment of the institution, namely, the promotion, within its bounds, of literature, science, morality, and religion, could be accomplished by an institute located at Millersburg. It is equally true, upon the record before us, that the Conference was not wanting in earnest, persistent efforts to sustain the Institute at Millersburg. But that body, in its wisdom, determined that the objects in view could be best accomplished by removing the college to some other place. And we are of opinion that its removal to Winchester would not be in excess of its authority.

At the meeting of citizens of Millersburg, held in 1858, it was declared that the Institute should be under the control of the Methodist Episcopal Church, South; and, although the object avowed was to secure a collegiate institute at Millersburg or in its immediate vicinity, the only condition named in the resolution passed at that meeting, upon which the property should revert to the stockholders was the failure of the church to sustain the Institute, or its discontinuance from any cause. And, in the charter of the Institute, it is provided that if "the Methodist Church shall ever relinquish or surrender, or cease to exercise a control over said Institute, then, and in that case, its control and management shall revert to and vest in said

stockholders, who may, at a meeting for that purpose called, proceed to elect a board of trustees; and if said corporation shall cease to exist, or be dissolved, or its charter surrendered or repealed, all its property of every kind or description shall vest in said stockholders." It is a significant fact that the *permanent* location of the Institute at Millersburg was not made in terms by the resolutions of the citizens' meeting or by the charter of the college a condition upon which the control of the Institute and its property should remain with the Conference. The Methodist Episcopal Church, South, as represented by the Kentucky Annual Conference, has not relinquished, surrendered, or ceased to exercise control of the Institute, and, therefore, its control and management has not reverted to stockholders through trustees of their own selection. The Institute has not been discontinued; nor has the corporation ceased, in law, to exist; nor has its charter been surrendered or repealed; and, therefore, its property has not, in any view of the facts, or of the legislation in question, vested in stockholders.

The primary object of those who first moved in this matter, namely, to secure the establishment of an institution of learning under the control of the Kentucky Conference of the Methodist Episcopal Church, South, has not been overlooked or ignored in anything that has been done or proposed to be done. The belief of those who subscribed to the stock of the Institute, or accepted scholarships after the Institute passed under the control of the Conference, through its Board of Education, that the Institute would remain permanently at Millersburg, cannot be regarded as equivalent to a contract or absolute agreement that prevents the Conference from removing the Institute to another place, if it deems such a course to be best for the cause of education and morality. It is not the province of this court to sit in judgment upon the propriety of the course pursued by that body. We can only deal with the question of contract. And that question cannot depend upon any consideration of what, under all the circumstances, is fair and just as between the Conference and those citizens of Millersburg and vicinity who may have believed,

or expected, when making their subscriptions or giving their support to the institution, that it would always be maintained at that place. This court, in determining the Federal question involved, can only look at the question of the power of the General Assembly of Kentucky to authorize the removal of the Institute to another place within the bounds of the Conference. In the absence of a binding agreement, upon the part of the Conference or those representing it, that the Institute should remain permanently at Millersburg, even if the object of its original establishment could not be accomplished by keeping it there, our duty is to adjudge, without reference to considerations of abstract justice or equity, that the legislation in question is not repugnant to the Constitution of the United States.

In the brief of learned counsel for the plaintiffs are cited numerous authorities which, it is supposed, require a different conclusion from that announced by us.

One of the cases much relied on is *Sage* v. *Dillard*, 15 B. Mon. 340, 360, 361. The question there determined is indicated in the following extract from the opinion of the Court of Appeals of Kentucky: "In this case it appears that the original founders, or endowers, of the Institute, were willing to entrust their charity to the care and management of the original trustees, and such others, of course, as might be necessary, in their opinion, to effectuate the objects of the charity. To trustees, of their own selection, they confided the bounty which they bestowed for a great, a praiseworthy, and a noble purpose. In the hands of these men, and others of *their* choice, they entrusted the management and control of an institution which, by their munificence, was brought into being, and into which their beneficence has infused energy and usefulness. This charity has grown into a valuable estate, and sustains an institution which was designed to promote education in the Christian Scriptures, and qualify a Baptist ministry to disseminate religious knowledge in the West. The object is a laudable one; and can it be that the legislature, in retaining the right to 'alter' or 'amend' the charter, retained the right to take the supervision and control of this

opulent charity out of the hands of those to whose care and oversight the founders confided it, and place it in the hands of strangers, who never breathed, perhaps, a single breath of vitality into this institution, either to impart to it life or growth? We think not."

Another case cited by plaintiffs is *City of Louisville* v. *Pres. & Trustees of University of Louisville*, 15 B. Mon. 642, 687, 694. The principal question in that case was as to the validity of an amendment of the charter of the University of Louisville, giving to the city of Louisville, one of the donors of the institution, to the exclusion of other donors, the power of electing trustees of the University. The court, as counsel correctly observe, held that though a part of the funds were granted by the city, the charter constituted a contract, by which all the donors, the trustees, and the State were bound, and the obligation of which could not be impaired by an act passed under a reserved power to alter, amend, or repeal. Chief Justice Marshall, speaking for the Court of Appeals of Kentucky, said, among other things, that "it would at least seem to be just that the donors should have a right to insist that, as long as their donation is retained, it shall not, even under the authority of the State, be diverted from the uses stipulated in the charter, and the right should be transmissible as incident to the reversionary interests, and to the contract of donation. . . . We are of opinion, therefore, upon the ground of authority as well as of reason, that the original charter of the University of Louisville creates a private corporation, which is protected by that clause of the Constitution of the United States which prohibits the enactment of laws impairing the obligation of contracts; and that so much of the amended charter of the city of Louisville of 1861, as relates to the existing corporation and charter of the university, and vests, or professes to vest, in a new corporation, or in new trustees, the property and privileges of the original corporation, is in violation of that constitutional prohibition, and consequently void."

Our attention has also been called to the case of *State* v. *Adams*, 44 Missouri, 571, 577, relating to the charter of St.

Charles College, a corporation of Missouri. That charter, in conformity with the wishes of its founder, declared the college to be an institution purely literary, affording instruction in ancient and modern languages, and in the sciences and the liberal arts, and not including or supporting by its funds any department for instruction in systematic or polemic theology, nor instituting any regulations which should render a place in its classes offensive "to reasonable, liberal-minded persons, whatever might be their religious views." By a legislative amendment of the charter, it was provided that the concurrence of the Missouri Annual Conference of the Methodist Episcopal Church, South, should be requisite in filling vacancies on the board of curators, upon the Conference affording satisfactory assurances for the maintenance and endowment of the college. One of the questions in the case was whether this amendment was not void as impairing the obligation of the contract created by the original charter. The Supreme Court of Missouri, referring to the provisions of the original charter, said: "It would have been difficult to more emphatically provide for the exclusion of special or denominational religious influences. The declared objects and principles of the foundation are inconsistent with it, and the choice of future curators is to be uncontrolled by any ecclesiastical body or personage. We do not, hence, suppose that the founder intended to exclude all influence from, or instruction in, the great principles of Christian ethics, the basis of all character, the foundation of good citizenship and just government, and which are professedly adopted by men of all creeds; but he did intend to prevent the institution from becoming in any special sense a theological or religious school. The amendment in the charter, by requiring the concurrence in the choice of the curators of an ecclesiastical body representing one of the religious denominations of the State, endangers, in this regard, the principles of the foundation; and even if it did not, it changes the character of the administration of the trust, hinders the free choice of their successors, according to the will of the founder, by the men to whom he had entrusted his bounty, and essentially impairs the contract under which

he advanced it." For these reasons the amendment was held to be a violation of the contract embraced in the charter.

Reference has been made to *Allen* v. *McKean*, 1 Sumner, 276, 305, which involved the validity of an act of the legislature of Maine relating to Bowdoin College, of which the Commonwealth of Massachusetts was the founder. By the Act of Separation of Maine from Massachusetts, the powers and privileges of the president, trustees, and overseers of the college were guaranteed under its charter, so that they could not be altered, limited, annulled, or restrained except by judicial process, according to the principles of law, unless with the assent of both States. Massachusetts subsequently, by formal Resolve, gave its assent to any alteration or modification of the act relating to the college, not affecting the rights or interests of that Commonwealth, which the authorities of the college corporation might make, with the consent of the legislature of Maine. Alluding to the Resolve of Massachusetts, and considering its scope and effect, Mr. Justice Story said: "Nothing is clearer in point of law than the right of a founder to have his visitorial power exclusively exercised by the very functionaries in whom he has vested it. It is the very substratum of his dotation. This is not all. The founder has a right to have the statutes of his foundation, as to the powers of the trustees, strictly adhered to, except so far as he has consented to any alteration of them. But an authority to alter or modify those powers can never be fairly construed into an authority to take them away from his trustees, and confer the same powers on other persons. My view of the resolve, therefore, is, that it authorizes no alterations or modifications of the college charter which shall divert the funds of the founder from their original objects . . . and, *a fortiori*, that it does not justify the transfer of these powers from the trustees to any other persons not in privity with them. It does not authorize the legislature of Maine to assume to itself the powers of the trustees or overseers, or either of them, or to appoint new trustees or overseers; for that would affect the rights and interests of the founder, who has a right to select his own administrators of his own bounty in perpetuity."

Neither of those cases has any application to the one before us. There has been no diversion of the funds raised for this Institute. From the beginning, the purpose was to establish an institution to be under the control and supervision of some religious denomination, and the denomination selected was the Methodist Episcopal Church, South, represented by the Kentucky Annual Conference. Nor has the legislature assumed to make any material change in its control and management. The trustees, as the charter of the Institute required, are selected by that Conference. The question here relates simply to the power of removing the Institute from the place of its origin to another place within the bounds of that Conference. There is no question of diversion of funds, or of change of control and management. It is clear that the above cases are wholly inapplicable to the present controversy.

The case more directly in point than any one to which our attention has been called is the *Pennsylvania College Cases*, 13 Wall. 190. It resembles the present one in many important particulars. The principles which, in that case, sustained the validity of the legislation of Pennsylvania relating to the colleges at Canonsburg and Washington lead to an affirmance of the decree below.

We concur with the Court of Appeals of Kentucky in saying that neither the contract between the original stockholders and Board of Education nor the act of 1860 contains an express condition that the title of the property which became part of the endowment fund was to be held upon condition that the college be forever conducted and maintained at Millersburg, and nowhere else within the territorial limits of the Annual Conference; that such condition exists, if at all, by implication only; that the law does not presume a party entitled to a right or benefit of reservation claimed under contract in the absence of an express stipulation, except such as reason and justice dictates; that not only those residing elsewhere, but as well residents of Millersburg and vicinity, must be presumed to have regarded the establishment and successful maintenance of a first-class college under the patronage and control of the Annual Conference as the first and

main consideration for the outlay of money made, and the particular locality as of secondary importance; and, therefore, all that can be reasonably implied in behalf of the citizens of Millersburg is that they expected and believed that the successful operation of the institution would prove compatible with the continuance of it at that place. To now imply anything else or more, that court well says, would not only involve the absurdity of hazarding or sacrificing an institution of learning, the successful and useful operation of which within the bounds of the Conference was clearly the main inducement for the great outlay already made, "but be in disregard of the rights and interests of those residing elsewhere than at Millersburg, who have contributed either by purchasing scholarships or donations, very much more than has been raised at that place. There is mention made in the act of 1860, and also in the certificates of scholarships, of the college being established at Millersburg, but the language used does not import an agreement that it shall permanently remain there; on the contrary, we think it should, as it can fairly, be interpreted as merely descriptive of the institution. In our opinion, therefore, there exists no contract or undertaking, express or implied, for the continuance of the institution at Millersburg any longer than its useful and successful operation requires."

It results from these views that the decree below does not give effect to an act of the General Assembly of Kentucky that is repugnant to the Constitution of the United States. The decree must, therefore, be

Affirmed.

DOWER *v.* RICHARDS.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 178. Argued December 20, 1893. — Decided February 4, 1894.

Under the Statutes of the United States, a ledge containing gold-bearing rock, which has formerly been profitably worked for mining purposes, but all work upon which has been abandoned, and which, at the date of

a town-site patent of the land within which it lies, is not known to be valuable for mining purposes, is not excepted from the operation of the town-site patent, although, after the town-site patent has taken effect, the land is found to be still valuable for mining purposes.

This court, upon a writ of error to the highest court of a State in an action at law, cannot review its judgment upon a question of fact.

THE case is stated in the opinion.

Mr. H. L. Gear for plaintiffs in error.

Mr. Preston F. Simonds for defendants in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an action of ejectment, brought November 15, 1887, by the executors of Philip Richards against Harriet Dower and others, in the superior court for the county of Nevada in the State of California, to recover possession of two lots in the city of Nevada in that county, which the complaint alleged that Richards in his lifetime was the owner and in possession of.

The defendants, in their answer, alleged that Harriet Dower, of whom the other defendants were servants, was the owner and in possession and entitled to the possession of a quartz ledge and mine, called the Wagner ledge, situated partly upon and crossing the lots demanded; that Richards had no other right of possession than under a town-site patent, granted by the United States to the city of Nevada in 1869; that the ledge was known to be a gold-bearing ledge, and was held and worked as such long prior and subsequent to that patent, and was by the laws of the United States excepted from that patent; and that Harriet Dower had located the ledge, and was engaged in working it, including three hundred feet on either side thereof, under those laws. The laws relied on by the defendants were the acts of July 26, 1866, c. 262; March 2, 1867, c. 177; 14 Stat. 251, 541; June 8, 1868, c. 53; 15 Stat. 67; May 10, 1872, c. 152; 17 Stat. 91; Rev. Stat. § 2392.

Opinion of the Court.

