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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.
EDWARD DOUGLASS WHITE,[1] Associate Justice.

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

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[1] Mr. Justice White's commission is dated February 19, 1894. He took the oath of office in open court, March 12, 1894, and at once took his seat upon the bench.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1893.

SHIVELY *v.* BOWLBY.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 787. Submitted December 2, 1892. — Decided March 5, 1894.

This court has jurisdiction to review by writ of error a judgment of the highest court of the State of Oregon, deciding that a donation land claim under the act of Congress of September 27, 1850, c. 76, of land bounded by tide water, passed no title or right below high water mark, as against a subsequent grant from the State.

By the common law, the title in the soil of the sea, or of arms of the sea, below high water mark, except so far as private rights in it have been acquired by express grant, or by prescription or usage, is in the King, subject to the public rights of navigation and fishing; and no one can erect a building or wharf upon it, without license.

Upon the American Revolution, the title and the dominion of the tide waters and of the lands under them vested in the several States of the Union within their respective borders, subject to the rights surrendered by the Constitution to the United States.

In the original States, by various laws and usages, the owners of lands bordering on tide waters were allowed greater rights and privileges in the shore below high water mark, than they had in England.

The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions.

The United States, upon acquiring a Territory, whether by cession from one of the States, or by treaty with a foreign country, or by discovery

Statement of the Case.

and settlement, take the title and the dominion of lands below high water mark of tide waters for the benefit of the whole people, and in trust for the future States to be created out of the Territory.

Upon the question how far the title extends of the owner of land bounding on a river actually navigable, but above the ebb and flow of the tide, there is a diversity in the laws of the different States; but the prevailing doctrine now is that he does not, as in England, own to the thread of the stream.

The title and rights of riparian or littoral proprietors in the soil below high water mark are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

The United States, while they hold country as a Territory, have all the powers both of national and of municipal government, and may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters.

Congress has not undertaken, by general laws, to dispose of lands below high water mark of tide waters in a Territory; but, unless in case of some international duty or public exigency, has left the administration and disposition of the sovereign rights in such waters and lands to the control of the States, respectively, when admitted into the Union.

A donation land claim, bounded by the Columbia River, acquired under the act of Congress of September 27, 1850, c. 76, while Oregon was a Territory, passes no title or right in lands below high water mark, as against a subsequent grant from the State of Oregon, pursuant to its statutes.

The original suit was in the nature of a bill in equity, brought June 8, 1891, by John Q. A. Bowlby and W. W. Parker against Charles W. Shively and wife, in the Circuit Court for the county of Clatsop and State of Oregon, to quiet the title to lands below high water mark in the city of Astoria. The case, as appearing by the record, was as follows:

On and before May 20, 1854, John M. Shively and wife were the owners of a donation land claim, as laid out and recorded by him under the act of Congress of September 27, 1850, c. 76, (9 Stat. 496,) commonly known as the Oregon Donation Act, embracing the then town and much of the present city of Astoria, and bounded on the north by the Columbia River.

On May 20, 1854, John M. Shively laid out and caused to be recorded a plat of that claim, not only of the land above high water mark, but also of adjacent tide lands and a portion of the bed of the Columbia River, including the lands in controversy, and divided into blocks three hundred feet square,

and separated from each other by streets thirty or sixty feet wide, some running at right angles to, and the others nearly parallel with, high water mark, the outermost of which streets were not within eight hundred feet of the ship channel.

Blocks 4 and 9 were above ordinary high water mark. Block 146 was in front of block 4, and between high and low water mark. In front of block 9 came blocks 141, 126 and 127 successively. A strip about fifty feet wide, being the southern part of block 141, was above high water mark, and the whole of the rest of that block was below high water mark and above low water mark. The line of ordinary low tide was on September 18, 1876, at the north line of that block: but on December 15, 1890, and for some time before this date, was one hundred feet north of the north line of block 127.

On February 18, 1860, John M. Shively and wife conveyed blocks 9, 126, 127 and 146, "in the town plat of Astoria, as laid out and recorded by John M. Shively," to James Welch and Nancy Welch, whose title was afterwards conveyed to the plaintiffs.

On June 2, 1864, John M. Shively laid out and caused to be recorded an additional plat, covering all the space between blocks 127 and 146 and the channel.

In 1865, the United States issued a patent to John M. Shively and wife for the donation land claim, bounded by the Columbia River.

On September 18, 1876, the State of Oregon, by its governor, secretary and treasurer, acting as the board of school land commissioners, pursuant to the statute of Oregon of October 26, 1874, (Laws of 1874, p. 76,) amending the statute of Oregon of October 28, 1872, (Laws of 1872, p. 129,) the provisions of both of which statutes are set forth in the margin,[1] (the words printed in brackets having been in the statute of 1872 only,

[1] An Act to provide for the sale of tide and overflowed lands on the sea shore and coast.

Whereas, in many of the bays, harbors and inlets on the sea coast of this State, the sea is annually encroaching upon the land, washing away the shores and shoaling such bays, harbors and inlets; and

and those printed in italics having been inserted in the statute of 1874,) executed to the plaintiffs a deed of all the lands lying

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Whereas such encroachments can be prevented only at great expense, and by occupying and placing improvements upon the tide and overflowed lands belonging to the State; and

Whereas it is desirable that facilities and encouragement should be offered to the owners of the soil abutting upon the coast in such bays, harbors and inlets to make improvements and expenditures that will stay such encroachments:

Therefore, Be it enacted by the Legislative Assembly of the State of Oregon:

SEC. 1. That the owner or owners of any land abutting or fronting upon or bounded by the shore *of the Pacific Ocean, or* of any bay, harbor or inlet [on the sea coast of this State] *of the same, and rivers and their bays, in which the tide ebbs and flows, within this State*, shall have the right to purchase [from the State] all the tide land belonging to [the] *this* State in front of [such owner or owners] *the lands so owned:* Provided, that if valuable improvements have been made upon any of the tide lands of this State before the title to the land on the shore shall have passed from the United States, the owner of such improvements shall have exclusive right to purchase the lands so improved, extending to low water mark, for a period of [one year] *three years* from the approval of [this act] *the act to which this is amendatory; Provided, further, that the Willamette River shall not be deemed a river in which the tide ebbs and flows, within the meaning of this act, or of the act to which this act is amendatory; and the title of this State to any tide or overflowed lands upon said Willamette River is hereby granted and confirmed to the owners of the adjacent lands, or, when any such tide or overflowed lands have been sold, then in that case to the purchaser or purchasers of such tide or overflowed lands from such owner of such adjacent lands, or some previous owner thereof, as the case may be.*

SEC. 2. The officers of this State, who now are or who may hereafter be authorized to dispose of the school lands belonging to this State, are authorized, empowered and directed to sell such tide lands, upon proper application to purchase by parties hereby authorized to purchase; and all such tide lands shall be sold, and the money resulting from such sale shall be distributed, in accordance with the laws of this State, which now are or may hereafter be in force respecting the sale of the school lands of this State; Provided, that in the certificates of sale and patents for such lands the same shall be described as —— acres of tide land, or land under water belonging to this State, in front of the following described premises. (Here describe by legal subdivisions the lands in front of which said tide lands are located.)

SEC. 3. Every applicant for the purchase of tide land, under section 1 of this act, shall, with his application, present to the officer or officers, who are or shall be authorized to sell such lands, the evidences of his title to land which abuts or fronts upon or is bounded by such tide lands; and

between high water mark and low water mark in front of block 9, including all the tide land in block 141; and also a

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before making such sale such officer or officers shall be satisfied that such applicant is the owner of such lands so fronting, abutting or bounded as aforesaid.

SEC. 4. The value of such tide lands shall be appraised at a certain sum per acre of the same, and such appraisal shall not value such lands at less than $1.25 for each acre of such land: Provided, the board having in charge the sale of said lands shall have power to set aside any appraisement on evidence taken of the true value of the same, and shall make another and true appraisement based on such evidence.

SEC. 5. If any person or persons who, at the passage of [this act] *the act of which this is amendatory* [shall be] *were* entitled [under section 1 thereof] to purchase any tide lands *under the provisions of section* 1 *thereof* shall not, [within twelve months from the passage of this act, make application to purchase such tide lands] *have applied for the same within three years from the passage of said act*, or, having made such application, shall have failed to prosecute the same, as provided by law, then such [lands] *land* shall be open to purchase by any other person who is a citizen and resident of the State of Oregon: Provided, that *when any application shall be made for the purchase of any such tide land by any person or persons other than the owner or owners of the land adjacent to such tide lands, or the purchaser or purchasers of such tide lands from such owner of adjacent lands, or some previous owner thereof, notice shall be given by said board to the owner or owners of such adjacent lands, and to any parties who are in possession of, or who shall have improved such tide lands in any manner, and such owner or owners of such adjacent lands, or the person in possession of such tide lands by purchase from such owner of such adjacent lands, or any previous owner thereof, or who shall have improved the same, shall have sixty days after service of such notice to make application for the purchase of such tide lands, and such application shall have preference over all others, and in case any person to whom notice is hereby required to be given cannot, after due diligence, be found, notice may be given at the cost of the applicant by publication in the state paper for four successive weeks; and all applications to purchase tide lands by the owner of adjacent lands shall be accompanied by the affidavit of the applicant, setting forth the fact that such land is not held by any other person under a deed from said applicant, or any person under whom he holds; but* this [section] *provision* shall not apply to [any] *the tide* lands abutting *upon* [or fronting on or bounded by the sea shore, which are] *lands* owned by the United States: [And] provided further, that if the United States *has parted or* shall [hereafter] part with its title to any lands of which, at the passage of [this act] *the act of which this is amendatory* it [is] *was* the owner, [fronting or abutting upon or bounded by the sea shore,] the grantee of such lands shall have [twelve months] *three years* after perfecting his title from the United States to apply for [the] *all* tide lands in front thereof *which may be owned by the State*,

deed of all the tide lands in block 146; but never executed to any one a deed of any tide lands north of block 146.

The plaintiffs afterwards held possession of the lands so conveyed to them, and maintained a wharf in front of block 127, which extended several hundred feet into the Columbia River, and at which ocean and river craft were wont to receive and discharge freight.

On December 15, 1890, John M. Shively, having acquired whatever title his wife still had in the lands in controversy, conveyed all his right, title and interest therein to the defendant Charles W. Shively.

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and, in case of his failure to make such application within said period of [twelve months] *three years*, or, having made such application, [in case of his failure] *shall fail* to prosecute the same [as provided by] *according to* law, such tide [lands] *land* shall be open to purchase by any other person who is a citizen and resident of the State of Oregon.

SEC. 6. Nothing in this act provided shall prevent the Legislature of this State, or the corporate authorities of any city or town thereof, from regulating the building of wharves or other improvements in any bay, harbor or inlet of this State; and nothing in this act provided shall be construed as a grant of an exclusive right to any person or persons to use the natural oyster beds of this State; but the grantee of any land in this State, under this act, shall hold the same subject to the easement of the public, as provided by the existing laws of this State, to enter thereupon and remove, under the provisions and restrictions of the laws of this State, oysters and other shell fish therefrom.

SEC. 7. All applicants to purchase lands under the provisions of this act shall, at their own expense, cause the same to be surveyed by the county surveyor of the county in which such lands are situated, such survey to conform to and connect with the surveys of the United States adjoining, as far as may be practicable; and the certificate of the county surveyor, describing the lands applied for by metes and bounds and designating the quantity thereof, shall be forwarded under the certificate of appraisement to the officers of the State who are authorized to sell the same.

SEC. 8. Inasmuch as there is no law upon this subject at the present time, this act shall take effect from and after its passage.

The act of 1874 contains two additional sections, the one providing that *the title to all tide lands heretofore sold, and for which conveyances have already been executed, under the provisions of the act to which this is amendatory, be and the same is hereby confirmed unto the purchasers thereof;* and the other providing that, *inasmuch as the existing law does not authorize the sale of tide lands lying on the ocean beach and the rivers and bays thereof, this act shall take effect and be in force from and after its approval by the Governor.*

Statement of the Case.

On April 7, 1891, the defendants, pretending to act under the statute of Oregon of February 18, 1891, (Laws of 1891, p. 594,) executed and recorded an instrument dedicating to the public their interest in some of the streets adjacent to these lands.

The plaintiffs claimed, under the deeds from the State of Oregon, the title in all the tide lands on the west half of block 141, on all of blocks 126 and 127 and north thereof, and on the west half of block 146 and north thereof, between the lines of low and ordinary high tide of the Columbia River; and also claimed all the wharfing rights and privileges in front thereof to the ship channel; and prayed that the cloud created by the defendants' instrument of dedication might be removed, and the defendants be adjudged to have no title or right in the premises, and for further relief.

The defendants denied any title or right in the plaintiffs, except in the west half of block 146; and, by counter-claim, in the nature of a cross bill, stating the facts above set forth, asserted that, under the patent from the United States to John M. Shively, and his deed to Charles W. Shively, the latter was the owner in fee simple of so much of the east half of block 141 as was above high water mark, and of all the tide lands and riparian and wharfing rights in front thereof to the channel, excepting blocks 126 and 127; and was also the owner of all the riparian and wharfing rights in front of block 4 to the channel, excepting block 146; and contended that the first deed from the State of Oregon to the plaintiffs conveyed no title in that part of block 141 above high water mark, or in any tide lands, and that John M. Shively's conveyance of specific blocks by reference to his plat passed no wharfing rights in front thereof; and prayed that Charles W. Shively might have possession of said premises, and damages against the plaintiffs for withholding the same, and further relief.

The court sustained a demurrer of the plaintiffs to the counter-claim, (except as to that part of block 141 above high water mark,) and dismissed that claim; and then, on motion of the plaintiffs, dismissed their suit, without prejudice to their interest in the subject thereof.

The defendant Charles W. Shively appealed to the Supreme Court of the State, which affirmed the judgment, upon the ground that the grant from the United States, bounded by the Columbia River, passed no title or right in lands below high water mark, as against the subsequent deeds from the State of Oregon. 22 Oregon, 410.

The said defendant thereupon sued out this writ of error, and assigned the following errors:

"First. The Supreme Court of Oregon decided that a grantee of the United States, under the act of Congress of September 27, 1850, known as the Oregon Donation Land Law, of land bounded by the tidal navigable waters of the Columbia River, obtained by virtue of said grant no exclusive access to the channel of said river, and no wharfage rights below ordinary high tide of said river in front of said high land."

"Second. The Supreme Court of Oregon decided that said State was the absolute owner of all rights in front of the high land granted by the United States to said grantee, with said Columbia River as a boundary, below the meander line, out to the channel of said Columbia River, to the exclusion of all rights of the grantee aforesaid of the United States, under the said act of Congress of September 27, 1850."

"Third. The Supreme Court of Oregon decided that said State had the absolute power to dispose of the soil of said river and of all wharfage rights in front of the high land granted by the United States to said grantee, the predecessor of the plaintiff in error, with said Columbia River as a boundary, to a private person for a private beneficial use, and had so disposed of the same to the defendants in error."

Mr. A. H. Garland, *Mr. John F. Dillon*, and *Mr. Sidney Dell* for plaintiff in error.

Mr. J. N. Dolph for defendants in error.

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

Opinion of the Court.

This case concerns the title in certain lands below high water mark in the Columbia River in the State of Oregon; the defendant below, now plaintiff in error, claiming under the United States, and the plaintiffs below, now defendants in error, claiming under the State of Oregon; and is in substance this: James M. Shively, being the owner, by title obtained by him from the United States under the act of Congress of September 27, 1850, c. 76, while Oregon was a Territory, of a tract of land in Astoria, bounded north by the Columbia River, made a plat of it, laying it out into blocks and streets, and including the adjoining lands below high water mark; and conveyed four of the blocks, one above and three below that mark, to persons who conveyed to the plaintiffs. The plaintiffs afterwards obtained from the State of Oregon deeds of conveyance of the tide lands in front of these blocks, and built and maintained a wharf upon part of them. The defendant, by counter-claim, asserted a title, under a subsequent conveyance from Shively, to some of the tide lands, not included in his former deeds, but included in the deeds from the State.

The counter-claim, therefore, depended upon the effect of the grant from the United States to Shively of land bounded by the Columbia River, and of the conveyance from Shively to the defendant, as against the deeds from the State to the plaintiffs. The Supreme Court of Oregon, affirming the judgment of a lower court of the State, held the counter-claim to be invalid, and thereupon, in accordance with the state practice, gave leave to the plaintiffs to dismiss their complaint, without prejudice. Hill's Code of Oregon, §§ 246, 393.

The only matter adjudged was upon the counter-claim. The judgment against its validity proceeded upon the ground that the grant from the United States upon which it was founded passed no title or right, as against the subsequent deeds from the State, in lands below high water mark. This is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a Federal question within the appellate jurisdiction of

over

this court. Rev. Stat. § 709. That jurisdiction has been repeatedly exercised, without objection or doubt, in similar cases of writs of error to the state courts. *Railroad Co.* v. *Schurmeir*, 7 Wall. 272; *Packer* v. *Bird*, 137 U. S. 661; *Knight* v. *United States Land Association*, 142 U. S. 161.

It was argued for the defendants in error that the question presented was a mere question of construction of a grant bounded by tide water, and would have been the same as it is if the grantor had been a private person. But this is not so. The rule of construction in the case of such a grant from the sovereign is quite different from that which governs private grants. The familiar rule and its chief foundation were felicitously expressed by Sir William Scott: "All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away." *The Rebeckah*, 1 C. Rob. 227, 230. Many judgments of this court are to the same effect. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 544–548; *Martin* v. *Waddell*, 16 Pet. 367, 411; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 49.

In *Yesler* v. *Washington Harbor Commissioners*, at the last term, in which the writ of error was dismissed for want of jurisdiction, it did not appear that the plaintiff in error claimed under a grant from the United States. 146 U. S. 646, 653, 654.

The present case being clearly within our jurisdiction, we proceed to the consideration of its merits.

The briefs submitted to the court in the case at bar, as well as in *Yesler* v. *Washington Harbor Commissioners*, above cited, and in *Prosser* v. *Northern Pacific Railroad*, (which now stands for judgment,) have been so able and elaborate, and have disclosed such a diversity of view as to the scope

and effect of the previous decisions of this court upon the subject of public and private rights in lands below high water mark of navigable waters, that this appears to the court to be a fit occasion for a full review of those decisions and a consideration of other authorities upon the subject.

I. By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit.

The great authority in the law of England upon this subject is Lord Chief Justice Hale, whose authorship of the treatise *De Jure Maris*, sometimes questioned, has been put beyond doubt by recent researches. Moore on the Foreshore, (3d ed.) 318, 370, 413.

In that treatise, Lord Hale, speaking of "the King's right of propriety or ownership in the sea and soil thereof" within his jurisdiction, lays down the following propositions: "The right of fishing in this sea and the creeks and arms thereof is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river." "But though the King is the owner of this great waste, and as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without

injury to their right be restrained of it, unless in such places, creeks or navigable rivers, where either the King or some particular subject hath gained a propriety exclusive of that common liberty." "The shore is that ground that is between the ordinary high water and low water mark. This doth *prima facie* and of common right belong to the King, both in the shore of the sea and the shore of the arms of the sea." Hargrave's Law Tracts, 11, 12. And he afterwards explains: "Yet they may belong to the subject in point of propriety, not only by charter or grant, whereof there can be but little doubt, but also by prescription or usage." "But though the subject may thus have the propriety of a navigable river part of a port, yet these cautions are to be added, viz." "2d. That the people have a public interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances." "For the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the King's subjects; as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified." pp. 25, 36.

So in the second part, *De Portibus Maris*, Lord Hale says that "when a port is fixed or settled by" "the license or charter of the King, or that which presumes and supplies it, viz. custom and prescription;" "though the soil and franchise or dominion thereof *prima facie* be in the King, or by derivation from him in a subject; yet that *jus privatum* is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are interested, by reason of common commerce, trade and intercourse." "But the right that I am now speaking of is such a right that belongs to the King *jure prerogativæ*, and it is a distinct right from that of propriety; for, as before I have said, though the dominion either of franchise or propriety be lodged either by prescription or charter in a subject, yet it is charged or affected with that *jus publicum* that belongs to all men, and so it is charged or affected with that *jus regium*, or right of preroga-

tive of the King, so far as the same is by law invested in the King." Hargrave's Law Tracts, 84, 89.

In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage; *Fitzwalter's Case*, 3 Keb. 242; *S. C.* 1 Mod. 105; 3 Shep. Ab. 97; Com. Dig. Navigation, A, B; Bac. Ab. Prerogative, B; *The King* v. *Smith*, 2 Doug. 441; *Attorney General* v. *Parmeter*, 10 Price, 378, 400, 401, 411, 412, 464; *Attorney General* v. *Chambers*, 4 D. M. & G. 206, and 4 D. & J. 55; *Malcomson* v. *O'Dea*, 10 H. L. Cas. 591, 618, 623; *Attorney General* v. *Emerson*, (1891) App. Cas. 649; and that this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing. *Attorney General* v. *Parmeter*, above cited; *Attorney General* v. *Johnson*, 2 Wilson Ch. 87, 101–103; *Gann* v. *Free Fishers of Whitstable*, 11 H. L. Cas. 192. The same law has been declared by the House of Lords to prevail in Scotland. *Smith* v. *Stair*, 6 Bell App. Cas. 487; *Lord Advocate* v. *Hamilton*, 1 Macq. 46, 49.

It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention. Lord Hale, in Hargrave's Law Tracts, 17, 18, 27; *Somerset* v. *Fogwell*, 5 B. & C. 875, 885; *S. C.* 8 D. & R. 747, 755; *Smith* v. *Stair*, 6 Bell App. Cas. 487; *United States* v. *Pacheco*, 2 Wall. 587.

By the law of England, also, every building or wharf erected, without license, below high water mark, where the soil is the King's, is a purpresture, and may, at the suit of the King, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation. Lord Hale, in Hargrave's Law Tracts, 85; Mitf. Pl. (4th ed.) 145; *Blundell* v. *Catterall*, 5 B. & Ald. 268, 298, 305; *Attorney General* v. *Richards*, 2 Anstr. 603, 616; *Attorney General* v. *Parmeter*, 10 Price, 378, 411, 464; *Attorney General* v. *Terry*, L. R. 9 Ch. 425, 429,

note; *Weber* v. *Harbor Commissioners*, 18 Wall. 57, 65; *Barney* v. *Keokuk*, 94 U. S. 324, 337.

By recent judgments of the House of Lords, after conflicting decisions in the courts below, it has been established in England, that the owner of land fronting on a navigable river in which the tide ebbs and flows has a right of access from his land to the river; and may recover compensation for the cutting off of that access by the construction of public works authorized by an act of Parliament which provides for compensation for "injuries affecting lands," "including easements, interests, rights and privileges in, over or affecting lands." The right thus recognized, however, is not a title in the soil below high water mark, nor a right to build thereon, but a right of access only, analogous to that of an abutter upon a highway. *Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418; *Lyon* v. *Fishmongers Co.*, 1 App. Cas. 662. "That decision," said Lord Selborne, "must be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the *lex loci*." *North Shore Railway* v. *Pion*, 14 App. Cas. 612, 620, affirming 14 Canada Sup. Ct. 677.

II. The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several Colonies and States, or by the Constitution and laws of the United States.

The English possessions in America were claimed by right of discovery. Having been discovered by subjects of the King of England, and taken possession of in his name, by his authority or with his assent, they were held by the King as the representative of and in trust for the nation; and all vacant lands, and the exclusive power to grant them, were vested in him. The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters. And upon the Ameri-

can Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States. *Johnson* v. *McIntosh*, 8 Wheat. 543, 595; *Martin* v. *Waddell*, 16 Pet. 367, 408–410, 414; *Commonwealth* v. *Roxbury*, 9 Gray, 451, 478–481; *Stevens* v. *Paterson & Newark Railroad*, 5 Vroom, (34 N. J. Law,) 532; *People* v. *New York & Staten Island Ferry*, 68 N. Y. 71.

The leading case in this court, as to the title and dominion of tide waters and of the lands under them, is *Martin* v. *Waddell*, (1842,) 16 Pet. 367, which arose in New Jersey, and was as follows: The charters granted by Charles II. in 1664 and 1674 to his brother the Duke of York (afterwards James II.) included New York and New Jersey and the islands of Martha's Vineyard and Nantucket, and conveyed to the Duke the territories therein described, "together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings and fowling, and all other royalties, profits, commodities and hereditaments," thereto belonging or appertaining, and all the "estate, right, title, interest, benefit, advantage, claim and demand" of the King, of, in or to the same; as well as full powers of government: provided, however, that all statutes, ordinances and proceedings should not be contrary to, but, as near as conveniently might be, agreeable to the laws, statutes and government of England. All these rights, both of property and of government, in a part of those territories, were granted by the Duke of York to the Proprietors of East Jersey; and they, in 1702, surrendered to Queen Anne all "the powers, authorities and privileges of and concerning the government of" the Province, retaining their rights of private property. Leaming and Spicer's New Jersey Grants, 4, 5, 42, 43, 148, 149, 614, 615. An action of ejectment was brought in the Circuit Court of the United States for the District of New Jersey, for land under tide waters in Raritan Bay and River, to which the plaintiff claimed title under specific conveyances of that land from the Proprietors of East Jersey, and of which the defendants were in possession, for the purpose of

planting and growing oysters, under a statute passed by the legislature of the State of New Jersey in 1824.

This court, following, though not resting wholly upon, the decision of the Supreme Court of New Jersey in *Arnold* v. *Mundy*, 1 Halsted, (6 N. J. Law,) 1, gave judgment for the defendants, for reasons assigned in the opinion delivered by Chief Justice Taney, which cannot be better summed up than in his own words: "The country mentioned in the letters patent was held by the King in his public and regal character as the representative of the nation, and in trust for them." 16 Pet. 409. By those charters, in view of the principles stated by Lord Hale, in the passage above quoted concerning the right of fishing, "the dominion and propriety in the navigable waters, and in the soils under them, passed, as a part of the prerogative rights annexed to the political powers conferred on the Duke;" and "in his hands they were intended to be a trust for the common use of the new community about to be established" — "a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell fish as floating fish" — and not as "private property, to be parcelled out and sold by the Duke for his own individual emolument." "And in the judgment of the court, the lands under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner and for the same purposes that the navigable waters of England, and the soils under them, are held by the Crown." pp. 411–413. The surrender by the proprietors in 1702 restored to the Crown all "its ordinary and well known prerogatives," including "the great right of dominion and ownership in the rivers, bays and arms of the sea, and the soils under them," "in the same plight and condition in which they originally came to the hands of the Duke of York." p. 416. "When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government." p. 410.

It was in giving the reasons for holding that the royal charters did not sever the soil under navigable waters, and the public right of fishing, from the powers of government, and in speaking of the effect which grants of the title in the sea shore to others than the owner of the upland might have, not upon any peculiar rights supposed to be incident to his ownership, but upon the public and common rights in, and the benefits and advantages of, the navigable waters, which the colonists enjoyed "for the same purposes, and to the same extent, that they had been used and enjoyed for centuries in England," and which every owner of the upland therefore had in common with all other persons, that Chief Justice Taney, in the passage relied on by the plaintiff in error, observed: "Indeed, it could not well have been otherwise; for the men who first formed English settlements could not have been expected to encounter the many hardships that unavoidably attended their emigration to the New World, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another, as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell fish from its bottom, or fasten there a stake, or even bathe in its waters, without becoming a trespasser upon the rights of another." 16 Pet. 414.

The full extent of that decision may be more clearly appreciated by referring to the dissenting opinion of Mr. Justice Thompson in that case, and to the unanimous judgment of the court in the subsequent case of *Den* v. *Jersey Co.*, (1853,) 15 How. 426.

In *Martin* v. *Waddell*, Mr. Justice Thompson unavailingly contended that the title in the lands under the navigable tide water, the *jus privatum*, as distinguished from the *jus publicum*, passed as private property from the King to the Duke, and from him to the Proprietors of East Jersey, and was unaffected by their surrender to Queen Anne, and therefore passed from them to the plaintiff, subject indeed to the public rights of navigation, passing and repassing, and perhaps of fishery for floating fish, but not to the right of planting,

growing and dredging oysters; and also that, if the King held this land as trustee for the common benefit of all his subjects, and inalienable as private property, the State of New Jersey, on succeeding to his rights at the Revolution, could not hold it discharged of the trust, and dispose of it to the private and exclusive use of individuals. 16 Pet. 418–434.

In *Den* v. *Jersey Co.*, which was ejectment for land under tide water, that had been reclaimed and occupied as building lots by a corporation, pursuant to an act of the legislature of the State of New Jersey, the plaintiff, claiming under a conveyance from the Proprietors of East Jersey, contended that the fee of the soil under the navigable waters of that part of the State was conveyed to the Proprietors as private property, subject to the public use; that, the public use having ceased as to the land in question, they were entitled to the exclusive possession; and that nothing but the right of fishery was decided in *Martin* v. *Waddell.* But the court, again speaking by Chief Justice Taney, held that the decision in *Martin* v. *Waddell*, being in ejectment, necessarily determined the title to the soil, and governed this case; and therefore gave judgment for the grantee of the State, and against the claimant under the Proprietors. 15 How. 432, 433.

III. The governments of the several Colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed to the owners of lands bounding on tide waters greater rights and privileges in the shore below high water mark, than they had in England. But the nature and degree of such rights and privileges differed in the different Colonies, and in some were created by statute, while in others they rested upon usage only.

In Massachusetts, by virtue of an ancient colonial enactment, commonly called the Ordinance of 1641, but really passed in 1647, and remaining in force to this day, the title of the owner of land bounded by tide water extends from high water mark over the shore or flats to low water mark, if not beyond one hundred rods. The private right thus created in the flats is not a mere easement, but a title in fee,

which will support a real action, or an action of trespass *quare clausum fregit*, and which may be conveyed by its owner with or without the upland; and which he may build upon or enclose, provided he does not impede the public right of way over it for boats and vessels. But his title is subject to the public rights of navigation and fishery; and therefore, so long as the flats have not been built upon or enclosed, those public rights are not restricted or abridged; and the State, in the exercise of its sovereign power of police for the protection of harbors and the promotion of commerce, may, without making compensation to the owners of the flats, establish harbor lines over those flats, beyond which wharves shall not thereafter be built, even when they would be no actual injury to navigation. Mass. Colony Laws, (ed. 1660,) 50; (ed. 1872,) 90, 91; *Boston* v. *Lecraw*, 17 How. 426, 432, 433; *Richardson* v. *Boston*, 19 How. 263, and 24 How. 188; *Commonwealth* v. *Alger*, 7 Cush. 53, 67–81. It is because of the ordinance vesting the title in fee of the flats in the owner of the upland, that a conveyance of his land bounding on the tide water, by whatever name, whether "sea," "bay," "harbor" or "river," has been held to include the land below high water mark as far as the grantor owns. *Boston* v. *Richardson*, 13 Allen, 146, 155, and 105 Mass. 351, 355, and cases cited. As declared by Chief Justice Shaw, grants by the Colony of Massachusetts, before the ordinance, of lands bounded by tide water did not include any land below high water mark. *Commonwealth* v. *Alger*, 7 Cush. 53, 66; *Commonwealth* v. *Roxbury*, 9 Gray, 451, 491–493. See also *Litchfield* v. *Scituate*, 136 Mass. 39. The decision in *Manchester* v. *Massachusetts*, 139 U. S. 240, affirming 152 Mass. 230, upheld the jurisdiction of the State, and its authority to regulate fisheries, within a marine league from the coast.

The rule or principle of the Massachusetts ordinance has been adopted and practised on in Plymouth, Maine, Nantucket and Martha's Vineyard, since their union with the Massachusetts Colony under the Massachusetts Province Charter of 1692. *Commonwealth* v. *Alger*, 7 Cush. 53, 76, and other authorities collected in 9 Gray, 523.

In New Hampshire, a right in the shore has been recognized to belong to the owner of the adjoining upland, either by reason of its having once been under the jurisdiction of Massachusetts, or by early and continued usage. *Nudd* v. *Hobbs*, 17 N. H. 524, 526; *Clement* v. *Burns*, 43 N. H. 609, 621; *Concord Co.* v. *Robertson*, 66 N. H. 1, 26, 27.

In Rhode Island, the owners of land on tide water have no title below high water mark; but by long usage, apparently sanctioned by a colonial statute of 1707, they have been accorded the right to build wharves or other structures upon the flats in front of their lands, provided they do not impede navigation, and have not been prohibited by the legislature; and they may recover damages against one who, without authority from the legislature, fills up such flats so as to impair that right. Angell on Tide Waters, (2d ed.) 236, 237; *Folsom* v. *Freeborn*, 13 R. I. 200, 204, 210. It would seem, however, that the owner of the upland has no right of action against any one filling up the flats by authority of the State for any public purpose. *Gerhard* v. *Seekonk Commissioners*, 15 R. I. 334; *Clark* v. *Providence*, 16 R. I. 337.

In Connecticut, also, the title in the land below high water mark is in the State. But by ancient usage, without any early legislation, the proprietor of the upland has the sole right, in the nature of a franchise, to wharf out and occupy the flats, even below low water mark, provided he does not interfere with navigation; and this right may be conveyed separately from the upland; and the fee in flats so reclaimed vests in him. *Ladies' Seamen's Friend Society* v. *Halstead*, 58 Conn. 144, 150–152; *Prior* v. *Swartz*, 62 Conn. 132, 136–138. The exercise of this right is subject to all regulations the State may see fit to impose, by authorizing commissioners to establish harbor lines, or otherwise. *State* v. *Sargent*, 45 Conn. 358. But it has been intimated that it cannot be appropriated by the State to a different public use, without compensation. *Farist Co.* v. *Bridgeport*, 60 Conn. 278.

In New York, it was long considered as settled law that the State succeeded to all the rights of the Crown and Par-

liament of England in lands under tide waters, and that the owner of land bounded by a navigable river within the ebb and flow of the tide had no private title or right in the shore below high water mark, and was entitled to no compensation for the construction, under a grant from the legislature of the State, of a railroad along the shore between high and low water mark, cutting off all access from his land to the river, except across the railroad. *Lansing* v. *Smith*, 4 Wend. 9, 21; *Gould* v. *Hudson River Railroad*, 6 N. Y. 522; *People* v. *Tibbetts*, 19 N. Y. 523, 528; *People* v. *Canal Appraisers*, 33 N. Y. 461, 467; *Langdon* v. *New York*, 93 N. Y. 129, 144, 154–156; *New York* v. *Hart*, 95 N. Y. 443, 450, 451, 457; *In re Staten Island Rapid Transit Co.*, 103 N. Y. 251, 260. The owner of the upland has no right to wharf out, without legislative authority; and titles granted in lands under tide water are subject to the right of the State to establish harbor lines. *People* v. *Vanderbilt*, 26 N. Y. 287, and 28 N. Y. 396; *People* v. *New York & Staten Island Ferry*, 68 N. Y. 71. The law of that State, as formerly understood, has been recently so far modified as to hold — in accordance with the decision in *Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418, and contrary to the decisions in *Gould* v. *Hudson River Railroad*, above cited, and in *Stevens* v. *Paterson & Newark Railroad*, 5 Vroom, (34 N. J. Law,) 532 — that the owner of land bounded by tide water may maintain an action against a railroad corporation constructing its road by authority of the legislature so as to cut off his access to the water. *Williams* v. *New York*, 105 N. Y. 419, 436; *Kane* v. *New York Elevated Railroad*, 125 N. Y. 164, 184; *Rumsey* v. *New York & New England Railroad*, 133 N. Y. 79, and 136 N. Y. 543.

The law of New Jersey upon this subject was recognized and clearly stated in a recent judgment of this court, in which a grant by commissioners under a statute of the State to a railroad corporation, of a tract of land below high water mark, was held to preclude a city from continuing over the flats a highway dedicated to the public by the owner of the upland. "In the examination of the effect to be given to

the riparian laws of the State of New Jersey," said Mr. Justice Matthews, speaking for the court, "it is to be borne in mind that the lands below high water mark, constituting the shores and submerged lands of the navigable waters of the State, were, according to its laws, the property of the State as sovereign. Over these lands it had absolute and exclusive dominion, including the right to appropriate them to such uses as might best serve its views of the public interest, subject to the power conferred by the Constitution upon Congress to regulate foreign and interstate commerce. The object of the legislation in question was evidently to define the relative rights of the State, representing the public sovereignty and interest, and of the owners of land bounded by high water mark." "The nature of the title in the State to lands under tide water was thoroughly considered by the Court of Errors and Appeals of New Jersey in the case of *Stevens* v. *Paterson & Newark Railroad*, 5 Vroom, (34 N. J. Law,) 532. It was there declared (p. 549) 'that all navigable waters within the territorial limits of the State, and the soil under such waters, belong in actual propriety to the public; that the riparian owner, by the common law, has no peculiar rights in this public domain as incidents of his estate; and that the privileges he possesses by the local custom or by force of the wharf act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature. The result is that there is no legal obstacle to a grant by the legislature to the defendants of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high water mark.' It was therefore held, in that case, that it was competent for the legislative power of the State to grant to a stranger lands constituting the shore of a navigable river under tide water, below high water mark, to be occupied and used with structures and improvements in such a manner as to cut off the access of the riparian owner from his land to the water, and that without making compensation to him for such loss." *Hoboken* v. *Pennsylvania Railroad*, (1887,) 124 U. S. 656, 688, 690, 691.

The arguments on both sides of that proposition, upon general principles, as well as under the law of New Jersey, are nowhere more strongly and fully stated than by Chief Justice Beasley delivering the opinion of the majority of the court, and by Chancellor Zabriskie speaking for the dissenting judges, in *Stevens* v. *Paterson & Newark Railroad*, above cited, decided in 1870. Two years later, Chancellor Zabriskie recognized it as settled by that case, "that the lands under water, including the shore on the tide waters of New Jersey, belong absolutely to the State, which has the power to grant them to any one, free from any right of the riparian owner in them." *Pennsylvania Railroad* v. *New York & Long Branch Railroad*, 8 C. E. Green, (23 N. J. Eq.) 157, 159. See also *New York &c. Railroad* v. *Yard*, 14 Vroom, (43 N. J. Law,) 632, 636; *American Dock Co.* v. *Trustees of Public Schools*, 12 Stewart, (39 N. J. Eq.) 409, 445.