A jury trial was waived, and the case submitted to the Superior Court, which made findings of fact, in substance as follows: A town-site patent for a tract including the two lots demanded was issued July 1, 1869, by the United States to the city of Nevada, which, before May 1, 1887, conveyed all its title in these lots to Richards, and that title was now vested in the plaintiffs as his executors. Before the issue of that patent, the Wagner ledge was known to exist as a gold-bearing quartz lode, but had never been located or marked out; and there was no proof that any local mining rules were in force in that district. For many years before 1869 it had been profitably worked, and many tons of gold-bearing rock extracted from it, by persons who were trespassers upon the public domain, and were not shown to have had more than a mere *possessio pedis* of certain shafts, tunnels and dumps. In the winter of 1868–69, work on the ledge was abandoned, and no work was afterwards done by those persons, and the defendants did not claim under them. In 1884, Harriet Dower, being a citizen of the United States and qualified to make a mining location, attempted to make a quartz mining location upon the ledge, within the lots demanded, which in manner and form complied with the laws of the United States in respect to mining locations; and by virtue of her location she claimed the ledge with three hundred feet on each side thereof, and since did annual work thereon as required by those laws, excavated the soil, sank shafts, erected buildings, and piled earth, sand and débris across the surface of the lots. For more than a year before her attempted location, no annual work had been done by any one upon the ledge. On May 1, 1887, Richards was the owner and in possession and entitled to the possession of the lots, and the defendants wrongfully and unlawfully ejected him from the part claimed by them, and ever since wrongfully and unlawfully withheld the possession thereof from him and his executors.

Upon the facts so found, the court decided, as matter of law, that the plaintiffs were owners and entitled to the possession of the lots; that no part of them was subject to location as a mining claim at the date of Harriet Dower's attempted

location; that the whole of these lots passed to Richards by the town-site patent and the subsequent conveyance; and that the plaintiffs were entitled to judgment against the defendants for the restitution of the part claimed by the latter, and for costs; and gave judgment for the plaintiffs accordingly. Upon a statement of the evidence, agreed to in writing by counsel, and certified by the judge, a motion for a new trial was made and denied. From the judgment for the plaintiffs, and from the order denying a new trial, the defendants, in accordance with the state practice, appealed to the Supreme Court of the State.

That court, as stated in its opinion filed in the case, and reported in 81 California, 44, affirmed the judgment upon the following grounds: Upon the facts found and the evidence stated in the record before that court, it decided, as matter of fact, that before 1869 a gold-bearing quartz ledge was known to exist and had been profitably worked within the limits of these lots, but had never been located or marked out; that in the winter of 1868–69 all work on the ledge was abandoned, and no work was afterwards done there until one of the defendants in 1884 made the location under which they claimed; that from the time when work was so abandoned until July 1, 1869, when the town-site patent was granted, the portion of the ledge included within the boundaries of these lots was regarded as worked out, and as of no further value for mining purposes, and was not known to be valuable for mining purposes at the date of that patent, nor discovered to be so before the plaintiffs and their predecessors occupied and improved the lots for the purpose of residence under the town-site patent. Having decided that to be the state of facts at the time when the town-site patent took effect — and assuming that the provision of the act of March 2, 1867, that no title should be acquired by a town-site patent "to any mine of gold, silver, cinnabar, or copper," was not repealed by the provision of the act of June 8, 1868, c. 53, that no title should be so acquired to "any valid mining claim or possession held under the existing laws of Congress," but stood with it, as in the reënactment of both provisions in section 2392 of the Revised Statutes — the court decided, as matter of law, that land not known at

the time to be valuable for minerals was not excepted from the operation of a town-site patent, even if afterwards found to contain minerals which might be profitably worked. The defendants thereupon sued out this writ of error.

The only Federal question presented by the writ of error is whether there was error in this decision in matter of law.

The proposition of law on which the plaintiffs in error rely is thus stated in their brief: "When a quartz ledge, known to be gold-bearing and to have been profitably worked prior to the acquisition of a town-site patent in the year 1869, and not then worked out, is situated within the exterior boundaries of the patent," "the rights of the government and its mining grantees are not limited to such actual mining or tunnel possession as may have existed before the town-site patent; or to any continuance of a mining claim or possession by prior locators or their grantees; but the government owns and can grant the right to any quartz mine or gold-bearing ledge, which was known to exist and to be valuable for minerals before the town-site patent was obtained, and which was not worked out, when the town-site patent was obtained; and the rights of a subsequent locator under the government, by virtue of its reservation of the mine, and of the mining acts of 1866 and 1872, include a reasonable quantity of surface for the convenient working of the ledge, not exceeding three hundred feet on each side thereof."

The essential difference between this proposition and that affirmed by the Supreme Court of the State of California is that the plaintiffs in error insist that if the ledge in question was known to have been gold-bearing and to have been profitably worked before the acquisition of the town-site patent, and had not in fact been worked out before the acquisition of that patent, the right to that ledge was not included in the patent, but was reserved to the United States, and would pass by a subsequent mining location; whereas the court held that if the ledge was not known, at the time of the acquisition of the town-site patent, to contain such an amount of minerals as to be valuable for mining purposes, it was not excepted from the operation of that patent.

Opinion of the Court.

There can be no doubt that the decision of the Supreme Court of the State in this respect was correct. It is established by former decisions of this court, that, under the acts of Congress which govern this case, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect; but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them; and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent. *Deffeback* v. *Hawke*, 115 U. S. 392; *Davis* v. *Weibbold*, 139 U. S. 507.

The principal ground on which the plaintiffs in error seek to reverse the judgment of the Supreme Court of California is that its decision in matter of fact was erroneous, and contrary to the weight of the evidence in the case. But to review the decision of the state court upon the question of fact is not within the jurisdiction of this court.

In the legislation of Congress, from the foundation of the government, a writ of error, which brings up matter of law only, has always been distinguished from an appeal, which, unless expressly restricted, brings up both law and fact. *Wiscart* v. *Dauchy*, 3 Dall. 321; *United States* v. *Goodwin*, 7 Cranch, 108; *Cohens* v. *Virginia*, 6 Wheat. 264, 410; *Hemmenway* v. *Fisher*, 20 How. 255, 258; *In re Neagle*, 135 U. S. 1, 42.

In the first Judiciary Act, the whole appellate jurisdiction of this court was limited to matters of law. While an appeal lay from the District Court to the Circuit Court in admiralty cases, neither the judgments or decrees of the Circuit Court, whether in law, equity or admiralty, nor judgments or decrees of the highest court of a State, could be reviewed by this court, except by writ of error. Act of September 24, 1789, c. 20, §§ 19, 22–25; 1 Stat. 83–86.

Under that act, it was held that a decree in admiralty could not be reviewed by this court in matter of fact; and Chief Justice Ellsworth, after laying down the rule that the appellate jurisdiction of this court could only be exercised within the regulations prescribed by Congress, said: "It is to be considered, then, that the judicial statute of the United States speaks of an appeal and of a writ of error; but it does not confound the terms, nor use them promiscuously. They are to be understood, when used, according to their ordinary acceptation, unless something appears in the act itself to control, modify or change the fixed and technical sense which they have previously borne. An appeal is a process of civil law origin, and removes a cause entirely, subjecting the fact, as well as the law, to a review and retrial; but a writ of error is a process of common law origin, and it removes nothing for reëxamination but the law." *Wiscart* v. *Dauchy*, 3 Dall. 327; *The Perseverance*, 3 Dall. 336; *The Charles Carter*, 4 Dall. 22.

In 1803, Congress substituted an appeal from the Circuit Court to this court, instead of a writ of error, in cases in equity and in admiralty; and upon such an appeal the facts as well as the law were open to review in both those classes of cases until 1875, when the appeal in admiralty was restricted to questions of law. Act of March 3, 1803, c. 40; 2 Stat. 244; *The San Pedro*, 2 Wheat. 132; *The Baltimore*, 8 Wall. 377; Rev. Stat. § 692; Act of February 16, 1875, c. 77, § 1; 18 Stat. 315; *The Francis Wright*, 105 U. S. 381.

Judgments of the Circuit Court in actions at law have remained reviewable by writ of error only. *Jones* v. *La Vallette*, 5 Wall. 579; Act of July 4, 1840, c. 43, § 3; 5 Stat. 393; Rev. Stat. § 691. Upon such a writ of error, this court, as is well settled, cannot review a decision of a question of fact, even if by the local practice, as in Louisiana, the law and the facts are tried together by the judge without a jury.

In such a case, Mr. Justice Story said: "We have no authority, as an appellate court, upon a writ of error, to revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence or drew right conclusions from it. That is the proper province of the jury; or of

the judge himself, if the trial by jury is waived, and it is submitted to his personal decision." *Hyde* v. *Booraem*, 16 Pet. 169, 176.

In a petitory action, in the nature of ejectment, to recover land in Louisiana, the subject was fully explained by Chief Justice Taney, who (according to the original opinion on file, misprinted in some particulars in the official report) said: "According to the laws of that State, unless one of the parties demands a trial by jury, the court decides the fact as well as the law; and if the judgment is removed to a higher court for revision, the decision upon the fact as well as the law is open for examination in the appellate court. The record transmitted to the superior court, therefore, in the state practice necessarily contains all the evidence offered in the inferior court. And as there is no distinction between courts of law and courts of equity, the legal and equitable rights of the parties are tried and decided in the same proceeding. In the courts of the United States, however, the distinction between courts of law and of equity is preserved in Louisiana as well as in the other States. And the removal of the case from the Circuit Court to this court is regulated by act of Congress, and not by the practice of Louisiana; and the writ of error, by which alone a case can be removed from a Circuit Court when sitting as a court of law, brings up for revision here nothing but questions of law; and if the case has been tried according to the Louisiana practice, without the intervention of a jury, the decisions of the Circuit Court upon questions of fact are as conclusive as if they had been found by the jury." The Chief Justice stated that, upon the first argument of the case at a former term, the court, its attention "not having been drawn to the difference between an appeal in the state practice, and the writ of error from this court," and being of opinion that the weight of evidence was against the authenticity of an instrument under which one of the parties claimed title, and which the Circuit Court had held to be authentic, therefore reversed the judgment of that court; but that this court, upon reconsideration, was "unanimously of opinion that the decision of the Circuit Court upon this question of fact

must, like the finding of a jury, be regarded as conclusive; that the writ of error can bring up nothing but questions of law; and that, in deciding the question of title in this court, the paper referred to must be treated and considered as authentic and sufficiently proved;" and had therefore ordered the case to be reargued. *United States* v. *King*, 7 How. 833, 844, 845. Upon the final argument, while four of the justices dissented from the opinion of the court upon the principal question of law presented by the record, none of them differed from the Chief Justice on the question of practice; and Mr. Justice Wayne, who delivered the principal dissenting opinion, said: "No point has been more repeatedly and authoritatively settled, than that this court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the court below, and as they are exhibited by the record." 7 How. 865. See also *Parks* v. *Turner*, 12 How. 39, 43; *Arthurs* v. *Hart*, 17 How. 6, 12; *Lanfear* v. *Hunley*, 4 Wall. 204, 209; *Generes* v. *Campbell*, 11 Wall. 193; *Jeffries* v. *Mutual Ins. Co.*, 110 U. S. 305, 309.

The only appellate jurisdiction which has ever been conferred by Congress upon this court to review the judgments or decrees, at law or in equity, of the highest court of a State, has been by writ of error. *Cohens* v. *Virginia*, 6 Wheat. 264, 410; *Verden* v. *Coleman*, 22 How. 192; Act of September 24, 1789, c. 20, § 25; 1 Stat. 85; Act of February 5, 1867, c. 28, § 2; 14 Stat. 386; Rev. Stat. § 709; Act of March 3, 1891, c. 517, § 5; 26 Stat. 827.

Such a writ of error can be sustained only when the decision of the state court is against a right claimed under the Constitution and laws of the United States. *Montgomery* v. *Hernandez*, 12 Wheat. 129; *Missouri* v. *Andriano*, 138 U. S. 496. And if the decision of the state court rests on an independent ground of law, not involving any Federal question, this court has no jurisdiction. *New Orleans Waterworks* v. *Louisiana Sugar Co.*, 125 U. S. 18; *Eustis* v. *Bolles*, 150 U. S. 361; *California Powder Works* v. *Davis*, *ante*, 389. The reasons against its jurisdiction are as strong, if not stronger, when the decision of the state court proceeds upon matter of fact only.

When, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court. It was accordingly said by Mr. Justice Catron: "The powers of the Supreme Court are limited in cases coming up from the state courts, under the twenty-fifth section of the Judiciary Act, to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United States, &c., or where their construction is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant cannot raise a question involving either the validity or construction of an act of Congress, etc., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be in admitting the evidence to establish the fact. But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of state courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed, in a similar manner as if a like question had arisen in a Supreme Court of error of a State, when reversing the proceedings of inferior courts of original jurisdiction." *Mackay* v. *Dillon*, 4 How. 421, 447. The only questions of evidence considered in that case arose upon a bill of exceptions to the legal competency of evidence relied on to prove a title under an act of Congress.

Again, in *Almonester* v. *Kenton*, Mr. Justice Catron said: "Now that this court has no jurisdiction, under the twenty-fifth section of the Judiciary Act of 1789, to reëxamine the decision of a state court, which drew in question the mere fact of where a dividing line between two tracts of land was, is too plain for discussion. Had the decision of the Supreme Court of Louisiana stopped here, then certainly jurisdiction would be wanting." 9 How. 1, 7. And this court assumed jurisdiction of that case solely because the state court had

gone further, and had given a construction to an act of Congress.

So in *Moreland* v. *Page*, this court dismissed a writ of error to review the judgment of a state court upon a question of the proper boundary between two tracts of land, although the owner of each claimed under a grant from the United States; and Mr. Justice Grier in delivering judgment said: "It is a question of fact, depending on monuments to be found on the ground, documents in the land office, or the opinion of experts or surveyors appointed by the court or the parties. If the accident to the controversy that both parties claim title under the United States should be considered as sufficient to bring it within our jurisdiction, then every controversy involving the title to such lands, whether it involve the inheritance, partition, devise or sale of it, may, with equal propriety, be subject to the examination of this court in all time to come." 20 How. 522, 523.

In *Lytle* v. *Arkansas*, in which the Supreme Court of Arkansas had decided against a preëmptive right claimed under the laws of the United States, Mr. Justice Catron said: "It is not material whether the invalidity of the title was decreed in the Supreme Court of Arkansas upon a question of fact or of law. The fact that the title was rejected in that court authorizes this court to reëxamine the decree." 22 How. 193, 203. Those observations must be taken as applied to the case before the court, in which the decision of the question of fact depended on the legal effect of acts of officers of the United States regarding that title; and that it was not intended to enlarge the scope of the appellate jurisdiction of this court is evident from the cases there cited. See also *Magwire* v. *Tyler*, 1 Black, 195, 203.

That this court, in an action at law, at least, has no jurisdiction to review the decision of the highest court of a State upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided, is clearly settled by a series of later decisions, some of them in cases very like the one now before us.

In *Lewis* v. *Campau*, (1865,) 3 Wall. 106, a decision of the state court as to the value of land conveyed by deed, upon which depended the requisite amount of stamps under the revenue law of the United States, was held not to be reviewable, although, if the value of the land had been admitted, a Federal question would have been presented. *Hall* v. *Jordan*, 15 Wall. 393.

In *Boggs* v. *Mining Co.*, (1865,) a right of possession for the purpose of extracting gold from quartz rock was claimed "by a license inferred from the general policy of the State or of the United States, in relation to mines of gold and silver and the lands containing them;" and a writ of error to review a decision of the Supreme Court of California against the claim was dismissed by this court, speaking by Chief Justice Chase, for the following reasons: "We doubt whether such a claim, even if made in the pleadings, would be such an allegation as would give jurisdiction to this court. However that may be, there was no decision of the court against the validity of such a license. The decision was, that no such license existed; and this was a finding by the court of a question of fact upon the submission of the whole case by the parties, rather than a judgment upon a question of law. It is the same case, in principle, as would be made by an allegation, in defence to an action of ejectment, of a patent from the United States, with an averment of its loss or destruction, and a finding by the jury that no such patent existed, and a consequent judgment for the defendant. Such a judgment would deny, not the validity, but the existence of the patent. And this court would have no jurisdiction to review it." 3 Wall. 304, 310.

In *Carpenter* v. *Williams*, (1869,) it was held that this court had no jurisdiction where the decision of the state court turned upon the identity of the person to whom a recorder of land titles confirmed, or intended to confirm, a lot of ground; and Mr. Justice Miller in delivering judgment said: "It is a mistake to suppose that every suit for real estate, in which the parties claiming under the Federal government are at issue as to which of them is entitled to the benefit of that title, necessarily raises a question of Federal cognizance. If this were so, the title to all the vast domain, once vested in the United

States, could be brought from the state courts to this tribunal." 9 Wall. 785, 786.

In *Crary* v. *Devlin*, (decided February 21, 1876,) in an action to recover the price of alcohol sold, the defendants contended that the sale was unlawful because of a violation of the internal revenue laws of the United States. The Court of Appeals of New York gave judgment for the plaintiff, because no such violation was proved; and this court dismissed the writ of error, upon the authority of *Boggs* v. *Mining Co.*, above cited; Chief Justice Waite saying: "There could have been no decision of the Court of Appeals against the validity of any statute of the United States, because it was found that the facts upon which the defendants below relied to bring their case within the statute in question did not exist. The judgment did not deny the validity of the statute, but the existence of the facts necessary to bring the case within its operation." 23 Lawyers C. P. Co.'s Rep. 510, 511.

In *Republican River Bridge Co.* v. *Kansas Pacific Railway*, (decided a week later,) in an action at law concerning the title to real estate, in which each party claimed under a grant from Congress, a district court of the State of Kansas, to which the case had been submitted without the intervention of a jury, made findings of fact, upon which it declared the law to be for the defendant; its judgment was affirmed by the Supreme Court of the State, and the plaintiff sued out a writ of error from this court. Mr. Justice Miller, in delivering the opinion, said: "The finding by the district court was received by the Supreme Court of the State as conclusive as to all facts in issue, and it is equally conclusive upon us. Where a right is set up under an act of Congress in a state court, any matter of law found in the record, decided by the highest court of the State, bearing on the right so set up under the act of Congress, can be reëxamined here. In chancery cases, or in any other class of cases where all the evidence becomes part of the record in the highest court of the State, the same record being brought here, this court can review the decision of that court on both the law and the fact, so far as may be necessary to determine the validity of the right set up under

the act of Congress. But in cases where the facts are submitted to a jury, and are passed upon by the verdict, in a common law action, this court has the same inability to review those facts in a case coming from a state court that it has in a case coming from a Circuit Court of the United States. This conclusiveness of the facts found extends to the finding by a state court to whom they have been submitted by waiving a jury, or to a referee, where they are so held by state laws, as well as to the verdict of a jury." And *Boggs* v. *Mining Co.*, and *Crary* v. *Devlin*, above cited, were referred to as supporting this conclusion. 92 U. S. 315–317; 23 Lawyers C. P. Co.'s Rep. 515, 516.

Whether the suggestion in that opinion, as to the power of this court in chancery cases to review the decision of a state court on both the law and the fact, is to be limited to cases in which the decree of that court is general upon the whole record, without specifically passing upon any question of fact; and whether the suggestion, especially if more broadly construed, can be reconciled with the earlier opinions of this court, already cited, upon writs of error to the Circuit Court of the United States in admiralty cases, or in cases tried according to the law of Louisiana; need not now be considered.

In *Martin* v. *Marks*, (1877,) upon a writ of error to the Supreme Court of Louisiana in an action in the nature of ejectment, Mr. Justice Miller, speaking for this court, said that the question whether a selection of swamp lands had in fact been filed by the surveyor general of Louisiana in the General Land Office was "not of that Federal character which authorizes us to review the decision of the Supreme Court of Louisiana upon it." 97 U. S. 345, 348.

In *Kenney, trustee*, v. *Effinger*, (1885,) this court dismissed a writ of error to the Supreme Court of Appeals of the State of Virginia, for reasons stated in the opinion delivered by Mr. Justice Field as follows: "The writ of error brought by the trustee raises no Federal question which we can consider. Whether the bond of Effinger was or was not executed with reference to Confederate notes is a question of fact for the state court, and not one of law for this court." 115 U. S. 577.

Opinion of the Court.

In *Quimby* v. *Boyd*, (1888,) in which various errors were assigned in a judgment of the Supreme Court of the State of Colorado between two adverse claimants of a lode, this court, speaking by the present Chief Justice, dismissed the writ of error for want of jurisdiction, because some of the objections made in this court had not been taken below, and "the other alleged errors involved questions, either of fact, or of state and not of Federal law." 128 U. S. 488, 489.

In *California Powder Works* v. *Davis*, *ante*, 389, in which each party to a suit to quiet title claimed under a patent from the United States confirming a Mexican grant, and the judgment of the Supreme Court of California rested on the proposition of fact that the grant under which the plaintiff in error deraigned title was simulated and fraudulent, this court dismissed the writ of error for want of jurisdiction.

The case now before us is an action of ejectment, which was submitted to the Supreme Court of the same State, according to the local practice, upon findings of fact and a statement of evidence by an inferior court of the State. From the foregoing reasons and authorities, it follows that this court cannot review the decision of the state court upon the question of fact whether the ledge, at the time when the town-site patent took effect, was known to be valuable for mining purposes; and the only question of Federal law in the case having been rightly decided by that court, its judgment is

Affirmed.

Mr. Justice Harlan concurred in the judgment of affirmance, but not in all the reasoning of the opinion.

Syllabus.

MARTIN'S ADMINISTRATOR v. BALTIMORE AND OHIO RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 67. Argued November 6, 1893. — Decided February 5, 1894.

Under the provision of the act of March 3, 1887, c. 373, authorizing an action, brought in a court of a State between citizens of different States, to be removed into the Circuit Court of the United States "by the defendant or defendants therein, being nonresidents of that State," a defendant corporation must be created by the laws of another State only, in order to entitle it to remove the action; and if it is such a corporation, and has not been also created a corporation by the laws of the State in which an action is brought against it by a citizen thereof, it may remove the action, even if it has been licensed by the laws of the State to act within its territory, and is therefore subject to be sued in its courts.

Statutes of a State, creating railroad corporations, or licensing them to exercise their franchises within the State, if deemed by the courts of the State public acts of which they take judicial notice without proof, must be judicially noticed by the Circuit Court of the United States sitting within the State, and by this court on writ of error to that court.

The Baltimore and Ohio Railroad Company is a corporation of the State of Maryland only, though licensed by the State of West Virginia to act within its territory, and liable to be sued in its courts; and may therefore remove into the Circuit Court of the United States for the District of West Virginia an action brought against it in a court of the State of West Virginia by a citizen thereof.

Under the provision of the act of March 3, 1887, c. 373, by which a petition for the removal of an action from a court of a State into the Circuit Court of the United States is to be filed in the state court at or before the time when the defendant is required by the laws of the State, or by rule of the state court, "to answer or plead to the declaration or complaint of the plaintiff," the petition should be filed as soon as the defendant is required to make any defence whatever, either in abatement or on the merits, in that court.

The objection that the Circuit Court of the United States has no jurisdiction of a case removed into it from a state court, because the petition for removal was filed too late in the state court, is waived if not taken until after the case has proceeded to trial in the Circuit Court of the United States, and cannot be taken for the first time in this court on writ of error to that court.

The question, whether a cause of action survives to the personal representative of a deceased person, is a question not of procedure, but of right; and, when the cause of action does not arise under a law of the United States, depends upon the law of the State in which the suit is brought.

By the law of West Virginia, an action for a personal injury abates by the death of the person injured.

If, after verdict and judgment for the defendant in the Circuit Court of the United States in an action the cause of which does not survive by law, and pending a writ of error in this court upon the plaintiff's exceptions to the rulings and instructions at the trial, the plaintiff dies, the action abates and the writ of error must be dismissed.

THE case is stated in the opinion.

Mr. Daniel B. Lucas for plaintiff in error.

Mr. John K. Cowen for defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an action of trespass on the case, brought March 1, 1888, in the circuit court of Berkeley County in the State of West Virginia, by John W. Martin against the Baltimore and Ohio Railroad Company, to recover damages in the sum of $10,000 for personal injuries caused to the plaintiff by the defendant's negligence at Bayview in the State of Maryland on May 22, 1887.

On April 12, 1888, the defendant filed in that court a petition, with proper affidavit and bond, for the removal of the case into the Circuit Court of the United States for the District of West Virginia, upon the ground that at the commencement of the suit and ever since the plaintiff was a citizen of West Virginia and the defendant a corporation and citizen of Maryland. On April 24, 1888, the plaintiff was permitted by the state court, against the defendant's objection, to file an answer to the petition for removal, denying that the defendant was a nonresident corporation, and alleging that it was, for all the purposes of this suit, a resident of West Virginia, and therefore not entitled to remove the case; and the court, upon a hearing on that petition and answer, "taking judicial notice

of the statutes incorporating the defendant in Virginia and in this State, and being of opinion that said Baltimore and Ohio Railroad Company is not a nonresident corporation," refused to allow the removal.

But the Circuit Court of the United States, on June 11, 1888, upon the production by the defendant of a duly certified copy of the record of the above proceedings, ordered the case to be docketed in that court; and on July 23, 1888, ordered it to be removed into that court.

On December 13, 1888, the plaintiff filed in that court a plea (called in the record a plea in abatement) that it ought not to take further cognizance of the action, because before and at the time of the removal the defendant "was and is now a resident of the District of West Virginia, and is therefore not entitled to remove said action" to that court. A demurrer to that plea was filed by the defendant, and sustained by the court. "And thereupon," as the record stated, "the plaintiff moved to remand this action to the circuit court of Berkeley County, which motion the court overruled."

The defendant then pleaded not guilty. Upon the issue joined on this plea, the case was tried by a jury, the plaintiff and other witnesses testified in his favor, a verdict was rendered for the defendant under instructions of the court, and judgment was rendered upon the verdict.

The plaintiff duly excepted to those instructions, and sued out this writ of error, which was entered in this court on January 13, 1890, together with an assignment of errors, in which the only error assigned to the sustaining of the demurrer to the plaintiff's plea, or to the denial of his motion to remand, was as follows: "The Circuit Court erred in sustaining the demurrer of the said defendant in error to the plaintiff's plea in abatement, and in overruling the motion of the plaintiff in error to remand the said cause to the state court whence it had been removed to said Circuit Court of the United States, thus deciding, both in sustaining said demurrer and in overruling said motion, that the Baltimore and Ohio Railroad Company was a nonresident of West Virginia and entitled to remove."

The other errors assigned were in rulings and instructions at later stages of the case, which it will not be necessary to consider.

At the present term of this court, the plaintiff's death was suggested, and Gerling, his administrator, appointed by the county court of Berkeley County in West Virginia, came in to prosecute in his stead; and the defendant moved to dismiss the writ of error, because an action for personal injuries abated by the death of the plaintiff.

It was argued, in behalf of the administrator, that the removal from the state court gave the Circuit Court of the United States no jurisdiction of this case, for two reasons: 1st. That the Baltimore and Ohio Railroad Company was a resident corporation of the State of West Virginia; 2d. That the application to the state court for removal was not made in time.

The consideration of this argument naturally takes precedence; because, if the courts of the United States never lawfully acquired jurisdiction of the case, they have no rightful power to determine any question of the liability of the defendant, or of the right of the original plaintiff in his lifetime, or of his administrator since his death, to maintain this action, but all such questions can only be determined in the courts of the State in which the action was brought; and, therefore, if the Circuit Court of the United States had no jurisdiction of the case, its judgment should be reversed for want of jurisdiction, with directions to remand the case to the state court, without passing upon the right to maintain the action in a competent tribunal.