In Pennsylvania, likewise, upon the Revolution, the State succeeded to the rights, both of the Crown and of the Proprietors, in the navigable waters and the soil under them. *Rundle* v. *Delaware & Raritan Canal*, 14 How. 80, 90; *Gilman* v. *Philadelphia*, 3 Wall. 713, 726. But by the established law of the State, the owner of lands bounded by navigable water has the title in the soil between high and low water mark, subject to the public right of navigation, and to the authority of the legislature to make public improvements upon it, and to regulate his use of it. *Tinicum Co.* v. *Carter*, 61 Penn. St. 21, 30, 31; *Wainwright* v. *McCullough*, 63 Penn. St. 66, 74; *Zug* v. *Commonwealth*, 70 Penn. St. 138; *Philadelphia* v. *Scott*, 81 Penn. St. 80, 86; *Wall* v. *Pittsburgh Harbor Co.*, 152 Penn. St. 427.

In Delaware, as has been declared by its Supreme Court, "all navigable rivers within the State belong to the State, not merely in right of eminent domain, but in actual propriety." *Bailey* v. *Philadelphia, Wilmington & Baltimore Railroad*, 4 Harrington, (Del.) 389, 395. And see *Willson* v. *Blackbird Creek Co.*, 2 Pet. 245, 251.

In Maryland, the owner of land bounded by tide water is authorized, according to various statutes beginning in 1745, to

build wharves or other improvements upon the flats in front of his land, and to acquire a right in the land so improved. *Casey* v. *Inloes*, 1 Gill, 430; *Baltimore* v. *McKim*, 3 Bland, 453; *Goodsell* v. *Lawson*, 42 Maryland, 348; *Garitee* v. *Baltimore*, 53 Maryland, 422; *Horner* v. *Pleasants*, 66 Maryland, 475; *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U. S. 672, 675, 684, in which the question was who was the riparian owner, and as such entitled to wharf out into the Potomac River in the District of Columbia under the authority to do so expressly conferred under the laws of Maryland in force in the District. This court, speaking by Mr. Justice Curtis, in affirming the right of the State of Maryland to protect the oyster fishery within its boundaries, said: "Whatever soil below low water mark is the subject of exclusive propriety and ownership belongs to the State on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the State, or the sovereign power which governed its territory before the Declaration of Independence. But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell fish as floating fish." *Smith* v. *Maryland*, 18 How. 71, 74.

The State of Virginia was held by this court, upon like grounds, to have the right to prohibit persons not citizens of the State from planting oysters in the soil covered by tide waters within the State, Chief Justice Waite saying: "The principle has long been settled in this court, that each State owns the beds of all tide waters within its jurisdiction, unless they have been granted away. In like manner, the States own the tide waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States." *McCready* v. *Virginia*, 94 U. S. 391, 394. In Virginia, by virtue of statutes

beginning in 1679, the owner of land bounded by tide waters has the title to ordinary low water mark, and the right to build wharves, provided they do not obstruct navigation. 5 Opinions of Attorneys General, 412, 435–440; *French* v. *Bankhead*, 11 Grattan, 136, 159–161; *Hardy* v. *McCullough*, 23 Grattan, 251, 262; *Norfolk* v. *Cooke*, 27 Grattan, 430, 434, 435; *Garrison* v. *Hall*, 75 Virginia, 150.

In North Carolina, when not otherwise provided by statute, the private ownership of land bounded by navigable waters stops at high water mark, and the land between high and low water mark belongs to the State and may be granted by it. *Hatfield* v. *Grimstead*, 7 Iredell, 139; *Lewis* v. *Keeling*, 1 Jones, (No. Car.) 299, 306. The statutes of that State, at different periods, have either limited grants of land, bounded on navigable waters, to high water mark; or have permitted owners of the shore to make entries of the land in front, as far as deep water, for the purpose of a wharf; and any owner of the shore appears to have the right to wharf out, subject to such regulations as the legislature may prescribe for the protection of the public rights of navigation and fishery. *Wilson* v. *Forbes*, 2 Dev. 30; *Collins* v. *Benbury*, 3 Iredell, 277, and 5 Iredell, 118; *Gregory* v. *Forbes*, 96 No. Car. 77; *State* v. *Narrows Island Club*, 100 No. Car. 477; *Bond* v. *Wool*, 107 No. Car. 139.

In South Carolina, the rules of the common law, by which the title in the land under tide waters is in the State, and a grant of land bounded by such waters passes no title below high water mark, appear to be still in force. *State* v. *Pacific Guano Co.*, 22 So. Car. 50; *State* v. *Pinckney*, 22 So. Car. 484.

In Georgia, also, the rules of the common law would seem to be in force as to tide waters, except as affected by statutes of the State providing that "the right of the owner of lands adjacent to navigable streams extends to low water mark in the bed of the stream." Georgia Code of 1882, §§ 962, 2229, 2230; *Howard* v. *Ingersoll*, 13 How. 381, 411, 421; *Alabama* v. *Georgia*, 23 How. 505; *Savannah* v. *State*, 4 Georgia, 26, 39; *Young* v. *Harrison*, 6 Georgia, 130, 141.

The foregoing summary of the laws of the original States shows that there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.

IV. The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands below the high water mark, within their respective jurisdictions.

The act of 1783 and the deed of 1784, by which the State of Virginia, before the adoption of the Constitution, ceded "unto the United States in Congress assembled, for the benefit of the said States, all right, title and claim, as well of soil as jurisdiction," to the Northwest Territory, and the similar cession by the State of Georgia to the United States in 1802 of territory including great part of Alabama and of Mississippi, each provided that the territory so ceded should be formed into States, to be admitted, on attaining a certain population, into the Union, (in the words of the Virginia cession) "having the same rights of sovereignty, freedom and independence as the other States," or (in the words of the Ordinance of Congress of July 13, 1787, for the government of the Northwest Territory, adopted in the Georgia cession) "on an equal footing with the original States in all respects whatever;" and that "all the lands within" the territory so ceded to the United States, and not reserved or appropriated for other purposes, should be considered as a common fund for the use and benefit of the United States. Charters and Constitutions, 427, 428, 432, 433; Clayton's Laws of Georgia, pp. 48–51; Acts of Congress of April 7, 1798, c. 28; 1 Stat. 549; May 10, 1800, c. 50, and March 3, 1803, c. 27; 2 Stat. 69, 229; *Pollard* v. *Hagan*, 3 How. 212, 221, 222.

In *Pollard* v. *Hagan*, (1844,) this court, upon full con-

sideration, (overruling anything to the contrary in *Pollard* v. *Kibbe*, 14 Pet. 353; *Mobile* v. *Eslava*, 16 Pet. 234; *Mobile* v. *Hallett*, 16 Pet. 261; *Mobile* v. *Emanuel*, 1 How. 95; and *Pollard* v. *Files*, 2 How. 591,) adjudged that upon the admission of the State of Alabama into the Union, the title in the lands below high water mark of navigable waters passed to the State, and could not afterwards be granted away by the Congress of the United States. Mr. Justice McKinley, delivering the opinion of the court, (Mr. Justice Catron alone dissenting,) said: "We think a proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction or right of soil, in and to the territory of which Alabama or any of the new States were formed; except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French Republic of the 30th of April, 1803, ceding Louisiana." "When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new States, and to invest them with it to the same extent, in all respects, that it was held by the States ceding the territories." "When Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction and eminent domain, which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands." 3 How. 221–223. "Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union on an equal footing with the

original States, the Constitution, laws and compact to the contrary notwithstanding." "Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States." 3 How. 228, 229.

So much of the reasoning of the learned justice, as implied that the title in the land below high water mark could not have been granted away by the United States after the deed of cession of the territory and before the admission of the State into the Union, was not necessary to the decision, which involved only a grant made by Congress after the admission of Alabama, and which was followed in two similar cases in which Congress, after the admission of the State, had undertaken to confirm Spanish grants, made after the Treaty of San Ildefonso of 1800, and therefore passing no title whatever. *Goodtitle* v. *Kibbe*, (1850,) 9 How. 471; *Hallett* v. *Beebe*, (1851,) 13 How. 25. In the first of these cases, Chief Justice Taney, speaking for the whole court, of which Mr. Justice McKinley was still a member, said: "Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a State. But this was not done. And the existence of this imperfect and inoperative Spanish grant could not enlarge the power of the United States over the place in question after Alabama became a State, nor authorize the general government to grant or confirm a title to land when the sovereignty and dominion over it had become vested in the State." 9 How. 478.

V. That these decisions do not, as contended by the learned counsel for the plaintiff in error, rest solely upon the terms of the deed of cession from the State of Georgia to the United States, clearly appears from the constant recognition of the same doctrine as applicable to California, which was acquired from Mexico by the Treaty of Guadalupe Hidalgo of 1848. 9 Stat. 926; *United States* v. *Pacheco*, (1864,) 2 Wall. 587; *Mumford* v. *Wardwell*, (1867,) 6 Wall. 423; *Weber* v. *Harbor Commissioners*, (1874,) 18 Wall. 57; *Packer* v. *Bird*, (1891,) 137 U. S. 661, 666; *San Francisco* v. *Le Roy*, (1891,) 138 U. S. 656, 671; *Knight* v. *United States Land Association*, (1891,) 142 U. S. 161.

In *United States* v. *Pacheco*, it was decided that a grant from the Mexican government, confirmed by a decree of a court of the United States under authority of Congress, of land bounded "by the bay" of San Francisco, did not include land below ordinary high water mark of the bay; because, as was said by Mr. Justice Field, in delivering judgment, "By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails. And there is nothing in the language of the decree which requires the adoption of any other rule in the present case. If reference be had to the rule of the civil law, because the bay is given as a boundary in the grant from the Mexican government, the result will be equally against the position of the appellants." 2 Wall. 590.

The State of California was admitted into the Union in 1850, and within a year afterwards passed statutes, declaring that a certain line designated upon a recorded plan should "be and remain a permanent water front" of the city of San Francisco; reserving to the State "its right to regulate the construction of wharves or other improvements, so that they shall not interfere with the shipping and commercial interests of the bay and harbor;" and providing that the city might construct wharves at the end of all the streets commencing with the bay, not exceeding two hundred yards beyond that line, and that the spaces beyond, between the wharves, should remain free from obstructions and be used as public slips. In *Weber* v. *Harbor Commissioners*, it was held that a person afterwards acquiring the title of the city in a lot and wharf below high water mark had no right to complain of works constructed by commissioners of the State, under authority of the legislature, for the protection of the harbor and the convenience of shipping, in front of his wharf, and preventing the approach of vessels to it; and Mr. Justice Field, in delivering judgment, said: "Although the title to the soil under the tide waters of the bay was acquired by the

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United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the general government." 18 Wall. 65, 66.

In the very recent case of *Knight* v. *United States Land Association*, Mr. Justice Lamar, in delivering judgment, said: "It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States; and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf, as the original States possess within their respective borders. Upon the acquisition of the territory from Mexico, the United States acquired the title to tide lands, equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory." 142 U. S. 183. In support of these propositions he referred to *Martin* v. *Waddell*, *Pollard* v. *Hagan*, *Mumford* v. *Wardwell*, and *Weber* v. *Harbor Commissioners*, above cited.

In that case, it was further held, as it had previously been declared in *San Francisco* v. *Le Roy*, above cited, that "this doctrine does not apply to lands that had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way;" and that when the United States acquired California from Mexico by the treaty, they were bound by its stipulations, and by the principles of international law, to protect all rights of property acquired under previous lawful grants from the Mexican government. 142 U. S. 183, 184.

And it was therefore adjudged that under a boundary "by the bay," in the Mexican grant of the pueblo of San Francisco, duly confirmed by a decree of a court of the United States, and defined by a survey under the authority of the Secretary of the Interior as following the general line of high water mark of the bay, crossing the mouth of a tide water creek, the title of lands inside of that line, although below high water mark of the creek, was included, and therefore did not pass by a deed from the State.

VI. The decisions of this court, referred to at the bar, regarding the shores of waters where the ebb and flow of the tide from the sea is not felt, but which are really navigable, should be considered with reference to the facts upon which they were made, and keeping in mind the local laws of the different States, as well as the provisions of the acts of Congress relating to such waters.

By the law of England, Scotland and Ireland, the owners of the banks *prima facie* own the beds of all fresh water rivers above the ebb and flow of the tide, even if actually navigable, to the thread of the stream, *usque ad filum aquæ*. Lord Hale, in Hargrave's Law Tracts, 5; *Bickett* v. *Morris*, L. R. 1 H. L. Sc. 47; *Murphy* v. *Ryan*, Ir. R. 2 C. L. 143; *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839.

The rule of the common law on this point appears to have been followed in all the original States — except in Pennsylvania, Virginia and North Carolina, and except as to great rivers such as the Hudson, the Mohawk and the St. Lawrence in New York — as well as in Ohio, Illinois, Michigan and Wisconsin. But it has been wholly rejected, as to rivers navigable in fact, in Pennsylvania, Virginia and North Carolina, and in most of the new States. For a full collection and careful analysis of the cases, see Gould on Waters, (2d ed.) §§ 56–78.

The earliest judicial statement of the now prevailing doctrine in this country as to the title in the soil of rivers really navigable, although above the ebb and flow of the tide, is to be found in a case involving the claim of a riparian proprietor to an exclusive fishery in the Susquehanna River, in which

Chief Justice Tilghman in 1807, after observing that the rule of the common law upon the subject had not been adopted in Pennsylvania, said: "The common law principle is, in fact, that the owners of the banks have no right to the water of navigable rivers. Now the Susquehanna is a navigable river, and therefore the owners of its banks have no such right. It is said, however, that some of the cases assert that by navigable rivers are meant rivers in which there is no flow or reflow of the tide. This definition may be very proper in England, where there is no river of considerable importance as to navigation, which has not a flow of the tide; but it would be highly unreasonable when applied to our large rivers, such as the Ohio, Allegheny, Delaware, Schuylkill, or Susquehanna and its branches." *Carson* v. *Blazer*, 2 Binney, 475, 477, 478.

It was because of this difference in the law of Pennsylvania from that of England and of most of the older States, and because the decisions of the Supreme Court of Pennsylvania upon the subject were deemed binding precedents, that this court, speaking by Mr. Justice Grier, held that riparian owners, erecting dams on navigable rivers in Pennsylvania, did so only by license from the State, revocable at its pleasure, and could therefore claim no compensation for injuries caused to such dams by subsequent improvements under authority of the State for the convenience of navigation; and also that by the law of Pennsylvania preëmption rights to islands in such rivers could not be obtained by settlement. *Rundle* v. *Delaware & Raritan Canal*, (1852,) 14 How. 80, 91, 93, 94; *Fisher* v. *Haldeman*, (1857,) 20 How. 186, 194.

By the acts of Congress for the sale of the public lands, those lands are to be divided into townships, six miles square, unless the line of an Indian reservation, or of land previously surveyed and patented, or "the course of navigable rivers, may render it impracticable," and into sections and quarter sections, bounded by north and south and east and west lines, running to the corners, or, when the corners cannot be fixed, then, "to the watercourse," "or other external boundary;" and it is provided "that all navigable rivers within the territory to be disposed of by virtue of this act shall be deemed to

be and remain public highways; and that in all cases where the opposite banks of any stream not navigable shall belong to different persons, the stream and the bed thereof shall be common to both." Acts of May 18, 1796, c. 29, §§ 2, 9; 1 Stat. 464; May 10, 1800, c. 55, § 3; March 3, 1803, c. 27, § 17; March 26, 1804, c. 35, § 6; February 11, 1805, c. 14; 2 Stat. 73, 235, 279, 313; Rev. Stat. §§ 2395, 2396, 2476.

Those acts also provide that when, in the opinion of the President, "a departure from the ordinary method of surveying land on any river, lake, bayou or watercourse, would promote the public interest," the land may be surveyed and sold in tracts of two acres in width, fronting on any such water, and running back the depth of forty acres. Act of May 24, 1844, c. 141; 4 Stat. 34; Rev. Stat. § 2407.

By the Ordinance of 1787 for the government of the Northwest Territory, "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said Territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy." Charters and Constitutions, 432; Act of August 7, 1789, c. 8; 1 Stat. 50. And the acts relating to the Territories of Louisiana and Missouri contained similar provisions. Acts of March 3, 1811, c. 46, § 12; June 4, 1812, c. 95, § 15; 2 Stat. 666, 747.

In the acts for the admission of the States of Louisiana and Mississippi into the Union, it was likewise declared that "the river Mississippi, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said State, as to other citizens of the United States." Acts of February 20, 1811, c. 21, § 3; April 8, 1812, c. 50, § 1; 2 Stat. 642, 703; March 1, 1817, c. 23, § 4; 3 Stat. 349.

In *Withers* v. *Buckley*, (1857,) 20 How. 84, this court, affirming the judgment of the highest court of Mississippi in 29 Mississippi, 21, held that this did not prevent the legislature of the State from improving by a canal the navigation of one of those navigable rivers, and thereby diverting without

compensation the flow of water by the plaintiff's land; and Mr. Justice Daniel, in delivering judgment, said: "It cannot be imputed to Congress that they ever designed to forbid, or to withhold from the State of Mississippi, the power of improving the interior of that State, by means either of roads or canals, or by regulating the rivers within its territorial limits, although a plan of improvement to be adopted might embrace or affect the course or the flow of rivers situated within the interior of the State. Could such an intention be ascribed to Congress, the right to enforce it may be confidently denied. Clearly, Congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign independent State, or indispensable to her equality with her sister States, necessarily implied and guaranteed by the very nature of the Federal compact. Obviously, and it may be said primarily, among the incidents of that equality is the right to make improvements in the rivers, watercourses and highways, situated within the State." 20 How. 93. See also *Willamette Bridge Co.* v. *Hatch*, 125 U. S. 1, 9–12; *Monongahela Co.* v. *United States*, 148 U. S. 312, 329–333.

In *The Genesee Chief*, (1851,) 12 How. 443, in which this court, overruling its earlier decisions, held that the admiralty and maritime jurisdiction of the courts of the United States extended to all public navigable waters, although above the flow of the tide from the sea, Chief Justice Taney, taking the same line of argument as Chief Justice Tilghman in *Carson* v. *Blazer*, above cited, said that in England, where there were no navigable streams beyond the ebb and flow of the tide, the description of the admiralty jurisdiction as confined to tide waters was a reasonable and convenient one, and was equivalent to saying that it was confined to public navigable waters; but that, when the same description was used in this country, "the description of a public navigable river was substituted in the place of the thing intended to be described; and, under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on, after it had ceased, from a change in circum-

stances, to be the true description of public waters." 12 How. 454, 455.

In *Jones* v. *Soulard*, (1860,) 24 How. 41, the decision was that a title acquired under the act of June 13, 1812, c. 99, (2 Stat. 748,) to land in St. Louis, bounded by the Mississippi River, included an island west of the middle of the river, then only a sand bar, covered at ordinary high water and surrounded on all sides by navigable water, but which, after the admission of Missouri into the Union as a State, became, by the gradual filling up of the island and the intervening channel, connected with the shore as fast land. Mr. Justice Catron, indeed, in delivering the opinion, spoke of the rule of the common law, that "all grants of land bounded by fresh water rivers, where the expressions designating the water line are general, confer the proprietorship on the grantee to the middle thread of the stream and entitle him to the accretions," as a general and well settled rule, and applicable to the Mississippi River. 24 How. 65. But, as stated in that opinion, the charter of the city of St. Louis extended to the eastern boundary of the State of Missouri in the middle of the Mississippi River. By the law of Missouri, as theretofore declared by its Supreme Court, the title of lands bounded by the Mississippi River extended to low water mark and included accretions. *O'Fallon* v. *Price*, 4 Missouri, 343; *Shelton* v. *Maupin*, 16 Missouri, 124; *Smith* v. *St. Louis Schools*, 30 Missouri, 290. And the only question in *Jones* v. *Soulard* was of the title, not in the bed or shore of the river, but only in accretions which had become part of the fast land.

The rule, everywhere admitted, that where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters, and to the King or the State as to private persons; and is independent of the law governing the title in the soil covered by the water. Lord Hale, in Hargrave's Law Tracts, 5, 14, 28; *Rex* v. *Yarborough*, in the King's Bench, 3 B. & C. 91, and 4 D. & R. 790, and in the

House of Lords, 1 Dow & Clark, 178, 2 Bligh N. R. 147, and 5 Bing. 163; *Doe* v. *East India Co.*, 10 Moore P. C. 140; *Foster* v. *Wright*, 4 C. P. D. 438; *Handly* v. *Anthony*, 5 Wheat. 374, 380; *Jefferis* v. *East Omaha Co.*, 134 U. S. 178, 189–193; *Nebraska* v. *Iowa*, 143 U. S. 359; *Minto* v. *Delaney*, 7 Oregon, 337.

Again, in *St. Clair* v. *Lovingston*, (1874,) 23 Wall. 46, the right of a riparian proprietor in St. Louis, which was upheld by this court, affirming the judgment of the Supreme Court of Illinois in 64 Illinois, 56, and which Mr. Justice Swayne, in delivering the opinion, spoke of as resting in the law of nature, was the right to alluvion or increase of the upland by gradual and imperceptible degrees. And, as if to prevent any possible inference that the decision might affect the title in the soil under the water, the learned justice, after quoting the opinion in *Jones* v. *Soulard*, above cited, expressly reserved the expression of any opinion upon the question whether the limit of the land was low water or the middle thread of the river; and repeated the propositions established by the earlier decisions of this court, already referred to: "By the American Revolution, the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones." 23 Wall. 64, 68.

Some passages in the opinions in *Dutton* v. *Strong*, (1861,) 1 Black, 23; *Railroad Co.* v. *Schurmeir*, (1868,) 7 Wall. 272; and *Yates* v. *Milwaukee*, (1870,) 10 Wall. 497, were relied on by the learned counsel for the plaintiff in error, as showing that the owner of land adjoining any navigable water, whether within or above the ebb and flow of the tide, has, independently of local law, a right of property in the soil below high water mark, and the right to build out wharves so far, at least, as to reach water really navigable.

But the remarks of Mr. Justice Clifford in the first of those

cases, upon which his own remarks in the second case and those of Mr. Justice Miller in the third case were based, distinctly recognized the diversity of laws and usages in the different States upon this subject; and went no further than to say that wharves, piers and landing places, "where they conform to the regulations of the State" and do not extend below low water mark, have never been held to be nuisances, unless they obstruct the paramount right of navigation; that the right of the riparian proprietor to erect such structures in the navigable waters of the Atlantic States has been claimed, exercised and sanctioned from the first settlement of the country to the present time; that "different States adopted different regulations upon the subject, and in some, the right of the riparian proprietor rests upon immemorial local usage;" and that "no reason is perceived why the same general principle should not be applicable to the lakes," so far as to permit the owner of the adjacent land to build out as far as where the water first becomes deep enough to be navigable. 1 Black, 31, 32. And none of the three cases called for the laying down or defining of any general rule, independent of local law or usage, or of the particular facts before the court.

In *Dutton* v. *Strong*, the defendants, being the owners and occupants of a pier extending into Lake Michigan at Racine in the State of Wisconsin, were sued for cutting the hawser by which the plaintiffs had fastened their vessel to the pier during a storm, in consequence of which she was driven, by the force of the wind and waves, against another pier, and injured. And, as stated in the opinion, the pier appeared to be the private property of the defendants, constructed for their own use; there was no evidence that it constituted any obstruction whatever to the public right of navigation; the plaintiffs' vessel was made fast to it by her master without any authority from the defendants, either express or implied; and, under the increasing strain of the hawser by the storm, the piles of the pier began to give way before the hawser was cut. The only point adjudged was that, the plaintiffs' vessel having been wrongfully attached to the pier, the defendants, after she had been requested and had refused to leave, had

the right to cut her loose, if necessary to preserve the pier from destruction or injury. 1 Black, 33, 34. There can be no doubt of the correctness of that decision; for, even if the pier had been unlawfully erected by the defendants as against the State, the plaintiffs had no right to pull it down or injure it, and upon the facts of the case were mere trespassers upon the defendants' possession. *Linthicum* v. *Ray*, 9 Wall. 241; *Wetmore* v. *Brooklyn Gaslight Co.*, 42 N. Y. 384; *Harrington* v. *Edwards*, 17 Wisconsin, 604; *Johnson* v. *Barret*, Aleyn, 10, 11.

In *Railroad Co.* v. *Schurmeir*, the plaintiff claimed title to lots in a block in the city of St. Paul and State of Minnesota under a patent from the United States of a fractional section, bounded on one side by the Mississippi River. At the place in question there was a small island, lying along the shore of the river, about four feet lower than the mainland, and separated from it by a channel or slough twenty-eight feet wide, in which at very low water there was no current, and very little water, and that standing in pools; at a medium stage of the water the island was not covered, and there was a current or flow through the channel or slough; and at very high water the island was submerged. In the original government survey, the meander lines were run along the mainland of the shore, the quantity of land was estimated accordingly, and the island and intervening space were not shown or mentioned. That island and space were afterwards filled up by the city as a landing place, and were claimed by the railroad company under a subsequent survey and grant from the United States. The island, therefore, was connected with the mainland by a space substantially uncovered at low water; and the improvements complained of did not extend beyond high water mark of the island. The question in controversy was whether the plaintiff's patent was limited by the main shore, or extended to the outside of the island. The Supreme Court of Minnesota held that, by the law of Minnesota, land bounded by a navigable river extended to low water mark, at least, if not to the thread of the river; and that the plaintiff's title therefore extended to the water's edge at low

water mark and included the island, and gave judgment for the plaintiff. 10 Minnesota, 82. This court affirmed the judgment, saying: "Express decision of the Supreme Court of the State was, that the river, in this case, and not the meander line, is the west boundary of the lot, and in that conclusion of the state court we entirely concur. Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the watercourse, and not the meander line as actually run on the land, is the boundary." 7 Wall. 286, 287. The court also expressed an unhesitating opinion that "Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways." And the court treated it as too plain for discussion, that the island, separated from the mainland only by a depression in which at low water there was no continuous flow or line of water, was included in the first survey, and therefore not affected by the subsequent survey. 7 Wall. 288, 289.

In *Yates* v. *Milwaukee*, the material facts appear by the report to have been as follows: The owner of a lot fronting on a river in the city of Milwaukee and State of Wisconsin had built, upon land covered by water of no use for the purpose of navigation, a wharf extending to the navigable channel of the river. There was no evidence that the wharf was an obstruction to navigation, or was in any sense a nuisance. The city council afterwards, under a statute of the State, enacted before the wharf was built, authorizing the city council to establish dock and wharf lines upon the banks of the

river, to restrain and prevent encroachments upon and obstructions to the river, and to cause the river to be dredged, passed an ordinance declaring this wharf to be an obstruction to navigation and a nuisance, and ordering it to be abated. The point adjudged was that the mere declaration of the city council that the wharf already built and owned by the plaintiff was a nuisance did not make it such, or subject it to be removed by authority of the city. It was recognized in the opinion that by the law of Wisconsin, established by the decisions of its Supreme Court, the title of the owner of land bounded by a navigable river extended to the centre of the stream, subject, of course, to the public right of navigation. *Jones* v. *Pettibone*, 2 Wisconsin, 308; *Walker* v. *Shepardson*, 2 Wisconsin, 384, and 4 Wisconsin, 486; *Mariner* v. *Schulte*, 13 Wisconsin, 692; *Arnold* v. *Elmore*, 16 Wisconsin, 536. See also *Olson* v. *Merrill*, 42 Wisconsin, 203; *Norcross* v. *Griffiths*, 65 Wisconsin, 599. And the only decision of that court, which this court considered itself not bound to follow, was *Yates* v. *Judd*, 18 Wisconsin, 118, upon the question of fact whether certain evidence was sufficient to prove a dedication to the public. 10 Wall. 504–506.

VII. The later judgments of this court clearly establish that the title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several States, subject, of course, to the rights granted to the United States by the Constitution.

In *Weber* v. *Harbor Commissioners*, above cited, Mr. Justice Field, in delivering judgment, while recognizing the correctness of the doctrine "that a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream, for his own use, or the use of others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public," and admitting that in several of the States, by general legislation or immemorial usage, the proprietor of land bounded by the shore of the sea, or of an arm of the sea, has a right to wharf out to the point where the waters are

navigable, said: "In the absence of such legislation or usage, however, the common law rule would govern the rights of the proprietor, at least in those States where the common law obtains. By that law, the title to the shore of the sea, and of the arms of the sea, and in the soils under tide waters is, in England, in the King, and, in this country, in the State. Any erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a purpresture, which he may remove at pleasure, whether it tends to obstruct navigation or otherwise." 18 Wall. 64, 65.

In *Atlee* v. *Packet Co.*, (1874,) 21 Wall. 389, which arose in Iowa in 1871, Mr. Justice Miller, in delivering judgment, after referring to *Dutton* v. *Strong*, *Railroad Co.* v. *Schurmeir*, and *Yates* v. *Milwaukee*, above cited, disclaimed laying down any invariable rule as to the extent to which wharves and landing places might be built out into navigable waters by private individuals or municipal corporations; and recognized that a State might, by its legislation, or by authority expressly or impliedly delegated to municipal governments, control the construction, erection and use of such wharves or landings, so as to secure their safety and usefulness, and to prevent their being obstructions to navigation. 21 Wall. 392, 393. And it was adjudged, following in this respect the opinion of the Circuit Court in 2 Dillon, 479, that a riparian proprietor had no right, without statutory authority, to build out piers into the Mississippi River as necessary parts of a boom to receive and retain logs until needed for sawing at his mill by the water side.

In *Railway Co.* v. *Renwick*, (1880,) 102 U. S. 180, affirming the judgment of the Supreme Court of Iowa in 49 Iowa, 664, it was by virtue of an express statute passed by the legislature of Iowa in 1874, that the owner of a similar pier and boom recovered compensation for the obstruction of access to it from the river by the construction of a railroad in front of it.

In *Barney* v. *Keokuk*, (1876,) 94 U. S. 324, the owner, under a grant from the United States, of two lots of land in

the city of Keokuk and State of Iowa, bounded by the Mississippi River, brought an action of ejectment against the city and several railroad companies and a steamboat company to recover possession of lands below high water mark in front of his lots, which the city, pursuant to statutes of the State, had filled up as a wharf and levee, and had permitted to be occupied by the railroads and landing places of those companies. The plaintiff's counsel relied on *Dutton* v. *Strong*, *Railroad Co.* v. *Schurmeir* and *Yates* v. *Milwaukee*, above cited. 94 U. S. 329, 331. But this court, affirming the judgment of the Circuit Court of the United States, held that the action could not be maintained; and Mr. Justice Bradley, in delivering judgment, summed up the law upon the subject with characteristic power and precision, saying: "It appears to be the settled law of that State that the title of the riparian proprietors on the banks of the Mississippi extends only to ordinary high water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the State. This is also the common law with regard to navigable waters; although, in England, no waters are deemed navigable except those in which the tide ebbs and flows. In this country, as a general thing, all waters are deemed navigable which are really so; and especially is it true with regard to the Mississippi and its principal branches. The question as to the extent of the riparian title was elaborately discussed in the case of *McManus* v. *Carmichael*, 3 Iowa, 1. The above conclusion was reached, and has always been adhered to in that State. *Haight* v. *Keokuk*, 4 Iowa, 199; *Tomlin* v. *Dubuque &c. Railroad*, 32 Iowa, 106." "It is generally conceded that the riparian title attaches to subsequent accretions to the land, effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each State decides for itself. By the common law, as before remarked, such additions to the land on navigable waters belong to the Crown; but, as the only waters recognized in

England as navigable were tide waters, the rule was often expressed as applicable to tide waters only, although the reason of the rule would equally apply to navigable waters above the flow of the tide; that reason being that the public authorities ought to have entire control of the great passage-ways of commerce and navigation, to be exercised for the public advantage and convenience. The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines, with regard to the ownership of the soil in navigable waters above tide water, at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in *Martin* v. *Waddell*, 16 Pet. 367; *Pollard* v. *Hagan*, 3 How. 212; and *Goodtitle* v. *Kibbe*, 9 How. 471. These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genesee Chief*, 12 How. 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond

the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject." 94 U. S. 336–338.

In *St. Louis* v. *Myers*, (1885,) 113 U. S. 566, the court, speaking by Chief Justice Waite, held that the act of Congress for the admission into the Union of the State of Missouri, bounded by the Mississippi River, which declared that the river should be "a common highway and forever free," left the rights of riparian owners to be settled according to the principles of state law; and that no Federal question was involved in a judgment of the Supreme Court of the State of Missouri as to the right of a riparian proprietor in the city of St. Louis to maintain an action against the city for extending one of its streets into the river so as to divert the natural course of the water and thereby to injure his property.

In *Packer* v. *Bird*, (1891,) 137 U. S. 661, the general rules governing this class of cases were clearly and succinctly laid down by the court, speaking by Mr. Justice Field, as follows: "The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property by the grantee. As an incident of such ownership, the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the State, either to low or high water mark, or will extend to the middle of the stream." 137 U. S. 669, 670. And it was accordingly held, affirming the judgment of the Supreme Court of California in 71 California, 134, and referring to the opinion in *Barney* v. *Keokuk*, above cited, as specially applicable to the case, that a person holding land under a patent from the United States, confirming a Mexican grant bounded by the

Sacramento River, which was navigable in fact, took no title below the high water mark, either under the acts of Congress or by the local law.

In *St. Louis* v. *Rutz*, (1891,) 138 U. S. 226, the court, speaking by Mr. Justice Blatchford, and referring to *Barney* v. *Keokuk*, *St. Louis* v. *Myers* and *Packer* v. *Bird*, above cited, said: "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property, which is governed by the local law of Illinois." And it was because "the Supreme Court of Illinois has established and steadily maintained, as a rule of property, that the fee of the riparian owner of lands in Illinois bordering on the Mississippi River extends to the middle line of the main channel of that river," that it was decided that a deed of land in Illinois, bounded by the Mississippi River, passed the title in fee in the bed of the river to the middle line of the main channel, and to all islands found in the bed of the river east of the middle of that channel; and, "that being so, it is impossible for the owner of an island which is situated on the west side of the middle of the river, and in the State of Missouri, to extend his ownership, by mere accretion, to land situated in the State of Illinois, the title in fee to which is vested by the law of Illinois in the riparian owner of the land in that State." 138 U. S. 242, 250.

In the recent case of *Hardin* v. *Jordan*, (1891,) 140 U. S. 371, in which there was a difference of opinion upon the question whether a survey and patent of the United States, bounded by a lake which was not navigable, in the State of Illinois, was limited by the margin, or extended to the centre of the lake, all the justices agreed that the question must be determined by the law of Illinois. Mr. Justice Bradley, speaking for the majority of the court, and referring to many cases already cited above, said: "With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high water mark, and that the title to the shore and lands under water in front of lands so granted enures to the State within which they are

situated, if a State has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State — a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery — and cannot be retained or granted out to individuals by the United States. Such title being in the State, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. This right of the States to regulate and control the shores of tide waters and the land under them is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State; but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised." 140 U. S. 381, 382. And Mr. Justice Brewer, in beginning the dissenting opinion, said: "Beyond all dispute, the settled law of this court, established by repeated decisions, is that the question how far the title of a riparian owner extends is one of local law. For a determination of that question the statutes of the State and the decisions of its highest court furnished the best and the final authority." 140 U. S. 402.

In the yet more recent case of *Illinois Central Railroad* v.

Illinois, (1892,) which also arose in Illinois, it was recognized as the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, or navigable lakes, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce. 146 U. S. 387, 435–437, 465, 474.

VIII. Notwithstanding the *dicta* contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high water mark of navigable waters in a Territory of the United States, it is evident that this is not strictly true.

Chief Justice Taney, in delivering an opinion already cited, after the subject had been much considered in the cases from Alabama, said: "Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a State." *Goodtitle* v. *Kibbe*, 9 How. 471, 478. In the cases from California, already referred to, the question whether a Mexican grant, confirmed by the United States, did or did not include any lands below high water mark, was treated as depending on the terms of the decree of confirmation by a court of the United States under authority of Congress. By the application of that test, no such lands were held to be included in *United States* v. *Pacheco*, 2 Wall. 587, and some such lands were held to be included in *Knight* v. *United States Land Association*, 142 U. S. 161. And in *Packer* v. *Bird*, 137 U. S. 661, 672, Mr. Justice Field, speaking for the court, after referring to the rule, as stated in *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, 288, above quoted, that Congress, by the provisions of the land laws, intended that the title to lands bordering on navigable streams should stop at the stream, said: "The same rule applies when the survey is made and the patent is issued upon a confirmation of a previously existing right or equity of the

patentee to the lands, which in the absence of such right or equity would belong absolutely to the United States, unless the claim confirmed in terms embraces the land under the waters of the stream."

By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition. *American Ins. Co.* v. *Canter*, 1 Pet. 511, 542; *Benner* v. *Porter*, 9 How. 235, 242; *Cross* v. *Harrison*, 16 How. 164, 193; *National Bank* v. *Yankton County*, 101 U. S. 129, 133; *Murphy* v. *Ramsey*, 114 U. S. 15, 44; *Mormon Church* v. *United States*, 136 U. S. 1, 42, 43; *McAllister* v. *United States*, 141 U. S. 174, 181.

We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

IX. But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek.

As has been seen, by the law of England, the title in fee, or *jus privatum*, of the King or his grantee was, in the phrase of Lord Hale, "charged with and subject to that *jus publicum* which belongs to the King's subjects," or, as he elsewhere puts it, "is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are interested by reason of common commerce, trade and intercourse." Hargrave's Law Tracts, 36, 84. In the words of Chief Justice Taney, "the country" discovered and settled by Englishmen "was held by the King in his public and regal character as the representative of the nation, and in trust for

them;" and the title and the dominion of the tide waters and of the soil under them, in each colony, passed by the royal charter to the grantees as "a trust for the common use of the new community about to be established;" and, upon the American Revolution, vested absolutely in the people of each State "for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin* v. *Waddell*, 16 Pet. 367, 409–411. As observed by Mr. Justice Curtis, "This soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights." *Smith* v. *Maryland*, 18 How. 71, 74. The title to the shore and lands under tide water, said Mr. Justice Bradley, "is regarded as incidental to the sovereignty of the State — a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery." *Hardin* v. *Jordan*, 140 U. S. 371, 381. And the Territories acquired by Congress, whether by deed of cession from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States, upon an equal footing with the original States in all respects; and the title and dominion of the tide waters and the lands under them are held by the United States for the benefit of the whole people, and, as this court has often said, in cases above cited, "in trust for the future States." *Pollard* v. *Hagan*, 3 How. 212, 221, 222; *Weber* v. *Harbor Commissioners*, 18 Wall. 57, 65; *Knight* v. *United States Land Association*, 142 U. S. 161, 183.

The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes,

shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community.

X. The title of the United States to Oregon was founded upon original discovery and actual settlement by citizens of the United States, authorized or approved by the government of the United States; as well as upon the cession of the Louisiana Territory by France in the treaty of 1803, and the renunciation of the claims of Spain in the treaty of 1819. American State Papers, 6 Foreign Relations, 666; Barrow's History of Oregon, c. 22; 8 Stat. 202, 256. While the right to Oregon was in contest between the United States and Great Britain, the citizens of the one and the subjects of the other were permitted to occupy it under the Conventions of 1818 and 1827. 8 Stat. 249, 360. Its boundary on the north was defined by the treaty with Great Britain of June 15, 1846. 9 Stat. 869. So far as the title of the United States was derived from France or Spain, it stood as in other territories acquired by treaty. The independent title based on discovery and settlement was equally absolute. *Johnson* v. *McIntosh*, 8 Wheat. 543, 595; *Martin* v. *Waddell*, 16 Pet. 367, 409; *Jones* v. *United States*, 137 U. S. 202, 212.

By the act of 1848, establishing the territorial government of Oregon, "all laws heretofore passed in said Territory, making grants of land, or otherwise affecting or incumbering the title to lands," were declared to be void; and the laws of the United States were "extended over and declared to be in force in said Territory, so far as the same, or any provision thereof, may be applicable." Act of August 14, 1848, c. 177,

§ 14; 9 Stat. 329. The land laws adopted by the provisional government of Oregon, established by the people while the sovereignty was in dispute between the United States and Great Britain, regulated the occupation only. The settlers had no title in the soil. The United States, on assuming undisputed dominion over the Territory, owned all the lands therein; and Congress had the right to confine its bounties to settlers within just such limits as it chose. The provisions of the general land laws of the United States were not applicable to the Oregon Territory. And before 1850 there was no statute under which any one could acquire a legal title from the United States to lands in Oregon. *Lownsdale* v. *Parrish*, 21 How. 290, 293; *Stark* v. *Starrs*, 6 Wall. 402; *Davenport* v. *Lamb*, 13 Wall. 418, 429, 430; *Lamb* v. *Davenport*, 18 Wall. 307, 314; *Stark* v. *Starr*, 94 U. S. 477, 486; *Barney* v. *Dolph*, 97 U. S. 652, 654; *Hall* v. *Russell*, 101 U. S. 503, 507, 508; *Missionary Society* v. *Dalles*, 107 U. S. 336, 344.

The first act of Congress which granted to settlers titles in such lands was the Oregon Donation Act of September 27, 1850, c. 76. That act required the lands in Oregon to be surveyed as in the Northwest Territory; and it made grants or donations of land, measured by sections, half sections and quarter sections, to actual settlers and occupants. It contains nothing indicating any intention on the part of Congress to depart from its settled policy of not granting to individuals lands under tide waters or navigable rivers. 9 Stat. 496; Rev. Stat. §§ 2395, 2396, 2409.

It is evident, therefore, that a donation claim under this act, bounded by the Columbia River, where the tide ebbs and flows, did not, of its own force, have the effect of passing any title in lands below high water mark. Nor is any such effect attributed to it by the law of the State of Oregon.

The southern part of the Territory of Oregon was admitted into the Union as the State of Oregon, "on an equal footing with the other States in all respects whatever," by the act of February 14, 1859, c. 33; and the act of admission provided that "the said State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering

on the said State of Oregon, so far as the same shall form a common boundary to said State and any other State or States now or hereafter to be formed or bounded by the same; and said rivers and waters, and all the navigable waters of said State, shall be common highways and forever free, as well to the inhabitants of said State as to all other citizens of the United States." 11 Stat. 383.

The settlers of Oregon, like the colonists of the Atlantic States, coming from a country in which the common law prevailed to one that had no organized government, took with them, as their birthright, the principles of the common law, so far as suited to their condition in their new home. The jurisprudence of Oregon, therefore, is based on the common law. *Van Ness* v. *Pacard*, 2 Pet. 137, 144; *Norris* v. *Harris*, 15 California, 226, 252; *Cressey* v. *Tatom*, 9 Oregon, 541; *Lamb* v. *Starr*, Deady, 350, 358.

By the law of the State of Oregon, as declared and established by the decisions of its Supreme Court, the owner of upland bounding on navigable water has no title in the adjoining lands below high water mark, and no right to build wharves thereon, except as expressly permitted by statutes of the State; but the State has the title in those lands, and, unless they have been so built upon with its permission, the right to sell and convey them to any one, free of any right in the proprietor of the upland, and subject only to the paramount right of navigation inherent in the public. *Hinman* v. *Warren*, 6 Oregon, 408; *Parker* v. *Taylor*, 7 Oregon, 435; *Parker* v. *Rogers*, 8 Oregon, 183; *Shively* v. *Parker*, 9 Oregon, 500; *McCann* v. *Oregon Railway*, 13 Oregon, 455; *Bowlby* v. *Shively*, 22 Oregon, 410. See also *Shively* v. *Welch*, 10 Sawyer, 136, 140, 141.

In the case at bar, the lands in controversy are below high water mark of the Columbia River where the tide ebbs and flows; and the plaintiff in error claims them by a deed from John M. Shively, who, while Oregon was a Territory, obtained from the United States a donation claim, bounded by the Columbia River, at the place in question.

The defendants in error claim title to the lands in controversy by deeds executed in behalf of the State of Oregon, by

a board of commissioners, pursuant to a statute of the State of 1872, as amended by a statute of 1874, which recited that the annual encroachments of the sea upon the land, washing away the shores and shoaling harbors, could be prevented only at great expense by occupying and placing improvements upon the tide and overflowed lands belonging to the State, and that it was desirable to offer facilities and encouragement to the owners of the soil abutting on such harbors to make such improvements; and therefore enacted that the owner of any land abutting or fronting upon, or bounded by the shore of any tide waters, should have the right to purchase the lands belonging to the State in front thereof; and that, if he should not do so within three years from the date of the act, they should be open to purchase by any other person who was a citizen and resident of Oregon, after giving notice and opportunity to the owner of the adjoining upland to purchase; and made provisions for securing to persons who had actually made improvements upon tide lands a priority of right so to purchase them.

Neither the plaintiff in error nor his grantor appears to have ever built a wharf or made any other improvement upon the lands in controversy, or to have applied to the State to purchase them. But the defendants in error, after their purchase from the State, built and maintained a wharf upon the part of these lands nearest the channel, which extended several hundred feet into the Columbia River, and at which ocean and river craft were wont to receive and discharge freight.

The theory and effect of these statutes were stated by the Supreme Court of the State, in this case, as follows: "Upon the admission of the State into the Union, the tide lands became the property of the State, and subject to its jurisdiction and disposal. In pursuance of this power, the State provided for the sale and disposal of its tide lands by the act of 1872 and the amendments of 1874 and 1876. Laws 1872, p. 129; Laws 1874, p. 77; Laws 1876, p. 70. By virtue of these acts, the owner or owners of any land abutting or fronting upon or bounded by the shore of the Pacific Ocean, or of any bay, harbor or inlet of the same, and rivers and their bays in which the tide ebbs

and flows, within this State, were given the right to purchase all the tide lands belonging to the State, in front of the lands so owned, within a certain time and upon conditions prescribed; and providing further that in case such owner or owners did not apply for the purchase of such tide lands, or, having applied, failed to prosecute the same as provided by law, then that such tide lands shall be open to purchase by any other person who is a resident and citizen of the State of Oregon; but in consideration of the fact that prior to 1872, as it would seem, these lands had been dealt with as private property, and sometimes improved by expensive structures, the acts further provided, in such cases, that where the bank owners had actually sold the tide lands, then the purchaser of the tide land from the bank owner, or a previous bank owner, should have the right to purchase from the State. These statutes are based on the idea that the State is the owner of the tide lands, and has the right to dispose of them; that there are no rights of upland ownership to interfere with this power to dispose of them and convey private interests therein, except such as the State saw fit to give the adjacent owners, and to acknowledge in them and their grantees when they had dealt with such tide lands as private property, subject, of course, to the paramount right of navigation secured to the public. These statutes have been largely acted upon, and many titles acquired under them to tide lands. In the various questions relating to tide lands which have come before the judiciary, the validity of these statutes has been recognized and taken for granted, though not directly passed upon." 22 Oregon, 415, 416.

The substance and scope of the earlier statute of Oregon of October 14, 1862, (General Laws of 1862, p. 96; Hill's Code of Oregon, §§ 4227, 4228;) which is copied in the margin,[1]

[1] An Act to authorize the owners of land lying upon a navigable stream or other like water to build wharves into such stream or other water, beyond the line of low water mark.

Be it enacted by the Legislative Assembly of the State of Oregon, as follows:

SEC. 1. The owner of any land in this State, lying upon any navigable stream or other like water, and within the corporate limits of any incorpo-

were stated by that court as follows: "It is true, the legislature of this State had made provision by which the upland owner within the corporate limits of any incorporated town might build wharves, prior to the acts of 1872 and 1874, *supra;* but within the purview of our adjudications it would, as a matter of power, have been equally competent to have given this privilege to others. But this act is not a grant. It simply authorizes upland owners on navigable rivers within the corporate limits of any incorporated town to construct wharves in front of their land. It does not vest any right until exercised. It is a license, revocable at the pleasure of the legislature until acted upon or availed of. Shively did not avail himself of the license, nor is there any pretence to that effect. The plaintiffs have built a wharf upon and in front of their tide land. If the act is as applicable to tide lands as uplands on navigable waters, they have exercised the right." 22 Oregon, 420, 421.

Upon a review of its prior decisions, the court was of opinion that by the law of Oregon, in accordance with the law as formerly held in New York in *Gould* v. *Hudson River Railroad*, 6 N. Y. 522; with the law of New Jersey, as declared in *Stevens* v. *Paterson & Newark Railroad*, 5 Vroom, (34 N. J. Law,) 532, and recognized in *Hoboken* v. *Pennsylvania Railroad*, 124 U. S. 656; and with the law of the State of

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rated town therein, is hereby authorized to construct a wharf or wharves upon the same, and extend such wharf or wharves into such stream or other like water, beyond low water mark, so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water.

SEC. 2. The corporate authorities of the town, wherein such wharf or wharves is proposed to be constructed, shall have power to regulate the exercise of the privilege or franchise herein granted; and, upon the application of the person entitled to and desiring to construct such wharf or wharves, such corporate authorities shall by ordinance, or other like mode, prescribe the mode and extent to which the same may be exercised beyond the line of low water mark, so that such wharf or wharves shall not be constructed any farther into such stream or other water beyond such low water line than may be necessary and convenient for the purpose expressed in the first section of this act, and so that the same will not unnecessarily interfere with the navigation of such stream or other like water.

Washington, on the other side of the Columbia River, as declared in *Eisenbach* v. *Hatfield*, 2 Wash. St. 236; and upon the principles affirmed in decisions of this court, above cited, and especially in *Hardin* v. *Jordan*, 140 U. S. 371, 382; the authority conferred by the statutes of Oregon upon upland owners on navigable rivers to construct wharves in front of their land did not vest any right until exercised, but was a mere license revocable at the pleasure of the legislature until acted upon; and that the State had the right to dispose of its tide lands free from any easement of the upland owner.

The court thus stated its final conclusion: "From all this it appears that when the State of Oregon was admitted into the Union, the tide lands became its property and subject to its jurisdiction and disposal; that in the absence of legislation or usage, the common-law rule would govern the rights of the upland proprietor, and by that law the title to them is in the State; that the State has the right to dispose of them in such manner as she might deem proper, as is frequently done in various ways, and whereby sometimes large areas are reclaimed and occupied by cities, and are put to public and private uses, state control and ownership therein being supreme, subject only to the paramount right of navigation and commerce. The whole question is for the State to determine for itself; it can say to what extent it will preserve its rights of ownership in them, or confer them on others. Our State has done that by the legislation already referred to; and our courts have declared its absolute property in and dominion over the tide lands, and its right to dispose of its title in such manner as it might deem best, unaffected by any 'legal obligation to recognize the rights of either the riparian owners, or those who had occupied such tide lands,' other than it chose to resign to them, subject only to the paramount right of navigation and the uses of commerce. From these considerations it results, if we are to be bound by the previous adjudications of this court, which have become a rule of property, and upon the faith of which important rights and titles have become vested, and large expenditures have been made and incurred, that the defendants have no rights or interests in the lands in question.

Upon this point there is no diversity of judgment among us. We all think that the law as adjudicated ought not to be disturbed, independent of other reasons and authorities suggested in its support." 22 Oregon, 427.

By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, the law of Oregon governs the case.

The conclusions from the considerations and authorities above stated may be summed up as follows:

Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.

At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.

Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory.

The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or

littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

The United States, while they hold the country as a Territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the Territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the States, respectively, when organized and admitted into the Union.

Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future State when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States.

The donation land claim, bounded by the Columbia River, upon which the plaintiff in error relies, includes no title or right in the land below high water mark; and the statutes of Oregon, under which the defendants in error hold, are a constitutional and legal exercise by the State of Oregon of its dominion over the lands under navigable waters.

Judgment affirmed.

PROSSER *v.* NORTHERN PACIFIC RAILROAD.

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

No. 837. Argued January 16, 17, 1893. — Decided March 5, 1894.

A railroad corporation, which has laid out, built and maintained its railroad for two miles along the shore of a harbor, below high water mark, claiming under its charter the right to do so and the ownership of adjacent lands under tide waters of the harbor, cannot maintain a bill in equity to restrain a board of commissioners from establishing, pursuant to statutes of the State, a general system of harbor lines in the harbor, and from filing a plan thereof.

This was a bill in equity, filed December 29, 1891, and amended May 27, 1892, in the Circuit Court of the United States for the District of Washington, by the Northern Pacific Railroad Company, a corporation created and existing under the laws of the United States, for an injunction to prevent Prosser and four other persons, constituting the board of harbor line commissioners of the State of Washington, from establishing harbor lines and lines of waterways in front of the city and in the harbor of Tacoma, over the plaintiff's wharves and lands; and to prevent the Secretary of State of the State and the clerk of the city from receiving or filing a plat of such lines made by the commissioners, covering lands included in a strip two hundred feet wide on either side of the plaintiff's railroad.

On the day of the filing of the amended bill, a general demurrer was filed by the defendants, and overruled by the court; and, the defendants standing upon their demurrer and declining to answer further, a final decree was entered for the plaintiff, as prayed for in the bill; and the defendants appealed to this court.

By the act of Congress of July 2, 1864, c. 217, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the

Pacific Coast by the northern route," the Northern Pacific Railroad Company was incorporated, and authorized to construct and maintain a railroad, "beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's Sound;" and for the purpose of aiding in the construction of the railroad, and of a telegraph line, to the Pacific Coast, there was granted to the company "the right of way through the public lands" to the extent of two hundred feet in width on either side of the railroad, as well as every alternate section of the public lands on either side of the line; and it was authorized to take lands within the two hundred feet, "and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road;" and it was provided that the railroad should "be a post route, and a military road, subject to the use of the United States, for postal, military, naval and all other government service, and also subject to such regulations as Congress may impose, restricting the charges for such government transportation;" that the acceptance of the terms and conditions of the act should be signified by the company in writing to the President of the United States within two years after its passage; and that, "the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes," Congress might, at any time, having due regard to the rights of the company, add to, alter, amend or repeal this act. 13 Stat. 365.

The bill alleged that after the passage of the act, and before March 9, 1865, the company determined upon and selected the general line of its main road from Lake Superior to Puget

Sound; that on March 9, 1865, it duly signified to the President of the United States its acceptance of the act, and therewith presented and filed with the Secretary of the Interior a map showing the general route of its main line; that the general route so selected and designated was by way of the Columbia River to Puget Sound and north of the forty-fifth degree of latitude, and was "the most eligible railroad route for the main line of said railroad and telegraph line from Lake Superior to Puget Sound, and was at the time aforesaid selected and determined upon as such;" and that many years before November 11, 1889, and while the State of Washington was still a Territory, the plaintiff constructed and fully completed, and had since continuously maintained, its railroad from the city of Portland, in the State of Oregon, to the city of Tacoma, in the State of Washington.

The bill alleged that the main line of the plaintiff's railroad, as so constructed and maintained, extended to the eastern boundary of the Tacoma Mill Company's property at a point upon Commencement Bay, an arm or indentation of Admiralty Inlet, near its junction with Puget Sound. The bill, with a map annexed to it, showed that the railroad was laid out for about two miles along the edge of the harbor and in front of the city of Tacoma from a point opposite Fifteenth Street to the termination aforesaid; and that the greater part of the space two hundred feet in width on either side of the railroad, throughout these two miles, was below high water mark. And the bill alleged that the whole of that space between those points was, at the time of the passage of the act of 1864, "a part of the public domain, subject to no rights save those of the United States, and those at that date granted to this plaintiff by said act of Congress."

The bill further alleged that the plaintiff was the owner of the lands next the inner boundary of the right of way aforesaid; "that the plaintiff is also the owner of the littoral and riparian rights, rights of access to deep water, and preference rights of purchase of the tide lands pertaining or belonging to the said lands; that said right of way and said lands are chiefly valuable for their right of access to deep

water and the right to construct landings and warehouses upon the same northward and westward to the navigable waters of Commencement Bay; that many years prior to November 11, 1889, the plaintiff constructed and built upon the lands included within said right of way, and westward and northward thereof into deep water and the navigable water of the said Commencement Bay, wharves, upon which are constructed, in addition to the tracks, switches, turnouts, side tracks, spur tracks, station buildings and freight houses, and the other terminal facilities of its railroad; also warehouses for the accommodation of general commerce and shipping by water, coal bunkers for the accommodation of loading coal into ships and to facilitate the shipment thereof by water, wheat warehouses and grain elevators for the accommodation of the loading of ships with wheat and other grain, and to facilitate the shipment thereof by water, all of which were constructed for the accommodation of commerce and for the loading of ships and to facilitate navigation and all classes of shipment by water; and ever since has continuously maintained and does now maintain and use the same for the benefit of trade, commerce and navigation; that the land hereinbefore described is situated between said plaintiff's right of way and the platted portion of the city of Tacoma, and consists of a high, steep, abrupt bluff, over or across which a railroad could not be properly or safely built; that a railroad built over or across the same would not be practicable to operate so as to reach out and connect with the shipping by water on Commencement Bay; that the space included within the right of way limits designated upon the map hereto attached is the only space between the said bluff and the waters of Commencement Bay upon which the tracks, station buildings and terminal facilities of said plaintiff's railroad could be located, and the only space within the city of Tacoma where said plaintiff could establish such facilities as are necessary to make possible and facilitate transshipment from rail to vessel and from vessel to rail; that the general warehouses, coal bunkers, and wheat and grain warehouses, built and constructed along said harbor

front upon and extending outward from said right of way and said abutting lands, are also necessary adjuncts to the proper operating of said railroad and necessary to aid in and facilitate the said transshipment from rail to vessel and from vessel to rail;" and that a point opposite South Second Street, (about half-way along the aforesaid two miles,) was the first point on Commencement Bay, in the harbor front of the city of Tacoma, reached by the plaintiff's line of railroad, going westward towards the waters of Puget Sound, "where water can be found of sufficient depth to accommodate the navigation of deep-water vessels; and that all of the space included within said right of way of the plaintiff between said point and the point of termination of said plaintiff's line is required for the accommodation of the terminal facilities necessary in the use and operation of the plaintiff's said railroad."

The bill then alleged that the plaintiff's wharves, buildings and other facilities had been constructed at an expense of several millions of dollars; and were indispensable to the performance of the duties imposed upon the plaintiff by its charter; that for the public welfare and for the benefit of commerce and navigation it was necessary that they should be constructed and maintained upon and along said water front, and be used by the plaintiff in connection with its railroad; and that, though in large part below high water mark, they were not obstructions, but were aids, to commerce and navigation.

The bill further alleged that the harbor line commissioners, pretending to act under authority of the statutes of the State, of March 28, 1890, (1 Hill's Laws of the State of Washington, tit. 23, cc. 1, 3,) were about to take final action in the location and establishment of the harbor lines and lines of waterways within the city of Tacoma, in such a way as to include within those lines a part or the whole of the plaintiff's right of way, wharves, warehouses and other improvements, and, unless prevented by injunction, would thereby deprive the plaintiff of the use and benefit thereof, without compensation or due process of law, and would cloud the plaintiff's title.

Mr. W. C. Jones, Attorney General of the State of Washington, (with whom was *Mr. William Lair Hill* on the brief,) for appellants.

Mr. James McNaught and *Mr. A. H. Garland* for appellee.

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

It may be admitted that the Congress of the United States, while the present State of Washington was a Territory, had the power, in chartering a corporation to construct and maintain a railroad from Lake Superior to the Pacific Coast, to grant to the corporation such title or rights in lands below high water mark of tide waters of the Territory, as might be necessary or convenient for the building, maintenance, use and enjoyment of such structures as might be required for commerce and transportation on the railroad and by sea, and for transferring goods and passengers between the railroad and sea-going vessels. *Shively* v. *Bowlby*, just decided, *ante* 1; *In re New York Central & Hudson River Railroad*, 77 N. Y. 248; *In re Staten Island Rapid Transit Co.*, 103 N. Y. 251.

The more serious question, whether the grant of Congress to the Northern Pacific Railroad Company of the right to construct a railroad to the waters of Puget Sound can be construed as authorizing the corporation to lay out its railroad for two miles, below high water mark, along the shore of a harbor, so as practically to monopolize the use of the waters of the harbor, and of the lands under them, cannot properly be decided in this suit, and we express no opinion upon it.

There can be no doubt that a State may, by its legislature, or through a board of harbor commissioners, establish, for the protection and benefit of commerce and navigation, harbor lines in navigable waters, not inconsistent with any legislation of Congress, limiting the building of wharves and other structures upon lands not already built upon. *Yesler* v. *Wash. Harbor Commissioners*, 146 U. S. 646; *Weber* v. *Harbor Commissioners*, 18 Wall. 57; *Atlee* v. *Packet Co.*, 21 Wall.

389, 393; *Commonwealth* v. *Alger*, 7 Cush. 53: *People* v. *New York & Staten Island Ferry*, 68 N. Y. 71; *State* v. *Sargent*, 45 Conn. 358. Such harbor lines, in order to fulfil their purpose, must be established according to a general system, having in view not only the convenience of approach to the water from the shore, but the effect of the daily ebb and flow of the tide in keeping clear or filling up the harbor. The establishment of general harbor lines, of itself, takes or injures no one's property, and cannot, consistently with the interests of the public, or with the principles of equity, be restrained by injunction. If the State of Washington, or the city of Tacoma, or any public officer or private individual, shall hereafter take active measures, or bring suit, so as to injure or affect the supposed title or rights of the plaintiff, or its use and enjoyment thereof, the dismissal of this bill will not stand in the way of a full and fair trial of the title and rights claimed.

Decree reversed, and bill dismissed, without prejudice.

Mr. Justice Harlan and Mr. Justice Jackson were not present at the argument and took no part in the decision of this case.

HUTCHINSON INVESTMENT COMPANY *v.* CALDWELL.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 190. Argued January 3, 4, 1894. — Decided March 5, 1894.

In States whose laws permit illegitimate children, recognized by the father in his lifetime, to inherit from him, such children are "heirs" within the meaning of Rev. Stat. § 2269, which provides that when a party entitled to claim the benefits of the preëmption laws of the United States dies before consummating his claim, his executor or administrator may do so, and the entry in such case shall be made in favor of his heirs, and the patent, when issued, inure to them as if their names had been specially mentioned.

This was an action brought by John Caldwell against D. B. Miller (for whom the Hutchinson Investment Company

was substituted) and L. B. Miller in the District Court for Reno County, Kansas, to have his title established and recover possession of the northeast quarter of section twelve, township twenty-three south, range six west, in that county. The case was submitted to the District Court for trial, a jury being waived, and the court made special findings of fact and gave judgment in favor of the defendants, whereupon the cause was taken on error to the Supreme Court of Kansas. The Supreme Court reversed the judgment of the court below and remanded the cause with a direction to enter judgment upon the findings of fact in favor of Caldwell and against the defendants for an undivided thirteen twenty-eighths of the land and damages for its detention, and thereupon this writ of error was brought.

The facts necessary to be stated were in brief these: Robert Titus was married to Phœbe Thomas in Vermont in 1809, and the sole issue of this marriage was Alden W. Titus, born in October, 1810. After the birth of this son, Robert Titus, having gone into the war of 1812, abandoned both wife and child, and, in 1818, without having obtained a divorce, had a marriage ceremony performed between him and Miriam Lee in the State of New York. By her he had five children, of whom the youngest was a daughter, Lois, who married D. B. Miller. From 1850, Robert Titus lived with Mr. and Mrs. Miller, and in 1871 the family went to Reno County, Kansas, and settled there. July 10, 1871, Robert Titus made a pre-emption entry upon the land in controversy, but died before consummating his preëmption claim. After his death, D. B. Miller, administrator of his estate, filed the necessary papers to complete the preëmption, paying the price thereof, four hundred dollars, to the United States, with his own money, and April 20, 1874, a patent to the land was issued, to the effect that "the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided, have given and granted, and by these presents do give and grant, unto the said heirs of Robert Titus, deceased, and to their heirs, the tract above described; to have and to hold the same, together

with all the rights, privileges, immunities, and appurtenances of whatsoever nature belonging, unto the said heirs of Robert Titus, deceased, and to their heirs and assigns forever." The children of Robert Titus and Miriam Lee were notoriously recognized by Robert Titus as his own, and no question was ever raised as to their legitimacy until in this suit. D. B. Miller claimed the fee simple title to the land by conveyances from the heirs of Alden W. Titus, as the only heir of Robert Titus, deceased; and if the children of Robert Titus and Miriam Lee were heirs within the meaning of section 2269 of the Revised Statutes of the United States, then Caldwell was entitled to recover an undivided thirteen twenty-eighths of the land and damages.

The opinion of the Supreme Court of Kansas, by Horton, C. J., is reported in 44 Kansas, 12.

Mr. Almerin Gillett for plaintiffs in error.

Mr. S. B. Bradford and *Mr. G. A. Huron*, for defendant in error, filed a brief on his behalf, but the court declined to hear them.

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

By the statutes of Kansas, which was the State of the domicil of Robert Titus at the time of his death, and of the location of the real estate in controversy, illegitimate children could inherit from their father when they had been recognized by him, provided such recognition was general and notorious, or in writing. Gen. Stat. Kansas, 786, c. 33, §§ 22, 23. Under the circumstances disclosed on this record, therefore, the grantees in a deed to the heirs of Robert Titus and to their heirs would have embraced the children of Miriam Lee and their heirs, and this would be so as respects this patent, unless section 2269 of the Revised Statutes, under which it was issued, provided otherwise.

The section reads: "Where a party entitled to claim the benefits of the preëmption laws dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased preëmptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned." We are unable to concur with counsel for plaintiffs in error that the intention should be ascribed to Congress of limiting the words "heirs of the deceased preemptor," as used in the section, to persons who would be heirs at common law (children not born in lawful matrimony being therefore excluded) rather than those who might be such according to the *lex rei sitæ*, by which, generally speaking, the question of the descent and heirship of real estate is exclusively governed. If such had been the intention, it seems clear that a definition of the word "heirs" would have been given, so as to withdraw patents issued under this section from the operation of the settled rule upon the subject.

That rule was thus referred to by this court in *United States* v. *Fox*, 94 U. S. 315, 320: "It is an established principle of law everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated;" and although Congress might have designated particular grantees to whom the land should go in the first instance, it did not do so, nor make use of words indicative of any intent that the law of the State should not be followed.

But it is contended that the word "heirs" was used in its common law sense, and it is true that technical legal terms are usually taken, in the absence of a countervailing intent, in their established common law signification, but that consideration has no controlling weight in the construction of this statute. Undoubtedly the word "heirs" was used as meaning, as at common law, those capable of inheriting, but

it does not follow that the question as to who possessed that capability was thereby designed to be determined otherwise than by the law of the State which was both the *situs* of the land and the domicil of the owner.

The object sought to be attained by Congress was that those who would have taken the land on the death of the preëmptor, if the patent had issued to him, should still obtain it notwithstanding his death, an object which would be in part defeated by the exclusion of any who would have so taken by the local law if the title had vested in him. In other words, Titus intended to acquire the title and had complied, or was proceeding to comply, in good faith, with the requirements of the law to perfect his right to it, and by this statute that right could be perfected after his death for the benefit of those who would have been entitled if his death had occurred after patent instead of before. If the provision admitted of more than one construction, that one should be adopted which best seems to carry out the purposes of the act. *Bernier* v. *Bernier*, 147 U. S. 242.

In this view, it was held in *Brown* v. *Belmarde*, 3 Kansas, 41, that the words "heirs of deceased reservees" in the act of Congress of May 26, 1860, c. 61, (12 Stat. 21,) which operated as an original grant to certain reservees and their heirs, designated the persons who were capable of inheritance by the law of the State when the act of Congress took effect. And see *Clark* v. *Lord*, 20 Kansas, 390.

So the usual rule was recognized in *Lamb* v. *Starr*, Deady, 350. By the fourth section of the Oregon Donation Act, of September 27, 1850, c. 76, (9 Stat. 496,) it was provided that if either the settler or his wife died before the issue of the patent, "the survivor and children or heirs of the deceased" should be entitled to the share or interest of the deceased in equal proportions; and the late Judge Deady, referring to the disposal of the share of a deceased wife, said that at the time of her death "there was no statute in Oregon regulating the descent of real property, or declaring who should be the heirs of an intestate, and, therefore, the subject was regulated by the common law. By this rule her children were her heirs.

The Donation Act does not prescribe who shall be considered the heirs of a deceased settler any more than it prescribes who shall be considered the wife of a settler. Both of these are left to the local law — the law of Oregon. If the law of Oregon at the time of Nancy's death had prescribed that brothers and sisters should be heirs to the intestate, either exclusive or inclusive of the children, it appears to me that, under the Donation Act, then the children would take to the exclusion of the brothers and sisters. Congress seems to have intended to secure the share of the deceased to her children, if any, whether the law of Oregon made them heirs or not. Beyond this it left the matter to the local law, by providing the alternative, that in default of children, such share should go to her heirs, whoever they might be. Who would be entitled to claim as heir of the deceased would, in all cases, depend upon the law of Oregon at the time of the death, but persons claiming as children are by the Donation Act preferred to those claiming simply as heirs by the local law." And in *Davenport* v. *Lamb*, 13 Wall. 418, 427, it was pointed out that the act of Congress of May 20, 1836, c. 76, (5 Stat. 31, Rev. Stat. § 2448,) providing that where patents had been issued to persons who had died, the title should inure to and become vested in "the heirs, devisees, and assigns" of the deceased, made the title inure in a manner different from that provided by the Donation Act, upon the death of either owner before the issue of the patent, because the survivor of the husband or wife was not his or her heir by any law of Oregon at the time of the death in that case.

There is nothing to the contrary in *McCool* v. *Smith*, 1 Black, 459, which was a case coming to this court from Illinois, in which it was held that the meaning of the words "next of kin" was to be determined by the common law of England, because the common law in that regard was then in full force in that State.

The language of the acts of Congress has not been uniform in the matter of the disposition of the public domain, after the death of the principal beneficiary. Thus under section 2443, in respect of bounty lands granted to officers and soldiers of

the Revolutionary War or soldiers of the War of 1812, the patent when applied for by part of the heirs was to be issued in the name of the heirs, generally, and to inure to the benefit of the whole in such portions as they were severally entitled to by the laws of descent in the State or Territory of the decedent's domicil; and other illustrations might be given.

These differences, however, cannot affect our conclusion here, which, under the circumstances, accords with that of the Supreme Court of Kansas.

Judgment affirmed.

PLANT INVESTMENT COMPANY *v.* JACKSONVILLE, TAMPA AND KEY WEST RAILWAY COMPANY.

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

No. 226. Argued January 24, 1894. — Decided March 5, 1894.

A Circuit Court of the United States has no jurisdiction over a suit to enforce a contract for the conveyance of land brought in the State where the land is situated by the assignee of one party to the contract against the other party, if both parties to the contract are citizens of the same State, although the assignee is a citizen of a different State.

THE case is stated in the opinion.

Mr. John E. Hartridge, (with whom was *Mr. R. G. Erwin* on the brief,) for appellant.

Mr. Charles M. Cooper, (with whom was *Mr. J. C. Cooper* on the brief,) for the trustees of the internal improvement fund of Florida, appellees.

MR. JUSTICE FIELD stated the case, and delivered the opinion of the court.

This case comes to us on appeal from the decree of the Circuit Court for the Northern District of Florida sustaining the demurrer to the bill of complaint and dismissing the suit. The bill was brought to enforce the conveyance of certain lands in Florida, pursuant to the contract of the trustees of the internal improvement fund of Florida, made pursuant to certain statutes of that State, with the Jacksonville, Tampa and Key West Railway Company, a corporation created under its laws, the beneficial results of which contract are claimed by the complainant.

The facts out of which the suit arises are given at length in the bill, and, as there set forth, may be briefly stated so far as is necessary for the presentation of the question of jurisdiction, upon which the demurrer turned.

The Plant Investment Company, the complainant, is a corporation under the laws of Connecticut, having its principal office at New Haven. The defendants are the Jacksonville, Tampa and Key West Railway Company, and the trustees of the internal improvement fund of Florida, citizens and residents of that State.

The bill of complaint sets forth: That the general assembly of Florida, by an act of January 6, 1855, "to provide for and encourage a liberal system of internal improvements in the State," declared that the lands granted to the State by the acts of Congress of March 3, 1845, and September 28, 1850, together with the proceeds thereof, accrued or that might thereafter accrue, should be set apart and made a separate fund, to be called the internal improvement fund of the State; and that, for the purpose of assuring a proper application of the fund for the objects mentioned, the lands and the funds arising from the sale thereof, after paying the necessary expenses of selection, management, and sale, should be vested in five trustees, to wit, in the governor of the State, the comptroller of public accounts, the state treasurer, the attorney general, and the register of state lands, and their successors in office, to hold the same for the uses provided in the act; and by its twenty-ninth section, the general assembly reserved the right to grant to such railroad companies, thereafter chartered, as

they might deem proper, upon their compliance with the provisions of the act as to the manner of constructing the road and the drainage of the land, the alternate sections of the "swamp and overflowed lands" for six miles on each side of the line of the road of any such company. That the Jacksonville, Tampa and Key West Railway Company was incorporated in March, 1878, under the general corporation act of the State of February, 1874, by the name of the Tampa, Peace Creek and St. John's River Railroad Company. That the legislature of Florida by act of March 4, 1879, granted to that company alternate sections of the lands given to the State by the act of Congress of September 28, 1850, within six miles on each side of the track or line of its road, provided that the company should comply with the specified provisions of the act of January 6, 1855; and further granted to the company, in consideration of the greatly improved value which would accrue to the State from the construction of the road, ten thousand acres of the same class of lands for each mile of road it might construct, such lands to be of those nearest to the line of the road, its branches and extensions, this last-named grant being made subject to the rights of all creditors of the internal improvement fund and to the trusts to which the fund was applicable under the act of January 6, 1855. That on the 27th of June, 1881, the Tampa, Peace Creek and St. John's River Railroad Company, by a resolution of its board of directors, changed its corporate name to Jacksonville, Tampa and Key West Railway Company, and on the 23d of August, 1881, filed a plat of its route with the trustees of the internal improvement fund; and on the first of September, 1881, the trustees passed a resolution reserving from sale for the benefit of the company the even-numbered sections of land for six miles on each side of its line, and again on the 21st of September, 1881, acting under the provisions of the act of the legislature of March 12, 1879, "to amend section 26 of the act 'to provide a general law for the incorporation of railroads and canals,' and to grant aid to railroads and canals incorporated under said act," they passed a resolution to reserve from sale, to further aid in the construction of the road, a quantity

of lands in the even-numbered sections within twenty miles of said road sufficient to supply the deficiency existing in the even-numbered sections within six miles of the road.

The bill further avers that in 1883 the complainant entered into a contract with defendant company to construct the southern division of its road, to extend from the waters of Tampa Bay, in Hillsborough County, to Kissimmee City, in Orange County, with a branch to or near Bartow, in Polk County, and by that contract was to receive, as a part of the consideration for the construction of the road, all the alternate sections of land to which defendant company was or might be entitled under any of the aforesaid acts and any of the laws of Florida for its construction; that the resolutions passed by the board of trustees September 21, 1881, had been published in the report of its official proceedings, and submitted to the legislature in January, 1883, with the reports of the heads of departments of the state government, and went forth to the world unchallenged as the official action of the trustees, with the silent approval of the legislature; and the complainant, relying on the provisions of the acts of March 4 and 12, 1879, and the resolutions of the trustees, was induced to enter into its contract with the defendant company, believing that it would receive all the lands contemplated by those acts and resolutions; that to carry out the contract made between the complainant and the defendant company, the board of directors of that company passed a resolution in November, 1883, requesting and directing the trustees of the internal improvement fund to convey to the complainant all the alternate sections of land to which the defendant company was or might be entitled by reason of the construction of the said railroad from Tampa to Kissimmee City and its branch, and a copy of that resolution was presented to the trustees and entered in the minutes of their proceedings; that, as soon as practicable, after making the contract, complainant commenced the construction of the road and completed the line from Tampa to Kissimmee, a distance of seventy-five miles, by the following January; and the completion of the road being

reported to the trustees, the state engineer was directed to inspect the same, which he did, and approved it as being built according to the specifications required; whereupon the trustees accepted the same.

That when the complainant applied for the lands which it claimed under the contract with defendant company, it discovered that not only the lands in the even sections within twenty miles, but also within six miles of the road, had been selected by one Hamilton Disston, to whom the board of trustees had contracted to sell four million acres of land to pay off a large indebtedness of their fund, as a part of his purchase; that the complainant protested to the trustees against permitting said Disston to take these lands, but the trustees decided that the claim of said Disston for any lands outside the six-mile limit of said road should take precedence of the claim of the defendant company, and of the complainant contractor thereunder.