1. The act of March 3, 1887, c. 373, which was in force at the time of the removal of this case, authorized any civil action brought in a court of a State between citizens of different States, and in which the matter in dispute exceeded, exclusive of interest and costs, the sum or value of $2000, to be removed into the Circuit Court of the United States "by the defendant or defendants therein, being nonresidents of that State." 24 Stat. 552. In order to be a "nonresident of that State," within the meaning of this statute, the defendant must be a

citizen of another State, or a corporation created by the laws of another State. *McCormick Co.* v. *Walthers*, 134 U. S. 41; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202; *Martin* v. *Snyder*, 148 U. S. 663.

A railroad corporation, created by the laws of one State, may carry on business in another, either by virtue of being created a corporation by the laws of the latter State also, as in *Railroad Co.* v. *Vance*, 96 U. S. 450; *Memphis & Charleston Railroad* v. *Alabama*, 107 U. S. 581; *Clark* v. *Barnard*, 108 U. S. 436; *Stone* v. *Farmers' Co.*, 116 U. S. 307; and *Graham* v. *Boston, Hartford & Erie Railroad*, 118 U. S. 161; or by virtue of a license, permission or authority, granted by the laws of the latter State, to act in that State under its charter from the former State. *Railroad Co.* v. *Harris*, 12 Wall. 65; *Railroad Co.* v. *Koontz*, 104 U. S. 5; *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, 118 U. S. 290; *Goodlett* v. *Louisville & Nashville Railroad*, 122 U. S. 391; *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117. In the first alternative, it cannot remove into the Circuit Court of the United States a suit brought against it in a court of the latter State by a citizen of that State, because it is a citizen of the same State with him. *Memphis & Charleston Railroad* v. *Alabama*, above cited. In the second alternative, it can remove such a suit, because it is a citizen of a different State from the plaintiff. *Railroad Co.* v. *Koontz*, above cited.

Whether the Baltimore and Ohio Railroad Company had the right to remove into the Circuit Court of the United States this action, brought against it by a citizen of West Virginia in a court of that State, therefore depends upon the question whether this company was a corporation created by the laws of Maryland only, or by the laws of West Virginia also.

This company, as is admitted, was originally incorporated by the statute of Maryland of February 28, 1827, (1826, c. 123,) entitled "An act to incorporate the Baltimore and Ohio Railroad Company," by which subscriptions to its capital stock were to be received by commissioners therein appointed,

rights to subscribe for certain amounts of stock were reserved to the State of Maryland and to the city of Baltimore, and, as soon as a certain amount had been subscribed for, it was to become a corporation by the name of the Baltimore and Ohio Railroad Company, capable of purchasing, holding and selling real and personal property, and of suing and being sued by that name, and to enjoy all the powers, rights and privileges of a corporation; its general meetings were to be held and directors chosen annually in Baltimore, and the president chosen by the directors; and the president and directors were authorized to increase the capital stock, to declare dividends, and to construct and maintain a railroad from the city of Baltimore to the Ohio River, and to purchase or take property for this purpose, making compensation to the owners.

In support of the proposition that this company had no right to remove the case into the Circuit Court of the United States, several legislative acts and judicial decisions of Virginia and West Virginia were relied on, which require examination.

In West Virginia, statutes of that State, or of the parent State of Virginia, creating railroad corporations, or licensing and authorizing them to exercise their franchises within the State, are deemed public acts, of which the courts of the State take judicial notice, without proof. *Hart* v. *Baltimore & Ohio Railroad*, 6 W. Va. 336, 349–358; *Mahaney* v. *Kephart*, 15 W. Va. 609, 624; *Henen* v. *Baltimore & Ohio Railroad*, 17 W. Va. 881, 899; *Northwestern Bank* v. *Machir*, 18 W. Va. 271. Doubtless, therefore, such statutes must be judicially noticed by the Circuit Court of the United States, sitting within the State of West Virginia and administering its laws, and by this court on writ of error to that court. *Covington Drawbridge* v. *Shepherd*, 20 How. 227, 232.

By the statute of Virginia of March 8, 1827, c. 74, entitled "An act to confirm a law, passed at the present session of the general assembly of Maryland, entitled 'An act to incorporate the Baltimore and Ohio Railroad Company,'" and reciting that act in full, it was enacted that "the same rights and privileges shall be and are hereby granted to the aforesaid

company within the territory of Virginia, as are granted to them within the territory of Maryland; the said company shall be subject to the same pains, penalties and obligations, as are imposed by said act; and the same rights, privileges and immunities which are reserved to the State of Maryland, or to the citizens thereof, are hereby reserved to the State of Virginia and her citizens;" excepting as to the location of the railroad in Virginia, and the property to be taken for its construction; and excepting also that any injury at any time done to the road within the limits of Virginia should be punished according to its laws in force for the protection of its public works.

By the statute of Virginia of March 6, 1847, c. 99, it was enacted that "the Baltimore and Ohio Railroad Company be and they are hereby authorized to complete their road through the territory of this Commonwealth" to Wheeling in Virginia, upon certain conditions, including the following:

By section 6, "said company shall be subject to the provisions of" the statute of Virginia of March 11, 1837, c. 118, "with respect to that portion of their road or other improvements now or hereafter to be constructed within this Commonwealth, so far as the same are properly applicable."

By section 7, "the stock, property and profits of said company, so far as the same may be or accrue within this Commonwealth, shall be subject to general taxation in like manner and on the same footing with other similar companies within this State: Provided, however, that said taxing power shall not be exercised until and unless the net income of the said Baltimore and Ohio Railroad shall exceed six per centum per annum upon their capital invested."

By section 8, "the general assembly hereby reserves to itself the power of hereafter altering, amending or modifying any or any part of the provisions of this act: Provided, that the rights of property and franchises acquired under this act, and the free use and enjoyment of their rights and privileges, as granted by this or any other former act now in force, shall not be taken away or impaired by any such further act of legislation."

The statute of Virginia of March 11, 1837, c. 118, (referred to in section 6 of the statute of 1847, above cited,) was entitled "An act prescribing certain regulations for the incorporation of railroad companies;" and began by enacting that "whenever it shall be deemed necessary by the general assembly to grant a charter for the incorporation of a company to construct a railroad, the following general provisions shall be deemed and taken to be a part of the said charter or act of incorporation, to the same effect as if the same were expressly reënacted in reference to any such charter or act, except so far as such charter or act may otherwise expressly provide." Those general provisions related to the exercise of the right of eminent domain, and the payment of compensation for property taken or injured; the time of completing the works of a company so incorporated; the annulling of its charter by the State of Virginia in case it should afterwards fail to keep its road in repair, and to afford the intended accommodation to the public, for three successive years; the right and duty of transporting persons and property; and other matters not necessary to be specified.

Upon the division of the State of Virginia, and the admission of West Virginia into the Union as a State, that part of the Baltimore and Ohio Railroad, which had been within the State of Virginia, came within the State of West Virginia. See Act of Congress of December 31, 1862, c. 6; 12 Stat. 633; *Virginia* v. *West Virginia*, 11 Wall. 39. But the general statutes of West Virginia, cited for the plaintiff, do not appear to have any important bearing upon this part of the case.

The statutes of West Virginia of 1872, c. 227, § 16, and 1882, c. 97, § 30, by which all railroad corporations, "doing business in this State under charters granted and laws passed by the State of Virginia or this State," are declared to be domestic corporations, were evidently aimed at those companies which had been made corporations by either State, whether under special charters or general laws; and were probably intended to make sure that corporations, created by Virginia before the separation of West Virginia, and doing business within the territory of the latter, should be consid-

ered corporations of this State; and cannot reasonably be construed as including corporations created by some other State only.

Section 30 of chapter 54 of the code of West Virginia authorizes any corporation, duly incorporated by the laws of any other State, to hold property and transact business in West Virginia, "upon complying with the requirements of this section, and not otherwise." These requirements are that every such corporation shall file with the Secretary of State a copy of its charter, or of its articles of association and of the law under which it is incorporated, and shall receive from him a certificate of the fact, and file this certificate with the clerk of a county in which its business is conducted. By a further provision of this section, "every railroad corporation, doing business in this State under the provisions of this section, or under charters granted or laws passed by the State of Virginia, or this State, is hereby declared to be, as to its works, property, operations, transactions and business in this State, a domestic corporation, and shall be so held and treated in all suits and legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all other matters relating to such corporation." It then prohibits, under penalties, any "railroad corporation, which has a charter or any corporate authority from any other State," to do business or to bring any action in the State, until it has filed with the Secretary of State a writing under its corporate seal accepting the provisions of this section. This section does not make any corporation of another State, which has neither complied with its requirements, nor been previously made a corporation by special charter or general law of Virginia or of West Virginia, a domestic corporation of West Virginia. It has not been proved or suggested that the Baltimore and Ohio Railroad Company ever complied with the requirements of this section. Nor, as has been seen, had it been previously made a corporation by any statute of West Virginia.

The question under consideration, therefore, turns upon the construction and effect of the statutes of Virginia, above referred to.

The position that, by force of those statutes of Virginia, the Baltimore and Ohio Railroad Company became a corporation of Virginia, and consequently of West Virginia, is sought to be maintained by expressions of opinion to that effect by the Court of Appeals of Virginia in *Baltimore & Ohio Railroad* v. *Gallahue*, (1855,) 12 Grattan, 655, and by the Supreme Court of Appeals of West Virginia in *Goshorn* v. *Supervisors*, (1865,) 1 W. Va. 308, and in *Baltimore & Ohio Railroad* v. *Supervisors*, (1869,) 3 W. Va. 319. But in the first case the point decided was that the Baltimore and Ohio Railroad Company was liable to be sued in Virginia; the second case concerned the validity of a county subscription to stock of a railroad company incorporated in Pennsylvania, and authorized by a statute of Virginia to construct a railroad therein; and the third case involved only the right of the State of West Virginia to tax the Baltimore and Ohio Railroad Company.

On the other hand, this court, in *Railroad Co.* v. *Harris*, (1870,) 12 Wall. 65, upon great consideration, and with those cases before it, was clearly of opinion that neither the statutes of Virginia, nor a similar act of Congress as to the District of Columbia, made the Baltimore and Ohio Railroad Company a new corporation; and this for cogent and satisfactory reasons, which were stated by Mr. Justice Swayne in delivering judgment as follows: "In both the original Maryland act of incorporation is referred to, but neither expressly or by implication create a new corporation. The company was chartered to construct a road in Virginia, as well as in Maryland. The latter [a mistake for 'former,' as it evidently means in Virginia] could not be done without the consent of Virginia. That consent was given upon the terms which she thought proper to prescribe. With a few exceptions, not material to the question before us, they were the same as to powers, privileges, obligations, restrictions and liabilities as those contained in the original charter. The permission was broad and comprehensive in its scope, but it was a license and nothing more. It was given to the Maryland corporation as such, and that body was the same in all its elements and in its identity after-

wards as before. In its name, locality, capital stock, the election and power of its officers, in the mode of declaring dividends, and doing all its business, its unity was unchanged. Only the sphere of its operations was enlarged." 12 Wall. 81. This court then expressed its concurrence in the view taken in *Baltimore & Ohio Railroad* v. *Gallahue*, 12 Grattan, 655, that the company was suable in Virginia, and decided that it was likewise suable in the District of Columbia, concluding its discussion of the subject by saying, "Looking at the statute alone, and reading it by its own light, we entertain no doubt that it made the company liable to suit, where this suit was brought, in all respects as if it had been an independent corporation of the same locality." 12 Wall. 83, 84.

In *Baltimore & Ohio Railroad* v. *Pittsburg &c. Railroad*, (1881,) 17 W. Va. 812, a petition of the Baltimore and Ohio Railroad Company, for the removal into the Circuit Court of the United States of a proceeding for the taking of some of its land for the railroad of a West Virginia corporation, was denied by the courts of West Virginia, upon the ground that the Federal courts could under no circumstances have jurisdiction of such cases. 17 W. Va. 866, 867. That decision is inconsistent with the decisions of this court. *Boom Co.* v. *Patterson*, 98 U. S. 403, 407; *Union Pacific Railway* v. *Kansas City*, 115 U. S. 1, 19; *Searl* v. *School District*, 124 U. S. 197. But (which directly bears upon the question now before us) the highest court of West Virginia, in that case, after referring to the cases in 12 Grattan and in 1 and 3 West Virginia, and quoting at length from the opinion of this court in *Railroad Co.* v. *Harris*, including the passages above cited, said: "If this be true, we need not differ as to whether the act of Virginia was a charter to the Baltimore and Ohio Railroad Company, or a license of the character described; the result would be the same in either case; the effect would be to make it, *quoad* all its bearings [business?], contracts, etc., in West Virginia, liable to suit here, the same as if it were a corporation of West Virginia." 17 W. Va. 875. The decisions in *Henen* v. *Baltimore & Ohio Railroad*, 17 W. Va. 881, and *Quarrier* v. *Baltimore & Ohio Railroad*, 20 W. Va. 424,

simply follow that case; and we have been referred to no later decision of that court upon the subject.

There does not appear, therefore, to be such a settled course of adjudication in the courts of West Virginia that the Baltimore and Ohio Railroad Company has been made by the statutes of Virginia a corporation of that State and of the State of West Virginia, as should induce this court, when the question arises under an act of Congress defining the jurisdiction of the courts of the United States, to surrender its own opinion, and to reverse the conclusion at which it deliberately arrived in *Railroad Co.* v. *Harris*, and which it has since repeatedly approved. *Railway Co.* v. *Whitton*, 13 Wall. 270, 285; *Ex parte Schollenberger*, 96 U. S. 369, 376; *Railroad Co.* v. *Vance*, 96 U. S. 450, 458; *Railroad Co.* v. *Koontz*, 104 U. S. 5, 9, 13; *Goodlett* v. *Louisville & Nashville Railroad*, 122 U. S. 391, 402, 403.