The bill further sets forth that in February, 1884, the trustees conveyed to the complainant the lands granted to the State by the act of September 28, 1850, lying in the even-numbered sections and within six miles of the line of that portion of the road constructed which then remained undisposed of, viz., 123,481 acres, for the entire seventy-five miles of the road; and that the complainant is advised and believes that, under the grant of the alternate sections, the defendant company is entitled to 3840 acres of land for each mile of road it constructed, and that, where there is not sufficient land in the alternate sections within six miles of the line of the road to make that quantity, the deficiency can be made up from the alternate sections within twenty miles, under the act of March 12, 1879, and resolution of September 21, 1881; and that the complainant under its contract with the defendant company has the same right for such part of the road as it has constructed, and alleges that there is a deficiency in the quantity of land to which it is entitled of about 160,000 acres. After stating other matters not material for the consideration of the question presented for our determination, the bill prays that the trustees of the internal im-

provement fund be compelled to convey to complainant the necessary lands to make up to the complainant the deficiency claimed, according to the terms of their contract with the defendant railroad company; the complainant asserting its right to the lands necessary to make up this deficiency by virtue of its contract with the defendant railroad company for the construction of the road.

To this bill the defendant trustees of the internal improvement fund demurred, on the ground, among others, that the court had no jurisdiction in the premises.

The contract between the trustees of the internal improvement fund of Florida and the defendant railroad company, being a contract between citizens and residents of the same State, could not be enforced by suit in a Federal court. The complainant, the Plant Investment Company, claims the benefit of that contract, and seeks to have it enforced for its benefit. It occupies, in fact, the position of assignee of that contract, its only right to the lands depending upon its validity. But it cannot enforce the contract in the Federal court; because, by section 629 of the Revised Statutes, it is provided that no Circuit Court shall have cognizance of any suit to recover the contents of any promissory note, or other *chose in action* in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the same provision is contained in the act of March 3, 1887, c. 373, 24 Stat. 552, amendatory of the act to determine the jurisdiction of the Circuit Courts of the United States. As we said in the case of *Shoecraft* v. *Bloxham*, 124 U. S. 730, 735, "the terms used — 'the contents of any promissory note or other *chose in action*' — were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey this meaning, but they have received a construction substantially to that purport in repeated decisions of this court." And in support of this doctrine the case of *Corbin* v. *County of Black Hawk*, 105 U. S. 659, was cited. In that case a suit brought to enforce the specific performance of a

contract was held to be a suit to recover the contents of a *chose in action*, and therefore could not be maintained under the statute in question in a Federal court in the name of the assignee, if the assignor could not have maintained such suit.

The complainant is not, it is true, designated in the pleadings or in any formal instrument as assignee of the contract between the trustees of the internal improvement fund and the defendant railway company, but the term "assignee" in the statute covers not merely persons to whom is technically transferred the contract in controversy, but any one who, by virtue of any transfer to him, can claim its beneficial interest. The contract under which the complainant claims, to wit, its contract with the defendant company for the construction of the road, transferred to it the beneficial interest of that company in the lands covered by its contract with the trustees, and therefore brings the suit within the prohibition of section 629 of the Revised Statutes.

It follows that the Circuit Court had no jurisdiction of this case in the name of complainant, but as the decree below dismissed the bill generally, that decree is reversed at the costs of appellant, and the cause remanded with a direction to dismiss the bill for want of jurisdiction and without prejudice.

Dismissed.

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY *v.* SCHUMACHER.

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

No. 239. Submitted February 1, 1894. — Decided March 5, 1894.

When the employé of a railroad company sues the company to recover damages for injuries inflicted upon him while in its service by reason of defective machinery, and it plainly appears that he was guilty of contributory negligence, and there is no evidence of a wilful or intentional negligence on the part of the railroad company for the purpose of injuring the plaintiff, there is nothing in the case to submit to the jury.

Counsel for Defendant in Error.

THIS was an action by Schumacher to recover for personal injuries received by him while in the employ of the defendant railway company as a laborer upon a gravel train, which was engaged in "surfacing" or ballasting defendant's tracks in the Indian Territory.

The complaint alleged that the plaintiff boarded the train at Tuscahoma, to aid in unloading the gravel when the car should reach its destination; that when the train reached Talihina, it was stopped on the main track to take on several cars loaded with gravel which were then on the side track; that after these cars were switched to the main track from the side track, they were cut loose from the engine and run with great force and violence down grade, until they struck the train on which plaintiff was riding; that the brakeman was unable to diminish the speed or check the cars, by reason of a defective brake, of the condition of which the defendant had notice, or might with proper diligence have had notice; and that by reason of the negligence of the defendant in permitting such defective brake to be used, plaintiff was, by the striking of the cars against the train on which he was riding, violently thrown from the car upon the track, the wheels running over his left foot and inflicting painful and serious injuries. In a supplemental complaint, plaintiff further charged the defendant with negligence in failing to make and enforce suitable regulations as to the manner of switching and making up trains, regulating the speed thereof, and providing a sufficient number of brakemen to check and control the cars.

The answer put in issue all these allegations, and pleaded contributory negligence on the part of the plaintiff.

Upon the trial the case was submitted to jury, who returned a verdict for the plaintiff in the sum of $8000, upon which judgment was entered, and defendant sued out this writ of error.

Mr. George R. Peck, *Mr. A. T. Britton*, *Mr. A. B. Browne*, and *Mr. E. D. Kenna* for plaintiff in error.

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

Opinion of the Court.

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

We do not find it necessary to consider in detail the specification of errors assigned to the charge of the court in this case, as we are of opinion that, upon the conceded facts, there was such contributory negligence on the part of the plaintiff as required the court to direct a verdict for the defendant.

The testimony showed that plaintiff was employed as a common laborer by defendant; that it was his duty to assist in loading cars with gravel and then ride down on the train to that portion of the track where the gravel was to be used, and there to assist in unloading and placing the gravel between the ties. At the time of his injury, plaintiff was sitting on the end of a loaded flat car next to the caboose, with his feet hanging over the side of the car. The train had stopped at Talihina, a station between the gravel pit and its destination, to take up ten additional carloads of gravel, which were standing upon a side track, the original train consisting of four cars and a caboose. On arriving at Talihina, the engine left the cars and caboose on the main track, went in on the siding, coupled on thirteen cars that were standing on the side track, three of which next the engine were not wanted. When the engine and thirteen cars got on to the main track, the ten cars that were wanted were cut loose from the engine, and allowed to go down the grade. The grade proved to be a little steeper than the brakeman in charge of the cars supposed, and, to use his own words, "The cars got the start of me a little, and when I saw they were going to hit a little too hard, I halloaed to the men 'Look out!' I saw they were going to hit harder than I thought, harder than cars ought to strike in making a coupling." They came in contact with that portion of the train on which plaintiff sat with a violent jar or shock, which caused him to lose his balance, fall with his feet upon the track, when the wheels passed over a portion of his right foot, necessitating amputation.

The testimony showed that the train was manned by the usual complement of trainmen, namely, a conductor, two

brakemen, an engineer, and a fireman, and that each was competent. At the time of the injury, the conductor was near the forward end of the four stationary cars for the purpose of making the coupling. The engineer and fireman were in their proper positions upon the engine. One brakeman was with the engine and three cars, which were being replaced on the side track; and the other was on the ten cars which were to be attached to the train. There was no evidence of any defect in the brakes, machinery, or appliances, or any failure to make or enforce suitable regulations, and these issues were not submitted to the jury. There was evidence tending to show that the place where the plaintiff sat when he fell was a dangerous place to be in when cars were being coupled, and plaintiff testified that he knew that they were about to couple some cars, but was not watching and did not see the other cars come down. There was evidence tending to show that both the brakemen and the foreman shouted to the men on the flat cars to look out, and that they were distinctly heard by persons in a less favorable place to hear than the plaintiff. There was also evidence tending to show that the men had been warned by their foreman and by the train master not to ride on the flat cars, but to ride in the caboose, and that the conductor had told this same gang of laborers that morning that they had better ride in the caboose, and that there was plenty of room there. There was also testimony that the men often rode on flat cars with the knowledge of the foreman and conductor.

The gist of all this testimony is that, notwithstanding the foreman and the train master had warned the men not to ride on the flat cars, and had provided a caboose in which he was told it was safer to ride, plaintiff selected a place he knew to be dangerous, when cars were being coupled; sat with his legs hanging over the side of the car in a position in which he could be easily jostled off, and paid so little attention to what he knew was going on that he not only did not watch or see the other cars coming down, but failed to hear a warning shout heard by others in the vicinity, at least one of whom was more remote than he. Under such circumstances,

he has no right to call upon the company to pay him damages. Had he been riding in the caboose, he would have been safe. Had he taken the precaution to notice what was going on, he could not have failed to see that a collision was imminent, and could have jumped off. The only negligence chargeable against the defendant was in backing the train down at too great speed. But, giving to his own conduct as well as that of the defendant the construction most favorable to the plaintiff, there was no theory upon which it was proper to submit the case to the jury. There was no negligence by the defendant shown as occurring subsequent to the negligence of the plaintiff, since his negligence was continuous down to the moment of the injury. Neither was there any evidence of a wilful or intentional negligence on the part of the defendant for the purpose of injuring the plaintiff. None such was averred in the complaint, and none such was shown in the testimony. The case of *Railroad Co.* v. *Jones*, 95 U. S. 439, is directly in point, and is decisive of this. See also *St. Louis & San Francisco Railway* v. *Marker*, 41 Arkansas, 542; *Glover* v. *Scotten*, 82 Michigan, 369.

The judgment of the court below must be reversed, and the cause remanded with directions to set aside the verdict and for further proceedings in conformity with this opinion.

LAZARUS v. PHELPS.

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

No. 225. Argued and submitted January 23, 24, 1894. — Decided March 5, 1894.

An owner of grazing land in Texas, who stocks his land with cattle greatly in excess of the number which can be fed upon it, and permits them to go on and occupy and feed from the grass growing upon unoccupied land of a neighboring proprietor, with no separating fence, becomes liable to the latter for the rental value of his land so occupied.

Statement of the Case.

THIS was an action brought in the Circuit Court of the United States for the Northern District of Texas, September 17, 1888, by William Walter Phelps, to recover of the plaintiff in error, Sam. Lazarus, the rental value of 176,000 acres of land in Texas, from April 15, 1887, at eight cents per acre per annum. The facts of the case, as shown by the pleadings and proofs, were substantially as follows:

In 1882 Phelps's vendor leased these lands, the sections of which alternated with sections owned by the Texas public school fund, to the firm of Curtis and Atkinson for five years, at two cents per acre, for grazing purposes. It was agreed in the contract of lease that all improvements made by the lessees should become the property of the lessor at the expiration of the lease. Curtis and Atkinson, in conjunction with adjoining owners, built a fence around the north, east, and west sides of their land. These fences included the school sections as well as those of Phelps. They did not separate the sections leased by them from the alternate school sections by fence, nor did they apply for a lease of these alternate sections from the State until June 12, 1887. Before the lease was granted, however, Curtis and Atkinson sold nearly all the cattle and horses owned by them on the enclosure to Sam. Lazarus, plaintiff in error and defendant below. Lazarus applied to the State for a lease of these alternate school lands, and, in September, 1887, a lease was delivered to him to take effect from the date of the application of Curtis and Atkinson, June 12, 1887. There was a penalty under the law of Texas for using the public lands without a lease.

Phelps became the owner of 168,300 acres April 15, 1887, and Curtis and Atkinson held under him as tenants at will up to the date of the sale of their stock. After the purchase of this stock by Lazarus, some negotiations were entered into with Phelps for a lease of the lands, but nothing came of them. Subsequently he secured the lease of the alternate school sections to the amount of 162,270 acres.

In the fall of 1887, the owners of the land on the south of these sections in dispute erected a fence dividing their lands from those of Phelps, thus entirely enclosing the 168,300 acres

belonging to Phelps and the alternating school sections in one continuous tract of land.

During the tenancy of Curtis and Atkinson they had erected two tanks, one upon the land of Phelps. The location of the other was not proven. These tanks were subsequently used by Lazarus. After the purchase by defendant of the stock of Curtis and Atkinson, he contracted to pasture upon this land, besides his own stock, one herd of 3500 head, for which he received $5000 for the first year, and $1.65 per head until purchased by him in 1889; and 3000 calves for which he received $2500. The cattle owned and controlled by Lazarus were not confined to the school sections leased by him, but grazed upon the lands of Phelps; and the undisputed proof was that the entire tract was overstocked, but in no other way than by having his cattle in this enclosure, did Lazarus prevent the owner of the 168,300 acres from taking possession or from grazing other stock thereon.

Upon this state of facts and proof as to the rental value of the land, Phelps secured a verdict and judgment for $8417. The defendant thereupon sued out this writ of error.

Mr. Henry C. Coke, for plaintiff in error, submitted on his brief.

Mr. Leigh Robinson for defendant in error.

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

But a single error is assigned to the action of the court below, and that is to the charge that defendant was liable to the plaintiff for the value of the use and occupation of the plaintiff's land, if he had in the common enclosure more cattle than were sufficient to consume the grass on the lands leased of the State of Texas by the defendant.

The defendant, upon the contrary, requested the court to charge that "in Texas, the law is that the owner of stock is not required to keep them in an enclosure, or to prevent them

from ranging on the land of others; and that the owner of land trespassed upon by cattle cannot recover from the owner of the cattle damages for the trespass, unless his land is fenced;" and further, "that to entitle the plaintiff to recover in this suit you must believe from the evidence that the plaintiff's lands were fenced from those leased by defendant. If there was a common enclosure around the lands of plaintiff and those leased by defendant and no fence separating such lands, then the plaintiff cannot recover." The views of the court below, concisely stated, are contained in the instruction that if the defendant kept the enclosure so overstocked, as plaintiff claimed, then he is liable for the value of the rent of plaintiff's lands. The request of defendant, taken in connection with the instruction given, presents the respective views of the law entertained by counsel upon either side, and upon which the case turned.

The rule of the common law was admitted to be that a land owner is not bound to fence his land against the cattle of others. The owner of such cattle must confine them to his own land, and will be liable for trespasses committed by them upon the unenclosed lands of others. This rule, however, has been modified in Texas by Revised Statutes of Texas, article 2431, which enacts that "every gardener, farmer, or planter shall make a sufficient fence about his clear land under cultivation at least five feet high, and make such fence sufficiently close to prevent hogs from passing through the same." And by article 2434: "If it shall appear that the said fence is insufficient, then the owner of such cattle, horses, hogs, or other stock shall not be liable to make satisfaction for such damages." Construing this statute, the Supreme Court of Texas held, in *Sabine & East Texas Railway* v. *Johnson*, 65 Texas, 389, 393, that "since the fence law of 1840 the owner of unenclosed land has no right of action for the intrusion of stock upon it. . . . The appellee had no right to graze his cattle on these leagues, but in doing so was guilty of no actionable wrong. In letting his stock range on this land he asserted no right in the land and acquired none." See also *Pace* v. *Potter*, 85 Texas, 473, 476. This custom of permit-

ting cattle to run at large without responsibility for their straying upon the lands of others was also recognized by this court in *Buford* v. *Houtz*, 133 U. S. 320.

The object of the statute above cited is manifest. As there are, or were, in the State of Texas, as well as in the newer States of the West generally, vast areas of land over which, so long as the government owned them, cattle had been permitted to roam at will for pasturage, it was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular, and oblige cattle owners to incur the heavy expense of fencing their land, or be held as trespassers by reason of their cattle accidentally straying upon the land of others. It could never have been intended, however, to authorize cattle owners deliberately to take possession of such lands, and depasture their cattle upon them without making compensation, particularly if this were done against the will of the owner, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. In other words, the trespass authorized, or rather condoned, was an accidental trespass caused by straying cattle. If, for example, a cattle owner, knowing that the proprietor of certain lands had been in the habit of leasing his lands for pasturage, should deliberately drive his cattle upon such lands in order that they might feed there, it would scarcely be claimed that he would not be bound to pay a reasonable rental. So, if he lease a section of land, adjoining an unenclosed section of another, and stock his own section with a greater number of cattle than it could properly support, so that, in order to obtain the proper amount of grass, they would be forced to stray over upon the adjoining section, the duty to make compensation would be as plain as though the cattle had been driven there in the first instance. The ordinary rule that a man is bound to contemplate the natural and probable consequences of his own act would apply in such a case. In *St. Louis Cattle Co.* v. *Vaught*, 1 Texas Civil Appeals, 388, 390, the court observed: "This doctrine, however, does not authorize the owner of cattle by affirmative conduct on his part to appropriate the

use of such lands to his own benefit. He will not be permitted thus to ignore the truth that every one is entitled to the exclusive enjoyment of his own property. In this case the appellant, by means of fences constructed or maintained by it, enclosed the land of the appellee in such manner as to reap from it those benefits, which as a rule are incident exclusively to ownership. The use and enjoyment of the property under such circumstances import necessarily the idea of liability." In this case it was held that, where the owner of several tracts of land, in enclosing them within a larger enclosure, necessarily enclosed a tract belonging to another, this was such an appropriation of the lands of such person as rendered the defendant liable for the reasonable value of the tract so enclosed. See also *Kerwhacker* v. *Cleveland &c. Railroad*, 3 Ohio St. 172; *Union Pacific Railway* v. *Collins*, 5 Kansas, 167, 177; *Larkin* v. *Taylor*, 5 Kansas, 433; *Delaney* v. *Errickson*, 11 Nebraska, 533; *Otis* v. *Morgan*, 61 Iowa, 712; *Willard* v. *Mathesus*, 7 Colorado, 76.

In the case under consideration, the testimony showed that for five years before the plaintiff acquired title to the lands in question, they had been leased to Curtis and Atkinson for pasturage purposes, at a rental of two cents per acre, with the stipulation that all permanent improvements erected by the lessees during the term should, at the end of the term, remain on the leased lands, and become the property of the lessor; and that they were about leasing the alternate sections of school lands when they failed; that in September, 1887, defendant, who, in the June previous, had bought out the stock of Curtis and Atkinson, together with all their interest in the fences, corrals, water tanks, (one of which was upon plaintiff's land,) and other property within the common enclosure of plaintiff and the public school lands, leased of the State the alternate sections of school lands within this enclosure for four years at four cents per acre. It seems, too, that negotiations were had, after defendant bought the cattle and horses from Curtis and Atkinson, between him and the plaintiff's agent respecting the lease of plaintiff's lands, but no agreement was reached between the parties as to the price to be paid, and the

same were not leased by the defendant or held by him as tenant of the plaintiff. The testimony further showed that, from the time defendant obtained the lease of the State until the date of the trial, the stock owned or controlled by him was more than sufficient to consume the grass on the plaintiff's lands, and the sections alternating therewith leased by the defendant from the public school fund. Defendant not only pastured his own stock upon these lands, but 3500 head of cattle owned by one Evans, for which he received $5000 the first year, and for the remaining period up to the year 1889, when he purchased them, $1.65 per head, as well as $2500 for the pasturage of 3000 calves belonging to another party.

These facts certainly showed an intent on the part of the defendant to avail himself of the pasturage of plaintiff's lands, and fully authorized the instruction of the court to the jury that, if the defendant overstocked the enclosure, he should be held liable to the plaintiff for the rental value of the lands. In such case the law raises an implied promise to pay a reasonable sum for the use and occupation of the lands, even though negotiations for a new lease had proven unsuccessful. *Schuyler* v. *Smith*, 51 N. Y. 309.

There was no error in the action of the court below, and its judgment is, therefore,

Affirmed.

ROWE *v.* PHELPS.

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

No. 237. Argued and submitted February 1, 1894. — Decided March 5, 1894.

There being no assignment of errors, as required by Rev. Stat. § 997, and no specification of errors required by Rule 21, this case is dismissed.

THIS was, as in the preceding case, an action by the defendant in error to recover the rental value of certain sections of land alleged to have been depastured by the plaintiffs in error, constituting the firm of Rowe Bros.

Statement of the Case.

Upon the trial of the case the jury returned a verdict for the plaintiff in the sum of $7739, for which judgment was entered, and defendant sued out this writ of error.

Mr. M. L. Crawford, for plaintiff in error, submitted on his brief.

Mr. Leigh Robinson for defendant in error.

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

There is no assignment of errors sent up with the record in this case, as required by Rev. Stat. § 997, and no "specification of the errors relied upon," as required by Rule 21 of this court. This rule requires that the specification "shall set out separately and particularly each error assigned and intended to be urged," and there is no such "plain error not assigned or specified," as calls upon the court to exercise its option to review the questions involved. It would seem that unless the statute and rule are to be entirely disregarded, this writ of error must be

Dismissed.

GUMAER *v.* COLORADO OIL COMPANY.

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

No. 50. Argued October 24, 1893. — Decided March 5, 1894.

The court being unable, in any view that it can take of the evidence, to reconcile the conflicting testimony of the witnesses respectively examined in behalf of the parties, holds that the evidence fails to show that the complainant is entitled to the relief prayed for.

The Colorado Oil Company, describing itself as a corporation organized and existing under the laws of New York, brought its bill in equity in the Circuit Court of the United

Counsel for Appellee.

States for the District of Colorado, on June 15, 1887, against Augustus R. Gumaer, a citizen of Colorado, and the Florence Oil Company, of that State, praying for an injunction to restrain the defendant Gumaer from assigning or encumbering a certain leasehold estate, with certain rights and privileges thereto annexed, and to restrain the defendants and each of them from consuming any oil, gas, metal, or mineral from the leasehold premises, or disturbing the complainant's possession thereof, or destroying its property thereon. The court entered an order on the following day, restraining the defendants from doing any of the acts which the complainant sought to have enjoined until the 27th of the same month, the day set for a hearing of the cause. On that day it was ordered, in accordance with the stipulation of counsel, that the restraining order should remain in force until the final hearing, and that the defendants should answer to the merits on or before September 15, 1887. On the 12th of that month the defendant Gumaer filed his answer, and on the 3d of the following month the company filed a formal replication thereto.

A judgment *pro confesso* against the Florence Oil Company was entered on February 6, 1888. The cause as against Gumaer was heard in the said court upon bill, answer, and evidence, and, on December 22, 1888, the court entered a final decree embodying the relief by injunction prayed for in the bill, and ordering that a lease from Stephen J. Tanner to Gumaer, dated October 6, 1886, be surrendered and delivered, for the use of the complainant, into the office of the clerk of the court, and that two other leases, dated respectively October 12, 1886, and December 20, 1886, by which it appeared that Gumaer had granted and demised certain parts of the property to the company, be cancelled and annulled, and all parties thereto be relieved from the conditions thereof. The defendants appealed from that decree to this court.

Mr. Thomas M. Patterson for appellant.

Mr. E. T. Wells, *Mr. R. T. McNeal*, and *Mr. John G. Taylor*, for appellee, submitted on their brief.

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

The Colorado Oil Company, a corporation organized under the laws of the State of New York, and whose purpose was to mine, produce, refine, and deal in petroleum and its products, procured from the owners of lands, situated in the county of Fremont and State of Colorado, leases authorizing said company to sink wells on such lands and to extract oil therefrom. On or about the 13th day of July, 1886, the company appointed Augustus R. Gumaer, then a resident of Cañon City, Colorado, its general manager in that State.

Gumaer acted as general manager of the company until December 21, 1886, when his resignation was accepted by the company, through its vice-president, in a letter containing the following terms: "In accepting your resignation as general manager of the Colorado Oil Company for Colorado, I beg to express to you the regrets of the company and myself in losing your valuable services. You accepted the position when the company was in a precarious condition. Under your able management, its affairs to-day are in a much different condition, and prospects brighter than ever. I beg to express to you, for the company and myself, our thanks for the interest which you have taken in our affairs; and I beg to express the wish that our friendly relations may always continue."

On the 15th day of June, 1887, the Colorado Oil Company filed a bill of complaint against Gumaer and the Florence Oil Company, in which it sought to have Gumaer declared a trustee for it as to a certain lease for oil lands in Fremont County, which had been granted by one Stephen J. Tanner to Gumaer in his own name, but in such circumstances as that in equity it was the property of the company. The bill further alleged that certain leases of portions of the Tanner tract, subsequently executed by Gumaer to the Colorado Oil Company, were in fraud of the company's rights in the entire tract, and intended to operate as a fraud and deceit. It was also alleged that the Florence Oil Company, organized and controlled by Gumaer, had entered into possession of a part of the tract.

A decree *pro confesso* was taken against the Florence Oil Company. Gumaer answered, averring that the lease by Tanner to him was in his own right, and not as trustee, and that the leases of portions of the tract to the complainant had been made in good faith, and were binding, and that the rights of the complainant in the Tanner tract were limited and defined by those leases.

The cause was put at issue, and a large amount of evidence was put in by both parties. The result in the court below was a decree in favor of the complainant, declaring that Gumaer had taken the Tanner lease in trust for the complainant company, and commanding the defendant to surrender and assign the same to the complainant, and also to surrender the leases made by Gumaer, of portions of said tract, to be cancelled.

We are compelled to pass upon this case without the assistance of any opinion or findings of facts by the court below, and hence it has been necessary for us to consider all the evidence. The bill is definite and precise in its allegations, and waives answer under oath. The answer, although without weight as evidence, is also precise and specific in its allegations denying the equity of the bill.

There is no view that we can take of the evidence that enables us to reconcile the conflicting testimony of the witnesses respectively examined in behalf of the parties.

The principal witnesses who testified in behalf of the complainant were Jacob Wallace, president; Isaiah Josephi, vice-president, and Simeon E. Josephi, brother of Isaiah, and who succeeded Gumaer as manager of the company. Their testimony sustained in substance the allegations of the bill.

These witnesses were confronted by Stephen J. Tanner, the owner of the tract in question; by Samuel H. Baker, who had acted as attorney for Gumaer, and also, for a part of the time, as attorney for the company, and by Gumaer himself; and their testimony is, in essential particulars, directly contradictory to that given by the complainant's witnesses.

The principal matter in controversy is, whether Gumaer took the lease from Tanner for himself, or whether he took it

in circumstances that, in equity, prevent him from asserting his personal ownership of it against the company.

It was shown that the lease of Tanner to Gumaer was dated October 6, 1886, and when the latter was acting as general manager of the company, and it was claimed that he procured the lease by representing to Tanner that he was taking it for the company. It was testified by Wallace that he had, as president, directed Gumaer to procure additional leases, and particularly of the Tanner tract. He denied that Gumaer had informed him, before he agreed to become manager, that he had a contract of any kind with Tanner, and he denied that Gumaer had ever pretended to own a lease from Tanner. He also denied that Isaiah Josephi, the vice-president, had been authorized by the company to accept leases from Gumaer of portions of the Tanner tract.

Simeon Josephi testified that Tanner had told him that he had given Gumaer a lease, knowing him to be the general manager of the Colorado Oil Company, and believing that the company would carry out the conditions of the lease; that when Isaiah Josephi came to Colorado in December, 1886, and had learned that Gumaer held a lease from Tanner, he demanded that it be turned over to the company; and that, on Gumaer's refusal to turn over the Tanner lease, Josephi had, in order to avoid jeoparding the fixtures and property of the company that were on certain portions of the Tanner tract, accepted leases from Gumaer of such portions.

Isaiah Josephi testified that he had accepted the leases from Gumaer under protest.

On behalf of the defendants it was shown that while it was true that the lease from Tanner to Gumaer was executed on October 6, 1886, after he had been appointed manager, yet that it was given in pursuance of a contract in writing between Tanner and Gumaer, dated December 10, 1885, long before he had any connection with the company, which contract gave an option to Gumaer to purchase the tract.

Tanner testified to the existence of the contract of December 10, 1885, between himself and Gumaer, and also that he made the lease of October 6, 1886, to Gumaer directly, with-

out any reference to the Colorado Oil Company, believing that he was able to execute the terms of the lease which required him to enter upon the land and commence operations within ten days.

Gumaer testified that he had a contract with Tanner, and also with other parties, before he was appointed manager of the Colorado Company; that he had informed Wallace, the president, of his option for the Tanner tract before he was so appointed; that he subsequently offered to give an interest in the tract to the company on certain terms. He denied that he had ever received any instructions, either orally or in writing, from the company to get for it any interest in the Tanner lands. He also testified that he gave the leases to the Colorado Oil Company of certain parts of the Tanner tract, after a conference with Isaiah Josephi, the vice-president, in full and satisfactory settlement.

Samuel H. Baker, who was then acting as the company's attorney, testified that he had learned from Wallace that Gumaer had explained to him about Gumaer's connection with the Tanner lands. He also testified that he was present at the settlement between Gumaer and Josephi, vice-president, and that the lease from Gumaer to the company was given for "the purpose of adjusting a small difference between the company and Gumaer, and was received by the company as a sort of compromise and settlement."

It must be apparent, from this brief statement of the testimony of these witnesses, that the principal matters on which the complainant's right to relief depends are left in doubt and uncertainty.

Nor are our doubts resolved in favor of the complainant, when we turn from the irreconcilable statements of the witnesses to the letters and telegraphic messages that passed between Gumaer and Wallace, president of the company. On the contrary, the impression made upon our minds by their perusal is favorable to the defendants.

Thus, on August 21, 1886, Gumaer wrote a letter to Wallace, in which he distinctly adverts to his option on the Tanner tract, and says: "My option does not expire before the middle

of December, but I want to call your attention to the fact that time is passing by, and after we see the result of No. 5, something must be done. I am confident that I can handle it with Denver parties, but, as promised, I will give you first chance."

In a letter dated October 3, 1886, he wrote: "I will make this proposition to the company: If you will sink one well immediately, one within a year and three more within the second and third years, I will give you the right to put the five wells on the one hundred and sixty acre lease that belongs to me, at one-eighth royalty, and in such places as you may select from time to time; however, this lease will not prohibit me from leasing or sinking other wells on said lease." This was followed by a telegraphic dispatch, dated October 7, as follows:

"To Jacob Wallace, President, 304 Greenwood Street, New York:

"Six down five hundred feet. Ignore my proposition third: make new one to-day.

"A. R. Gumaer, *General Manager.*"

A letter of the same date read as follows:

"Cañon City, Col., *Oct. 7th*, 1886.

"Jacob Wallace, Esq., President.

"I wired you to ignore my proposition of the 3d, and that see new one which I make, viz.:

"If you will drill two wells on Tanner tract, adjoining McCandless lease, say one in pumping distance from No. 6 and the other east side of said tract, and commence derrick for third rig, I will give you forty acres of the McCandless lease, all, at one-eighth royalty; that is to say, the three wells' product and the forty acres, all for one-eighth royalty.

"You are not required to do any work on the forty-acre tract; both leases are given for twenty years, or as long as oil is found in paying quantities. . . .

"You understand, these are lands I have held options on before I acted for the company. I consider this very valuable territory, and I cannot get you as favorable a lease, considering

location, from any one. . . . Please wire me on receipt of this whether to go on with the work under the above proposed lease. . . . I will get ready, so that work can be pushed rapidly upon hearing from you. Do not fail to wire."

On October 11, Wallace sent the following dispatch:

"A. R. GUMAER, G. M., Cañon City, Colo.

"Without consulting trustees cannot consent to lease at more than one-tenth royalty.

"JACOB WALLACE, *President.*"

Upon October 12, Gumaer telegraphed Wallace as follows: "I accept proposition, one-tenth; have commenced work."

In this condition of affairs, Gumaer erected the derricks and fixtures on those portions of the Tanner tract which subsequently he leased to the company when he went out of their service.

This, and other correspondence which it is unnecessary to quote, seems to strongly corroborate Gumaer's version of these transactions. While it is true that the Tanner lease was executed after Gumaer's appointment as manager, it was fairly an exercise of the option to purchase given him previously. Wallace's allegation that he had instructed Gumaer to secure leases of the Tanner property is squarely denied by Gumaer. It was claimed that the company had given Gumaer a general power of attorney, authorizing him to make contracts and purchases, but the power, when produced, discloses that it merely authorized him to take such steps as were necessary in defending the company against a pending suit.

Upon the whole, our examination of the evidence fails to convince us that the complainant is entitled to the relief prayed for.

We, therefore, remand the case to the court below, with directions to set aside the decree and dismiss the bill.

COLEMAN *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 109. Submitted November 23, 1893. — Decided March 5, 1894.

In an action brought to recover fees as assistant district attorneys in suits to vacate patents of public land, it being conceded that the complainants did not expect, during the period in which the services were performed, that the United States would compensate them, and that they looked for recompense to the clients who had retained them, and that the use of the name of the United States had been consented to on the application of the plaintiffs with the understanding that they were to receive no compensation from the United States, and that on the first intimation that they might look to the United States for compensation, their formal employment was at once terminated, *held*, that there was no contract, express or implied, between them and the United States, for a breach of which judgment should be rendered against the latter.

THE case is stated in the opinion.

Mr. Edwin B. Smith and *Mr. T. H. N. McPherson* for appellants.

Mr. Assistant Attorney General Dodge and *Mr. George H. Gorman* for appellees.

MR. JUSTICE SHIRAS delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims, sustaining a demurrer of the defendants to the claimants' petition, and dismissing the petition.

It appears that in the year 1843 the government of Mexico granted to Miranda and Beaubien, citizens and residents of Mexico, a tract of land situated in Mexico. After the territory which included this grant was brought by treaty with Mexico within the jurisdiction of the United States Congress, in the year 1860, passed an act confirming the grant to Miranda and Beaubien. Subsequently, Miranda and Beaubien

conveyed these lands to the Maxwell Land Grant and Railway Company, and thereafter the lands were surveyed by the government of the United States, and a patent for them issued to the said company.

The petitioners allege that the grant from the Mexican government contained about one hundred and twenty-four thousand acres, but that the lands, included within the United States survey, embraced about two million acres, lying both in the Territory of New Mexico and the present State of Colorado, and that the excess included in said survey belonged to the United States, and was of great value, namely, of the value of two million dollars.

The petitioners further state that upon portions of the lands included in said fraudulent survey many persons had become actual settlers and residents prior to the confirmation of the survey, and that some of said settlers, who claimed that their right to possession had been invaded by the land grant company, determined, in 1881, to commence legal proceedings to test the title of that company to so much of said lands as had been fraudulently or mistakenly conveyed to the company by the United States. The petitioners were employed by these settlers to take the necessary proceedings, and they, accordingly, pursued an investigation into the facts connected with the said alleged fraudulent survey, and expended much time and labor in so doing.

In order to facilitate their proceedings the petitioners, on behalf of the settlers by whom they had been retained, applied to the then Attorney General of the United States for leave to bring suit in the name of the United States to vacate the patents which had been theretofore granted to the Maxwell Land Grant Company.

They allege that they were duly authorized to begin suit for that purpose, and that, in pursuance of such authority, they drew and prepared two bills in equity, one to vacate and set aside the patent so far as it embraced lands in New Mexico, the other for like purpose in respect to the lands within the State of Colorado. They further state that they filed one of these bills in the United States Circuit Court for the Southern

District of Colorado. The parties defendant to said bill were the Maxwell Land Grant Company and others, on whose behalf an answer was filed. The court by order fixed the time within which the United States as complainants and the defendants should close the taking of their testimony, to wit, in September, 1883.

It is further stated that, in the preparation for the trial of said case, the petitioners were required to expend time and money in the examination of maps and surveys of record in the various departments, and to go to New Mexico and Colorado, in order to get the names of proper persons to make defendants, and the names of witnesses. They allege that they were jointly employed by the settlers for the purpose aforesaid, and were to share equally in the moneys paid in compensation; but no sum was fixed or agreed upon as to the amount which they were to receive for their services, and that only the sum of $177 was paid to or received by them in compensation for services, or in reimbursement for money expended. In the fall of 1883 they were notified by the settlers that they could not furnish any more money to defray the expenses of the trial of said causes, neither could they pay attorneys any sum in compensation for services, for the reason that almost all the lands embraced within said fraudulent survey belonged to, and would revert to, the United States, and not to the settlers, in case of a successful result of said litigation; and that, as the benefits would result to the United States, they should bear the expenses of the litigation.

They further allege that, on August 16, 1882, they had been, by the then Attorney General, appointed special district attorneys, without compensation, to prosecute said suits to vacate said patent; that, on receipt of the notice aforesaid from the settlers, they notified the duly constituted authorities of the United States that the settlers upon the disputed lands would not pay any of the expense connected with the prosecution of said suits, and requested that such expense should be borne by the United States.

Thereupon and thereafter the United States refused to

further employ them, but employed other counsel, and took and appropriated to themselves all the benefit and advantages of the labor so rendered and the expenses so expended by them.

The petitioners claim that the United States are indebted to them, for such service and expenses, in the sum of $11,500.

The appellants assign for error the judgment of the court below, in sustaining the government's demurrer, and in dismissing their petition.

The appellants contend that the facts disclosed in their petition constitute an implied contract on the part of the United States to pay the value of the services rendered and of the expenditures made in furtherance of a suit in which they were beneficially interested. Assuredly there may be a state of facts from which an implied contract or promise to pay for services rendered may be justly inferred, and we do not doubt that, in such a case, where the United States are parties defendant, the Court of Claims have jurisdiction, under section 1079 of the Revised Statutes, to entertain a suit and render judgment. *United States* v. *Russell*, 13 Wall. 623; *Salomon* v. *United States*, 19 Wall. 178; *Hollister* v. *Benedict &c. Manfg. Co.*, 113 U. S. 59; *United States* v. *Palmer*, 128 U. S. 262. But we think that a promise to pay for services can only be implied when the court can see that they were rendered in such circumstances as authorized the party performing to entertain a reasonable expectation of their payment by the party benefited.

It is a conceded fact in the present case, by express allegation in the petition, that the claimants did not expect, during the period in which the services were performed, that the United States would compensate them; that they looked for recompense to the clients who had retained them; and that their use of the name of the United States in the litigation was consented to on their own application, and with the express understanding that they were to receive no compensation from the United States. On the first intimation that they might, in the matter of compensation, exchange their clients for the United States, their formal employment was at once

terminated. For their past services they are entitled to recover from the settlers who employed them, but the admitted facts clearly show that the United States are under no express or implied obligation to answer for a breach of contract between the appellants and their clients.

It is unnecessary to pursue the subject further. The court below committed no error in dismissing the claimants' petition, and the decree is

Affirmed.

BELDING MANUFACTURING COMPANY *v.* CHALLENGE CORN PLANTER COMPANY.

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

No. 235. Argued January 31, February 1, 1894. — Decided March 5, 1894.

Letters patent No. 204,216, granted May 28, 1878, to Richard T. Hambrook, for an improvement in refrigerators, are, in view of the prior state of the art, void for want of patentable novelty.

THE case is stated in the opinion.

Mr. Taylor Everett Brown, (with whom was *Mr. Charles Clarence Poole* on the brief,) for appellant.

Mr. Edward Taggart and *Mr. Arthur Stem* for appellee.

MR. JUSTICE SHIRAS delivered the opinion of the court.

Letters patent of the United States, No. 204,216, were granted, on May 28, 1878, to Richard T. Hambrook, for an improvement in refrigerators, and by various assignments the ownership thereof became vested, in 1885, in the Belding Manufacturing Company.

In March, 1889, in the Circuit Court of the United States for the Western District of Michigan, a bill in equity was filed

by the Belding Manufacturing Company against the Challenge Corn Planter Company, alleging infringement by the defendant of the complainant's rights, as owner of the Hambrook patent, and praying for relief. The Challenge Corn Planter Company appeared and answered. The cause was put at issue, a large amount of evidence was put in by the respective parties, and, after argument, on June 25, 1890, a final decree was entered dismissing the bill of complaint, from which decree this appeal was taken.

We have been aided in our consideration and decision of this case by very full and able arguments, oral and printed, on behalf of both the parties.

Hambrook's invention was described by himself as follows:

"The nature of my invention consists in the construction of a refrigerator having the ice chamber constructed in such a manner that the air will impinge upon the top, bottom, and sides of the ice, and that the continuous volume of cold air generated by the melting of the ice will descend, in a dry state, to the provision chamber without material hindrance, causing the displaced and less frigid air to ascend to the ice chamber through open spaces at each side thereof without meeting the descending current of cold air."

The specification describes the refrigerator as consisting of a cabinet or outer box, within which is an inner box, lined with metal throughout, and fastened and retained in its relative position to the outer case by any proper means used by makers of refrigerators. The inner box is divided into several compartments — one, occupying the upper part, being the ice chamber, and a lower one, consisting of two apartments, separated from each other by a partition, which is called the provision chamber.

We accept, as a satisfactory description of the Hambrook refrigerator, that given by Melville E. Dayton, an expert examined on behalf of the complainant:

"The patent illustrates and describes a domestic or household refrigerator, containing an ice-box at the top, a lid over the ice-box, a provision chamber or chambers below the ice-box, a partition separating the ice-box from the provision

chamber or chambers, a central passage through this passage for the downflow of cold air from the ice-box to the provision chamber, side passages rising from the provision chamber outside of the ice chamber to near the top of the latter, overhanging cleats or shields covering these side passages, gutters at the margins of the central opening in the partition to prevent the passage of water from the ice chamber into the provision chamber, a deflecting plate over said central opening, to carry the water, which would drip directly through said central opening to the top of the partition at the sides of said opening, so that the gutters shall carry away all water or moisture falling from the ice or its supporting rack, and a pipe for draining off the water delivered by the gutters. The patent shows a vertical partition dividing the provision chamber into two compartments, said partition being extended up through the central opening in the horizontal partition and into the ice chamber."

The court below did not deem it necessary to consider and pass upon the question of infringement, but, being of opinion that, in view of former inventions and of the state of the art in reference to the construction of refrigerators, there was no patentable invention in the Hambrook patent, dismissed complainant's bill; and if we are satisfied to adopt that conclusion of the court, no other question in the case need be considered.

Quite a number of prior patents were put in evidence by the defendant, beginning with a patent to Sanford in 1855, followed by one to Lyman in 1856, to Banta in 1867, to Chase in 1869, to Hunt in 1870, to Rohrer in 1871, to Butler in 1875, and to Smith in 1877.

Without going into a minute comparison of the features of these respective patents, it may be safely said that they closely resemble each other in the main particulars of their construction and in the objects sought to be effected. Certain disadvantages were overcome and improvements added from time to time.

Litigation took place in which the courts were called upon to consider conflicting claims under some of these patents. The most important case, and the only one which we need to

notice, involved a contest between the Lyman and Sanford patents, and came to this court on appeal from the Circuit Court of the United States for the Southern District of New York. *Roberts* v. *Ryer*, 91 U. S. 150.

The bill was filed by Roberts, assignee of Sanford, alleging an infringement of the patent to Sanford for an improvement in refrigerators. The principal defence relied upon was the prior invention of Lyman, and this defence was sustained in the court below, whose decree, dismissing the bill, was affirmed by this court in an opinion by Chief Justice Waite.

In that opinion the Sanford patent is described to be for a combination of three elements, to wit: 1, an open-bottom ice-box, or its equivalent, so constructed that the air may pass freely down through it, while, at the same time, the drip of the water from the melting ice is prevented by collecting the water and taking it in an escape-pipe outside of the refrigerator; 2, a dividing partition, open above and below, separating the refrigerator into two apartments; and, 3, a chamber directly under the open-bottom ice-box, in which articles to be refrigerated may be placed in such manner as to receive the descending current of air from the ice-box directly upon them.

The court proceeded to compare these devices with those found in the Lyman patent, in which were found an open-bottom ice-box, and a partition open above and below, dividing the refrigerator into two apartments, in one of which the air passed downward only, and in the other upward only. Each called for the circulation of air, and each obtained it substantially by the same device. They each passed the air cooled in the ice-box through convenient openings downwards in one apartment, and upwards through the other. In each device the cooled air passed through the opening in the bottom of the partition, and the warm air through that in the top. All this was done in both cases for the purpose of cooling, desiccating, and purifying the confined air, and to prepare it for the purposes of refrigeration. There was, therefore, one common object to be accomplished by both inventors; and they each devised substantially the same plan for that

purpose. With both of the inventors, the circulation by means of an ascending and descending current was the principal object to be obtained. One considered the greatest benefit for the purposes of refrigeration was to be derived from the use of the descending current, while the other saw more particularly the advantage of the ascending current, but they each had both, and could utilize both. The court, therefore, concluded that the effort to distinguish the two devices was futile; that if there was any change of construction suggested, it was only to increase its capacity for usefulness; that it was a carrying forward of new or more extended application of the original thought — a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the same means, with better results.

Bearing in mind the reasoning and conclusion of the court in that case, we shall pass by the patents subsequently granted till we reach that granted to Smith in 1877, reissued in 1878, and in which the court below found all the essential features of the Hambrook invention.

Smith described his theory and devices in the following language:

"My invention relates to that class of refrigerators wherein a constant circulation of air is maintained through the ice-box and provision chambers; and its object is to increase the circulation, reduce the air to a lower temperature than heretofore, and to deliver such air into the provision chambers deprived of all odor and free from sweating, preventing the sides of said provision chambers from sweating, and better preserving the articles placed therein.

"My invention therein consists in the combination of an ice-box of the entire width of the refrigerator, except the air passages at its end, said ice-box having a central air discharge opening in its bottom, the provision chambers and the air passages leading out of the same; also, in the combination of the same elements and an air discharge opening above the centre of the ice-box; also, in the combination of the ice-box with the central air discharge opening and a false bottom, raised above the bottom of the ice-box, having openings near

its ends and an air passage under it; also, in the combination of the various principal operative parts, all constructed and arranged as more fully hereinafter described."

In this description we recognize the principal features of those contained in the prior patents to Lyman and Sanford, and, without pausing to consider whether the art was thereby advanced within the meaning of the patent law, it is obvious that the territory for further invention, in this kind of refrigerator, was still further restricted.

The appellant's expert, Dayton, on rebuttal limited the Hambrook patent as follows:

"The Hambrook patent is not broadly for the idea or discovery that cold air is heavier than warm air, and will fall by its greater specific gravity, and thus cause the warm air which it displaces to rise; nor is it for the general location of an ice chamber above a provision chamber, by which the difference in specific gravity between the cold and warm air may induce a circulation; nor is it for a particular form of grate or support on which the ice may rest while allowing air to move downward in contact with the ice; nor is it for the idea of inclining a watershed in order to permit water to flow therefrom; nor is it for the provision of an air passage broadly, by which air may descend from the ice chamber, or ascend from the provision chamber. All these things, broadly considered, were well known in various forms at the date of the Hambrook invention."

These admissions were plainly constrained by the claims and descriptions contained in the prior patents.

So, too, the learned counsel for the appellant in his supplemental brief concedes that the Smith patent shows the provision chambers, the ice chamber, an ice-table or rack equivalent to the rack of Hambrook, the equivalent of the double-inclined bottom pieces of Hambrook provided with a central opening — that it has also the equivalents of the gutters, and that it has the waste-water pipe.

But it is claimed that the Smith patent does not contain the side passages of Hambrook or their equivalents, and that it does not have the deflector plate or any equivalent, and that these

missing elements are material to the combination; and hence it is argued that the Smith patent, omitting these two elements of the Hambrook combination, did not anticipate the latter.

Yet appellant's expert witness, Dayton, in his analysis of the Smith patent admits — as of course he had to do — that it contained an uptake flue or passage at each end of the ice-box, though he endeavors to distinguish them from the end passage ways of Hambrook, in that the former do not discharge into the sides of the ice chamber at the top thereof, but are continued or prolonged through spaces in the cover, which meet and open at the middle of the lid, which results, as he contends, in a retardation of the air currents.

So, too, the same witness admits that the imperforate ice-rack in the Smith patent operates to prevent the water from dripping, and thus performs the function of the Hambrook deflector, though less advantageously, and he argues that an imperforate ice-rest is an entirely different thing from a separate deflector interposed between such ice-rest and a subjacent opening.

Whether the device in the Smith patent, to prevent the water from dripping into the provision chamber, by the use of an imperforate ice-rack can be deemed an equivalent for the Hambrook deflector, we need not decide, because the evidence is clear that the refrigerators made by the defendant company do not have the Hambrook deflector, but the ice is carried on an imperforate plate of corrugated metal, through which no water can drip. Either, then, this imperforate ice-rest *is* an equivalent of the Hambrook deflector, in which case the Smith patent was an anticipation, or it is *not* an equivalent, in which case the defendant's refrigerator does not infringe in that particular.

Nor do we think the distinction pointed out between the uptake flues or side passages in the Smith and Hambrook patents amounts to a patentable difference. The purpose of the flues is the same and their mode of operation is the same. The fact that Hambrook did not prolong these air passages along the lid or cover might perhaps be a better way of intro-

ducing the air into the ice chamber, but it does not amount to a patentable improvement.

As was said in *Roberts* v. *Ryer*, *supra*, "it was a mere carrying forward, a change only in form, proportions, or degree, doing the same thing, in the same way, by substantially the same means, with better results."

In view, then, of the state of the art as manifested by numerous prior patents, and particularly by that of Smith, we conclude that the Hambrook patent is void for want of patentable novelty; and the decree of the court below, dismissing the bill for that reason, is

Affirmed.

MR. JUSTICE GRAY was not present at the argument, and took no part in the decision of the case.

NORTHERN PACIFIC RAILROAD COMPANY *v.* EVERETT.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

No. 188. Submitted December 21, 1893. — Decided March 5, 1894.

A switchman in the employ of a railroad company was directed, in the line of his regular duty, to connect together two cars, one of which was loaded with bridge timbers. The timbers were unusually and dangerously loaded, extending so far over the end of the car as to make the coupling dangerous. The switchman had no notice or knowledge of this fact, and in making the coupling was very severely injured. To an action brought to recover damages for the injury, the railroad company pleaded that the injuries were the result of the switchman's negligence, and not of the negligence of the company, and on the trial asked to have the jury instructed to return a verdict for defendant. The court declined, and instructed the jury on this point, in effect, that they were to find whether the car was or was not properly loaded, and whether the plaintiff, by the exercise of proper diligence, could or could not have discovered the projecting timber before the cars came together and in time

Statement of the Case.

to avoid the danger, and that if he could not, by the exercise of such diligence, have so discovered it, then he was entitled to recover. The jury returned a verdict for the plaintiff. *Held*, that, as there was no conclusive evidence of a want of due care on the part of the switchman in not observing the projecting timber while in discharge of his duty, and while his attention was directed to his work, there was no error or unfairness in these instructions.

William J. Everett brought an action in the District Court of the Sixth Judicial Circuit of the Territory of Dakota on November 13, 1889, against the Northern Pacific Railroad Company, seeking to recover from it the sum of thirty thousand dollars as damages for injuries received by him in coupling cars owned and controlled by the company, alleging that he had received such injuries while in the employ of the company, as a yard switchman, in its yards at Jamestown, Dakota Territory, and while there engaged in the performance of his regular duties. The accident had happened, as he stated in his complaint, under the following circumstances: On July 6, 1889, he was at work in the yard, and was ordered by the yard foreman to couple together a car loaded with bridge timbers and a box car which was standing upon a side track. The car bearing the timbers was moved by a switch engine. This car was loaded in an unusual and dangerous manner, in that the timbers extended so far beyond each end of the car as to leave insufficient space for coupling with safety. The plaintiff had, however, no notion or knowledge of this fact. He attempted to carry out the orders which he had received, and in so doing his head was caught between the box car and the end of a heavy timber which projected over the end of the other car a distance of twenty-two inches. His injuries, thus received, were of a serious and permanent character, and consisted in the impairment, not only of his physical powers and senses, but also of his mental faculties.

The defendant admitted, in its answer, its ownership and control of the cars mentioned, but denied generally all the other averments of the complaint upon which were founded the plaintiff's alleged right to a recovery from it, and averred that the injuries, if any, received by the plaintiff were the result of his own negligence, and not of that of the defendant.

Statement of the Case.

After the deposition, on behalf of the plaintiff, of a witness residing in the State of Washington had been taken, in pursuance of a commission to take testimony, issued out of the said territorial court, the portion of the Territory in which the action was pending became a part of the State of North Dakota, and before further proceedings were had in the case it was removed into the Circuit Court of the United States for the District of North Dakota, in which court a trial was had before the court and a jury.

On the trial, after all the evidence for both parties had been heard, the defendant moved the court to instruct the jury to return a verdict for the defendant for the reason that the evidence in the case would not warrant a verdict for the plaintiff. The court refused to so instruct the jury, and the defendant excepted to this ruling. The court then instructed the jury as follows:

"The fact that the plaintiff was injured in an effort to couple defendant's cars at the time and place mentioned has not on the trial been contested, but the defendant says the plaintiff's injury was the result of his own negligence, or that his own negligence contributed to his injury; and if this answer of defendant is true, it is a complete defence to this action.

"To entitle the plaintiff to a verdict, he must satisfy you, by a preponderance of the evidence, of these two principal facts: First, that his injury was the result of the negligence of the railroad company; and, second, that his own neglect was not the occasion of the injury, and did not in any manner contribute to it. If the plaintiff's injury resulted from his own negligence, or if his own negligence contributed to his injury, he cannot recover.

"The particular act which the plaintiff alleges constitutes the neglect on the part of the defendant which resulted in his injury is that the flat car, which was in motion, and which he was ordered to couple to a box car standing on the track, was loaded with lumber, which projected twenty-two inches, or about that distance, over the end of the car where the coupling was to be made.

"The first question for you to determine is, was this an unusual or improper or negligent manner of loading lumber on a flat car? If you answer this question in the negative, you need inquire no further, but will return a verdict for defendant.

"If you answer this question in the affirmative, you will then inquire whether such negligent loading of the lumber on the car was the cause of the plaintiff's injury, unmixed with any negligence on his part; and if you find that it was, your verdict will be for the plaintiff.

"The plaintiff was bound to exercise care and diligence in his employment of coupling cars; he was bound to use all his senses as actively and intelligently as any prudent man having a knowledge of the hazardous character of his business would have done under like circumstances. The business is a dangerous one, and imposed on him the duty of exercising great care and caution.

"If the plaintiff saw that the lumber projected over the end of the car before he attempted the coupling, or if he could have seen it if he had exercised great care and diligence, which, under the circumstances, it was incumbent upon him to exercise, then he can claim nothing on account of the injury resulting from such projecting lumber, and the injury must be attributed to his own negligence.

"If you find the lumber was negligently loaded — that is, in an unusual and dangerous manner — and that this fact was unknown to the plaintiff, then when the plaintiff was ordered to couple the cars he had a right to assume that the car was properly loaded, and act on that assumption; but if before the peril was encountered he discovered the projecting lumber, he should have desisted from any effort to make the coupling, or should have made it in some manner that would not have subjected him to injury, if it was practicable for him to do so; and if by the exercise of proper diligence he might have discovered the projecting lumber before the accident, and in time to avoid it, he cannot recover."

The defendant objected to the last paragraph of the foregoing instructions, and moved that it be withdrawn. The motion was denied, to which ruling of the court the defendant

excepted. The case was then submitted to the jury, which rendered a verdict for the plaintiff, and awarded him damages in the sum of seven thousand dollars. Judgment in accordance with the verdict was entered on April 25, 1890. The defendant thereupon sued out a writ of error from this court.

Mr. James McNaught, *Mr. A. H. Garland* and *Mr. H. J. May* for plaintiff in error.

Mr. S. L. Glaspell for defendant in error.

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

While it is true that the defendant company excepted to the court's refusal to give, on the whole evidence, a peremptory charge in favor of the defendant, and has assigned such refusals for error, yet, in the brief of plaintiff in error, the learned counsel have not thought fit to discuss those assignments, but have put their case mainly upon the error alleged to have been committed by the trial court in instructing the jury in the following terms:

"If you find the lumber was negligently loaded — that is, in an unusual manner — and that this fact was unknown to the plaintiff, then when the plaintiff was ordered to couple the cars he had a right to assume that the car was properly loaded, and act on that assumption; but if before the peril was encountered he discovered the projecting lumber, he should have desisted from any effort to make the coupling, or should have made it in some manner that would not have subjected him to injury, if it was practicable for him to do so; and if by the exercise of proper diligence he might have discovered the projecting lumber before the accident, and in time to avoid it, he cannot recover."

The criticism made upon this instruction is that the court erred in stating that Everett had a right to assume that the car was properly loaded, without, at the same time, telling the jury that some portion of the duties of a car inspector were cast upon Everett himself, and that he should have discharged those duties before he undertook the work.

But though the court did say that Everett had a right to assume that the car was properly loaded and to act on that assumption, yet, at the same time, the court told the jury that if Everett had discovered the projecting lumber before the peril was encountered, he should have desisted from his effort to make the coupling, or should have made it in some manner that would not have subjected him to injury, and that if by the exercise of proper diligence he might have discovered the projecting timber before the accident and in time to avoid it, he could not recover.

In effect, the jury were told to find whether the car was or was not properly loaded, and whether the plaintiff, by the exercise of proper diligence, could or could not have discovered the projecting timber before the cars came together and in time to avoid the danger. In other words, the jury were instructed that if the car was negligently loaded, with the sticks of timber extending too far beyond the end of the car, and if the plaintiff could not, in the exercise of proper diligence, have perceived the projecting timber in time to escape, then he was entitled to recover.

We are unable to detect any error or unfairness in these instructions.

It appeared that Everett was a young and inexperienced man; that this was his first service in attempting to couple a car with a projecting load; the duty he was expected to perform gave him no time to narrowly inspect the approaching car or to observe its condition. His attention was not called to the projecting timber until he was in the very act of making the coupling, and when his effort to avoid it was too late. He had first to throw the switch to receive the approaching car, and then run ahead and get ready to put the pin in the drawhead. It was shown that there was no pin in the drawhead of the stationary car, and he was obliged to pick one up and put it in place ready to make the coupling. These duties gave him no opportunity to closely scan the car that was in rapid motion behind him. In such circumstances, when the whole transaction is the work of a moment, and when his duty calls upon him to act promptly, a man cannot be expected

to act with circumspection. At all events, we think that, in view of the fact that the car was improperly loaded, that Everett was new and inexperienced in such work, and that he was required to perform the double duty of throwing the switch and making the coupling, the case was an appropriate one for submission to a jury.

In the case of *Dunlap* v. *Northeastern Railroad Co.*, 130 U. S. 649, 652, we held that the Circuit Court erred in not submitting the question of contributory negligence to the jury, as the conclusion did not follow, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish.

And in *Richmond and Danville Railroad* v. *Powers*, 149 U. S. 443, we said that where in an action against a common carrier to recover damages for injuries there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because the facts, being undisputed, fair-minded men will honestly draw different conclusions from them.

In *Sullivan* v. *N. Y. & N. H. Railroad*, 154 Mass. 524, 527, it was held that the court is not permitted to take from the jury these questions of negligence and to decide them for the jury and for the case, unless the evidence shows that the negligence of the defendant in error was gross and wilful; if it was less than that, then the questions of negligence were for the jury, and are all settled in favor of defendant in error by the verdict.

It is not easy, in a subject of this kind, to lay down unbending rules, and conflicting cases can readily be found. But, without pursuing the subject further, we are satisfied that, in the present case, there was no conclusive evidence of a want of due care on the part of Everett in not observing the projecting timber while he was in the discharge of his duty, and while his attention was directed to the work in which he was engaged.

The judgment of the court below is

Affirmed.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *v.* ROBERTS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 230. Argued and submitted January 30, 1894. — Decided March 5, 1894.

The original claim of the State of Kansas to the school-lands in townships 16 and 36 in that State, was rejected by Congress and abandoned by the State, and the right of Congress was conceded to the absolute control of the lands thus embraced and of lands set apart for the use of Indians until such right should be extinguished by appropriate legislation.

By the act of July 26, 1866, c. 270, 14 Stat. 289, granting a right of way to the company subsequently known as the Missouri, Kansas and Texas Railway Company across the public lands in the State of Kansas, the title of the lands composing that right of way, including townships 16 and 36, when crossed by it, became vested in that company.

THE case is stated in the opinion.

Mr. Thomas N. Sedgwick, (with whom was *Mr. James Hagerman* on the brief,) for plaintiff in error.

Mr. Nelson Case, for defendant in error, submitted on his brief.

MR. JUSTICE FIELD stated the case and delivered the opinion of the court.

This is an action of ejectment to recover possession of certain lands situated in section sixteen (16) of township thirty-four (34) in the county of Labette, State of Kansas, occupied and used by the Missouri, Kansas and Texas Railway Company as part of its right of way, to which it claims title under the act of Congress of July 26, 1866, granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph Company from Fort Riley, Kansas, to Fort Smith, Arkansas. Act of July 26, 1866, c. 270, 14 Stat. 289.

The act declares that, for the purpose of aiding the Union Pacific Railway Company, southern branch, that being a corporation then organized under the laws of Kansas, to construct and operate a railroad from Fort Riley, in that State, or near that military reservation, thence down the valley of the Neosha River to the southern line of the State, with a view to the extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there was thereby granted to that State, for the use and benefit of the railroad company, every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of its road, and not exceeding in all ten sections per mile; provided that in case it should appear that the United States had, when the line of the railroad was definitely located, sold any sections, or any part thereof, granted as aforesaid, or that the right of preëmption or homestead settlement had attached to the same, or that it had been reserved by the United States for any purpose whatever, then it should be the duty of the Secretary of the Interior to cause to be selected for the purposes stated, from the public lands of the United States nearest to the sections specified, so much land as should be equal to the amount of the lands sold, reserved, or otherwise appropriated, or to which the right of a homestead settlement or preëmption had attached. But to the said act a proviso was attached that any and all lands reserved to the United States by any act of Congress or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement, or other purposes whatever, were reserved and excepted from the operation of the act, except so far as it might be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, was thereby granted, subject to the approval of the President of the United States.

The Union Pacific Railway Company, southern branch, the corporation designated in the act of Congress, was organized by the legislature of Kansas, and incorporated on the 25th day of September, 1865, under an act providing for the incor-

poration and regulation of railroad companies; and on the 3d day of February, 1870, its name was changed to that of the Missouri, Kansas and Texas Railway Company, under which designation it is one of the defendants herein.

Certain lands within the present State of Kansas were reserved whilst it was still a Territory, and long previously, by the United States, for the use and occupation of the Osage Indians. Such reservation was made by treaty between them and the United States concluded as far back as June 2, 1825, and proclaimed in December following. 7 Stat. (Indian Treaties) 240. From that time, and continuously thereafter, the reserved lands were occupied by those Indians until the treaty ceding the lands, or parts thereof, to the United States, concluded in 1866, and proclaimed in January, 1867, (14 Stat. 687,) except such portion thereof as was appropriated and used as a right of way by the Missouri, Kansas and Texas Railway Company for its road under the grant of July 26, 1866. Prior to June 6, 1870, that company located its railroad through these reserved lands in Kansas, with the approval of the President, and constructed its road in substantial conformity with the act of Congress. The right of way for its road, two hundred feet in width, was granted to the company unconditionally, subject only to such approval. The title to the land for the two hundred feet in width thus granted vested in the company either upon the passage of the act of Congress, July 26, 1866, or upon the construction of the road, and so far as the present case is concerned, it does not matter which date be taken.

The United States had the right to authorize the construction of the road of the Missouri, Kansas and Texas Railway Company through the reservation of the Osage Indians, and to grant absolutely the fee of the two hundred feet as a right of way to the company. Though the lands of the Indians were reserved by treaty for their occupation, the fee was always under the control of the government; and when transferred, without reference to the possession of the lands and without designation of any use of them requiring the delivery of their possession, the transfer was subject

to their right of occupancy; and the manner, time and conditions on which that right should be extinguished were matters for the determination of the government, and not for legal contestation in the courts between private parties. This doctrine is applicable generally to the rights of Indians to lands occupied by them under similar conditions. It was asserted in *Buttz* v. *The Northern Pacific Railroad Company*, 119 U. S. 55, and has never, so far as we are aware, been seriously controverted. In that case, the lands were within what is known as Indian country, where the right of the Indians to the occupancy of their lands was recognized; and in grants by the government of portions thereof for works of internal improvement, there usually was a stipulation for its extinguishment as rapidly as might be consistent with public policy and the welfare of the Indians. Such a stipulation was given when the grant under consideration in the case cited was made, showing that the government intended the grant to take effect notwithstanding any existing right of occupancy by the Indians, and it was deemed a sufficient expression of its intention to that effect. No such stipulation was made when the grant of the right of way through the Osage reservation was made, but the uses to which the lands were to be applied necessarily involved their possession. That grant was absolute in terms, covering both the fee and possession, and left no rights on the part of the Indians to be the subject of future consideration. Though the law as stated with reference to the power of the government to determine the right of occupancy of the Indians to their lands has always been recognized, it is to be presumed, as stated by this court in the *Buttz case*, that in its exercise the United States will be governed by such considerations of justice as will control a Christian people in their treatment of an ignorant and dependent race, the court observing, however, that the propriety or justice of their action towards the Indians, with respect to their lands, is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties neither of whom derives title from the Indians. The right of the United States to

dispose of the fee of land occupied by them, it added, has always been recognized by this court from the foundation of the government. There are, however, certain well-established doctrines controlling the action of the government, which can always be invoked to prevent hasty and improvident action against the Indians. It has always been held that the occupancy of lands set apart by statute or treaty with them for their use cannot be disturbed by claimants under other grants of the government not indicating its intention, either in express terms or by the uses to which the lands are to be applied, to change the possession of the lands.

And the setting apart by statute or treaty with them of lands for their occupancy is held to be of itself a withdrawal of their character as public lands, and consequently of the lands from sale and preëmption.

The right and power of the government to dispose of the fee of the lands in controversy occupied by the Osage Indians, with their rights of occupancy, having been exercised, and a grant of both fee and possession having been made to the Missouri, Kansas and Texas Railway Company, it follows that this company, the plaintiff in error, is entitled to a reversal of the judgment unless the claim of the plaintiff below, the defendant in error here, rests upon tenable grounds, and to them we will now turn our attention. Roberts, the plaintiff below, traces his title to the premises through a patent from the State of Kansas to his grantor, dated May 25, 1871, and by conveyance from him, claiming that they constituted a portion of the lands ceded to the State for school purposes prior to the grant of Congress to the railway company under the act of July 26, 1866.

On the 30th of May, 1854, Congress passed an act (c. 59, 10 Stat. 277, 289) to organize the Territories of Nebraska and Kansas. The sections of the act from the nineteenth to the thirty-seventh inclusive, relate to the Territory of Kansas. Section thirty-four (34) provided "that when the lands in the said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-

six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory and in the States and Territories hereafter to be erected out of the same."

If the reservation named was intended as a grant of the sections sixteen (16) and thirty-six (36) to the Territory and to the States to be created out of them, or as a dedication of them for schools, it could only apply to such lands as were public lands, for no other lands in our land system are subdivided into sections, nor could it embrace lands which had been set apart and reserved by statute or treaty with them for the use of the Indians, as was the case with the lands involved in this controversy, as we have already shown. As early as 1839 it was held in *Wilcox* v. *Jackson*, 13 Pet. 498: "That a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace or operate upon it, although no exception be made of it." The reservation referred to there was of land for military purposes; and in *Leavenworth, Lawrence and Galveston Railroad* v. *United States*, 92 U. S. 733, 745, it was said that this doctrine "applies with more force to Indian than to military reservations. The latter," the court observed, "are the absolute property of the government. In the former other rights are vested. Congress cannot be supposed to grant them in a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose."

The present constitution of Kansas was proposed by a convention of people in the then Territory, July 29, 1859, with specified boundaries. An ordinance of the convention, preceding it, recites that, "whereas the Government of the United States is the proprietor of a large portion of the lands included in the limits of the State of Kansas as defined by this constitution; and whereas the State will possess the right to tax said lands for purposes of government and for other purposes: Now therefore, be it ordained by the people of Kansas that the right of the State of Kansas to tax said lands is relin-

quished forever, and the State of Kansas will not interfere with the title of the United States to such lands nor with any regulation of Congress in relation thereto, nor tax non-residents higher than residents, *Provided always*, that the following conditions be agreed to by Congress," among which conditions was the following: "That 'sections numbered sixteen (16) and thirty-six (36) in each township in the State, *including Indian reservations and trust lands*, shall be granted to the State for the exclusive use of common schools; and when either of said sections or any part thereof has been disposed of, other lands of equal value, as nearly contiguous thereto as possible, shall be substituted therefor.'" 1 Charters and Constitutions, 629, 630.

Congress did not accept the proposed constitution with the conditions designated, but on the contrary, in its act for the admission of the State into the Union, passed on the 29th of January, 1861, c. 20, 12 Stat. 126, 127, after declaring that the State was admitted on an equal footing with the original States in all respects whatever, and, describing its boundary, added a clause, containing the following provisions among others: "*Provided*, That nothing contained in the said constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, . . . or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never been passed." By this provision Congress reserved to itself the right to make all needful regulations for the government of the Indians, and for the use and disposition of their lands and other property. The Indians continued thereafter as previously in possession of the lands, and their rights, whatever their nature and extent, were not extinguished by anything in the act of admission of the State into the Union, nor at the time of the grant of a right of way by the act of July 26, 1866.

Congress went further, and rejected in express terms the claims of the State asserted in the ordinance accompanying the proposed state constitution. By section 3 of the act of admission it declared that the act of admission should not be construed as an assent to all or any of the propositions or claims contained in the ordinance accompanying the proposed constitution or in the resolutions attached, but at the same time it made certain propositions, which it offered to the people of the State for compliance or rejection, and which, if accepted, should be held obligatory upon the United States and upon the State.

One of these propositions declared "that sections numbered sixteen and thirty-six in every township of *public lands* in said State, and where either of said sections or any part thereof has been sold or otherwise been disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools." And the several propositions were followed by the declaration that they were offered "on the condition that the people of Kansas shall provide by an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States or with any regulations Congress may find necessary for securing the title in said soil to *bona fide* purchasers thereof."

These several provisions were accepted by the State of Kansas, by a joint resolution of its legislature, January 20, 1862, in this language: "That the propositions contained in the act of Congress entitled 'An act for the admission of Kansas into the Union,' are hereby accepted, ratified, and confirmed, and shall remain irrevocable, without the consent of the United States; and it is hereby ordained that this State shall never interfere with the primary disposal of the soil within the same by the United States or with any regulations Congress may find necessary for securing the title to said soil, to *bona fide* purchasers thereof; and no tax shall be imposed on lands belonging to the United States."

It is clear beyond any doubt from this statement of the

legislation of Congress and of Kansas, and the accepted conditions upon which that State was admitted into the Union, that her original claim to the school sections in townships sixteen and thirty-six of the State was rejected by Congress, and abandoned by the State, and the right of Congress was conceded to the absolute control of the lands thus embraced and of lands set apart for the use of the Indians until such right should be extinguished by appropriate legislation. This rejection by Congress of the original claim of Kansas to the school lands in townships sixteen (16) and thirty-six (36), and its subsequent abandonment by the State itself, and the concession to Congress of the right of absolute control of the lands until such right should be extinguished by appropriate legislation, distinguishes the case materially from that of Wisconsin, which was considered in *Beecher* v. *Wetherby*, 95 U. S. 517, and upon which the defendant in error principally relies. No such right was relinquished until after the grant of the right of way under the act of Congress of July 26, 1866, to the Missouri, Kansas and Texas Railway, and the title of the lands composing that right of way had become vested in that company.

It follows, therefore, that the Supreme Court of the State, the court below, erred in sustaining the judgment of the inferior court of the State, in favor of the plaintiff in that court, the defendant in error here, and the judgment of the Supreme Court must therefore be

Reversed, and the cause remanded with directions to take further proceedings in accordance with this opinion.

THE MAIN *v.* WILLIAMS.

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

No. 233. Argued January 30, 31, 1894. — Decided March 5, 1894.

Under Rev. Stat. § 4283, the liability of a ship owner for the "freight then pending" extends, (1), to passage money, and, (2), to freight prepaid at the port of departure.

Argument for Appellant.

THIS was an appeal from a decree entered in a proceeding taken to limit the liability of the owners of the steamship Main for a collision with the steamship Montana, in respect to her "freight pending."

The proceedings were begun by a petition filed by the Nord Deutscher Lloyd, owner of the Main, setting forth the filing of a libel against the steamship for a collision with the steamship Montana, which occurred in the Patapsco River on January 5, 1889, wherein was claimed a sum largely in excess of the value of the Main and her freight then pending, and praying for the appointment of appraisers of the interest of petitioner in the ship and her freight for the voyage. The value of the vessel was subsequently fixed by stipulation at $70,000. The appraisers returned the amount of freight pending at $1577.38, which was disputed. The decree of the District Court subsequently fixed the gross amount of freight upon the cargo on board at the time of the collision, prepaid at Bremen, as well as collectable at Baltimore, at $1870.10, and added thereto $5200 gross passage money prepaid at Bremen for the transportation of emigrant passengers for Baltimore, making in all $7070.10.

On appeal to the Circuit Court this decree was affirmed, and the owners of the Main appealed to this court.

Mr. Thomas W. Hall for appellant.

The word "freight" has, at most, in the English language, two acceptations. It is used as signifying: *first*, the burden or thing carried, whether by land or sea; *secondly*, the hire, price, or compensation paid for the carriage or transportation of goods or merchandise. Worcester's Dictionary; Webster's Dictionary; *Kirchner* v. *Venus*, 12 Moore, P. C. 390; Scrutton on Charter Parties, Art. 136; Nelson's Shipping, Art. 74; Maclachlan's Shipping, (4th ed.,) 474; *Brittan* v. *Barnaby*, 21 How. 527, 533.

Not only do the definitions given of the word "freight," whether by lexicographers or by the courts, negative and exclude any idea that the money, commonly called "fares,"

paid for the transportation of passengers, is included in or covered by the term "freight," but the courts, when asked, have expressly refused so to extend the meaning of the word. In an action by a broker to recover commissions upon his contract to obtain freight for a ship on a voyage from London to New South Wales, it was held that the passage money of steerage passengers procured by him could not be included in the estimate of the amount of freight, the words "cargo" and "freight" being terms applicable to goods only. *Lewis* v. *Marshall*, 7 Man. & Gr. 729.

So, in a suit brought to recover on a policy of insurance valued on freight, where the ship had been lost with a cargo of rice and coolies on board for Mauritius, it was held that the word "freight" in the policy did not include the passage money of the coolies. *Denoon* v. *Home & Colonial Ass. Co.*, L. R. 7 C. P. 341.

The Limited Liability Act was principally taken from the act 26 Geo. 3, and from the Revised Statutes of Maine.

While these statutes are *in pari materia*, it is evident that they are very far from being *in totidem verbis*. Not only is there a complete departure in the act of Congress from the language of the British statute, but the addition to the simple word "freight" found in the Maine and Massachusetts statutes, of the words "then pending," cannot be supposed to be without significance and intention. It is not necessary to quote lexicographers for the meaning of the word "pending." The words "then pending" not only limit the owner's liability on account of "freight" to the amount of freight pending at the time of the collision, but also to the amount of freight depending and contingent upon the termination of the voyage and the delivery of the goods. Otherwise, these words are utterly without meaning and mere surplusage. In its opinion in the case of *The City of Norwich*, 118 U. S. 468, 491, construing this very statute and section, this court has said: "Pending freight is of no value to the ship owner until it is earned, and it is not earned, if earned at all, until the conclusion of the voyage."

The rule of statutory construction, applicable to this case,

Counsel for Appellees.

is well settled. Congress must be presumed to have understood the meaning of the words employed in the statute, and to have employed those words in their usual and ordinary sense. It is in this spirit that this court has already construed this section of the Revised Statutes, (§ 4283,) in *The City of Norwich*, 118 U. S. 468; *The Scotland*, 118 U. S. 507; and *The Great Western*, 118 U. S. 520. In these cases the court was pressed to extend the meaning of the word "interest" so as to include any insurance which the owner might have on the ship or freight, in the amount for which he should be held liable. But the court refused to enlarge by construction the meaning of the word "interest." In the opinion in the first of the cases referred to, that of *The City of Norwich*, at page 495, after fully stating the contention in the case, it is said, "The truth is that the whole question after all comes back to this: whether a limited liability of ship owners is consonant to public policy or not. Congress has declared that it is, and they, and not we, are the judges of that question. Having, as we think, ascertained the true construction of the statute, the point in dispute is really settled. It is a question of construction, and does not require an examination of the general maritime law to determine it. If the rule of the maritime law is different, the statute must prevail."

The appellant submits, with great respect, that the Circuit Court erred accordingly in including in the amount of its decree against the appellant on account of its liability for "freight then pending" at the time of the collision: (1) The sum of $847.23, freight on goods, prepaid at the port of Bremen "under an express stipulation and agreement that said freight money so prepaid was not to be returned, goods lost or not lost;" (2) the sum of $5200, also prepaid at Bremen for the passage money of immigrants who were on board of said ship at the time of the collision.

Mr. J. Wilson Leakin and *Mr. John H. Thomas*, (with whom was *Mr. George Leiper Thomas* on the brief,) for appellees.