The Baltimore and Ohio Railroad Company, not being a corporation of West Virginia, but only a corporation of Maryland, licensed by West Virginia to act as such within its territory, and liable to be sued in its courts, had the right under the Constitution and laws of the United States, when so sued by a citizen of this State, to remove the suit into the Circuit Court of the United States; and could not have been deprived of that right by any provision in the statutes of the State. *Insurance Co.* v. *Morse*, 20 Wall. 445; *Barron* v. *Burnside*, 121 U. S. 186; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207.

2. The other objection taken in argument to the validity of the removal of the case into the Circuit Court of the United States is that the petition for removal was not seasonably filed in the state court under the provision of the act of Congress of 1887, by which any party, entitled to remove such a suit from a state court into the Circuit Court of the United States, "may make and file a petition in such suit in such state court at the time, or any time before, the defendant is required by the laws of the State, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff." 24 Stat. 554.

Opinion of the Court.

The original summons in this case was issued by the state court on March 3, 1888, returnable at the rules to be held on the first Monday of March, 1888, which was March 5, and was served, as appeared by the officer's return, at 11 A.M. of March 5, the statutes of the State providing that "any process may be executed on or before the return day thereof." W. Va. Code of 1884, c. 124, § 2.

On the record of that court were the following minutes: "March rules, 1888: Declaration filed and common order. April rules, 1888: Common order confirmed and W. E."

The meaning of these minutes is that the plaintiff, having filed his declaration at the rule day on which the summons was returnable, and the defendant having failed to appear on that day, there was thereupon entered in the clerk's office, as authorized by the statutes of the State, a conditional judgment, or judgment *nisi*, known as the "common order," that judgment be entered for the plaintiff unless the defendant should appear and plead at the next rules; and at April rules, the defendant continuing in default, the clerk entered, pursuant to those statutes, an office judgment, confirming the former one, with an order or writ of enquiry of damages. W. Va. Code, c. 125, §§ 1, 6; 4 Minor's Institutes, 599, 601.

By the statutes and practice of the State, this office judgment would, if not set aside, become a final judgment on, and not before, the last day of the next succeeding term. But the defendant might, at any time before the end of that term, "appear and plead to issue," that is to say, answer to the merits of the action, either by plea in bar, or by demurrer; and, if he did so appear and plead within that time, the office judgment, not having been entered up in court, nor the writ or order of enquiry executed, would be set aside as of course, and the case stand for trial upon the merits. In short, either judgment in the clerk's office was merely a formal judgment of default, not affecting the defendant's absolute right to interpose any defence upon the merits. But at a subsequent term, or if the office judgment had been confirmed by the court, or the writ of enquiry executed, he could not, without leave of court, file any plea whatever. A plea to the juris-

diction, or in abatement, if it could have been filed after the common order or conditional judgment in the clerk's office, certainly could not be filed, without special leave of the court, after the office judgment confirming that order; and therefore, in this case, upon the most liberal construction possible, not after the April rules. W. Va. Code, c. 125, §§ 16, 46, 47; 4 Minor's Institutes, 601, 605; *Resler* v. *Shehee*, 1 Cranch, 110; *Furniss* v. *Ellis*, 2 Brock. 14; *Hinton* v. *Ballard*, 3 W. Va. 582; *Delaplain* v. *Armstrong*, 21 W. Va. 211.

The defendant's petition for the removal of the case into the Circuit Court of the United States was not filed at the rules, either in March or in April. But it was afterwards filed in and heard by the state court before the end of the April term. It was therefore filed at or before the time at which the defendant was required by the laws of the State to answer or plead to the merits of the case, but after the time at which he was required to plead to the jurisdiction of the court, or in abatement of the writ.

Was this a compliance with the provision of the act of Congress of 1887 which defines the time of filing a petition for removal in the state court? We are of opinion that it was not, for more than one reason. This provision allows the petition for removal to be filed at or before the time when the defendant is required by the local law or rule of court "to answer or plead to the declaration or complaint." These words make no distinction between different kinds of answers or pleas; and all pleas or answers of the defendant, whether in matter of law by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action, are said, in the standard books on pleading, to "oppose or answer" the declaration or complaint which the defendant is summoned to meet. Stephen on Pleading, (1st Am. ed.,) 60, 62, 63, 70, 71, 239; Lawes on Pleading, 36. The Judiciary Act of September 24, 1789, c. 20, § 12, required a petition for removal of a case from a state court into the Circuit Court of the United States to be filed by the defendant "at the time of entering his appearance in

such state court." 1 Stat. 79. The recent acts of Congress have tended more and more to contract the jurisdiction of the courts of the United States, which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earliest statute. *Pullman Car Co.* v. *Speck*, 113 U. S. 84; *Smith* v. *Lyon*, 133 U. S. 315, 320; *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Fisk* v. *Henarie*, 142 U. S. 459, 467; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 449.

Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defence whatever in that court, so that, if the case should be removed, the validity of any and all of his defences should be tried and determined in the Circuit Court of the United States.

As the petition for the removal of this case into the Circuit Court of the United States was not filed in the state court within the time mentioned in the act of Congress, it would follow that, if a motion to remand upon that ground had been made promptly and denied, the judgment of the Circuit Court of the United States must have been reversed, with directions to remand the case to the state court. *Edrington* v. *Jefferson*, 111 U. S. 770; *Baltimore & Ohio Railroad* v. *Burns*, 124 U. S. 165.

3. But the record, as appears by the statement of the material parts thereof at the beginning of this opinion, not only does not show that any such objection to the removal was made, either in the state court or in the Circuit Court of the United States, but clearly implies that it was not, and that the only objection made in either court to the jurisdiction of the Circuit Court of the United States was that the defendant, as well as the plaintiff, was a citizen of West Virginia; and the assignment of error in this respect is expressly so limited.

The question therefore arises whether the objection to the time of filing the petition for removal can be raised for the

first time in this court, or must be held to have been waived by not taking it below.

The time of filing a petition for the removal of a case from a state court into the Circuit Court of the United States for trial is not a fact in its nature essential to the jurisdiction of the national court under the Constitution of the United States, like the fundamental condition of a controversy between citizens of different States. But the direction as to the time of filing the petition is more analogous to the direction that a civil suit within the original jurisdiction of the Circuit Court of the United States shall be brought in a certain district, a non-compliance with which is waived by a defendant who does not seasonably object that the suit is brought in the wrong district. *Gracie* v. *Palmer*, 8 Wheat. 699; *Taylor* v. *Longworth*, 14 Pet. 172, 174; *St. Louis & San Francisco Railway* v. *McBride*, 141 U. S. 127; *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593; *Central Trust Co.* v. *McGeorge*, 151 U. S. 129.

That the jurisdiction of the Circuit Court of the United States over a case removed into it from a state court cannot be defeated upon the ground that the petition for removal was filed too late, if the objection is not taken until after the case has proceeded to trial in the Circuit Court of the United States, has been distinctly decided by this court.

In *French* v. *Hay*, 22 Wall. 238, the case had been removed under the act of March 2, 1867, c. 196, (14 Stat. 558,) reënacted in Rev. Stat. § 639, cl. 3, which required the petition to be filed "before the final hearing or trial" in the state court; the Circuit Court of the United States denied a motion to remand, made, as the report states, because the act "had not been complied with in respect to time and several other important particulars;" and this court, on appeal, approved its action, and, speaking by Mr. Justice Swayne, said: "The objection made in the court below touching the removal of the case from the state court, and which objection has been renewed here, was not made in the court below until the testimony was all taken, the case was ready for hearing, and nearly three years had elapsed since the transfer was made. The objection came too late. Under the circumstances it must be held to

have been conclusively waived." And *Taylor* v. *Longworth*, above cited, was referred to as in point. 22 Wall. 244, 245.

The reasons in support of this conclusion were stated at length in *Ayers* v. *Watson*, 113 U. S. 594, which was brought up by writ of error from the Circuit Court of the United States, into which the case had been removed under the act of March 3, 1875, c. 137, since amended by the act of 1887 in no material respect bearing upon the present inquiry, except in fixing an earlier time for filing the petition for removal in the state court, by requiring it to be filed at or before the time when the defendant is required to answer or plead, instead of (as it was in the act of 1875) "before or at the term at which such cause could be first tried and before the trial thereof." The two acts are printed side by side in 120 U. S. 786–794.

In *Ayers* v. *Watson*, Mr. Justice Bradley, speaking for the whole court, after observing that "the application for removal was beyond question too late according to the act of 1875," which governed the case, and that the court was therefore compelled to examine the effect of the act of 1875 when the application was made at a later period of time than was allowed by that act, and stating the substance of section 2 of that act, defining the classes of cases which might be removed into the Circuit Court of the United States, said: "This is the fundamental section, based on the constitutional grant of judicial power. The succeeding sections relate to the forms of proceeding to effect the desired removal." "The second section defines the cases in which a removal may be made; the third prescribes the mode of obtaining it, and the time within which it should be applied for. In the nature of things, the second section is jurisdictional, and the third is but modal and formal. The conditions of the second section are indispensable, and must be shown by the record; the directions of the third, though obligatory, may to a certain extent be waived. Diverse state citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. *Mansfield*

& Coldwater Railway Co. v. *Swan*, 111 U. S. 379. Application in due time, and the proffer of a proper bond, as required in the third section, are also essential if insisted on, but, according to the ordinary principles which govern such cases, may be waived, either expressly or by implication. We see no reason, for example, why the other party may not waive the required bond, or any informalities in it, or informalities in the petition, provided it states the jurisdictional facts; and if these are not properly stated, there is no good reason why an amendment should not be allowed, so that they may be properly stated. So, as it seems to us, there is no good reason why the other party may not also waive the objection as to the time within which the application for removal is made. It does not belong to the essence of the thing; it is not, in its nature, a jurisdictional matter, but a mere rule of limitation. In some of the older cases the word jurisdiction is often used somewhat loosely, and no doubt cases may be found in which this matter of time is spoken of as affecting the jurisdiction of the court. We do not so regard it. And since the removal was effected at the instance of the party who now makes the objection, we think that he is estopped." 113 U. S. 597–599.

In that case, it is true, it was the party who had removed the case into the Circuit Court of the United States, who afterwards objected to the jurisdiction of that court because the removal was not in time, and was held to be estopped to do so. But if due time of removal had been made by the act of Congress a jurisdictional fact, neither party could waive, or be estopped to set up, the want of it; but, as observed by Mr. Justice Bradley in the passage above quoted, and directly adjudged in *Mansfield & Coldwater Railway Co.* v. *Swan*, cited by him, the fact would be absolutely essential, and the want of it would be error at any stage of the cause, even though assigned by the party at whose instance it was committed. His whole course of reasoning leads up to the conclusion that the time of removal, not being a jurisdictional and essential fact, is a subject of waiver and of estoppel alike.

The incidental suggestion, in that opinion, that the petition for removal might be amended in the Circuit Court as to the

form of stating the jurisdictional facts, assumes that those facts are already substantially stated therein; and accords with later decisions, by which such amendments may be allowed when, and only when, the petition, as presented to the state court, shows upon its face sufficient ground for removal. *Carson* v. *Dunham*, 121 U. S. 421, 427; *Crehore* v. *Ohio & Mississippi Railroad*, 131 U. S. 240; *Jackson* v. *Allen*, 132 U. S. 27.

The decision in *Ayers* v. *Watson*, as to the waiver in the Circuit Court of the United States of the objection that the petition for removal had not been seasonably filed in the state court, has never been doubted or qualified. In *Kansas City Railroad* v. *Daughtry*, 138 U. S. 298, cited by the plaintiff in the present case, the writ of error was not to the Circuit Court of the United States, after the case had been removed into that court and tried and determined there; but it was to the state court, which had refused to allow the removal, and the decision of this court was that there was no error in that refusal if the petition for removal had not been filed in time to make it the duty of that court to surrender its jurisdiction.

The result is, that an objection to the exercise by the Circuit Court of the United States of jurisdiction over a case, otherwise removable, upon the ground that the petition for removal was filed too late, is an objection which may be waived, and that it has been waived in the case at bar.

4. There being no error, of which advantage can be taken at this stage of the case, affecting the jurisdiction of the Circuit Court of the United States, the next matter to be considered is the defendant's motion to dismiss the writ of error, as having abated by the death of the original plaintiff, because it was an action to recover damages for a personal injury.

By the Judiciary Act of September 24, 1789, c. 20, § 31, (1 Stat. 90,) following the statute of 8 & 9 Will. 3, c. 11, §§ 6, 7, and since embodied as follows in the Revised Statutes, "when either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by

law, prosecute or defend any such suit to final judgment," and upon *scire facias* judgment may be rendered for or against him; and "if there are two or more plaintiffs or defendants, in a suit where the cause of action survives to the surviving plaintiff, or against the surviving defendant, and one or more of them dies, the writ or action shall not be thereby abated, but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant." Rev. Stat. §§ 955, 956.

These statutes authorize the executor or administrator to prosecute or defend in those cases only in which the cause of action survives by law, and do not undertake to define what those cases are.

The question whether a particular cause of action is of a kind that survives for or against the personal representative of a deceased person is a question not of procedure, but of right. As was said by Chief Justice Waite, speaking for this court: "The personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death, unless the cause of action, on account of which the suit was brought, is one that survives by law. Rev. Stat. § 955." "The right to proceed against the representatives of a deceased person depends not on forms and modes of proceeding in a suit, but on the nature of the cause of action for which the suit is brought. If the cause of action survives, the practice, pleadings, and forms and modes of proceeding in the courts of the State may be resorted to in the courts of the United States for the purpose of keeping the suit alive and bringing in the proper parties. Rev. Stat. § 914. But if the cause of action dies with the person, the suit abates and cannot be revived. Whether an action survives depends on the substance of the cause of the action, not on the forms of proceeding to enforce it." *Schreiber* v. *Sharpless*, 110 U. S. 76, 80. In that case, the right in question being of an action for a penalty under a statute of the United States, the question whether it survived was governed by the laws of the United States. But in the case at bar, the question whether the administrator has a right of action depends upon the law of West Virginia, where the

action was brought and the administrator appointed. Rev. Stat. § 721; *Henshaw* v. *Miller*, 17 How. 212. The mode of bringing in the representative, if the cause of action survived, would also be governed by the law of the State, except so far as Congress has regulated the subject.