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

This case raises two questions: (1) as to whether, under Revised Statutes, § 4283, the liability of a ship owner for the "freight then pending" extends to passage money; and, (2), whether it extends to freight prepaid at the port of departure.

1. By the common law, as administered both in England and America, the personal liability of the owner of a vessel for damages by collision is the same as in other cases of negligence, and is limited only by the amount of the loss and by his ability to respond. *Wilson* v. *Dickson*, 2 B. & Ald. 2; *The Dundee*, 1 Hagg. 109, 120; *The Aline*, 1 W. Rob. 111; *The Mellona*, 3 W. Rob. 16, 20; *The Wild Ranger*, Lush. 553, 564; *Cope* v. *Doherty*, 4 K. & J. 367, 378. The civil law, too, as well as the general law maritime, made no distinction in this particular in favor of ship owners. (Emerigon, Contrats à la grosse, c. 4, § 11.) Nor did the ancient laws of Oleron or Wisby or the Hanse towns suggest any restriction upon such liability. Indeed, it is difficult, if not impossible, to say when and where the restrictions of the modern law originated. They are found in the Consolato del Mare, which, in two separate chapters, expressly limits the liability of the part owner to the value of his share in the ship. Vinnius, an early Continental writer, states that by the law of the land the owners were not chargeable beyond the value of the ship and the things that were in it. The Hanseatic Ordinance of 1644 also pronounced the goods of the owner discharged from claims for damages by the sale of the ship to pay them. But however the practice originated, it appears, by the end of the seventeenth century, to have become firmly established among the leading maritime nations of Europe, since the French Ordinance of 1681, which has served as a model for most of the modern maritime codes, declares that the owners of the ship shall be answerable for the acts of the master, but shall be discharged therefrom upon relinquishing the ship and freight. (Bk. II, Tit. VIII, Art. 2.) A similar provision in

the Ordinance of Rotterdam of 1721 declared that the owners should not be answerable for any act of the master done without their order, any further than their part of the ship amounted to; and by other articles of the same ordinance it was provided that each part-owner should be liable for the value of his own share. The French Ordinance of 1681 was carried, with slight change of phraseology, into the commercial code of France, and all the other maritime nations whose jurisprudence is founded upon the civil law. (Code de Commerce (French) Art. 216; German Mar. Code, Art. 452; Code of the Netherlands, Art. 321; Belgian Code, Art. 216; Italian Code, Art. 311; Russian Code, Art. 649; Spanish Code, Art. 621, 622; Portuguese Code, Art. 1345; Brazilian Code, Art. 494; Argentine Code, Art. 1039; Chilian Code, Art. 879.)

The earliest legislation in England upon the subject is found in the act of 7 Geo. 2, c. 15, passed in 1734, which enacted that no ship owner should be responsible for loss or damage to goods on board the ship by embezzlement of the master or mariners, or for any damage occasioned by them without the privity or knowledge of such owner, further than the value of the ship and her appurtenances, and the freight due or to grow due for the voyage, and if greater damage occurred it should be averaged among those who sustained it. By subsequent acts this limitation of liability was extended to losses in which the master and mariners had no part, to losses by their negligence, and to damage done by collision, while there was an entire exemption of liability for loss or damage by fire or for loss of gold and jewelry, unless its nature and value were disclosed. In all these statutes the liability of the owner was limited to his interest in the ship and freight for the voyage.

By section 505 of the Merchants' Shipping Act of 1854, 16 and 17 Vict. c. 131, freight was deemed to include the value of the carriage of goods, and *passage money*. Owing, probably, to some difficulties encountered in determining at what point of time the value of the ship should be taken, and to establish a more uniform and equitable method of limiting the liability of the owner, the Merchant Shipping Act Amendment Act of 1862, extended the provisions of the prior acts to foreign

as well as British ships, and to cases of loss of life or personal injury, as well as damage or loss to the cargo, and provided that the owners should not be liable in damages in respect of loss of life or personal injury, "to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage," nor in respect of loss or damage to ships or their cargoes to an amount exceeding eight pounds per ton.

The earliest American legislation upon this subject is found in a statute of Massachusetts passed in 1818, and revised in 1836. This was taken substantially from the statute of George II. It was followed by an act of the legislature of Maine in 1831, copied from the statute of Massachusetts.

The attention of Congress does not seem to have been called to the necessity for similar legislation until 1848, when the case of *The Lexington*, reported under the name of the *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344, was decided by this court. In this case the owners of a steamboat, which was burnt on Long Island Sound, were held liable for about $18,000 in coin, which had been shipped upon the steamer and lost. In consequence of the uneasiness produced among ship owners by this decision, and for the purpose of putting American shipping upon an equality with that of other maritime nations, Congress, in 1851, enacted what is commonly known as the Limited Liability Act, which has been incorporated into the Revised Statutes, sections 4282 to 4290, and amended in certain particulars not material to this case, in two subsequent acts. Act of June 26, 1884, c. 121, § 18, 23 Stat. 53, 57; Act of June 19, 1886, c. 421, § 4, 24 Stat. 79, 80.

By section 4283, upon the construction of which this case depends, "the liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing lost, damage, or forfeiture done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Opinion of the Court.

By the law maritime the word "freight" is used to denote not the thing carried, but the compensation for the carriage of it. Prior to the era of steam navigation, travel by sea was comparatively of such little magnitude that "freight" was commonly used to denote compensation for the carriage of goods; yet, in Les Bones Costumes de la Mar, (Black Book, 3 Twiss' ed. 50, App. Pt. III,) it is said "the term passenger includes all those who ought to pay freight for their persons apart from their merchandise," and "every man is called a passenger who pays freight for his own person, and for goods which are not merchandise. And every person who carries less than two quintals ought to pay freight for his own person;" and in this, one of the most ancient books upon the maritime law, (at least as old as the fourteenth century,) it is also said: "And in this same manner with regard to any person who may come on board the ship without the consent of the managing owner or of the ship's clerk, it is in the power of the managing owner to take what freight he pleases." (Ibid. pp. 173–5.) That passengers' fares were regarded as the substantial equivalent of freight is evident from the case of *Mulloy* v. *Backer*, 5 East, 316, 321, in which Lawrence, Judge, remarks that "foreign writers consider passage money the same as freight;" and Lord Ellenborough adds, "except for the purposes of lien, it seems the same thing." In this country, as early as 1801, it was said by Judge Peters in the case of the *Brig Cynthia*, 1 Pet. Adm. 203, 206: "I think the force and true meaning of 'freight' has been misconceived. It is a technical expression. It does not always imply that it is the *naulum*, *merces*, or *farè*, for the transportation of goods. It is applied to all rewards, hire, or compensation, paid for the use of ships; either for an entire voyage, one divided into sections, or engaged by the month, or any period. It is also called *freight* (and it is to be determined on the like legal principles) in the case of passengers, transported in vessels, for compensation. In *Saxon*, from which much of the English language is derived, it is called *fracht*, whether it be a compensation for transportation in ships by sea, or carriage by land, either of goods or persons, in gross, or detail."

With the introduction of steam vessels, however, the carriage of passengers became at once a most important branch of maritime industry, and modern authorities have generally placed the fare or compensation for the carriage of such passengers upon the same footing as freight for the transportation of goods. While many of the lexicographers, such as Webster, Worcester, and the Imperial Dictionary, still define freight as the sum paid by a party hiring a ship or part of a ship, or for the carriage of goods, in the Century Dictionary it is said to be, in a more general sense, the price paid for the use of a ship, including the transportation of passengers. Similar definitions are given in the law dictionaries of Burrill, Bouvier, and Anderson. See also Benedict's Admiralty, sections 283, 286, and 288.

Our attention has not been called to any express adjudications upon the question involved here, but, so far as the courts have been called upon to consider the subject, they have usually given to the word freight the same definition. Thus in *Flint* v. *Flemyng*, 1 B. & Ad. 45, which was an action upon an insurance policy upon freight, it was held that plaintiff could recover freight upon his own goods, Lord Tenterden holding that the word "freight," as used in policies of insurance, imported the benefit derived from the employment of a ship. So, in *Brown* v. *Harris*, 2 Gray, 359, the Supreme Court of Massachusetts, holding that passage money, paid in advance, might be recovered back, upon the breaking up of the voyage, observed that the rule was well settled as to freight for the carriage of goods; that if freight be paid in advance, and the goods not carried for any event, not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary. The court further observed: "Passage money and freight are governed by the same rules. Indeed, freight, in its more extensive sense, is applied to all compensation for the use of ships, including transportation of passengers." See also 3 Kent Com. 219.

It is true that in the case of *Lewis* v. *Marshall*, 7 Man. & Gr. 729, it was said that freight was a term applicable to goods only, but this was said with reference to a contract

which made a distinction between freight upon a cargo and the fare of steerage passengers. The same remark may be made of the case of *Denoon* v. *Home and Colonial Insurance Co.*, L. R. 7 C. P. 341, in which it was held that the question whether the term "freight" in a marine policy includes passage money, must depend upon the circumstances of each particular case, and the context of the particular policy; and, in that case, under the particular terms of the policy, which made a different rate of insurance upon freight and the transportation of coolies, it was held that the insurance did not cover the price to be paid for their transportation.

The real object of the act in question was to limit the liability of vessel owners to their interest in the *adventure;* hence, in assessing the value of the ship, the custom has been to include all that belongs to the ship, and may be presumed to be the property of the owner, not merely the hull, together with the boats, tackle, apparel, and furniture, but all the appurtenances, comprising whatever is on board for the object of the voyage, belonging to the owners, whether such object be warfare, the conveyance of passengers, goods, or the fisheries. *The Dundee*, 1 Hagg. 109; *Gale* v. *Laurie*, 5 B. & C. 156, 164. It does not, however, include the cargo, which, presumptively at least, does not belong to the owner of the ship.

There is no reason, however, for giving to the word "freight" a narrow or technical definition. The fares of the passengers are as much within the reason of the rule as the freight upon the cargo. It would be creating a distinction without a real difference to say that a transatlantic steamer laden with passengers should be wholly exempt from the payment of freight, while another, solely engaged in the carriage of merchandise, should be obliged to pay the entire proceeds of her voyage. The words "freight pending," in section 4283, or "freight for the voyage," section 4284, were copied from the English statute of George II, which, in turn, had taken them from the Marine Ordinance of 1681, and the prior Continental codes; but in both cases they were evidently intended to represent the *earnings* of the voyage, whether from the carriage of passengers or merchandise. If these words were used

instead of the words "freight for the voyage," it would probably more accurately express the intent of the legislature.

2. Nor by the use of the word "pending" was it intended to limit the recovery to the uncollected freight, or such as had not been completely earned at the time of the disaster. As the object of the statute was to curtail the amount that would otherwise be recoverable, it should not be construed to abridge the rights of the owner of the injured vessel to a greater extent than its language will fairly warrant. This is the view taken in *Wilson* v. *Dickson*, 2 B. & Ald. 2, 10, in which the court held the words "freight due or to grow due" included all the freight for the voyage, whether paid in advance or not.

It is worthy of remark in this connection that the codes of the Netherlands, of Chili, and of the Argentine Republic, in the sections above quoted, extend the liability for freight to such as is earned and yet to be earned.

The English courts have held, very properly we think, that these statutes should be strictly construed. As observed by Abbott, C. J., in *Gale* v. *Laurie*, 5 B. & C. 156, 164: "Their effect, however, is to take away or abridge the right of recovering damages, enjoyed by the subjects of this country at the common law, and there is nothing to require a construction more favorable to the ship owner than the plain meaning of the word imports." To the same effect are the remarks of Sir Robert Phillimore in *The Andalusian*, 3 P. D. 182, 190, and in *The Northumbria*, L. R. 3 Ad. & Ec. 6, 13. Speaking of this statute, Lord Justice Brett, in *Chapman* v. *Royal Netherlands Nav. Co.*, 4 P. D. 157, 184, remarked: "A statute for the purposes of public policy, derogating to the extent of injustice, from the legal rights of individual parties, should be so construed as to do the least possible injustice. This statute, whenever applied, must derogate from the direct right of the ship owner against the other ship owner. . . . It should be so construed as to derogate as little as is possible consistently with its phraseology, from the otherwise legal rights of the parties."

While, from the universal habit of insuring vessels, the application of the statute probably results but rarely in an

actual injustice to the owner of the injured vessel, yet, being in derogation of the common law, we think the court should not limit the right of the injured party to a recovery beyond what is necessary to effectuate the purposes of Congress.

We are satisfied with the conclusions of the court below upon both of the points involved, and its decree is, therefore,

Affirmed.

LAWTON *v.* STEELE.

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

No. 203. Submitted January 17, 1894. — Decided March 5, 1894.

It is within the power of a State to preserve from extinction fisheries in waters within its jurisdiction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish.

The provision in the statutes of New York, c. 591 of the Laws of 1880, as amended by c. 317 of the Laws of 1883, that nets set or maintained upon waters of the State, or on the shores of or islands in such waters, in violation of the statutes of the State enacted for the protection of fish, may be summarily destroyed by any person, and that it shall be the duty of certain officers to abate, remove, and forthwith destroy them, and that no action for damages shall lie or be maintained against any person for or on account of such seizure or destruction, is a lawful exercise of the police power of the State, and does not deprive the citizen of his property without due process of law, in violation of the provision of the Constitution of the United States.

This was an action at law instituted in the Supreme Court for the county of Jefferson by the plaintiffs in error against the defendant in error, together with Edward L. Sargent and Richard U. Sherman, for the conversion of fifteen hoop and fyke nets of the alleged value of $525. Defendants Steele and Sargent interposed a general denial. Defendant Sherman pleaded that he, with three others, constituted the "Commissioners of Fisheries" of the State of New York, with power to give directions to game and fish protectors with regard to the enforcement of the game law; that defendant Steele was

Counsel for Plaintiffs in Error.

a game and fish protector, duly appointed by the governor of the State of New York, and that the nets sued for were taken possession of by said Steele, as such game and fish protector, upon the ground that they were maintained upon the waters of the State in violation of existing statutes for the protection of fish and game, and thereby became a public nuisance.

The facts were undisputed. The nets were the property of the plaintiffs, and were taken away by the defendant Steele and destroyed. At the time of the taking most of the nets were in the waters of the Black River Bay, being used for fishing purposes, and the residue were upon the shore of that bay, having recently been used for the same purpose. The plaintiffs were fishermen, and the defendant Steele was a state game and fish protector. The taking and destruction of the nets were claimed to have been justifiable under the statutes of the State relating to the protection of game and fish. Plaintiffs claimed there was no justification under the statutes, and if they constituted such justification upon their face, they were unconstitutional. Defendant Sherman was a state fish commissioner. Defendant Sargent was president of the Jefferson County Fish and Game Association. Plaintiffs claimed these defendants to be liable upon the ground that they instigated, incited, or directed the taking and destruction of the nets.

Upon trial before a jury a verdict was rendered, subject to the opinion of the court, in favor of the plaintiffs against defendant Steele for the sum of $216, and in favor of defendants Sargent and Sherman. A motion for a new trial was denied, and judgment entered upon the verdict for $216 damages and $166.09 costs. On appeal to the General Term this judgment was reversed, and a new trial ordered, and a further appeal allowed to the Court of Appeals. On appeal to the Court of Appeals, the order of the General Term granting a new trial was affirmed, and judgment absolute ordered for the defendant. 119 N. Y. 226. Plaintiffs thereupon sued out a writ of error from this court.

Mr. Levi H. Brown for plaintiffs in error.

Mr. Elon R. Brown for defendant in error.

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

This case involves the constitutionality of an act of the legislature of the State of New York known as chapter 591, Laws of New York of 1880, as amended by chapter 317, Laws of New York of 1883, entitled "An act for the appointment of game and fish protectors."

By a subsequent act enacted April 15, 1886, c. 141:

"Section 1. No person shall at any time kill or take from the waters of Henderson Bay or Lake Ontario, within one mile from the shore, between the most westerly point of Pillar Point and the boundary line between the counties of Jefferson and Oswego, . . . any fish of any kind by any device or means whatever otherwise than by hook and line or rod held in hand. But this section shall not apply to or prohibit the catching of minnows for bait, providing the person using nets for that purpose shall not set them, and shall throw back any trout, bass, or any other game fish taken, and keep only chubs, dace, suckers, or shiners.

"Sec. 2. Any person violating any of the provisions of this act shall be guilty of a misdemeanor, and liable to a penalty of $50 for each offence."

By the act of 1880, as amended by the act of 1883:

"Sec. 2. Any net, pound, or other means or device for taking or capturing fish, or whereby they may be taken or captured, set, put, floated, had, found, or maintained, in or upon any of the waters of this State, or upon the shores of or islands in any of the waters of this State, in violation of any existing or hereafter enacted statutes or laws for the protection of fish, is hereby declared to be, and is, a public nuisance, and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and of every game constable to seize and remove and forthwith destroy the same, . . . and no action for damages shall lie or be maintained against any person for or on account of any such seizure or destruction."

This last section was alleged to be unconstitutional and void for three reasons: 1, as depriving the citizen of his property without due process of law; 2, as being in restraint of the liberty of the citizen; 3, as being an interference with the admiralty and maritime jurisdiction of the United States.

The trial court ruled the first of the above propositions in plaintiffs' favor, and the others against them, and judgment was thereupon entered in favor of the plaintiffs.

The constitutionality of the section in question was, however, sustained by the General Term and by the Court of Appeals, upon the ground of its being a lawful exercise of the police power of the State.

The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Barbier* v. *Connolly*, 113 U. S. 27; *Kidd* v. *Pearson*, 128

U. S. 1. To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. Thus an act requiring the master of a vessel arriving from a foreign port to report the name, birthplace, and occupation of every passenger, and the owner of such vessel to give a bond for every passenger so reported, conditioned to indemnify the State against any expense for the support of the persons named for four years thereafter, was held by this court to be indefensible as an exercise of the police power, and to be void as interfering with the right of Congress to regulate commerce with foreign nations. *Henderson* v. *New York*, 92 U. S. 259. A similar statute of California, requiring a bond for certain classes of passengers described, among which were "lewd and debauched women," was also held to show very clearly that the purpose was to extort money from a large class of passengers, or to prevent their immigration to California altogether, and was held to invade the right of Congress. *Chy Lung* v. *Freeman*, 92 U. S. 275. So in *Railroad Co.* v. *Husen*, 95 U. S. 465, a statute of Missouri which prohibited the driving of Texas, Mexican, or Indian cattle into the State between certain dates in each year was held to be in conflict with the commerce clause of the Constitution, and not a legitimate exercise of the police powers of the State, though it was admitted that the State might for its self-protection prevent persons or animals having contagious diseases from entering its territory. In *Rockwell* v. *Nearing*, 35 N. Y. 302, an act of the legislature of New York, which authorized the seizure and sale without judicial process of all animals found trespassing within

private enclosures, was held to be obnoxious to the constitutional provision that no person should be deprived of his property without due process of law. See also *Austin* v. *Murray*, 16 Pick. 121; *Watertown* v. *Mayo*, 109 Mass. 315; *The Slaughter-house Cases*, 16 Wall. 36; *In re Cheesebrough*, 78 N. Y. 232; *Brown* v. *Perkins*, 12 Gray, 89. In all these cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations harmless in themselves, and which might be carried on without detriment to the public interests.

The preservation of game and fish, however, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts. Thus in *Smith* v. *Maryland*, 18 How. 71, it was held that the State had a right to protect its fisheries in Chesapeake Bay by making it unlawful to take or capture oysters with a scoop or drag, and to inflict the penalty of forfeiture upon the vessel employed in this pursuit. The avowed object of the act was to prevent the destruction of the oysters by the use of particular instruments in taking them. "It does not touch," said the court, "the subject of the common liberty of taking oysters save for the purpose of guarding it from injury to whom it may belong and by whomsoever it may be enjoyed." It was held that the right of forfeiture existed, even though the vessel was enrolled for the coasting trade under the act of Congress. So in *Smith* v. *Levinus*, 8 N. Y. 472, a similar act was held to be valid, although it vested certain legislative powers in boards of supervisors, authorizing them to make laws for the protection of shell and other fish. In *State* v. *Roberts*, 59 N. H. 256, which was an indictment for taking fish out of navigable waters out of the season prescribed by statute, it was said by the court: "At common law the right of fishing in navigable waters was common to all. The taking and selling of certain kinds of fish and game at certain seasons of the year tended to the destruction of the privilege or right by the destruction conse-

quent upon the unrestrained exercise of the right. This is regarded as injurious to the community, and, therefore, it is within the authority of the legislature to impose restriction and limitation upon the time and manner of taking fish and game, considered valuable as articles of food or merchandise. For this purpose fish and game laws are enacted. The power to enact such laws has long been exercised, and so beneficially for the public that it ought not now to be called into question." *Commonwealth* v. *Chapin*, 5 Pick. 199; *McCready* v. *Virginia*, 94 U. S. 391; *Vinton* v. *Welsh*, 9 Pick. 87, 92; *Commonwealth* v. *Essex County*, 13 Gray, 239, 248; *Phelps* v. *Racey*, 60 N. Y. 10; *Holyoke Co.* v. *Lyman*, 15 Wall. 500; *Gentile* v. *State*, 29 Indiana, 409; *State* v. *Lewis*, 33 N. E. Rep. 1024.

As the waters referred to in the act are unquestionably within the jurisdiction of the State of New York, there can be no valid objection to a law regulating the manner in which fishing in these waters shall be carried on. *Hooker* v. *Cummings*, 20 Johns. 91. The duty of preserving the fisheries of a State from extinction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish, is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food.

The main, and only real difficulty connected with the act in question is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries, is to be treated as a public nuisance, "and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and every game constable to seize, remove, and forthwith destroy the same." The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offence, and to take such measures as were reasonable and necessary to prevent such offences in the future. It certainly could not do this more effectually than by destroying the means of the offence. If the nets were being used in a manner detrimental to the interests of the public, we think it was

within the power of the legislature to declare them to be nuisances, and to authorize the officers of the State to abate them. *Hart* v. *Albany*, 9 Wend. 571; *Meeker* v. *Van Rensselaer*, 15 Wend. 397. An act of the legislature which has for its object the preservation of the public interests against the illegal depredations of private individuals ought to be sustained, unless it is plainly violative of the Constitution, or subversive of private rights. In this case there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic; distilleries or breweries illegally carried on or operated, and buildings standing upon or near the boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, or infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. *Newark Railway* v. *Hunt*, 50 N. J. Law, 308; *Blasier* v. *Miller*, 10 Hun, 435; *Mouse's Case*, 12 Rep. 63; *Stone* v. *New York*, 25 Wend. 157, 173; *Am. Print Works* v. *Lawrence*, 21 N. J. Law, 248; 23 N. J. Law, 590.

It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial

proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act, as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling room.

The value of the nets in question was but $15 apiece. The cost of condemning one, (and the use of one is as illegal as the use of a dozen,) by judicial proceedings, would largely exceed the value of the net, and doubtless the State would, in many cases, be deterred from executing the law by the expense. They could only be removed from the water with difficulty, and were liable to injury in the process of removal. The object of the law is undoubtedly a beneficent one, and the State ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation.

There is not a State in the Union which has not a constitutional provision entitling persons charged with crime to a trial by jury, and yet from time immemorial the practice has been to try persons charged with petty offences before a police magistrate, who not only passes upon the question of guilt,

but metes out the proper punishment. This has never been treated as an infraction of the Constitution, though technically a person may in this way be deprived of his liberty without the intervention of a jury. *Callan* v. *Wilson*, 127 U. S. 540, and cases cited. So the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the Constitution, and it has never been supposed that the constitutional provision in question in this case was intended to interfere with the established principles in that regard.

Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute. As was said by the Supreme Court of New Jersey in a similar case, *Am. Print Works* v. *Lawrence*, 21 N. J. Law, 248, 259: "The party is not, in point of fact, deprived of a trial by jury. The evidence necessary to sustain the defence is changed. Even if the party were deprived of a trial by jury, the statute is not, therefore, necessarily unconstitutional." Indeed, it is scarcely possible that any actual injustice could be done in the practical administration of the act.

It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose, (*Ely* v. *Supervisors*, 36 N. Y. 297,) but where minor articles of personal property are devoted to such

use the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them. The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question, (*People* v. *West*, 106 N. Y. 293,) and in such case the legislature may annex to the prohibited act all the incidents of a criminal offence, including the destruction of property denounced by it as a public nuisance.

In *Weller* v. *Snover*, 42 N. J. Law, 341, it was held that a fish warden for a county, appointed by the governor, had the right, under an act of the legislature, to enter upon land and destroy a fish basket constructed in violation of the statute, together with the materials of which it was composed, so that it might not again be used. It was stated in that case that "after a statute has declared an invasion of a public right to be a nuisance it may be abated by the destruction of the object used to effect it. The person who, with actual or constructive notice of the law, sets up such nuisance cannot sue the officer whose duty it has been made by the statute to execute its provisions." So in *Williams* v. *Blackwall*, 2 H. & C. 33, the right to take possession of or destroy any engine placed or used for catching salmon in contravention of law was held to extend to all persons, and was not limited to conservators or officers appointed under the act.

It is true there are several cases of a contrary purport. Some of these cases, however, may be explained upon the ground that the property seized was of considerable value — *Ieck* v. *Anderson*, 57 California, 251, boats as well as nets; *Dunn* v. *Burleigh*, 62 Maine, 24, teams and supplies in lumbering; *King* v. *Hayes*, 80 Maine, 206, a horse; in others the court seems to have taken a more technical view of the law than the necessities of the case or an adequate protection of the owner required. *Lowry* v. *Rainwater*, 70 Missouri, 152; *State* v. *Robbins*, 124 Indiana, 308; *Ridgeway* v. *West*, 60 Indiana, 371.

Upon the whole, we agree with the Court of Appeals in holding this act to be constitutional, and the judgment of the Supreme Court is, therefore,

Affirmed.

Dissenting Opinion: Fuller, C. J., Field, Brewer, JJ.

MR. CHIEF JUSTICE FULLER (with whom concurred MR. JUSTICE FIELD and MR. JUSTICE BREWER) dissenting.

In my opinion the legislation in question, so far as it authorizes the summary destruction of fishing nets and prohibits any action for damages on account of such destruction, is unconstitutional.

Fishing nets are in themselves articles of property entitled to the protection of the law, and I am unwilling to concede to the legislature of a State the power to declare them public nuisances, even when put to use in a manner forbidden by statute, and on that ground to justify their abatement by seizure and destruction without process, notice, or the observance of any judicial form.

The police power rests upon necessity and the right of self-protection, but private property cannot be arbitrarily invaded under the mere guise of police regulation, nor forfeited for the alleged violation of law by its owner, nor destroyed by way of penalty inflicted upon him, without opportunity to be heard.

It is not doubted that the abatement of a nuisance must be limited to the necessity of the occasion, and, as the illegal use of fishing nets would be terminated by their withdrawal from the water and the public be fully protected by their detention, the lack of necessity for the arbitrary proceedings prescribed seems to me too obvious to be ignored. Nor do I perceive that the difficulty which may attend their removal, the liability to injury in the process, and their comparatively small value ordinarily, affect the principle, or tend to show their summary destruction to be reasonably essential to the suppression of the illegal use. Indeed, I think that that argument is to be deprecated as weakening the importance of the preservation, without impairment, in ever so slight a degree, of constitutional guaranties.

I am, therefore, constrained to withhold my assent to the judgment just announced, and am authorized to say that MR. JUSTICE FIELD and MR. JUSTICE BREWER concur in this dissent.

SOUTHERN PACIFIC COMPANY *v.* SELEY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 119. Argued November 27, 1893. — Decided March 5, 1894.

After serving as a brakeman in the employ of a railroad company, S. became a conductor on the same railroad, and as such had been engaged at a depot yard at one of its stations at least once a week, and usually oftener, for seven years. While making up his train at that yard, preparatory to running out with it, after the chief brakeman had failed in an attempt to make a coupling he tried to make it. There was an unblocked frog at the switch where the car was. He put his foot into this frog, and was told by the brakeman that he would be caught if he left it there. He took it out, but put it in again, and, being unable to extricate it when the cars came together, he was thrown down and killed. In an action brought by his administratrix against the railroad company to recover damages, *held*, that S. must be assumed to have entered and continued in the employ of the railroad company with full knowledge of any danger which might arise from the use of unblocked frogs; that he was guilty of contributory negligence; and that the company was entitled to a peremptory instruction in its favor.

This was an action in the District Court for the First Judicial District of the Territory of Utah against the Southern Pacific Company, a railroad corporation, brought by Isabella Seley, administratrix of William B. Seley, deceased, to recover damages for the death of her husband caused by the alleged negligence of the defendant company. The Southern Pacific Company was incorporated under the laws of the State of Kentucky, and is engaged in operating the Central Pacific Railroad, running between the city of Ogden in Utah and a point in California.

Seley was, for seven years prior to his death, a conductor upon freight trains on the lines of the Southern Pacific Company and of its predecessor, the Central Pacific Railroad Company, and before that time had been a brakeman in the same employ. In the course of his business he was engaged in the depot yard at Humboldt Wells at least once a week and usually oftener.

Argument for Plaintiff in Error.

The accident in which Seley met his death took place on July 7, 1887, at this depot yard, while he was making up his train, preparatory to running out with it.

The chief brakeman, named Hardy, had met with some difficulty in coupling a car, and had twice failed to make the coupling. The other brakeman had also failed in an attempt to couple the car. Seley undertook to effect the coupling. His first effort was a failure, the link slipping. At this time, Hardy testifies that he warned Seley to take his foot out of the frog — that he would be caught.

Seley made a second attempt, and, while endeavoring to make the coupling, again put his foot into the frog, from which he was unable to extricate it when the cars came together. He was thrown down by the break-beam, the wheel passed over him, and he was instantly killed.

At the close of the plaintiff's evidence, the defendant moved for a nonsuit. This was refused and an exception was allowed. At the close of the entire evidence, the defendant asked the court to instruct the jury to find a verdict for the defendant. This was refused, as were likewise certain instructions prayed for. A verdict for $7500 was rendered in favor of the plaintiff, on which judgment was entered, a motion for a new trial having been overruled. This judgment was affirmed by the Supreme Court of the Territory, to whose judgment a writ of error was brought to this court.

Mr. Maxwell Evarts, for plaintiff in error, cited: *Washington & Georgetown Railroad* v. *McDade*, 135 U. S. 554; *Tuttle* v. *Detroit & Milwaukee Railway*, 122 U. S. 189; *Kohn* v. *McNulta*, 147 U. S. 238; *Bunt* v. *Sierra Butte Gold Mining Co.*, 138 U. S. 483; *O'Rorke* v. *Union Pacific Railway*, 22 Fed. Rep. 189; *The Maharajah*, 49 Fed. Rep. 111; *Naylor* v. *New York Central Railroad*, 33 Fed. Rep. 801; *The Luckenbach*, 53 Fed. Rep. 662; *Appel* v. *Buffalo, New York &c. Railroad*, 111 N. Y. 550; *Chicago, Rock Island & Pacific Railway* v. *Lonergan*, 118 Illinois, 41; *Williams* v. *Central Railroad*, 43 Iowa, 396; *Rush* v. *Missouri Pacific Railway*, 36 Kansas, 129; *Wilson* v. *Winona &c. Railroad*, 37 Min-

nesota, 326; *Lake Shore &c. Railway* v. *McCormick*, 74 Indiana, 440; *Haas* v. *Buffalo, N. Y. & P. Railroad*, 40 Hun, 145; *Woodley* v. *Metropolitan District Railway*, 2 Ex. D. 384; *Walsh* v. *Whiteley*, 21 Q. B. D. 371; *Thomas* v. *Quartermaine*, 18 Q. B. D. 685; *Cunningham* v. *Chicago, Milwaukee &c. Railroad*, 17 Fed. Rep. 882; *Railroad Co.* v. *Jones*, 95 U. S. 439; *Randall* v. *Balt. & Ohio Railroad*, 109 U. S. 478; *The Serapis*, 51 Fed. Rep. 91; *Townsend* v. *Langles*, 41 Fed. Rep. 919; *Schroeder* v. *Michigan Car Co.*, 56 Michigan, 132; *Sweeney* v. *Berlin & Jones Envelope Co.*, 101 N. Y. 520.

Mr. A. A. Hoeling, Jr., and *Mr. J. M. Wilson*, (with whom was *Mr. Samuel Shellabarger* on the brief,) for defendant in error.

I. It was negligence on the part of the plaintiff in error to provide, in the construction, such a frog. The deceased did not take the risk of injury because thereof, and was not chargeable with notice of danger, nor with negligence, in making the coupling at the place, and under the circumstances, as shown in this record.

There is no evidence that plaintiff in error ever used blocked frogs on its road, but there is evidence that it used at that time a cast-iron frog, in which the space between the rails at the apex of the frog is filled with cast iron. In this frog a man's foot could not get caught. It is also in evidence that the Union Pacific and some other railroads used blocked frogs, and that they have been used for at least ten or twelve years in this country; that blocking the frog would make such an accident as the present almost impossible, and that it is more generally the custom to block frogs in yards (such as this, where the accident occurred) than on the main line.

It is important here to note the difference between a blocked frog and a frog that is blocked. A blocked frog is one made of iron, and so constructed that the space is filled with iron; while a frog blocked is one in which there is no iron in the space, but that space is filled with wood — the object being the

same in both cases, to prevent injuries by catching the foot between the rails; and on this road the blocked frog, that is, one in which the space is filled with iron, was used, and also the open frog which was not blocked, by inserting the wood, to prevent injury, as above.

This is mentioned here as throwing light not only upon the question under immediate consideration, but also upon the question of notice hereafter to be considered.

The court below, in passing upon this same question of the risks assumed by the deceased in entering the employ of the defendant, cites, with approval, the case of *Patterson* v. *Pittsburgh & Connellsville Railroad*, 76 Penn. St. 389, 393.

In that case, the court, per Gordon, J., says: "If the instrumentality by which he is required to perform his service is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. In such case, the law adjudges the servant guilty of concurrent negligence, and will refuse him that aid to which he otherwise would be entitled. But where the servant, in obedience to the requirement of the master, incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the rule is different. In such case, the master is liable for a resulting accident." See also *Conroy* v. *Vulcan Iron Works*, 62 Missouri, 35; *Pennsylvania Co.* v. *Roy*, 102 U. S. 451; *Lawless* v. *Connecticut River Railroad*, 136 Mass. 1.

II. The employer is bound to provide suitable physical means and agencies for the conduct of his business. The employé does not take the hazard of any negligence of the employer in that regard. The employé only takes the risks of the dangers which ordinarily attend, or are incident to, the business in which he engages, and which cannot be avoided by extreme diligence and the highest skill, and what are the ordinary risks depends upon the special circumstances of the particular case. *Hough* v. *Railway Co.*, 100 U. S. 213; *Wabash Railway* v. *McDaniels*, 107 U. S. 454; *Snow* v. *Housatonic Railroad*, 8 Allen, 441; *S. C.* 85 Am. Dec. 720; *Cayzer* v.

Taylor, 10 Gray, 274; *S. C.* 69 Am. Dec. 317; *Seaver* v. *Boston & Maine Railroad*, 14 Gray, 466; *Bartonshill Coal Co.* v. *Reid*, 3 Macq. App. Cas. 266.

III. Where, in an action against a common carrier to recover damages for injuries, there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and is to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them. *Richmond & Danville Railroad* v. *Powers*, 149 U. S. 43; *Washington & Georgetown Railroad* v. *McDade*, 135 U. S. 554; *Hough* v. *Railway Co.*, 100 U. S. 213; *Delaware, Lackawanna &c. Railroad* v. *Converse*, 139 U. S. 469; *Railroad Co.* v. *Stout*, 17 Wall. 657; 2 Thompson on Negligence, 1178; *Gates* v. *Pennsylvania Railroad*, 154 Penn. St. 566.

The court is not permitted to take from the jury these questions of negligence, and to decide them, unless the evidence shows that the negligence of the defendant in error was gross and wilful. If it was less than that, then the questions of negligence were for the jury, and are all settled in favor of defendant in error by the verdict.

It is, we submit, impossible fairly to contend, in the present case, that any of the alleged contributory negligence of the defendant in error was of this kind.

Therefore, the verdict has settled, in favor of the defendant in error, both the question of the negligence of plaintiff in error, and the absence of contributory negligence on the part of the defendant in error.

In this case it cannot be conclusively presumed that the defendant knew the dangerous character of these frogs. The most that can be said of it is that the inference may be drawn that he did know it from the length of his service on the road as an employé; and yet, from the nature of that service, reasonable men might also infer that in discharging his duties he would not observe matters that appertained wholly to the construction of the road; that his attention was directed to

the movement of his train. Reasonable men might conclude that he had not such knowledge of the conditions at this place as to charge him with neglect, and especially under the circumstances, where there was difficulty in making this particular coupling, three efforts having been made by brakemen and one by himself before this injury occurred, that it was not negligence for him in his effort to make this coupling under such circumstances to fail to observe this particular frog, which happened to be at the very place where this duty necessarily was performed. It was, therefore, preëminently a case to be submitted to the jury, and the finding of the jury on that subject under the authorities above alluded to will not be reviewed by the court.

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

The theory upon which the plaintiff proceeded in the court below was that Seley lost his life by reason of the negligence of the defendant, a railroad company, in using in its switches what is called an "unblocked frog."

A frog, in railroad parlance, is a section of a rail, or of several rails combined, at a point where two railways cross, or at the point of a switch from a line to a siding or to another line, and its function is to enable a car or train to be turned from one track to another. In a blocked frog the point of space between the rails, at the point where the car is switched from one track to another, is filled with wood or other material, so that the foot will not be held. There is a form of cast-iron frog, in which the space between the rails at the apex of the frog is filled with cast iron. But the evidence clearly was that the defendant company used the unblocked frog, although at some places the cast-iron frog was used. The weight of the evidence, as we read it in the bill of exceptions, plainly was that on the other great railroad systems of the West the unblocked frog was generally used. There was evidence tending to show that the unblocked frog is the better form — that the blocked frog is liable to be broken, get out of place, and throw the train from the track.

In this disputable state of the facts the defendants asked the court to charge the jury as follows:

"The jury are instructed that if they find from the evidence that the railroad companies used both the blocked and the unblocked frog, and that it is questionable which is the safest or most suitable for the business of the roads, then the use of the unblocked frog is not negligence, and the jury are instructed not to impute the same as negligence to the defendant, and they should find for the defendant."

This prayer should have been given by the court.