The provisions of the Code of West Virginia, which have been supposed in argument to have any bearing upon this subject, are copied in the margin.[1]

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[1] CHAPTER LXXXV.

OF PERSONAL REPRESENTATIVES; THEIR POWERS AND DUTIES AS TO PERSONAL ASSETS.

SEC. 19. A personal representative may sue or be sued upon any judgment for or against, or any contract of or with, his decedent.

SEC. 20. An action of trespass, or trespass on the case, may be maintained by or against a personal representative for the taking or carrying away of any goods, or for the waste or destruction of, or damage to, any estate of or by his decedent.

CHAPTER CIII.

OF ACTIONS FOR INJURIES.

SEC. 5. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof; then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as to amount in law to murder in the first or second degree, or manslaughter.

SEC. 6. Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties and in the proportions provided by law in relation to the distribution of personal estates left by persons dying intestate. In every such action, the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars, and the amount so recovered shall not be subject to any debts or liabilities of the deceased: Provided, that every such action shall be commenced within two years after the death of such deceased person.

CHAPTER CIV.

LIMITATION OF SUITS.

SEC. 12. Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring

Chapter 85, entitled "Of personal representatives; their powers and duties as to personal assets," authorizes actions,

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the same shall have accrued, if it be for a matter of such nature that, in case a party die, it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued, and not after.

[The only limitations of personal actions, otherwise prescribed in the code, are of actions for injuries causing death, in c. 103, § 6, above quoted; of actions on recognizances, in c. 104, § 11; on judgments, in c. 104, § 13, and c. 139, §§ 10, 11; on other contracts and awards, in c. 104, §§ 6, 7; and of proceedings to avoid voluntary gifts, in c. 104, § 14.]

CHAPTER CXXVII.

OF THE DEATH OR CHANGE OF PARTIES, AND THE DISCONTINUANCE OF CAUSES NOT PROSECUTED.

SEC. 1. Where a party dies, or becomes convict of felony, or insane, or the powers of a party who is a personal representative or committee cease, if such fact occur after verdict, judgment may be entered as if it had not occurred.

SEC. 2. Where such fact occurs in any stage of a cause, whether it be in a court of original or appellate jurisdiction, if it occur as to any of several plaintiffs or defendants, the suit may proceed for or against the others, if the cause of suit survive to or against them. If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract.

SEC. 3. If, in any case of appeal, writ of error or *supersedeas*, which is now or may hereafter be pending, there be at any time in an appellate court suggested or relied on, in abatement, the death of the party, or any other fact which, if it had occurred after the verdict in an action, would not have prevented judgment being entered as if it had not occurred, the appellate court may, in its discretion, enter judgment or decree in such case as if the said fact had not occurred.

SEC. 4. In any stage of any case, a *scire facias* may be sued out for or against the committee of any party who is insane or a convict; or for or against a party before insane, the powers of whose committee have ceased; or for or against the personal representative of the decedent who, or whose personal representative, was a party; or for or against the heirs or devisees of a decedent who was a party; or for the assignee or beneficiary party; to show cause why the suit should not proceed in the name of him or them. Or where the party dying, or whose powers cease, or such insane person or convict, is plaintiff or appellant, the person or persons for whom such *scire facias* might be sued out may, without notice or *scire facias*, move that the

which might have been brought by or against a person in his lifetime, to be brought after his death by or against his personal representative, in no other cases but those of judgments or contracts, or of taking or injuring personal property.

These provisions are copied from the Code of Virginia of 1849, c. 130, §§ 19, 20, and approximately, though not exactly, adopt the rule of the common law that a personal action dies with the person, as modified by the English statutes of 4 Edw. 3, c. 7, and 3 & 4 Will. 4, c. 42, § 2. Williams on Executors, pt. 2, bk. 3, c. 1, sec. 1. In Virginia and West Virginia, except as specified in their own statutes, no action of tort can be maintained by or against the executor or administrator of the person to or by whom the wrong was done. *Henshaw* v. *Miller*, 17 How. 212; *Harris* v. *Crenshaw*, 3 Rand. 14; *Curry* v. *Mannington*, 23 W. Va. 14, 18.

The only case of a personal injury, for which an action might have been brought by a person in his lifetime, in which the Code of West Virginia authorizes an action to be brought by his personal representative, is that of a wrongful act, neglect, or default causing death, in which case chapter 103, entitled "Of actions for injuries," provides in sections 5 and 6, following the English statute of 9 & 10 Vict. c. 93, §§ 1, 2, (commonly known as Lord Campbell's Act,) that the person or corporation, who would have been liable if death had not ensued, shall be liable to an action by the personal representa-

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suit proceed in his or their name. In the former case, after service of the *scire facias*, or in the latter case, on such motion if no sufficient cause be shown against it, an order shall be entered that the suit proceed according to such *scire facias* or motion. Any such new party, except in an appellate court, may have a continuance of the case at the term at which such order is entered; and the court may allow him to plead anew, or amend the pleadings, as far as it deems reasonable; but in other respects the case shall proceed to final judgment or decree for or against him, in like manner as if the case had been pending for or against him before such *scire facias* or motion.

Sec. 5. The clerk of the court in which the case is may issue such *scire facias* at any time, and an order may be entered at rules for the case to proceed in the name of the proper party, although the case be on the court docket.

[The subsequent sections as to discontinuance are not material.]

tive of the deceased person. The right of action thus given, although for the same act or neglect for which the person injured would have had a right of action in his lifetime, differs from an action brought by him, both in the ground on which it proceeds, and in the award of damages. It is not a common law action to recover damages for the injuries suffered by him while he lived, but it is an action given by statute for causing his death. The damages recovered cannot exceed $10,000; and are no part of the estate of the deceased, and cannot pass by his will, or be reached by his creditors; but, by the express terms of the statute, are to be distributed to his next of kin as if he died intestate, and are not subject to his debts. These sections, therefore, authorizing the personal representative to bring such an action after the death of the person injured, have no tendency to show an intention of the legislature that the representative may prosecute a common law action brought by that person in his lifetime.

The statute action must be brought within two years after the death. All other actions for personal injuries come within the general provision of the statute of limitations, chapter 104, § 12, of the Code of West Virginia, (corresponding to chapter 149, § 11, of the Code of Virginia,) by which the period of limitation of every personal action, for which no other limitation is prescribed, is fixed at five years, or at one year, depending upon the question whether "it be for a matter of such a nature that, in case a party dies, it can be brought by or against his personal representative."

It is hardly contended that by the law of West Virginia this action could have been begun by an executor or administrator. But it is argued that, having been begun by the person injured, it may be prosecuted by his administrator since his death, under the provisions of chapter 127 of the Code of West Virginia, and especially by virtue of the last clause of § 2 of this chapter.

The chapter is entitled "Of the death or change of parties, and the discontinuance of causes not prosecuted," and all its provisions relate rather to matters of procedure than of substantial right.

Opinion of the Court.

By the rule of the common law, *actio personalis moritur cum persona*, the death of the sole plaintiff or of the sole defendant before final judgment abated any personal action, except that, if the death occurred in vacation after verdict, judgment might be entered as of the preceding term. *Hatch* v. *Eustis*, 1 Gallison, 160, 162; *Green* v. *Watkins*, 6 Wheat. 260, 262. The rule has been modified in England and in this country by various statutes, with the object of avoiding the necessity of bringing a new action when the cause of action survives to the personal representative, but not always limited to that object.

Chapter 127 of the Code of West Virginia reënacts, with some modifications, chapter 173 of the Code of Virginia. After reënacting the provision of § 1 that when a party dies after verdict judgment may be entered as if the death had not occurred, and the provision of § 2 that in case of the death of any of several plaintiffs or defendants "the suit may proceed for or against the others, if the cause of action survive to or against them," it adds to this section this clause: "If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract."

It is argued that, by virtue of this clause, all actions of tort, including libel and slander and all actions for injury to the person, may, in case of the death of either party, be prosecuted by or against his personal representative.

However plausible that argument might be if this clause stood alone, and were to be construed by itself, and according to the literal meaning of the words, the clause assumes a different aspect upon considering the connection in which it stands, and the provisions of previous chapters, already mentioned, relating to the survivorship of causes of action.

It would be hardly consistent with the legislative intent, apparent from the objects and the limits of those provisions, to give the clause relied on the effect of allowing all actions of tort whatever to be prosecuted after the death of the original plaintiff by his personal representative; and to give it that

effect would permit the prosecution, after the death of a sole plaintiff or defendant, of an action which, by the first clause of the same section, if there had been several plaintiffs or defendants and one only had died, could not have proceeded for or against the others.

Moreover, by the final clause of § 4 of the same chapter, after the personal representative of either party dying has been brought in by *scire facias* or motion, "the case shall proceed to final judgment or decree for or against him, in like manner as if the case had been pending for or against him before such *scire facias* or motion." But if an action for a personal injury had been pending for or against the personal representative after the death of the person who suffered or committed the injury, the final judgment would have been that the action was abated by the death.

The reasonable inference is that the clause relied on, like the rest of the chapter, is intended only to prescribe the mode of procedure in actions the cause of which survives, either at common law, or by virtue of other chapters of the Code; and that its whole effect is to avoid the necessity of bringing a new action when the right of action so survives; and not to give a new right of action, which did not exist before.

This is the view that has been taken by the highest court of the State whenever the matter has been brought before it.

In *Cunningham* v. *Sayre*, 21 W. Va. 440, that court, after observing that, at common law, "actions grounded in *tort* generally died with the person, and actions founded on contract generally survived," went on to say: "When the legislature, in the statute above referred to, used the language, that 'if a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution *in the same manner as if it were a cause of action arising out of contract*,' it is evident that it referred in the last clause of the section to the general common law rule that '*actions founded on contracts* survived.' It was found that great inconvenience arose in following the technical rule of the common law in abating actions, when the personal representative, his heir or

devisee, might bring another suit to accomplish substantially the same object had in view by the ancestor in bringing the original suit, and the manifest object of the statute was to enlarge the remedy so that the suit might be revived. It was not the object of the statute to create any new right, and give an action to the heir, devisee, or representative, which he had not at common law; but where the representative, heir, etc., had a right, by suit, to accomplish the same object, substantially, as the ancestor had in view in bringing the suit, that for convenience it should not abate on the ancestor's death, but might be revived." And it was upon that construction of the statute, that the court grounded its decision that an action of unlawful entry and detainer survived, upon the death of the plaintiff, to his heir, saying: "The suit which the ancestor brought was sufficient to acquire the possession, and the statute intended, in case of his death, that his heirs or devisees, who took his place with reference to that right, may revive the suit and prosecute it." 21 W. Va. 444, 445.

In *Curry* v. *Mannington*, 23 W. Va. 14, the question whether a right of action of tort for a personal injury, not causing death, would survive to the personal representative of the person injured, was directly presented for adjudication by a plea of the statute of limitations to an action against a town for a personal injury caused by a defect in a highway, and was decided in the negative, the court saying that, "under the common law, the rule was that all personal actions died with the person, according to the maxim, *actio personalis moritur cum persona;*" that by successive statutes in England and in this country, and by chapter 85, § 20, of the Code, the personal representative might sue for an injury to the personal estate of the decedent in his lifetime; that, "in the cases, however, of injuries to the *person*, and not to the *property* or *estate* of the decedent, whether by assault, battery, false imprisonment, slander, *negligence* or otherwise, if either the party who received or he who committed the injury die, the maxim applies rigidly, and no action can be supported either by or against his representative;" and that the only exception to this rule, known to the court, was in chapter 103,

§§ 5, 6, of the Code, "embracing what is known as Lord Campbell's Act, giving a right of action to the representative against any party wrongfully causing the death of his decedent." 23 W. Va. 18.

In *Gainer* v. *Gainer*, 30 W. Va. 390, 398, whether a suit could be revived by the personal representative under chapter 127, was treated as depending upon the question whether, by other laws of the State, the cause of action survived.

A like view was taken by the Court of Appeals of Maryland of similar statutes of that State, published in 2 Kilty's Laws of Maryland. By the act of 1785, c. 80, § 1, it was enacted "that no action, brought or to be brought, in any court of law in this State, shall abate by the death of either of the parties to such action; but upon the death of any defendant, in a case where the action by such death would have abated before this act, the action shall be continued," and, in a real action, "the heir or devisee of the deceased, or tenant in possession, or other proper person to defend in such action," and, in an action "to recover personal chattels, debt or damages," the executor or administrator or other proper person to defend, might appear or be summoned in; "and in case the plaintiff or plaintiffs, in any action aforesaid, shall die before the same may be tried and judgment given, and such death would abate the action before this act, the appearance of the heir, devisee, executor or administrator, as the case may require, or other proper person to prosecute such suits, shall be admitted to be entered to the same." And the act of 1798, chapter 101, sub-chapter 14, § 4, provided that "no personal action shall abate by the death of either party, but executors and administrators shall notice and conform to the directions of the act of 1785, chapter 80, respecting their prosecution or defence of such action." Notwithstanding the broad terms of those statutes, the Court of Appeals held that an action against a railroad company for a personal injury was abated by the death of the plaintiff, saying: "Suits for injuries to the person or character die with the person, and cannot be maintained by the representatives of the deceased party. Before the acts of 1785, chapter 80, and 1798, chapter 101, sub-chapter 14, § 4, all per-

sonal actions abated by the death of a party, and it was necessary for his representatives to commence the action anew; and the object of those acts was to prevent this inconvenience and delay, and to enable the representatives of deceased parties to prosecute such actions as had been instituted by their decedents, during their lives, and which did not die with the person. Those acts never were intended, however, to prevent the abatement of actions which died with the person." *Baltimore & Ohio Railroad* v. *Ritchie*, 31 Maryland, 191, 198, 199.