In the case of *Schroeder* v. *Michigan Car Co.*, 56 Mich. 132, 133, the Supreme Court of Michigan, per Cooley, J., said:

"From this statement of facts it will appear that if the defendant has been guilty of any negligence contributing to the injury, it is to be found in the fact that a machine is made use of which is not so constructed as to guard as well as it might against similar accidents. Had the machine been constructed with a shield over the cog wheels, this particular accident would probably not have occurred; and any one whose attention was drawn to the danger of such accidents would probably have perceived the desirability of such a shield. But the machine is shown by the evidence to be manufactured and sold by a prominent and reputable house, and much used throughout the country, and the defendant cannot be said to be exceptionally wanting in prudence in purchasing and making use of it. Such danger as would result from making use of it was perfectly apparent, and would seem to be easily avoided."

Walsh v. *Whiteley*, 21 Q. B. D. 371, 378, 379, was a case where the plaintiff was employed in defendant's mill, and it was his duty to put a band upon a vertical wheel while in motion. The disk of the wheel was not solid throughout, but had a number of holes in it. While putting the band on the wheel the plaintiff's thumb slipped into one of the holes, and was cut off. It appeared on the trial that these wheels were made sometimes with and sometimes without holes. The plaintiff's witnesses stated generally that the wheels with holes were dangerous. The plaintiff never made any complaint to his

employers. He recovered a verdict, but the judgment was, on appeal, reversed, Lindley and Lopez, JJ., saying: "Is there any evidence of the machine being defective, even in the abstract? It was perfect in all respects. It was not impaired by use. The only suggestion is that the wheel, which might have been solid, had holes in it; and that, if the wheel had been solid, the plaintiff could not have put his thumb where he did, and the accident would not have happened. . . . But the plaintiff had used the same kind of machine for thirteen years, and had sustained no injury. . . . In these circumstances we can see no evidence of any defect in the condition of the machine, even apart from the negligence of the employer. It may be that a solid wheel would have been safer, but it would be placing an intolerable burden on employers to hold that they are to adopt every fresh improvement in machinery. . . . It seems to us that in this case there is not a particle of evidence of any defect arising from the negligence of the employer. It was a machine generally used, used by the plaintiff for thirteen years without any complaint or mischief arising."

Sweeny v. *Berlin & Jones Manufacturing Co.*, 101 N. Y. 520, 524, was a case where the plaintiff was injured by some sort of a press worked by steam. It was old-fashioned and with no modern improvements. The court said: "He knew as much about it and the risk attending its use as the master. The defendant could not be required to provide himself with other machinery or with new appliances, nor to elect between the expense of doing so and the imposition of damages for injuries resulting to servants from the mere use of an older or different pattern. In the absence of defective construction, or of negligence or want of care in the reparation of machinery furnished by him, the master incurs no liability from its use. The general rule is that the servant accepts the service subject to the risks incidental to it, and where the machinery and implements of the employer's business are at that time of a certain kind or condition and the servant knows it, he can make no claim upon the master to furnish other or different safeguards." *Hodgkins* v. *Eastern Railroad*, 119 Mass. 419, is to the same effect.

Our own cases speak the same language. *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478, 482, was a case where the plaintiff was injured in the course of his employment as a brakeman. It appeared on the trial that he was hurt, while unlocking a ground switch, by a train other than his own. It was alleged that the defendant company was negligent in that it did not have an upright switch instead of a ground switch, as the former was safer. This court, affirming the judgment of the court below, said: "There was no sufficient evidence of any negligence on the part of the railroad company in the construction and arrangement of the switch to warrant a verdict for the plaintiff on that ground. The testimony of the plaintiff and his witness was too slight. A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad company, in any work connected with the making up or moving of trains, assumes the risk of that condition of things. . . . The switch was of a form in common use, and was, to say the least, quite as fit for its place and purpose as an upright switch would have been."

In *Washington & Georgetown Railroad* v. *McDade*, 135 U. S. 554, 570, this court used the following language: "Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employés. Nor are they bound to supply the best and safest or newest of these appliances for the purpose of securing the safety of those who are thus employed."

In the case of *Tuttle* v. *Detroit & Milwaukee Railway*, 122 U. S. 189, 194, it was claimed that a brakeman, who was injured in coupling cars, had a right to go to the jury on the question whether the defendant company was not negligent in having too sharp a curve in its road where it entered a yard; but this court, by Mr. Justice Bradley, said: "Although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to re-

strict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering question. . . . It is for those who enter into such employment to exercise all that care and caution which the perils of the business in each case demand. The perils in the present case, arising from the sharpness of the curve, were seen and known. They were not like the defects of unsafe machinery which the employer has neglected to repair, and which his employés have reason to suppose is in proper working condition. Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed. One of these dangers was that of the draw bars slipping and passing each other when the cars were brought together. It was his duty to look out for this and avoid it. The danger existed only on the inside of the curve. This must have been known to him. It will be presumed that, as an experienced brakeman, he did know it, for it is one of those things which happen, in the course of his employment, under such conditions as existed here."

It was not pretended in the present case that the frog in which Seley had put his foot was defective or out of repair. The contention solely is that there is another form of frog, not much used, and which, if used by the defendant, might have prevented the accident.

In view of these cases and many others of similar import, which it is unnecessary to cite, we think it is plain that the defendant was entitled not merely to the instruction prayed for, if the case went to the jury, but that, upon the whole evidence, the prayer for a peremptory instruction in the defendant's favor ought to have been granted.

The evidence showed that Seley had been in the employ of the defendant for several years as brakeman and as conductor of freight trains; that his duty brought him frequently into the yard in question to make up his trains; that he necessarily knew of the form of frog there in use; and it is not shown

that he ever complained to his employers of the character of frogs used by them. He must, therefore, be assumed to have entered and continued in the employ of the defendant with full knowledge of the dangers asserted to arise out of the use of unblocked frogs.

Appel v. *Buffalo, N. Y. &c. Railroad*, 111 N. Y. 550, was a case where the plaintiff's intestate was a brakeman employed in coupling cars in the yards of the defendant at Buffalo, N. Y., and while so engaged his foot was caught in an unblocked frog, and he was run over and killed; and the Court of Appeals held that, "in accepting and continuing in the employment, the deceased assumed the hazard of all known and obvious dangers, and that he was chargeable with notice of the difficulty in removing the foot when caught in the frog, and of the danger to be apprehended therefrom, and therefore that a cause of action was not made out, and a refusal to nonsuit was error."

In the case of *Washington & Georgetown Railroad* v. *McDade*, 135 U. S. 554, 570, this court said, through Mr. Justice Lamar: "If the employé knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery."

In *Tuttle* v. *Detroit & Milwaukee Railway*, 122 U. S. 189, this court approved the action of the court below in holding that the plaintiff was precluded from a recovery by negligence of his own, and added that the judge was right in directing a verdict for the defendant on the broader ground that a person who enters into the service of another in a particular employment assumes the risk incident to such employment.

In *Kohn* v. *McNulta*, 147 U. S. 238, 241, the case was that of a brakeman who was injured while coupling cars, and who alleged negligence in the defendant company in permitting cars of another road to be brought on defendant's road, which cars had bumpers of unusual length; and it was said by this court: "It is not pretended that these cars were out of

repair, or in a defective condition, but simply that they were constructed differently from the Wabash cars in that they had double deadwoods or bumpers of unusual length to protect the draw bars. But all this was obvious even to a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The intervenor was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to any one. Under those circumstances he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

That Seley was guilty of contributory negligence, and therefore not entitled to recover, we think is also obvious.

Knowing, as he did, the character of the frog, and the liability of being caught in it, and after having been specially warned by the assistant brakeman, he yet persisted in exposing himself to an obvious danger. His object to couple the cars might have been successfully accomplished without placing his foot in the frog.

Recklessness could hardly go further. The evidence would warrant no other conclusion than that he took the risk of the work in which he was employed, and that his negligence in the course of that work was the direct cause of his death. The court should have directed a verdict for the defendant. *Randall* v. *Balt. & Ohio Railroad*, 109 U. S. 478; *Schofield* v. *Chicago, Milwaukee &c. Railway*, 114 U. S. 615; *Gunther* v. *Liverpool & Globe Ins. Co.*, 134 U. S. 110; *Bunt* v. *Sierra Butte Gold Mining Co.*, 138 U. S. 483.

The judgment of the court below is reversed, and the cause is remanded with directions to award a new trial.

EL PASO WATER COMPANY *v.* EL PASO.

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

No. 238. Submitted February 1, 1894. — Decided March 5, 1894.

In a suit in a Circuit Court by a water company, to which a municipal government has granted the exclusive right to supply it and its inhabitants with water for fifteen years, against the municipality to prevent it from establishing or maintaining other water works within the limits of the municipality until after the expiration of said period, it did not appear affirmatively that it was contemplated that the other works complained of were to go into operation until after the expiration of that period; and as it did not appear from the record that there was over $5000 in controversy, *held*, that this court had no jurisdiction.

This was an appeal from a decree of the Circuit Court of the United States for the Western District of Texas, sustaining a demurrer to the plaintiff's original and amended bills, and dismissing the same. The facts as alleged in the bills were substantially these: By an ordinance passed May 7, 1881, the city council of the city of El Paso, Texas, assumed to grant "the sole and exclusive right, warrant and authority, for the period of fifteen years, to manufacture, sell and furnish water to the inhabitants of the city of El Paso, to both public and private buildings, and for irrigation within the corporate limits of said city," with "the sole and exclusive right, warrant, and authority for said period to lay pipes, mains, and conductors underneath the streets, alleys, lanes, and squares in said city, for the purpose of conducting water," and by a subsequent ordinance rented hydrants at a certain annual rent. By certain assignments and transfers these rights became vested in the plaintiff, and in reliance thereon it expended a large sum of money, to wit, the sum of $150,000, in establishing its plant. The substance of these ordinances, the acts of the plaintiff, and subsequent dealings between it and the city were stated at length in the bills, but the sum of the whole matter lay in the fact of the alleged exclusive right to supply water to the city for the term of fif-

teen years, and to occupy the streets for the purpose of laying mains, etc.

The wrong complained of was the passage of two ordinances in 1889 and 1890, approved by a vote of the people, authorizing the issue of $25,000 and $75,000, respectively, of the bonds of the city for the avowed and declared purpose on the part of the council of sinking artesian wells and constructing a system of water works to be owned and operated by said council for supplying water to said city and inhabitants, for all public and private purposes; and the relief prayed was that the city be enjoined from establishing, maintaining, or operating any water works within the limits of said city until the expiration of said period of fifteen years, and from selling or negotiating any bonds, or other securities, for that purpose.

It was also alleged that if the bonds are issued, the plaintiff will be compelled to pay taxes on its property for the interest on said bonds and to provide a sinking fund for the principal thereof, but the amount of the tax which will be thereby cast upon the plaintiff's property is not disclosed.

The appellee moved to dismiss the appeal for want of jurisdiction.

Mr. Walter D. Davidge and *Mr. Leigh Clark* for the motion.

Mr. William Thompson and *Mr. Maurice McKeag* opposing.

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

Probably the Circuit Court sustained the demurrer on the ground that under the constitution of the State of Texas, adopted in 1876, the attempt to grant exclusive rights in these matters was beyond the power of the city, and that, among other matters, is discussed at length by counsel in their respective briefs. That constitution (article 1, section 26) provides that "perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." In the case of *Brenham* v. *The Brenham Water Works Co.*, 67 Texas, 542, the Supreme Court of the State, construing this provision, held

that a contract similar to that made with the plaintiff was inhibited by the constitution, and that neither the city council nor the state legislature had power to make or authorize such a contract.

We do not deem it necessary to consider the important constitutional question thus presented, for it does not appear from the record that there is over $5000 in controversy, as is necessary to give this court jurisdiction. The bill is filed by the plaintiff to protect its individual interests, and to prevent damage to itself. It must, therefore, affirmatively appear that the acts charged against the city, and sought to be enjoined, would result in its damage to an amount in excess of $5000. So far as respects the matter of taxes which, by the issue of bonds, would be cast upon the property of the plaintiff, it is enough to say that the amount thereof is not stated, nor any facts given from which it can be fairly inferred.

With regard to the claim of exclusive rights, there is no allegation in the bills of the time at which the city will, unless restrained, commence the operation of its contemplated system of water works, and thus interfere with the actual performance of its contract with the plaintiff so far as respects the supply of water. Every averment would be satisfied by proof that the city intended to begin the use of its proposed water works on the day before the expiration of the fifteen years. And the only distinct disclosure of damage in the bills, or by the affidavits filed in this court, is that resulting from an actual supply of water by the city and a failure to pay the plaintiff for the use of its hydrants. So far as the mere construction of water works is concerned, that of itself is no violation of the terms of this contract. The time for which the exclusive right, as claimed, was given, was fifteen years, and the city would be guilty of no breach of any obligations if, during the life of the contract, it proceeded to sink artesian wells, to establish water works, and put itself in condition to, in the future and after the termination of the fifteen years, supply water for all public and private purposes. Suppose that the very next day after the acceptance by the grantee of these franchises the city had commenced the work of sinking

artesian wells and establishing a system of water works, and had continued its labors in that direction during the entire life of the contract: that would have been no breach of its obligations to the plaintiff. It might have affected pecuniarily the value of the plaintiff's plant in that it carried a strong intimation that the moment the fifteen years expired the city would itself engage in the work of supplying water, and thus take from the plaintiff its business. So, preparations made by the city, at the time stated in the bills, to wit, 1889 and 1890, for the establishment of water works, may, and doubtless did, have some effect upon the value of the plaintiff's property, but the extent of the diminution of value thus caused is not alleged, and cannot be inferred. The bills do not allege that the city in terms denies the validity of its agreement to pay rent for hydrants or otherwise, and the acts which they charge that the city is about to do are acts which the city may do consistently with the continuance of the contract, and as a mere matter of preparation for the discharge of a public duty after the termination of that contract. Under these circumstances, we are of the opinion that it is not affirmatively disclosed by the record that the amount in controversy is a sum in excess of $5000, and, therefore, for want of jurisdiction in this court, the appeal must be

Dismissed.

MONTANA COMPANY *v.* ST. LOUIS MINING AND MILLING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 167. Submitted December 13, 1893. — Decided March 5, 1894.

The provision in section 376 of the Code of Civil Procedure of Montana, which authorizes a court on the petition of a person interested in a lead, lode, or mining claim which is in the possession of another person, after notice to the adverse party, to order an inspection, examination, or survey of the lode or mining claim in question, and that the petitioner shall have free access thereto for the purpose of making such inspection,

examination, and survey, and that any interference with him while acting under such order, shall be contempt of court, is not in conflict with the Constitution of the United States.

THE facts in this case are as follows: On November 6, 1889, the defendant in error filed in the District Court of the county of Lewis and Clarke, in the then Territory of Montana, its petition praying an order for the inspection of certain mines alleged to be the property and in possession of the Montana Company (Limited). Notice was given, the defendant appeared and answered, a hearing was had, and on the 7th of December, 1889, an order for an inspection was made by the judge of said court. This order recited the giving of the notice, the hearing of the application, the production of evidence, and the arguments of counsel; finds that an inspection is necessary for the ascertainment, enforcement, and protection of the rights and interests of the petitioner in the mining claim owned by it; appoints the inspectors, and directs that they make an inspection, examination, and survey. It limits the survey to the vertical planes of the end lines of the petitioners' claim, forbids the removal of any ore or minerals, or entrance to the mine unless accompanied by three representatives of the defendant, and in general makes suitable provisions to prevent any unnecessary interference with the defendant's working of the mine. By subsequent proceedings in the way of contempt, Rawlinson T. Bayliss, the general manager of the Montana Company (Limited), became a party to this litigation, and upon an adverse termination thereof in the District Court a review was sought in the Supreme Court of the State, the Territory having been admitted into the Union intermediate the filing of the application and the final disposition of the case in the District Court. By that court the proceedings were sustained, and on February 4, 1890, it entered a judgment of affirmance. To review this judgment the defendants sued out a writ of error from this court. The statute under which the proceedings were had is section 376 of the Code of Civil Procedure, (Compiled Statutes, p. 162,) and is in these words:

Statement of the Case.

"Whenever any person shall have any right to or interest in any lead, lode, or mining claim which is in the possession of another person, and it shall be necessary for the ascertainment, enforcement, or protection of such right or interest that an inspection, examination, or survey of such mine, lode, or mining claim should be had or made; or whenever any inspection, examination, or survey of any such lode or mining claim shall be necessary to protect, ascertain, or enforce the right or interest of any person in another mine, lead, lode, or mining claim and the person in possession of the same shall refuse for a period of three days after demand therefor in writing, to allow such inspection, examination, or survey to be had or made, the party so desiring the same may present to the district court or a judge thereof of the county wherein the mine, lead, lode, or mining claim is situated a petition under oath setting out his interest in the premises, describing the same, that the premises are in the possession of a party, naming him, the reason why such examination, inspection, or survey is necessary, the demand made on the person in possession so to permit such examination, inspection, or survey, and his refusal so to do. The court or judge shall thereupon appoint a time and place for hearing such petition and shall order notice thereof to be served upon the adverse party, which notice shall be served at least one day before the day of hearing. On the hearing either party may read affidavits, and if the court or judge is satisfied that the facts stated in the petition are true, he shall make an order for an inspection, examination, or survey of the lode or mining claim in question in such manner, at such time, and by such persons as are mentioned in the order. Such persons shall thereupon have free access to such mine, lead, lode, or mining claim for the purpose of making such inspection, examination, or survey, and any interference with such persons while acting under such order shall be contempt of court. If the order of the court is made while an action is pending between the parties to the order, the costs of obtaining the order shall abide the result of the action, but all costs of making such examination or survey shall be paid by the petitioner."

Argument for Plaintiffs in Error.

Mr. W. E. Cullen, *Mr. A. H. Garland*, and *Mr. H. J. May* for plaintiffs in error.

The statute under which this proceeding is brought, while not entirely without precedent, seems to be one of unusual hardship, and one which might be made the instrument of much oppression and injustice. Its operation, it is true, is confined to mining claims, but if the principle is a good one, no reason is perceived why it might not be extended to any other species of property. The title which a miner obtains to his mining claim differs in no essential respect from that by which any other property is held, so far as the right to equal protection of law is concerned. If, as in the case at bar, a person, who is about to bring an action of some sort against a mine owner, is to be entitled to go into the premises to make a survey of them to ascertain what development work has been done on them, and what ore has been extracted, then it would seem that it would be only even-handed justice to allow one about to commence an action of ejectment against another for a farm, to go upon the demanded premises for the purpose of surveying them that he may get an accurate description for insertion in his complaint, or for the purpose of enabling him to determine what have been the mesne profits, to allow him to go into the bins and granaries of the defendant and measure their contents. No right of this kind existed at common law, nor is such procedure authorized by statute in any State in the Union with reference to any other species of property than mining claims.

To justify the making of an order for an inspection, examination, or survey, the petitioner must establish the fact that he has "a right to or interest in" the lead, lode, or mining claim so to be examined or surveyed, or that he is the owner of another mining claim, and that it is necessary for the purpose of protecting, ascertaining, and enforcing his rights in such claim that he should be permitted to inspect, examine, or survey another mining claim belonging to his neighbor. In either case there is a question of ownership — of right or title to real estate to be found by the court. The issue is as

material and substantial in all respects as if it were presented in an action of ejectment or trespass. No reason is perceived why the final order made should not have the binding force, as to this issue, of a judgment or decree, and be conclusive between the parties. To say the least of it, this is a very considerable encroachment on the right of trial by jury secured by the Constitution.

It is safe to say that section 376 of the Montana Code of Civil Procedure is a very pernicious and dangerous piece of legislation, and one liable to great abuse. It engrafts upon the judicial system a principle not known to the common law, and one not found in the laws of any State or Territory in the Union, with two exceptions. Nowhere is it made applicable to any other species of real estate except mining claims, and under its terms the tenure of this class of property is rendered most precarious. A mine-owner on an *ex parte* hearing, or at best on barely one day's notice, may have possession of his property taken from him, and be kept out of possession of it indefinitely. And this can be done without any security being given for the payment of his inevitable damages, perhaps without even a cause of action against the petitioner for damages, and without that orderly ascertainment of his rights in a court of justice which is the birthright of every freeman. We do not believe that a miner thus holds his property under the ban of the law, and we do believe that the constitution of Montana extends to it a just and equal protection; and if it does not, surely the Constitution of the United States does. And we submit there was no mistake in our designating, in the first part of this brief, this statute as special, harsh, innovating and summary, as well as unconstitutional.

It is useless to consume time in examining and analyzing the decisions in the English courts of equity, as these courts, with their great powers, make and mould their process, and deal with these questions as equity requires. But here is a statute giving a certain power, which, construed, we say is cruel, and violates the organic law of the nation, and these English cases do not and cannot enlighten us on this point.

Mr. E. W. Toole and *Mr. John B. Clayberg* for defendant in error.

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

The decision of the Supreme Court of the State ends all inquiry as to a conflict between the statute or the proceedings had thereunder and the state constitution. The only question we may consider is whether there is any violation of the provisions of the Federal Constitution.

In the petition filed for the writ of error the plaintiffs in error alleged as the basis thereof that "the validity of said statute is drawn in question on the ground of its being repugnant to that provision of the Fourteenth Amendment to the Constitution of the United States, which prohibits any State from depriving any person of life, liberty, or property, without due process of law."

In the brief it is said that the Chief Justice of the Supreme Court of the State, in his opinion, summarized exactly what they insist upon, as follows:

"It is contended that this statute is unconstitutional, and authorizes the inspection, examination, and survey of the mining property of the Montana Company (Limited) upon the petition of the St. Louis Mining and Milling Company of Montana, and before the commencement of any action by the parties. The obnoxious features are pointed out in the brief, and may be summarized under the following heads: This law may be made an instrument of oppression and injustice; the quality of the interest of the petitioner is not defined; no bond is required to be given to secure the payment of the damages which may result to the owner of the property which is invaded; no appeal is allowed from the order of the court or judge in granting the prayer of the petitioner; the power of the court or judge is vast, and can practically confiscate any mine in the State; the innocent owners of mining property are injured without 'due process of law.'"

Inspection orders like this have been frequently made, some-

times under the authority of special statutes and sometimes by virtue only of the general powers of a court of equity. See the following cases, most of which are collected in the opinion of the Supreme Court of the State: *Earl of Lonsdale* v. *Curwen*, 3 Bligh, 168; *Walker* v. *Fletcher*, 3 Bligh, 172; *Blakesley* v. *Whieldon*, 1 Hare, 176; *Lewis* v. *Marsh*, 8 Hare, 97; *Bennitt* v. *Whitehouse*, 28 Beav. 119; *Bennett* v. *Griffiths*, 30 L. J. N. S. Part 2, Q. B. 98; *Whaley* v. *Brancker*, 10 Law Times N. S. 155; *Thornburgh* v. *Savage Mining Co.*, 1 Pac. Law Mag. 267; *S. C.* 7 Morrison Min. Rep. 667; *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80; *Thomas Iron Co.* v. *Allentown Mining Co.*, 1 Stewart, (28 N. J. Eq.) 77.

It was said in *Lewis* v. *Marsh*, *supra*, by the Vice-Chancellor: "I think the case is one in which there is a necessity that the party should be allowed what he asks, in order to prove his case. That is the meaning of necessity. A party cannot get his rights without proving what his rights are; and it is inherent in the case that the plaintiffs should have an opportunity of ascertaining that the defendants do not work more coal than they are entitled to do."

And in *Bennett* v. *Griffiths*, where leave was asked not merely for an inspection, but for making a driftway through a wall for the purpose of determining what workings had been done behind it, the court, by Cockburn, C. J., said: "We are of opinion that the judge had jurisdiction to make the order in question. The power to order an inspection of real or personal property has long existed in the courts of equity, and we find that as ancillary to that power the courts of equity have ordered the removal, where necessary, of obstructions to the inspection."

In *Thornburgh* v. *Savage Mining Co.*, 7 Morrison's Min. Rep., a case heard and determined in the Circuit Court of the United States for the District of Nevada by the District Judge, Alexander W. Baldwin, we find the matter thus discussed:

"Ought a court of equity, in a mining case, when it has been convinced of the importance thereof for the purposes of the trial, to compel an inspection and survey of the works of

the parties, and admittance thereto by means of the appliances in use at the mine? All the analogies of equity jurisprudence favor the affirmative of this proposition. The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law.

"That a court of equity, having jurisdiction of the subject-matter of the action, has the power to enforce an order of this kind will not be denied. And the propriety of exercising that power would seem to be clear, indeed, in a case where, without it, the trial would be a silly farce. Take, as an illustration, the case at bar. It is notorious that the facts by which this controversy must be determined cannot be discovered except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft and machinery operated by it. It would be a denial of justice, and utterly subversive of the objects for which courts were created, for them to refuse to exert their power for the elucidation of the very truth — the issue between the parties. Can a court justly decide a cause without knowing the facts? And can it refuse to learn the facts?"

See also *Kynaston* v. *East India Co.*, 3 Swanst. 249, in which an inspection of buildings was ordered to enable the inspectors to testify as to the value; *State* v. *Seymour*, 6 Vroom, (35 N. J. L.) 47, 53; and *Winslow* v. *Gifford*, 6 Cush. 327.

In the latter case it appeared that certain commissioners, under authority of a statute, entered upon the lands of the plaintiff and made certain surveys, with a view of ascertaining the boundaries of a tract of land devoted to public purposes, no compensation being provided for such apparent trespass. Plaintiff brought suit to recover damages therefor. It was held that the act authorizing such entry without compensation was not unconstitutional. Other instances of like temporary occupancy were referred to by the court in its opinion, such as the act of the sheriff, with criminal process against an individual, going to arrest him on the land of a third party; entering upon the lands of an individual for the purpose of surveying

for a highway, when, as a result of such survey, the purpose of establishing the highway is abandoned. It was conceded that such entry and occupancy created a slight trespass upon the absolute right of the owner to an undisturbed and exclusive use of his real estate, but it was held that if the occupancy was reasonably necessary for some public purpose, was temporary, and with no unnecessary damage, it carried no right to compensation. Other instances will readily suggest themselves in which there is some temporary interference with a man's absolute control of his own property, as when a party is compelled to produce his books and papers for examination by the adverse party, or when, through a receiver, possession of property is taken pending a dispute as to the title or liens upon it. All these cases involve some invasion of the rights of the owner to the possession and use of his property, yet the necessities of justice seem to compel it.

It is true that most of the reported cases of order for inspection are of recent date, but the question whether a certain proceeding is due process of law is not determined by the matter of age. In *Hurtado* v. *California*, 110 U. S. 516, 537, the question was presented whether the prosecution of criminal offences by information rather than by indictment, if authorized by the constitution and laws of a state, was in conflict with the clause of the Fourteenth Amendment to the Constitution of the United States requiring due process of law, and it was held that it was not, and that such mode of proceeding, though of recent origin, was nevertheless due process of law. The court, by Mr. Justice Matthews, after referring to the fact that there are certain fundamental rights which cannot be disregarded, said: "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

On the other hand, while not decisive of the question, the frequency with which these orders of inspection have of late years been made, and the fact that the right to make them has

never been denied by the courts, is suggestive that there is no inherent vice in them. And if the courts of equity, by virtue of their general powers, may rightfully order such an inspection in a case pending before them, surely it is within the power of a State by statute to provide the manner and conditions of such an inspection in advance of the suit. To "establish justice" is one of the objects of all social organizations, as well as one of the declared purposes of the Federal Constitution, and if, to determine the exact measure of the rights of parties it is necessary that a temporary invasion of the possession of either for purposes of inspection be had, surely the lesser evil of a temporary invasion of one's possession should yield to the higher good of establishing justice; and any measures or proceedings which, having the sanction of law, provide for such temporary invasion with the least injury and inconvenience, should not be obnoxious to the charge of not being due process of law.

Passing from these general suggestions to some of a more special character, it must be remembered that inspection does not deprive the owner of the title to any portion of his property, nor does it deprive him permanently of the use. The property, therefore, is not taken in the sense that he no longer remains the owner, nor in the sense that the permanent use of the property has been appropriated. In *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, it was held that if a party is deprived of the entire use of his property it is a taking within the scope of the Fifth Amendment, although the mere title is not disturbed. But by an inspection neither the title nor the general use is taken, and all that can be said is that there is a temporary and limited interruption of the exclusive use. And it is in that light that the question of the validity of this statute is to be determined.

Counsel for plaintiffs in error contend that there is possibility of grievous wrong being done in carrying into effect the provisions of this statute, and say that the question of validity is to be determined not by the amount of wrong done in the present case, but by what may be done in other cases, quoting the language of Earl, J., in *Stuart* v. *Palmer*, 74 N. Y. 183,

188: "The constitutional validity of law is to be tested not by what has been done under it, but by what may, by its authority, be done." This test is accurate, provided, of course, it is limited to what may rightfully be done, and does not extend to that which is wrongfully, though under pretence of the statute, done. Thus, that the power of a court of equity to grant injunctions is not inhibited by the constitutional provision requiring due process of law is clear, although in a particular case a court may disregard the rules of equity and justice in granting the injunction.

It is objected that the statute does not define the quality of "right to or interest in" the mining claim which entitles to an inspection. But does the amount of a party's interest determine the question of the constitutionality of a statute passed to enable an accurate determination thereof? Suppose it be true that a petitioner has but a limited interest in a mine, has not that petitioner a legal right to the protection of that interest equal to that of the other owners? Has he not the same constitutional right to any means of ascertaining and enforcing that interest that belongs to any other party interested in the mine? Indeed, it may be said to be generally true that the weaker a party and the smaller his interest, the greater the need of the strong hand of the court to ascertain and protect his rights. It is true, the quality of the right or interest is not defined, but it must, in order to come within the statute, be a "right to or interest in" the mining claim. The language is general and comprehensive, because the intent is to include within its purview every actual right, every real interest. While it is possible that in any particular case a court may err in determining the existence of a right or interest, the same possibility attaches to all litigation. If it be the duty of the State to protect the rights of its citizens, it certainly cannot be a violation of that duty to provide a uniform rule for the admeasurement of all rights of a similar character, large or small.

The failure to require a bond, or in terms to allow an appeal, is not fatal to the constitutionality of the act. It is familiar knowledge that the Circuit Courts of the United

States are not compelled in granting preliminary injunctions to take from the plaintiff a bond of indemnity to the defendant, and, frequently, they do not take any. As in such cases the matter of a bond is within the discretion of the judge, so, whether a bond shall be required as preliminary to an inspection, is a matter within the discretion of the State. The right to an inspection does not depend upon a bond, and the order for an inspection does not cease to be due process of law because a bond is not required. No inspection is ordered by the court or judge until there has been a hearing and an adjudication of the petitioner's right; and while further testimony in the future litigation between the parties may show that such adjudication was erroneous, and that there is, in fact, no right on the part of the petitioner, yet that is a result common to all litigation, and does not gainsay the statement that the inspection is based upon a right established by judicial determination. Nor can the withholding, if it be withheld, of an appeal affect the question of due process. An appeal simply means a second hearing; and if one hearing is not due process of law, doubling it cannot make it so.

No more significant is the want of a trial by jury upon the existence of the right or interest prior to the order for the inspection. A jury trial is not in all cases essential to due process of law. *Murray's Lessee* v. *Hoboken Land & Co.*, 18 How. 272; *Palmer* v. *McMahon*, 133 U. S. 660. Equity proceeds to final determination of the most important rights without a jury, and nothing is more common than a new proceeding established by statute to be carried on without the aid of a jury, as, for instance, proceedings by the State under its right of eminent domain: *Livingston* v. *New York City*, 8 Wend. 85. To determine the right to office under an election: *Whallon* v. *Bancroft*, 4 Minnesota, 109. To compel delivery of the possession of the seal, records, and papers of an office: *Atherton* v. *Sherwood*, 15 Minnesota, 221. To appoint guardians of insane persons: *Gaston* v. *Babcock*, 6 Wisconsin, 503. To assess the value of improvements under the occupying claimants' law: *Ross* v. *Irving*, 14 Illinois, 171. To enforce statutory liens upon vessels for labor and material:

Sheppard v. *Steele*, 43 N. Y. 52. To determine the settlement of paupers: *Shirley* v. *Lunenburg*, 11 Mass. 379. For the assessment and collection of taxes: *Crandall* v. *James*, 6 R. I. 144. But it is needless to multiply instances.

In conclusion, it may be observed that courts of equity have, in the exercise of their inherent powers, been in the habit of ordering inspections of property, as of requiring the production of books and papers; that this power on the part of such courts has never been denied, and if it exists, *a fortiori*, the State has power to provide a statutory proceeding to accomplish the same result; that the proceeding provided by this statute requires notice to the defendant, a hearing and an adjudication before the court or judge; that it permits no removal or appropriation of any property, nor any permanent dispossession of its use, but is limited to such temporary and partial occupation as is necessary for a mere inspection; that there is a necessity for such proceeding in order that justice may be exactly administered; that this statute provides all reasonable protection to the party against whom the inspection is ordered; that the failure to require a bond, or to provide an appeal, or to have the question of title settled before a jury, is not the omission of matters essential to due process of law. It follows, therefore, that there is no conflict between this statute and the Fourteenth Amendment of the Constitution of the United States, and the judgment of the Supreme Court of Montana is

Affirmed.

MILLER *v.* COURTNAY.

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

No. 157. Submitted December 11, 1893. — Decided March 5, 1894.

In an action of ejectment, in a Federal court, the legal title prevails.

The legal title to the premises in dispute passed to the grantor of the defendant by sale under execution and the sheriff's deed, and was not divested by the subsequent decree set forth in the statement of facts.

Statement of the Case.

THIS was an action of ejectment commenced by Jason G. Miller in the Circuit Court of the United States for the District of Nebraska, on February 21, 1887, to recover of the defendant the possession of certain real estate situate in an addition to the city of Lincoln, in that State. After answer and reply, the case on November 15, 1887, came on for trial before a jury, which returned a special verdict finding the facts. Upon such special verdict judgment was, on motion, entered in favor of the defendant. The plaintiff thereupon sued out a writ of error from this court. Since the filing of the record Jason G. Miller has died, and the action been revived in the name of Mary P. Miller, his devisee.

The testimony given on the trial was not preserved by any bill of exceptions, and the questions which arise are upon the sufficiency of the facts found to sustain the judgment. It appears from these findings that on August 21, 1867, the title to the land passed to Luke Lavender, the common source of title of plaintiff and defendant. On November 4, 1873, Henry Atkins obtained a judgment against Luke Lavender in the district court of Lancaster County, the county in which the land is situated. Executions were issued from time to time on this judgment and levied on the property in controversy. Finally, on March 22, 1879, the sheriff sold the property to Martha I. Courtnay, wife of the defendant. This sale was confirmed by the court and the sheriff's deed duly executed. Lavender was personally served with process, and the proceedings from the commencement of the action to the execution of the sheriff's deed were regular in form. The title thus acquired she subsequently conveyed to the defendant, though not till after the commencement of the present action. On April 17, 1884, Lavender filed his petition in the same court against Henry Atkins, Martha I. Courtnay, and D. G. Courtnay, this defendant, in which he alleged his ownership, in 1873, of the property in controversy, as well as other real estate, the rendition of several judgments against him during the years 1873 and 1874, among others that in favor of Atkins; that the property then belonging to him was worth $75,000 over and above any homestead exemption; that all the judgments

against him amounted in the aggregate to less than $10,000; that, notwithstanding this, through the wrongful conduct of said Atkins, John S. Gregory, the defendant in this case, (who was a son-in-law of said Atkins,) and James E. Philpott, who was acting as his (Lavender's) attorney, his entire property was sold on executions issued on these judgments, and still leaving a balance unsatisfied. The various steps by which this result was accomplished, such as having irresponsible parties present at the sales and bidding on the property offered far above its real value, and thus preventing sales to *bona fide* bidders, circulating reports as to incumbrances upon the property, inducing the plaintiff Lavender to file a voluntary petition in bankruptcy in the United States District Court, and then to abandon it, are all stated at length in the petition. The prayer was that the sales made on the judgments owned or controlled by Atkins, Courtnay, or Gregory be set aside; that an account be stated of the amounts due under such judgments, and that plaintiff be allowed time in which to pay such amounts, or in lieu thereof that new executions and sales be ordered.

The defendants appeared and answered, and on November 5, 1885, a decree was entered finding the issues as to this land in favor of the plaintiff, the language of the finding and decree being as follows:

"That the plaintiff is entitled to redeem the same and to be restored to the possession thereof upon the payment within six months next ensuing of the sum of two hundred and thirty-four dollars, with interest thereon at the rate of seven per centum per annum from March 22, 1879, until the same is paid into court for said defendants; to which defendants except. It is therefore ordered, adjudged, and decreed that upon the payment by the plaintiff of said sum into court for the defendants within the time aforesaid, the sheriff's sale of March 22, 1879, and deed to said lands, to wit, the southwest quarter of the northwest quarter of the northeast quarter of section twenty-five, township ten north, of range six east, in Lancaster County, Nebraska, be set aside, annulled, and held for naught, and the title to said lands be quieted in the plaintiff as against all claims or title that said defendants or either of

them and all persons holding or claiming to hold under them or either of them may have or claim to have under and by virtue of said sale and deed, and that the defendants and each of them convey to plaintiff all right, title, and interest by them or either of them held or claimed in and to said lands by virtue of said sale and deed, and that plaintiff have possession of said lands and execution therefor, and that in default of the plaintiff making such payment within the time aforesaid it is ordered, adjudged, and decreed that the title in and to the said lands, to wit, the southwest quarter ($\frac{1}{4}$) of the northwest quarter of the northeast quarter of section twenty-five, township ten, range six east, in Lancaster County, Nebraska, be quieted in the defendant, Martha I. Courtnay; to which defendants except. This decree, however, is not to affect any judgment or execution lien or liens which said defendants or either of them may have or hold on said lands; and plaintiff excepts thereto and prays an appeal therefrom, which is allowed; and the court further finds as to the rest and residue of said lands in the petition described the issues joined in favor of the defendants and against the plaintiff; and it is further ordered and decreed that the title in and to all the rest and residue of said lands in the petition described be quieted in the defendants."

Subsequently this stipulation was filed:

"This cause is settled and the judgment and decree rendered in the District Court of Lancaster County is in all things affirmed, and all errors are waived by the plaintiff, and the said plaintiff waives that part of the decree in this case which gives said plaintiff the right to redeem certain parts of said premises mentioned in said decree, and the said Luke Lavender and wife deed all of said premises mentioned in the said decree to D. G. Courtnay, and defendants herein agree to pay all the costs, and judgment is rendered for the same in favor of the plaintiff.