In an action for a personal injury, a similar decision was made in England under the Common Law Procedure Act of 1852, Stat. 15 & 16 Vict. c. 76, which provided, in § 135, that "the death of a plaintiff or defendant shall not cause the action to abate, but it may be continued as hereinafter mentioned;" in § 136, that when one of two or more plaintiffs or defendants should die, the action should proceed, if the cause of action survived to or against the others; in § 137, that "in case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of such plaintiff may, by leave of the court or a judge, enter a suggestion of the death, and that he is such legal representative, and the action shall thereupon proceed," "and such judgment shall follow upon the verdict in favor of or against the person making such suggestion, as if such person were originally the plaintiff;" and in § 138, that "in case of the death of a sole defendant or sole surviving defendant, where the action survives," the plaintiff might suggest the death and proceed with the action. It was argued for the plaintiff that § 135, which was not restricted to actions the cause of which survived, was quite large enough in its terms to include the case. But the court held that the section was not intended to give any new right of action, but only to prevent the proceedings abating by the death of the plaintiff, and to permit the personal representative to continue them, when he could have brought an action; Mr. Justice Crompton saying, "It would be a strange thing to hold that these sections, which relate merely to matters of procedure, had the effect of doing away with the ancient common law rule — *actio personalis moritur cum persona*." *Flinn* v. *Perkins*, 32

Law Journal (N. S.) Q. B. 10, 11; *S. C.* 8 Jurist, (N. S.) 1177.

That case does not appear to have ever been overruled or questioned, although it was cited by counsel in *Kramer* v. *Waymark*, L. R. 1 Ex. 241; *S. C.* 4 H. & N. 427; and again in *Hemming* v. *Batchelor*, L. R. 10 Ex. 54; *S. C.* 44 Law Journal (N. S.) Exch. 54.

In *Kramer* v. *Waymark*, the point decided was that § 139 of the Common Law Procedure Act, reënacting the general provision of the statute of 17 Car. 2, c. 8, § 1, that the death of either party between verdict and judgment should not be alleged for error, if judgment should be entered within two terms after the verdict, included an action for a personal injury. Such an entry of judgment upon a verdict which has established the rights of the parties is equivalent, in substance and effect, to the ordinary entry of judgment *nunc pro tunc* upon such a verdict; and is quite a different thing from permitting a litigation to be prosecuted by or against an executor or administrator.

In *Hemming* v. *Batchelor*, on the other hand, where the plaintiff, in an action for a personal injury, had been nonsuited, with leave to move for a new trial at the next term, and died before that term, the court held that the action abated by the death, and, while declining to enter judgment for the defendant on the nonsuit, held that it had no authority to grant a new trial.

In *Green* v. *Watkins*, 6 Wheat. 260, 262, it was said by Mr. Justice Story, following Tidd's Practice, 1096, that a writ of error in a personal action would not abate if the plaintiff in error died after assignment of errors. But the case before the court was a real action, in which, as he observed, the right descended to the heir. And there is nothing in Tidd's Practice, or in the authorities there cited, which countenances the theory that a writ of error in an action, the cause of which would not survive, either to heirs or to personal representatives, would not be abated by the death of the only person who could maintain the action. Section 956 of the Revised Statutes, like the statute of 8 & 9 Will. 3, c. 11, § 7, by which

the death of one of several plaintiffs or defendants does not abate an action which survives to or against the survivor of them, has been held to extend to writs of error, because, as said by Lord Ellenborough, and repeated by Chief Justice Waite: "The proceeding is an action which is commenced by a writ, and the cause of the action is the damage sustained by the parties from the error in the previous judgment, and this damage equally attaches on the survivor in this as in any other action." *Clarke* v. *Rippon*, 1 B. & Ald. 586; *Moses* v. *Wooster*, 115 U. S. 285; *McKinney* v. *Carroll*, 12 Pet. 66. Equally applicable to writs of error is section 955 of the Revised Statutes, (following section 6 of the statute of Will. 3,) by which, as observed by Chief Justice Waite in *Schreiber* v. *Sharpless*, before cited, "the personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death, unless the cause of action on account of which the suit is brought survives by law." 110 U. S. 76, 80.

The result is, that by the law of Virginia the administrator has no right to maintain this action, and that by the statutes of the United States regulating the proceedings in this court he is not authorized to come in to prosecute this writ of error. The only verdict and judgment below were in favor of the defendant, who is not moving to have that judgment affirmed or set aside. The original plaintiff never recovered a verdict, judgment upon which might be entered or affirmed *nunc pro tunc* in his favor. If the judgment below against him should now, upon the application of his administrator, be reversed and the verdict set aside for error in the instructions to the jury, or, according to the old phrase, a *venire de novo* be awarded, no new trial could be had, because the action has abated by his death. *Hemming* v. *Batchelor*, above cited; *Bowker* v. *Evans*, 15 Q. B. D. 565; *Spalding* v. *Congdon*, 18 Wend. 543; *Corbett* v. *Twenty-third Street Railway*, 114 N. Y. 579; *Harris* v. *Crenshaw*, 3 Rand. 14, 24; *Cummings* v. *Bird*, 115 Mass. 346.

The necessary conclusion is that, the action having abated by the plaintiff's death, the entry must be

Writ of error dismissed.

MR. JUSTICE HARLAN dissenting.

I cannot agree that this action abates or that the writ of error should be dismissed because of the death of the original plaintiff.

In the discussion at the bar of the question whether the action had abated by the death of the plaintiff, reference was made to chapter 103 of the Code of West Virginia, giving to the personal representative of one whose death has been caused by the wrongful act, neglect, or default of any person or corporation, a right of action for damages against such person or corporation. The right to bring such action is limited to two years, and the damages recovered cannot be subjected to the payment of the debts and liabilities of the decedent, but must be distributed to the parties and in the proportion provided by law in relation to the personal estate of those who die intestate. In my judgment, those provisions are of no consequence in the present inquiry. This suit was brought by the person alleged to have been injured to recover compensation for such injuries as he sustained. It is not claimed that his death, since this writ of error was sued out, was caused by those injuries. And the question is whether this personal action was abated by his death. Its determination, it is agreed, depends upon the law of West Virginia.

By the Code of West Virginia, c. 127, it is provided:

"SEC. 1. Where a party dies, or becomes convict of felony, or insane, or the powers of a party who is a personal representative or committee cease, if such fact occur after verdict, judgment may be entered as if it had not occurred.

"SEC. 2. Where such fact occurs in any stage of a cause, whether it be in a court of original or appellate jurisdiction, if it occur as to any of several plaintiffs or defendants, the suit may proceed for or against the others, if the cause of suit survive to or against them. If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract.

"SEC. 3. If, in any case of appeal, writ of error or *supersedeas* which is now or may hereafter be pending, there be at any time in an appellate court suggested or relied on, in abatement, the death of the party, or any other fact which, if it had occurred after the verdict in an action, would not have prevented judgment being entered as if it had not occurred, the appellate court may, in its discretion, enter judgment or decree in such case as if the said fact had not occurred."

Under the first section above quoted judgment could be entered without reviving the action if the party died after verdict. That section is substantially like section 1 of the statute of 17 Car. 2, c. 8, § 1. The object of the first clause of the second section of chapter 127 of the Code of West Virginia was to dispense with the necessity of reviving an action in which there were several plaintiffs or defendants, one of whom had died pending the action, provided the cause of suit was one which, according to the settled principles of the common law, survived to or against the other parties. This clause had the same object as the sixth and seventh sections of the statutes of 8 and 9 Will. 3, c. 2. These English statutes were examined in *Kramer* v. *Waymark*, L. R. 1 Ex. 241, 243, in which an infant plaintiff sued by next friend to recover damages for injuries sustained through the negligence of the defendant. The child died after verdict and before judgment was signed. Upon a rule to show cause why the judgment should not be set aside, on the ground of the death of the plaintiff before judgment, the court discharged the rule, saying that the proceedings could not be stayed in face of *Palmer* v. *Cohen*, 2 B. & Ad. 966. In the latter case, which was an action for libel, the plaintiff died after verdict and before judgment was entered by his executor at the next term. The court refused to set aside the judgment, holding that the death of the plaintiff, after verdict, did not prevent his executor from entering judgment. In the same case, the court referred to the Common Law Procedure Act, 1852, § 139, which provided that "in all actions, personal, real, or mixed, the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such

judgment be entered within two terms after such verdict," (15 & 16 Vict. c. 76, § 139,) and said that it was stronger than the statute of Car. 2, and applied "to all actions, whether they would have survived to an executor or not." See *Gaines* v. *Conn's Heirs*, 2 Dana, 232.

The principal difference between the West Virginia statute, before it was amended in 1868, and the statutes of 17 Car. 2 and 8 and 9 Will. 3, §§ 6, 7, was that the latter did not apply to real actions, whereas the former embraced all actions — real, mixed, and personal. The first clause of section 2 of chapter 127 of the West Virginia Code is important in the present discussion, because the words "if the cause of suit survive to or against" any one of several plaintiffs or defendants, show that even when that section was adopted the legislature had in mind the distinction at common law between actions that survived and those that did not survive. And in 1868, with this distinction still in view, the legislature added the second clause of the second section, providing that "if a plaintiff or defendant die pending any action, *whether the cause of action would survive at common law or not*, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract."

If the second clause of section 2 of chapter 127 had never been adopted, an action in tort would not have abated in West Virginia by reason of the death of the plaintiff after verdict, but judgment could have been entered upon the verdict. This, according to *Kramer* v. *Waymark*, above cited, was the construction placed on the English statute, upon which the first section and the first clause of the second section of chapter 127 of the Code of West Virginia were evidently based. But the second clause of the second section of that chapter was a step in advance. It seems to me clear that the legislature intended, by that clause and under the circumstances stated in it, to permit any action, whatever its nature, and at every stage of it, to be revived and prosecuted to judgment and execution without reference to the question whether the cause of action would or would not survive at common law. The

purpose was to remove from the jurisprudence of West Virginia the distinction existing at common law between causes of action that survived and those that did not survive. Martin sued to recover compensation for the injury alleged to have been done to him through the negligence of the railroad company. This cause of action would not have survived at common law where death occurred before verdict. But that fact became immaterial under the legislation of 1868, which expressly provided that, whether the cause of action would survive at common law or not, the case could be revived and proceed to judgment precisely as it might do in cases of contracts. The decision now rendered makes the statute mean just what it would mean, if it did not contain the words "whether the cause of action would survive at common law or not." The court holds that an action cannot be revived and prosecuted to judgment and execution if the cause of action be one that would not have survived at common law; and this, notwithstanding the statute, in plain words, says that the inquiry "whether the cause of action would survive at common law or not," is immaterial.

It is said that this conclusion cannot be sustained with due regard to the decisions of the Supreme Court of Appeals of West Virginia. The case particularly relied on in support of this contention is *Cunningham* v. *Sayre*, 21 W. Va. 440, 444. There death occurred before the verdict, and the question was whether an action for unlawful entry and detainer abated upon the death of the plaintiff. The court held that the action did not abate, and its decision of that point is expressed in the syllabus. As the constitution of the State makes it the duty of the court "*to prepare a syllabus of the points adjudicated in each case*," the profession in that State look only to the syllabus to ascertain the points in judgment. When, however, we turn to the opinion of the court, nothing, I submit, is found in it justifying the conclusion this court has reached. Referring to the last clause of section 2 of chapter 127 of the Code, the Supreme Court of Appeals of West Virginia said: "It was not the object of the statute to create any new right, and give an action to the heir, devisee, or representative which he

had not at common law." No one supposes that that clause gives a personal representative the right of action to sue for personal injuries to the decedent. The personal representative can bring an original action only where death is caused by the wrongful act or default of the defendant. He does not bring an action where one, rightfully brought by the decedent, is revived in his name as personal representative. But the Supreme Court of Appeals of West Virginia proceeds: "But where the representative, heir, etc., had a right, by suit, to accomplish the same object substantially as the ancestor had in view in bringing the suit, that for convenience it should not abate on the ancestor's death, but might be revived." Even this principle, the statement of which was not at all necessary to the decision, is sufficient to embrace the present case; for, as the suit of Martin was to recover compensation for the injuries he received, a revivor of it, in the name of his personal representative, and its prosecution to judgment and execution, would accomplish substantially the same object the decedent had in view, namely, to compel the railroad company to pay for the injury inflicted upon him as the result of its negligence.

Another case referred to in support of the contention that the action abated by the death of the plaintiff is *Curry* v. *Mannington*, 23 W. Va. 14, 18. But that case did not involve any question in reference to the revivor of an action for personal injuries received by the plaintiff. It was a suit against a municipal corporation for injuries, alleged to have been received through the neglect of the defendant to keep its streets and walks in repair. It is true that the court, in that case, said: "In the cases, however, of injuries to the *person* and not to the *property* or *estate* of the decedent, whether by assault, battery, false imprisonment, slander, *negligence*, or otherwise, if either the party who received or he who committed the injury die, the maxim applies rigidly, and no action can be supported either by or against his representative. 3 Bl. Com. 302. In this State the only exception to this rule, so far as I have been able to discover, is the provision of our statute, embracing what is known as Lord Campbell's Act,

giving a right of action to the representative against any party wrongfully causing the death of his decedent. §§ 5 and 6, c. 103, Code, p. 545." But it is plain from the context that this language had reference to the meaning of a particular statute of limitations of personal actions, that used the words "if they be for matters of a nature that in case of the *death* of the party, they could not be brought by or against his representative." In effect, the court was considering the question as to whether a personal representative could bring an original action for personal injury received by his decedent. That is an entirely different question from the one here presented, which is, whether an action for the recovery of money duly brought by the person injured could, upon his death, be revived in the name of his personal representative, and be prosecuted by the latter to judgment and execution. There is not a hint, much less a distinct statement, either in the syllabus or in the opinion in *Curry* v. *Mannington*, in respect to any such question.

Suppose Martin had obtained a judgment for ten thousand dollars in damages and had died after the case was brought here by the railroad company. Could it not have been revived in this court against his personal representative? And if this court had reversed such a judgment and remanded the cause for a new trial, could the railroad company have prevented another trial in the court below by the suggestion of record that, pending the writ of error in this court, the plaintiff had died? In my opinion, this question should be answered in the negative, if any effect whatever be given to the local statute. A different rule should not be applied when the case is here upon writ of error sued by the plaintiff.

Reference has been made to the case of *Flinn* v. *Perkins*, 32 Law Journal, (N. S.) Q. B. 10, 11; *S. C.* 8 Jurist, (N. S.) 1177. That was an action to recover damages for a personal injury. The plaintiff died before verdict, and the effort was to have it revived in the name of the personal representative. It was held that the Common Law Procedure Act did not permit the revivor under such circumstances. But that case differs from this in two important particulars: 1, there was

a verdict and judgment in this case before the plaintiff died; 2, there was no provision in the English statute, as there is in the West Virginia Code, giving the right of revivor, where the plaintiff or defendant dies pending the action, "whether the cause of action would survive at common law or not."

But if I am wrong in my interpretation of the Code of West Virginia, there is still another view of this question which, in my judgment, is important. Martin's death occurred after the assignment of errors was filed and made part of the record. In Tidd's Practice, 1163, it is said: "A writ of error may abate by the act of God, the act of law, or the act of the party. If the *plaintiff* in error die before errors assigned, the writ abates, and the defendant in error may thereupon sue out a *scire facias quare executionem non* to recover the judgment against the executors or administrators of the plaintiff in error. But if the plaintiff in error die after errors assigned, it does not abate the writ. In such case the defendant, having joined in error, may proceed to get the judgment affirmed, if not erroneous, but must then revive it against the executors or administrators of the plaintiff in error." And so it was adjudged by this court in *Green* v. *Watkins*, 6 Wheat. 260, 262, in which Mr. Justice Story, speaking for the court, and after referring to the rules that controlled the question of abatement, whether in real or personal actions, where the party died before judgment, said: "But in cases of writs of error upon judgments already rendered a different rule prevails. In personal actions, if the plaintiff in error dies before assignment of error, it is said that by the course of proceedings at common law the writ abates; but if after assignment of errors, it is otherwise." These authorities, I submit, indicate that the writ of error should not be dismissed after there has been an assignment of errors.

Being of opinion that the action has not abated by the death of the plaintiff, I am unable to concur in the opinion and judgment of the court.

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1. The proofs fail to establish that the transactions complained of by the appellant were fraudulent, as alleged. *Gottlieb* v. *Thatcher*, 271.
2. The relationship of brothers does not of and in itself cast suspicion upon a transfer of property by one to the other, or create such a *prima facie* presumption against its validity as would require the court to hold it to be invalid without proof that there was fraud on the part of the grantor, participated in by the grantee. *Ib.*
3. In an action brought in South Dakota by the assignee of the stock of goods of an insolvent trader (who had taken the stock in satisfaction of an alleged debt due him from the insolvent) against a sheriff who had seized them on a writ of attachment at the suit of a creditor of the insolvent, the defence being set up that the transfer to the plaintiff was fraudulent and in violation of the statutes of that State, it is competent for defendant to put in evidence a confidential business statement by the insolvent to a commercial agency, concealing the alleged liability to the plaintiff. *Shauer* v. *Alterton*, 607.
4. The statutes of that State, strictly construed, invalidate any transfer of property, made with the intent, on the part of the owner, to delay or defraud creditors, even when the grantee purchased in good faith; and, when liberally construed, will not permit the grantee, although taking the property in part in satisfaction of his own debt, to enjoy it to the exclusion of other creditors, if the sale was made with intent to delay or defraud other creditors, and if he had, at the time, either actual notice of such intent, or knowledge of circumstances that were sufficient to put a prudent person upon an inquiry that would have disclosed its existence. *Ib.*
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7. An assignment of error, based upon the exclusion by the trial court of an answer given in the deposition of a witness to a particular question,

INTERSTATE COMMERCE.

A railroad company agreed with a cotton compress company that the latter should receive and compress all the cotton which the railroad might have to transport in compressed condition, and that it should insure the same for the benefit of the railroad company, or of the owners of the cotton, for a certain compensation which the railroad company agreed to pay weekly. It was further agreed that the compress company, on receiving the cotton, was to give receipts therefor, and that the railroad company, on receiving such a receipt, was to issue a bill of lading in exchange for it. Cotton of the value of $700,000, thus deposited with the compress company for compress and transportation, was destroyed by fire. That company had taken out policies of insurance upon it, but to a less amount, in all of which the compress company was named as the assured, but in the body of each policy it was stated that it was issued for the benefit of the railroad company or of the owners. The various owners of the cotton further insured their respective interests in other insurance companies, called in the litigation the marine insurance companies. After the fire the amounts of the several losses were paid to the assured by the several marine companies. In an action in the courts of Tennessee to settle the rights of the parties, the Supreme Court of that State held, (89 Tennessee, 1; 90 Tennessee, 306,) that the companies so paying were entitled to be subrogated to the rights of the owners or consignees against the railroad company under its bills of lading, and that the railroad company was entitled to have the insurance which had been taken out by the compress company collected for its benefit. The railroad company not being party to those suits, the marine insurance companies filed their bill in equity in a state court in Tennessee against the compress company, the several persons who had insured the destroyed cotton for it, and the railroad company, to reach and subject the fire insurance taken out by the compress company for the benefit of the railroad company, and for other relief set forth in the bill. The plaintiffs in the suit were, a corporation under the laws of Pennsylvania, a corporation under the laws of New York, and a corporation under the laws of Rhode Island, on behalf of themselves and of all other companies standing in like position. On the other side were two corporations under the laws of Pennsylvania, two corporations under the laws of Great Britain, a corporation under the laws of New York, certain residents of Rhode Island, certain citizens of New York, certain citizens of Tennessee, two aliens, and forty-four insurance companies of West Virginia, Pennsylvania, New York, Illinois, Louisiana, Wisconsin, Alabama, Connecticut, Ohio, Texas, Indiana, and Great Britain. The defendants petitioned for the removal of the cause to the Circuit Court of the United States, on the ground that the controversy was wholly between citizens of different States, or between citizens of one or more of the several States and foreign

Illinois, pursuant to the opinion of this court in this cause," reported in 147 U. S. 1. At the same term the commissioners filed a report of their doings, which was ordered to be confirmed, and it was further ordered "that said commissioners proceed to determine and mark the boundary line between said States throughout its extent, and report thereon to this court, with all convenient speed." At the present term the State of Illinois moved to set aside the order of confirmation. The State of Iowa resisted on the ground, among others, that the decree of confirmation was a final decree, which could not be set aside at a term subsequent to that at which it was entered. *Held*, that the confirmation of the report was not a final decree deciding and disposing of the whole merits of the cause, and discharging the parties from further attendance; that the court could not dispose of the case by piecemeal; and that until the boundary line throughout its extent is determined, all orders in the case will be interlocutory. *Iowa* v. *Illinois*, 238.

8. In the exercise of original jurisdiction in the determination of the boundary line between sovereign States, this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded. *Ib.*

9. Under the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, 827, when an appeal or writ of error is taken from a District Court or a Circuit Court in which the jurisdiction of the court alone is in issue, a certificate from the court below of the question of jurisdiction to be decided is an absolute prerequisite for the exercise of jurisdiction here; and, if it be wanting, this court cannot take jurisdiction. *Maynard* v. *Hecht*, 324.

10. Following *Maynard* v. *Hecht*, *ante*, 324, this case is dismissed for want of jurisdiction. *Moran* v. *Hagerman*, 329.

11. This case is dismissed on the authority of *Meagher* v. *Minnesota Thresher Mfg. Co.*, 145 U. S. 608, (and other cases named in the opinion,) in which it was held that a judgment of the highest court of a State, overruling a demurrer, and remanding the case to the trial court for further proceedings, is not a final judgment. *Werner* v. *Charleston*, 360.

12. Two parties claiming title to the same land in California, each under a Mexican grant made prior to the treaty of Guadalupe Hidalgo, and each under a patent from the United States, one of them filed a bill in equity against the other in a District Court in San Francisco to quiet title. The cause was transferred to the Superior Court for that city and county, and being heard there, it was decreed that the defendant's title was procured by fraud, and the relief sought for was granted. On appeal to the Supreme Court of the State the judgment was affirmed, the court saying that the question of the genuineness of each original grant was a legitimate subject of inquiry, when the issue

C. Of Circuit Courts of Appeal.

The Circuit Court of Appeals for the Eighth Circuit has no jurisdiction in error over a judgment of the Supreme Court of the Territory of New Mexico in a case not in admiralty, nor arising under the criminal, revenue, or patent laws of the United States, nor between aliens and citizens of the United States or between citizens of different States. *Aztec Mining Co.* v. *Ripley*, 79.

D. Jurisdiction of Circuit Courts of the United States.

1. When the jurisdiction of a Circuit Court has fully attached against the tenant in possession in an action of ejectment, the substitution of the landlord as defendant will in no way affect that jurisdiction, although he may be a citizen of the same State with the plaintiff. *Hardenberg* v. *Ray*, 112.
2. A domestic corporation, incorporated under the laws of Texas, a State divided into more than one Federal district is, under the State law and the Federal laws as to the bringing of suits and actions in Federal courts, a citizen and inhabitant of that district in the State within which the general business of the corporation is done, and where it has its headquarters and general offices. *Galveston, Harrisburg and San Antonio Railway Co.* v. *Gonzales*, 496.
3. A railway company, incorporated under the laws of Texas, in which there is more than one Federal district, and having its headquarters and principal offices in one of those districts, is an inhabitant of that district, and cannot be said to be an inhabitant of the other Federal district in the State, although it operates its line of railroad through it, and maintains freight and ticket offices and stations in it. *Ib.*
4. If an alien desires to commence an action or bring a suit against a citizen of the United States, he must resort to the domicil of the defendant in order to bring it. *Ib.*
5. *In re Hohorst*, 150 U. S. 653, distinguished from this case. *Ib.*
6. *Southern Pacific Company* v. *Denton*, 146 U. S. 202, and *Mexican Central Railway* v. *Pinkney*, 149 U. S. 194, followed in holding that a statute of a State which makes 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 jurisdiction by reason of nonresidence, is not applicable, under Rev. Stat. § 914, to actions in a Circuit Court of the United States held within the State. *Ib.*
7. Under the act of March 3, 1885, c. 341, 23 Stat. 362, the Federal court in Wisconsin has jurisdiction to try an Indian charged with murdering another Indian within the limits of section 16 in a township in that State which is embraced within and forms part of the La Court Oreilles reservation for the Chippewa Indians. *United States* v. *Thomas*, 577.
8. A Chippewa Indian being indicted in the District Court of the United

LOCAL LAW.

LONGEVITY PAY.

RECEIVER.

REMITTITUR.

See JUDGMENT.

REMOVAL OF CAUSES.

SUMMONS AND SEVERANCE.

SURVIVAL.

TAX AND TAXATION.

1. The Federal courts universally follow the rulings of the state courts in matters of local law, arising under tax laws, unless it is claimed that some right, protected by the Federal Constitution, has been invaded. *Lewis* v. *Monson*, 545.
2. When a person acquires tracts of land in Mississippi, designated by numbers upon an official map, which tracts are from year to year assessed according to those numbers, and the taxes paid as assessed, and a new official map is filed without his knowledge, with different divisions and a different numeration, he is not bound as matter of law to take notice of the new map; and if, after its filing, he pays his taxes under a mistake, intending in good faith to pay all his taxes, but fails to pay on a tract by reason of the changes in the map, and such tract is sold for non-payment of the tax, he remaining in possession, his title will prevail in an action by the purchaser to recover possession of it. *Ib.*

TORT.

1. If one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer. *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 1.

2. When a man does an act which in law and fact is a wrongful act, and injury to another results from it as a natural and probable consequence, an action on the case will lie. *Ib.*

TOWN SITE.

See MINERAL LAND.

TRUST.

1. It is a general principle of law that a trust estate must bear the expense of its administration. *Meddaugh* v. *Wilson*, 333.
2. A corporation in Michigan was the owner of a large and valuable real estate. Three successive mortgages on this property were created, and a large amount of corporation bonds secured by them were issued. Suits being begun for the foreclosure of these mortgages, a receiver was appointed by the court to take possession of and hold all the mortgaged property. The corporation was then adjudged to be a bankrupt. Assignees were appointed, who appeared by counsel in the foreclosure suits and contested them. The property remained with the receiver, and never passed into the possession of the assignees. Negotiations took place, looking towards a sale of the property and a reorganization, which contemplated that a certain proportion of shares in the reorganization should be delivered to W. In the course of the negotiations, the amount which the assignees were entitled to receive, and the amount which should be paid to their counsel, were determined, with the assent of all parties. W. agreed to pay this sum to D. for them out of the moneys to be received by him. These negotiations fell through. New negotiations then took place, looking towards a different scheme for reorganization. Under these a decree of foreclosure was obtained, under which the property was sold to M. and W. No provision was made in the decree for the payment of the sums agreed to be due to the assignees and their counsel, but the court was informed that satisfactory arrangements had been made therefor. In the reorganization a large amount of stock was allotted to W., but not so much, in proportion to the full amount, as had been allotted to him by the previous arrangement. The claims of the assignees in bankruptcy being transferred to their counsel, the latter filed their bill in equity against W., to charge him as trustee with the payment of the claims of both assignees and counsel, by virtue of his holding the shares which had been allotted to him in the new company. A large amount of proof was taken, much of which is referred to by the court in its opinion, and, as the result of examination, it was *held*, (1) That W. had assumed the payment of the claims of the assignees in bankruptcy and of their counsel, and that these claims were a lien in equity upon the stock of the new corporation in his hands; (2) That W., having received in the