"D. G. Courtnay,
"*Att'y for Def'ts.*
"Luke Lavender.

"This 18th day of December, 1885."

And on the 28th of December, 1885, the decree was modified in accordance therewith. On the day of the signing of this stipulation Lavender and wife executed and delivered to the defendant a warranty deed which included, with other real estate, the premises in controversy. Further findings were as follows:

"That the consideration received by the said Luke Lavender and paid and given by the said Dominic G. Courtnay for the settlement of the said suit under the said stipulation and the delivery of the said deed of conveyance to him by the said Luke Lavender and Julia A. Lavender, his wife, as above found, was the sum of five hundred dollars, cash paid to Lavender by said Courtnay, and the discharge and release by said Courtnay and Martha I. Courtnay and Henry Atkins of all the judgments held by them or any of them against the said Luke Lavender, amounting in the aggregate to about the sum of fourteen thousand dollars."

"And we further find and say that Luke Lavender did not pay within six months next accruing of the said decree the sum of $234, with interest thereon, at the rate of 7% per annum, from March 22, 1879, neither did any person pay or offer to pay the same, and no sum of money whatever has ever been paid as required by the terms of said decree."

It also appears that, on February 21, 1883, Lavender and his wife by two deeds quit-claimed the premises to the plaintiff, the granting clause in each reading as follows:

"Have remised, released, and quit-claimed, and by these presents, do for themselves, their heirs, executors, and administrators remise, release, and forever quit-claim and convey unto the said party of the second part and to his heirs and assigns forever all their right, title, interest, estate, claim, and demand, both at law and in equity," etc.

Mr. Walter J. Lamb, *Mr. A. C. Ricketts*, and *Mr. Henry H. Wilson* for plaintiff in error.

Mr. D. G. Courtnay in person for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

Opinion of the Court.

This was an action of ejectment, and in such an action in a Federal court the legal title prevails. As the proceedings in the action in the Lancaster County District Court, from the service of the summons upon Luke Lavender to the confirmation of the sale to Martha I. Courtnay and the execution of the sheriff's deed, were confessedly regular in form, the legal title passed thereby to her. If it be true, as claimed by plaintiff's counsel, that the quit-claim deeds to Miller in 1883 conveyed "every equitable and legal right held by Lavender in this land at the time," it is difficult to perceive how Lavender, in 1884, could maintain any suit to set aside such sale and deed. But, beyond this, there was nothing in the proceedings, including the decree in the case of Lavender against Atkins, Martha I. Courtnay, and this defendant, which ever, even for a single moment, operated to transfer the legal title back from Mrs. Courtnay to Lavender. The petition in that case admitted the regularity of the proceedings in the prior action as to matter of form, did not question the fact that the legal title had thereby passed to her, and only insisted on the equitable right to redeem by virtue of the alleged misconduct. The decree gave a right to redeem, but provided that if no redemption was made the title of Mrs. Courtnay should be quieted. The conditions of redemption prescribed in the decree were never performed, and under an agreement involving other matters, and upon a consideration paid by a party other than the then owner, Mrs. Courtnay, the decree was, by consent of the parties, modified, and even the conditional right to redeem denied. Surely it needs no argument to show that the legal title, once vested in Mrs. Courtnay, is not shifted backwards and forwards by the changing terms of a decree which gave and then denied the right to redeem.

It is unnecessary to go into any further consideration of this case. The legal title which passed to Mrs. Courtnay by the said sale and sheriff's deed was not divested by the subsequent decree, or any action taken thereunder, and the plaintiff never acquired the legal title by his quit-claim deeds. The judgment is

Affirmed.

UNITED STATES *v.* SHEA.

APPEAL FROM THE COURT OF CLAIMS.

No. 396. Submitted January 8, 1894. — Decided March 5, 1894.

S. agreed with a Deputy Quartermaster-General, who acted on behalf of the United States, to provide and furnish whenever called upon during the coming fiscal year, such vessels as might be required for a specified service in the harbor of New York. Each vessel was to have an engineer and fireman, the remainder of the crew to be supplied by the United States when required, and the fuel to be supplied by them. The payment, if employed by the day, was to be at the rate of $67 *per diem* for each vessel. The government was to have the management and control of the vessels while in its service. Under this contract S. furnished a vessel called the Bowen on the requisition of the quartermaster, which was accepted by the government, and went into its service. While in government employ a collision occurred, whereby the Bowen was so damaged that it had to be laid up for repairs for 61 days. During the most of this time S., at the government's request, furnished another vessel called the Stickney, which was accepted. He hired this vessel, paying $55 a day, and received from the government the contract price of $67 for its use. When the Bowen resumed service after the completion of the repairs, S. claimed compensation for it for the 61 days at the rate paid by him for the Stickney. *Held*, that the contract was one for hiring, and not for service, and that the government, during its possession of the vessel, was a special owner, and bound to pay rent for it until returned to S.

THE facts of this case are stated in the findings of the Court of Claims. The first is that on May 28, 1886, the petitioner entered into a contract with the Deputy Quartermaster-General of the Army for and in behalf of the United States, the important articles of which are as follows:

"ARTICLE 1. That the said Daniel Shea shall provide and furnish to the party of the first part, whenever called upon during the fiscal year ending June thirtieth, eighteen hundred and eighty-seven, such vessels of the descriptions hereinafter given as may be required to take the place of the vessels now performing service for the U. S. Army between New York City and Governor's Island, New York, Governor's Island and Sandy Hook, and New York Harbor generally, respectively,

the steamers Atlantic, Ordnance, and Chester A. Arthur; that the vessels furnished as aforesaid must each have an engineer and fireman, and conform to the following conditions, viz.: The steamer to take the place of the Chester A. Arthur must be of about the size and the character of the Chester A. Arthur, and the steamers to take the places of the Atlantic and Ordnance, respectively, must have the capacity for freight and passengers and be of the size and character of the steamer James Bowen; and that all the vessels furnished must be staunch, in first-class order in every respect, well equipped, and conform fully to the requirements of the law.

"It is further agreed that the fuel required by said vessels so furnished while in service, under this agreement, shall be supplied by the government, and that this contract shall commence on the first day of July, eighteen hundred and eighty-six.

"And it is further agreed that the party of the second part shall furnish, when required, the remainder of the crew, consisting of a captain, a mate, two deck hands, and a fireman.

* * * * *

"ART. 4. That for and in consideration of the faithful performance of the stipulations of this agreement the party of the second part shall be paid, at the office of the disbursing quartermaster U. S. Army, at New York City, as follows: The sum of sixty-seven (67) dollars per day for each vessel employed, including the engineer and the fireman, when employed by the day, and the sum of ten (10) dollars per hour for each vessel employed, including the engineer and the fireman, when employed by the hour; and for the said remainder of the crew, when required, the sum of thirteen dollars per day.

"ART. 5. That in case of failure of the said party of the second part to comply with the stipulations of this contract, according to the true intent and meaning thereof, then the party of the first part shall have the power to hire vessels elsewhere in open market at the sole expense and charge of the party of the second part."

The second and third findings are as follows:

2. "After the making of said contract, and before the expiration of the fiscal year, (June 30, 1887,) upon being called

upon by the quartermaster's department therefor, the claimant provided and furnished a vessel called the James Bowen, then staunch, in first-class order in every respect, well equipped, and conforming fully to the requirements of the law, and with such part of the crew as the claimant was required by the contract to furnish, and the same was accepted and used by the defendants.

3. "On the first day of January, 1887, while in the service and under the exclusive management and control of the quartermaster's department, and having an unlicensed captain or pilot, said vessel was damaged in a collision with a ferry-boat, in consequence of which she was necessarily laid up for repairs until March 2 of the same year, when, on the next day, she resumed work.

"The collision occurred during a fog, and the supervising inspectors, on an investigation, found that it was accidental and was not due to inattention, unskilfulness, or lack of precaution on the part of the pilots. The cost of repairs was paid by the claimant.

"During the time said vessel was undergoing repairs, the claimant, being called upon therefor, furnished another vessel under said contract, for which he paid $55 a day. During said time the engineer and fireman of the claimant were on the vessel watching and superintending the work."

There is no express finding that any sum was ever paid to the petitioner on account of this contract. It appears, however, from the fourth finding, that, on April 1, 1887, the Deputy Quartermaster-General forwarded to the Quartermaster-General a voucher, of which the following is a copy:

The United States to Daniel Shea, Dr.

Place and date.		Dols.	Cts.
N. Y. City, April 1, 1887	For hire of the steamer James Bowen, from Jan'y 1st to March 2d, 1887, inclusive, 61 days, at $55 per day	$3355	00
	Engineer and fireman, 61 days, at $7.00	427	00
		$3782	00

which voucher was accompanied with a recommendation that authority be granted to pay the same, and with the following explanation:

"The facts are as stated herein. The James Bowen was under charter to the quartermaster's department, and, as the Quartermaster-General is aware, was, on the 1st of January, 1887, on one of her trips between the Battery and Governor's Island, run into by the Brooklyn ferry-boat Atlantic.

"The James Bowen was at the time under the exclusive control and management of the government, being manned and navigated by employés of the quartermaster's department.

"In the collision the James Bowen was very badly damaged, and while undergoing repairs her owner was compelled to hire a vessel in her stead. The within claim is made for reimbursement of that expense. I regard it as perfectly proper, reasonable, and just, and therefore recommend its payment.

HENRY C. HODGES,

"*Deputy Q. M. Gen. U. S. Army, Depot Quartermaster.*"

That on April 6, 1887, the Quartermaster-General called upon the Deputy Quartermaster-General for further particulars, and received in response a letter, copied at length, the latter part of which is as follows:

"The James Bowen was under charter to and employed by the quartermaster's department at the time of the collision under the contract of Daniel Shea, dated May 28, 1886. Immediately after the collision the contractor was called upon to furnish another vessel under this contract. He furnished the steamer E. H. Webster, one of his own boats. That vessel, although a very staunch, good boat, was not entirely satisfactory for the service, and, upon search, the Joseph Stickney was found and put on the duty by the contractor. The E. H. Webster was on duty from January 1 to 4, inclusive, and the Joseph Stickney from January 5 to March 2, 1887. During this time the James Bowen was undergoing repair of the damage done in the collision. As the James Bowen was at the time wholly in charge and under the management and control of the quartermaster's department, I was

under the opinion, and am still, that the department was bound to save the contractor from loss on account of the damage and to pay for her time under the contract until restored to her owner upon completion of the repairs.

"With this in view she was reported on my report of persons and articles for January, at the contract rate, viz., $67 per day, including an engineer and a fireman. Upon further reflection, however, I concluded to allow for the Bowen's time only at the rate which her owner was obliged to pay for the vessel put in her stead. One of these, the E. H. Webster, was his own and was in service, as before stated, from January 1 to 4, and the other, the Joseph Stickney, was hired by him at $55.00 per day, and was in service from January 5 to March 2. So the matter stands thus:

"The E. H. Webster was in service from January 1 to 4, and the Joseph Stickney from January 5 to March 2, and has been paid for. The James Bowen was laid up from January 1 to March 2, inclusive, and her time has not been paid for, but I recommend that her owner be paid at the rate of $55.00 per day for the vessel. I enclose herewith a voucher covering the time, as well as the item for an engineer and a fireman, embraced in Shea's claim in article 1 of this letter. If the Quartermaster-General desires, supplementary reports of persons and articles covering this service will be prepared and forwarded immediately."

On May 17 the Quartermaster-General transmitted the claim and voucher to the Third Auditor of the Treasury for adjudication and settlement.

The fifth finding is that on "November 29, 1887, the Auditor reported against paying the claim, on the alleged ground that the boat was wholly under the control of the owner and his agents and employés, and if the injury had been due to the negligence of any one connected with the management of the James Bowen, and not due to the ferry-boat, (with which the collision occurred,) the United States could not be charged with that negligence. The Second Comptroller on the same day concurred with the Auditor in disallowing the claim, and it has not been paid."

Argument for Appellants.

On these facts thus found the Court of Claims decided as a conclusion of law that the plaintiff was entitled to recover the sum of $4087.

Mr. Assistant Attorney General Dodge and *Mr. Conway Robinson* for appellants.

The first question is, whether this contract constituted a mere hiring of the use of this vessel to do certain work, or a complete demise sufficient to divest ownership for the time. What is the proper construction of the contract of May 28, 1886? The court below has treated it as though it was a demise of the steamer James Bowen to the United States for the fiscal year ending June 30, 1887, and made the United States her special owner for said year. And such is the contention of the appellee. But this, it is submitted, is not the true or proper construction of that contract.

To have that effect a contract must be such as of itself to transfer the title and ownership of some particular vessel to a party as grantee or lessee for a voyage or for some definite period or time of service mentioned in the contract. It must give the grantee or lessee a right to that particular vessel for and during the time specified as against the grantor or lessor. This court has said: "Unless the ship herself is let to hire, and the owner parts with the possession, and command and navigation of the same, the charterer or freighter is not to be regarded as the owner for the voyage. . . . Courts of justice are not inclined to regard the contract as a demise of the ship if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer." *Reed* v. *United States*, 11 Wall. 591.

The language in which this contract is couched was clearly intended to permit the contractor to furnish any vessels he pleased, and to change them whenever he pleased, so long as they performed the service contracted for and came up to the standard and conformed to the requirements of the contract, and were such as the contract called for. Had it been contemplated that the government should by this contract acquire

any right, title, or ownership in any particular vessel during the fiscal year, or during any part of said year, it would necessarily have been couched in different language.

Could the government have insisted that any particular vessel which had entered upon the contract service should continue to perform the contract service during the rest of the year if the owner did not wish her to do so, and desired to withdraw her, and was ready and willing to furnish another vessel such as the contract called for? It is submitted that the government could not insist upon anything of the kind, and for the obvious reason that it would have no right to or ownership in any particular vessel.

Even where words of demise are used, yet it must appear that the instrument taken as a whole was intended to operate as such or it will not be so construed. "When the party enters into that, which on the face of it appears to be an agreement, though there are words of present demise, yet if you collect on the face of the instrument the intent of the parties to give a future lease, it shall be an agreement only." *Christie* v. *Lewis*, 2 Brod. & Bing. 410, 436; *Morgan* v. *Bissell*, 3 Taunt. 65.

Where, as in the case at bar, the contract contains no words of demise, and especially where its provisions are inconsistent with an intention to give any ownership to the hirer, it will be held to be a mere contract of affreightment or bailment for hire at most. *Saville* v. *Campion*, 2 B. & Ald. 511; *Christie* v. *Lewis*, 2 Brod. & Bing. 410; *Marcardier* v. *Chesapeake Ins. Co.*, 8 Cranch, 39; *Clarkson* v. *Edes*, 4 Cowen, 476; *Leary* v. *United States*, 14 Wall. 607.

The construction of the contract of May 28, 1886, which the appellant contends for, namely, that it is not a demise of the James Bowen and does not make the appellant special owner during the fiscal year ending June 30, 1887, or during the time of service, is borne out by all the other covenants and provisions of the contract.

The vessels are to be employed "by the day" or "by the hour." The contractor, Daniel Shea, covenants and agrees that "all the vessels furnished must be staunch, in first-class

order in every respect, well equipped, etc.," and that he "shall provide and furnish . . . such vessels . . . whenever called upon during the fiscal year ending June 30, 1887." And it is also covenanted and agreed "that in case of failure of the said party of the second part to comply with the stipulations of this contract, according to the true intent and meaning thereof, then the party of the first part (the appellants) shall have the power to hire vessels elsewhere in open market at the sole expense and charge of the party of the second part." The service which the government was to receive was such that it could be secured by hiring other vessels.

Can it be pretended for a moment that the contractor could provide and furnish to the government any vessels of which the government had the special ownership? He would not be providing and furnishing the government a vessel if the government already had that very vessel. He could only do so upon the theory that the government did not have ownership under said contract. The requirement that the contractor should furnish such vessels whenever called upon during the fiscal year is entirely inconsistent with the idea of any ownership in the government.

It cannot be contended for a moment that the entire possession and control of the vessels were surrendered by claimant. At all times his engineer and fireman were at least in partial possession, as evidenced by their management of the repairs.

In conclusion, we submit that, taking this contract of May 28, 1886, as a whole, sounding as it does in contract and covenant merely, containing no words of letting, designating no particular vessel, designating no definite time of service, and with its covenants and provisions inconsistent with the idea of any special ownership in any particular vessel being given to the government, it is clear that it should be construed not to be a demise of the James Bowen, and should be held to be a mere contract of affreightment, or bailment for hire at most.

The appellant did not in said contract undertake any responsibility beyond that which may be implied by the law of bailment.

Mr. Franklin H. Mackey and *Mr. John W. Butterfield* for appellee.

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

This case turns upon the construction to be given to the contract of May 28, 1886, taken in connection with the action of the parties thereunder. Was this a contract of hiring or for service? In *Reed* v. *United States*, 11 Wall. 591, 600, it was said by Mr. Justice Clifford, speaking for the court:

"Affreightment contracts are of two kinds, and they differ from each other very widely in their nature as well as in their terms and legal effect.

"Charterers or freighters may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship and have by the terms of the contract, and assume in fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, command, and navigation of the ship, and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment sounding in contract and not a demise of the vessel, and the charterer or freighter is not clothed with the character or legal responsibility of ownership. . . . Courts of justice are not inclined to regard the contract as a demise of the ship if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer, but where the vessel herself is demised or let to hire, and the general owner parts with the possession, command, and navigation of the ship, the hirer becomes the owner during the term of the contract, and if need be he may appoint the master and ship the mariners, and he becomes responsible for their acts."

And subsequently, in *Leary* v. *United States*, 14 Wall. 607, 610, Mr. Justice Field thus discussed the question:

"If the charter party let the entire vessel to the charterer with a transfer to him of its command and possession and

subsequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But, on the other hand, if the charter party let only the use of the vessel, the owner at the same time retaining its command and possession, and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case the charter party is a contract for the lease of the vessel; in the other it is a contract for a special service to be rendered by the owner of the vessel. . . . All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command, possession, and control is incompatible with the existence at the same time of such special ownership in the charterer."

See also *Hooe* v. *Groverman*, 1 Cranch, 214, in which these words in the charter party, "doth grant and to freight let . . . the whole tonnage of the vessel," were held the operative words, and indicating in connection with other language a contract for service rather than a demise of the vessel. *Marcardier* v. *Insurance Company*, 8 Cranch, 39, 49, in which Mr. Justice Story, speaking for the court, said: "A person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship. Such is understood to have been the case of *Vallejo* v. *Wheeler*, Cowp. 143. But where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership." *Gracie* v. *Palmer*, 8 Wheat. 605; *McIntyre* v. *Bowne*, 1 Johns. 229; *Hallett* v. *Columbia Insurance Company*, 8 Johns. 272; *Clarkson* v. *Edes*, 4 Cowen, 470; 1 Parsons on Maritime Law, 232, c. 8, § 2.

These authorities, although not all touching the question of

rent, bring out clearly the essential differences between the two kinds of affreightment contracts — the one in which there is a demise of the vessel, a parting with all possession and control, and the other in which the owner, retaining the possession and control, contracts simply for service — it may be the entire service of the vessel.

If the contract is one of the former kind, then rent is payable until the end of the stipulated term and the return of the vessel. In *Havelock* v. *Geddes*, 10 East, 555, 566, there was a demise of a vessel for a term of twelve months, and longer if the defendant should think fit to keep the same. There was a stipulation that the plaintiff, the owner of the vessel, should keep it tight, staunch, etc., and a reduction was sought of rent for the time occupied by defendants in making repairs during the term of the demise. Lord Ellenborough held that no such reduction could be allowed, saying: "The question then is, whether, because the plaintiff has undertaken to keep the vessel tight, etc., the defendants have a right to deduct anything out of the freight they are to pay, in respect of the time which may be taken up in making good such defects as may occur during the period for which the vessel is hired? And we are of opinion they are not. From the accidents to which ships are liable, it was in the ordinary course of things to expect that this ship might want repairs in the course of her voyage; and when the defendants were making their bargain they should have stipulated to deduct for the time which might be exhausted in making those repairs, if they meant to make that deduction. Without such a stipulation, we think the true construction of the charter party is, that whilst those repairs are going on, the ship is to be considered as in the defendants' service, and the defendants liable to continue their payments."

To like effect is the case of *Ripley* v. *Scaife*, 5 B. & C. 167, 169, in which Abbott, C. J., said:

"There is in the charter party an express stipulation for the payment of freight from a certain day, for six months certain; and so much longer as the vessel should be employed by the plaintiffs. There not being any other stipulation for

the case of repairs, I think that the ship was in the employ of the plaintiffs whilst those repairs was going on, and that they were liable to pay freight during that period."

See also *Spafford et al.* v. *Dodge et al.*, 14 Mass. 66, in which a vessel was hired to make a certain voyage "at the rate of three dollars a ton per month, and so in proportion for a less time, as the said brig should be continued in the service of the defendants." While making that voyage she was captured as a prize and detained for several months, but was finally restored, and arrived at her port of destination. It was held that the owner was entitled to rent for the full term of her absence without deduction for the time of the detention in consequence of the capture. And this is but an application of the same rule which controls in other cases of demise. If premises are rented for a term of years at a stipulated rent per year, and no provision for reduction in case of the destruction or injury of the buildings by fire be inserted in the lease, the rent is payable for the entire term and until the premises are returned, and this though the buildings may be injured, or even destroyed by fire. In short, a demise is not ended until the property is returned to the owner, and so long as that demise continues rent is payable at the stipulated price unless there be some provision for a reduction.

No technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command, and control. Now by this contract it was stipulated that the petitioner should "provide and furnish to" the government, whenever called upon, during a specified year, "such vessels of the descriptions hereinafter given as may be required to take the place of the vessels now performing service, etc.," and that in case of his failure so to do the government should have "the power to hire vessels elsewhere in open market" at his "sole expense and charge." These are the operative words: The contract is for vessels, and not for any use of them. The vessels are to be furnished to the government; they are to take the place of other vessels, presumably belonging to the government, engaged in a certain service, and if petitioner fails to furnish the needed vessels, the

government may go elsewhere and hire them. There is no stipulation which in terms, or by implication, casts upon the petitioner the management or control of any vessel accepted by the government. That the time for which the vessels were to be employed might be limited by the wishes of the government does not affect the question as to whether, while so employed, they were to be under its exclusive control and management. A demise may be for a day as well as for a year, and may be terminable at the will of the lessor. The pay, by the fourth article, was to be "for each vessel employed."

Not only this, but the conduct of the parties in the execution of the contract removes all obscurity as to its scope and meaning. As the findings show, the vessel, the James Bowen, was furnished by petitioner, and was accepted and used by the defendants. During the time of its use it was under the exclusive management and control of the defendants. The very condition resulted which is the purpose and effect of a demise — the transfer of the exclusive possession, management, and control. The vessel was not, when injured, returned to the petitioner, but when the repairs were finished, "resumed work." It is insisted by the defendants that there was no demise because, as claimed, the petitioner did not contract to furnish one vessel for any length of time, and could, if he wished, change vessels. It is doubtful whether that is a correct interpretation of the instrument, and whether it was in the power of the petitioner, after a vessel had been tendered and accepted by the government, to substitute another therefor. But even if it were so, the substituted vessel would pass into the exclusive possession of the government, the same as the vessel for which it was substituted.

We think little significance is to be attached to the provisions in reference to furnishing a crew or supplying fuel. They were matters of detail affecting the price to be paid, but throwing no particular light on the question of hiring or control. If it be said that the clause requiring the government to furnish fuel was unnecessary in case there was a demise, it may also, in like manner, be said that the further clause as to

the petitioner's furnishing a crew was unnecessary if he was to retain the management and control. Any possible inference from one clause may be set off against a different inference from the other, but neither of them destroys the significance of the operative words of transfer, nor outweighs that of the action of the parties in the execution of the contract.

The claim when presented to the department was rejected on the ground that the "boat was wholly under the control of the owner and his agents and employés." But the findings of fact show that that alleged ground is a mistake; that it was wholly under the management and control of the quartermaster's department. Nothing more need be said. While the question is not free from doubt, yet in view of the fact that the petitioner was to provide and furnish a vessel; that this vessel, when tendered, was accepted, and was not only in the service, but under the exclusive management and control of the quartermaster's department at the time of the accident, we think that it must be adjudged that the case presented is one of a contract of hiring, and not for service, and that the government, during this possession of the vessel, was a special owner, and bound to pay rent for the vessel until returned to petitioner.

The judgment will be

Affirmed.

The Chief Justice and Mr. Justice Jackson dissented from this opinion and judgment.

SNELL *v.* CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 242. Submitted February 1, 1894. — Decided March 5, 1894.

The decision by the highest court of a State, that the conveyance by a corporation existing under the laws of the State (and acting in this respect under a statute of the State) to an individual, his heirs, executors, administrators, and assigns, of "all the property of said company,

Statement of the Case.

consisting of the charter and its amendments and franchises," and other enumerated property, and "all the property, goods, and chattels of said company of whatsoever nature or description," passed to him only a life estate in the franchises of the corporation, and that these did not pass to his heirs, presents no question of a Federal nature, but only one as to the extent of an authority given by statute to a corporation to dispose of its franchises.

THIS case came before the court on error to the Supreme Court of the State of Illinois. The record disclosed these facts: On December 21, 1888, the plaintiffs in error, as plaintiffs, filed in the office of the clerk of the Superior Court of Cook County their bill of complaint, seeking to enjoin the defendants, their officers, agents, and servants, from removing, or attempting to remove, a certain toll-gate on Milwaukee Avenue, in the city of Chicago, and from interfering with the plaintiff's collection of tolls thereat. The bill set forth that on February 10, 1849, the general assembly of the State of Illinois passed an act to incorporate the Chicago Northwestern Plank Road Company, certain sections of which were quoted. It is unnecessary to refer to these sections in detail; it is enough to say that they provided for the incorporation of a company to construct a plank road, and described the various powers and privileges given to such corporation. The bill then referred to an act of the general assembly, dated February 12, 1849, Laws of 1849, Private Laws, p. 57, entitled "An act to construct a plank road," etc., the twenty-first and twenty-second sections of which, quoted in the bill, purported to incorporate the Northwestern Plank Road Company, the incorporators of which, as appeared from section 21, had a license from the county commissioners' court of Cook County to construct a plank road from the city of Chicago to Oak Ridge, and from thence to Wheeling and the north line of said county. It then quoted the act of the general assembly of the State of Illinois of date March 1, 1854, entitled an act to incorporate the Northwestern Plank Road Company. Laws of 1854, 2d sess., 224. This act commences with a preamble which, referring to the act of February 12, 1849, says that doubts exist as to whether by the twenty-first, twenty-second,

and twenty-third sections of said act the Northwestern Plank Road Company was duly incorporated, and therefore in the first section in terms incorporates the Northwestern Plank Road Company, and, by the second section, grants to it the powers and privileges, rights and duties, contained in the sections quoted from the earlier act of 1849. The allegation is that by virtue of these several acts the Northwestern Plank Road Company became duly incorporated and organized as a corporation, and proceeded to and did prosecute and complete the construction of the road under the powers and franchises granted. The bill further set forth that on February 15, 1865, another act was passed by the general assembly of the State of Illinois, Laws of 1865, (Private,) p. 115, which act was set forth in full, and the material sections of which are as follows:

"SEC. 3. The president, by the advice and direction of a majority of the stockholders, may sell to the county of Cook the franchise, the property, and immunities of said company, or to any other party or parties, and thus dissolve said company, and divide the avails amongst the stockholders.

"SEC. 4. That the board of supervisors of Cook County may purchase such franchise, property, and immunities, and, upon the order of said board, the clerk of said county shall proceed to purchase and receive the deed of title to the same, and should said county fail to purchase the same, any person or persons may purchase the same, and thereby make the same private property.

"SEC. 5. The deed of the president of said company to the said county of Cook, or to any other party purchasing, shall be a good and lawful title to the same; *provided*, always, that all the debts and liabilities of said company shall be paid; *provided, further*, that the purchaser or purchasers of said franchise and road shall be bound by all the obligations said Northwestern Plank Road Company is by its charter, and shall enjoy all the rights and privileges enjoyed by said company, and no more."

On August 5, 1870, the Northwestern Plank Road Company made a deed to Amos J. Snell. This deed, after reciting the

incorporation under the act of March 1, 1854, quoting sections 3 and 5 of the act of February 15, 1865, and reciting a meeting of the stockholders on January 5, 1866, closes with this resolution, passed at such meeting, and this granting clause:

"*Resolved by the stockholders of this Company*, That Thomas Richmond, president, be authorized to sell the plank road, toll-houses, and other property belonging to the company, with the franchise and all its rights and privileges, and give a deed of the same to the purchaser for such sum and upon such conditions as he shall deem advisable;

"And whereas the said plank road company is entirely free from debt, now, therefore, I, Thomas Richmond, president of the Northwestern Plank Road Company, for and in consideration of the sum of twenty thousand dollars ($20,000) to me in hand paid by Amos J. Snell, of Jefferson, in the county of Cook and State of Illinois, do hereby sell, transfer, convey, and set over to the said Amos J. Snell, his heirs, executors, administrators, and assigns, 'all the property of said company, consisting of the charter and its amendments and franchises, the right of way, the grading, the planking, ditches, bridges, and drainages, the toll-houses, gates, teams, implements of work, and being the plank from the old city limits of Chicago aforesaid to the nine-mile post, together with all the property, goods, and chattels of said company of whatsoever nature or description;'

"To have and to hold unto the said Amos J. Snell, his heirs, executors, administrators, and assigns, forever.

"In witness whereof the said Thomas Richmond, as president, has hereunto signed his name and affixed the seal of the said Northwestern Plank Road Company this fifth day of August, A.D. 1870.

"[Corporate seal of the Northw. P. R. R. Co.]

"THOMAS RICHMOND,
"*Pres't N. W. P. R. R. Co.*"

This deed was duly recorded. The bill also alleges that from that time until his death Snell continued in the owner-

ship of said property and in the actual and exclusive possession, control, and enjoyment thereof, and the undisturbed exercise of all the franchises, rights, and powers which were conferred upon the corporation by said enactments. At this time the plank road, or so much thereof as was constructed, was outside of the corporate limits of the city of Chicago, and during such time Snell erected a toll-gate and toll-house on the southeast corner of Milwaukee Avenue and Fullerton Avenue, at which place the tolls were collected. It is further averred that on February 8, 1888, Snell died; that the present plaintiffs are his personal representatives and heirs; that on December 10, 1888, the defendants commenced proceedings for the purpose of removing such toll-gate, the territorial limits of the city having been duly extended so as to include a part at least of the toll-road and the part on which the toll-gate was situated.

To this bill a demurrer was filed, which, on February 6, 1890, was sustained, and, the plaintiffs electing to stand by the bill, a decree of dismissal was entered. On appeal to the Supreme Court of the State the decision of the Superior Court was, on the 14th day of May, 1890, sustained, and the decree of dismissal affirmed. 133 Illinois, 413.

Mr. Frank J. Crawford and *Mr. Sidney Smith* for plaintiffs in error.

Mr. Harry Rubens and *Mr. Edward Roby* for defendants in error.

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

By this writ of error we are called upon to review the decision of the Supreme Court of the State of Illinois, and it is insisted that that decision is in conflict with the clause of the first section of the Fourteenth Amendment to the national Constitution, which declares that "no State shall deprive any person of life, liberty, or property without due process of law," and of the tenth section of the first article of that Constitution,

which prohibits a State from passing any law impairing the obligations of contracts.

It is the settled law of this court that to give it jurisdiction of a writ of error to a state court it must appear affirmatively not only that a Federal question was presented to that court for decision, but also that the decision of the question was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution; or that the judgment as rendered could not have been given without such decision. *Miller's Executors* v. *Swann*, 150 U. S. 132; *Eustis* v. *Bolles*, 150 U. S. 361, and cases cited therein.

Guided by the rule thus laid down and long established, we turn to the record, including therein the opinion of the Supreme Court of the State, to see what in fact was decided. From such inspection it is obvious that there was no decision adverse to the rights vested in the Northwestern Plank Road Company by its charter. On the contrary, the clear concession in the opinion of the Supreme Court was that that company had by its charter a valid and exclusive franchise in respect to the toll-road, including therein the right to take tolls, and to erect and maintain a toll-gate therefor. All the contract rights which it can be claimed passed by the charter to the plank road company were conceded to have passed to it, and the matter which was determined by that court, and upon which its decision rested, was that the franchises, thus vested in the corporation, did not pass by the deed made under the authority of the act of 1865 to Snell and his heirs in perpetuity. It was not denied that those franchises passed to Snell by the deed of August 5, 1870, but the ruling was that such conveyance did not vest in the grantee the franchises as a matter of private property, to pass by inheritance to his heirs.

In order that there may be no misunderstanding of the rulings of the Supreme Court we quote at length from its opinion (pp. 430–432):

"By the act of 1854, Gray, Filkins, Richmond, and their associates became a corporate body, with the right of perpetual succession, etc. This was the franchise of the corpo-

rators. By the same act the corporate body received the right to construct and maintain a toll-road, and to build toll-houses, and collect tolls. These were the franchises of the corporation. The former franchise, that is to say, the franchise to be a corporation, cannot be transferred without express provision of law pointing out the mode in which the transfer is to be made. *Coe* v. *The Columbus P. & I. R. R. Co.*, 10 Ohio St. 372; *Memphis R. R. Co.* v. *Commissioners*, 112 U. S. 609. The act of 1865 authorizes the sale of 'the franchise, the property, and immunities' of the plank road company, and specifies that such transfer is to be made by deed of the president. If the word 'franchise' as here used is broad enough to include the franchise to be a corporation, with the power of perpetual succession, even then, Snell was not thereby made a corporation under the old charter. He was merely vested with the 'right to organize as a corporation,' (*Memphis R. R. Co.* v. *Com'rs*, *supra*,) but such organization never took place. Neither he nor his heirs or representatives are claiming as the corporate successors of the plank road company. The appellants are claiming as the heirs of Snell the individual.

"'The franchise of becoming and being a corporation in its nature is incommunicable by the act of the parties and incapable of passing by assignment.' (*Memphis R. R. Co.* v. *Com'rs*, *supra*.) If Snell in his lifetime was the owner of such franchise by express legislative grant, he could not assign it and it could not descend to his heirs. He failed to use it for the purpose of effecting any corporate organization, and it died with him. Even if this were not so, his failure to effect said organization within ten days after the constitution of 1870 went into effect rendered it impossible, under section 2 of article 11 of that constitution, to give any validity to an organization made after the lapse of such period of ten days.

"If the franchises designated as those which belong to the corporation as distinguished from the corporators passed to Snell by the transfer, and if he had the right to maintain the toll-houses transferred to him and to collect the tolls therefrom, did such franchise and right pass to the appellants at his death? The second proviso of section 5 of the act of 1865

is as follows: 'Provided further, that the purchaser or purchasers of said franchise and road shall be bound by all the obligations said Northwestern Plank Road Company is by its charter, and shall enjoy all the rights and privileges enjoyed by said company and no more.' This provision is to be strictly construed in favor of the public and against the grantee of the privileges in question. (Angell on Highways, section 357; 1 Morawetz on Priv. Corp. sec. 323; *Stormfeltz* v. *The Manor Turnpike Co.*, 13 Penn. St. 555.) The person who is to 'enjoy all the rights and privileges enjoyed by said company' is stated to be the purchaser of the franchise and road. It is not stated that the purchaser *and his heirs and* assigns shall enjoy such rights and privileges. If it had been the intention of the legislature that the *heirs* of the purchaser should succeed to the privilege of collecting tolls and maintaining toll-gates, it would have been so specified.

"The dissolution of the corporation did away with the right of *perpetual succession* which attached to the corporate body. By neglecting to organize a corporation with such privilege of perpetual succession, if the power to do so passed to him, Snell failed to preserve the element of perpetuity. But if the right to collect tolls and maintain toll-houses descended to his heirs, and by consequence became inheritable by the heirs of such heirs, then there was a continuation of the perpetuity which has been abrogated by the dissolution of the corporation. It is true that the deed made by the president of the corporation to Snell conveys to him, 'his heirs, executors, administrators, and assigns,' but the question is not what the language of the deed was, but what the legislature authorized to be put into the deed."

There can be no mistake as to the scope of this decision. It is that the franchises vested in the plank road corporation, though passing to Snell by the deed, passed to him and not to him and his heirs, and that he took by such deed only a life estate. But in this is presented no question of a Federal nature, but only of the extent of an authority to dispose of its franchises given by a statute to a corporation. It is assumed that the charter was a valid and binding contract, and

that by it certain franchises were vested in the Northwestern Plank Road Company as its absolute property, beyond the power of the State to arbitrarily retake. After the grant of this charter, and after the full investiture of the corporation with these franchises, an act was passed giving it authority to dispose of them, and the matter which was determined by the Supreme Court was as to the extent of the authority thus conferred. But in this there is no matter of contract. The State never contracted with the plank road company that it should have the power to transfer its franchises; nor with these plaintiffs that their intestate and ancestor should acquire an absolute title to these franchises with an indefeasible estate of inheritance. The mere grant of franchises to a corporation carries with it no power of alienation. On the contrary, the general rule is that, in the absence of express authority, they are incapable of alienation. And many cases have arisen in which an attempted alienation by the corporation has been declared by the courts to be void, as divesting it of the power to discharge the duties imposed by the charter. *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad Co.* v. *St. Louis, Alton &c. Railroad Co.*, 118 U. S. 290; *Oregon Railway* v. *Oregonian Railway*, 130 U. S. 1; *Central Transportation Co.* v. *Pullman Car Co.*, 139 U. S. 24. In the original act of incorporation no power of alienation was given to the plank road company. The only authority is found in the act of 1865, and that is a mere grant of a permission to sell. Determining the extent of that permission determines no question of contract, and presents no other matter of a Federal nature. If it be true, as decided by the Supreme Court, that only a life estate passed to Snell, then the plaintiffs have no interest in the franchises, and the demurrer to the bill was properly sustained. This, therefore, is a pivotal question, and having been decided adversely to the plaintiffs, and in it there being no matter of a Federal nature, it follows that this court has no jurisdiction, and the case must be

Dismissed.

Syllabus.

CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING COMPANY *v.* WESTERN SIEMENS-LUNGREN COMPANY.

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

No. 193. Argued January 5, 8, 1894. — Decided March 5, 1894.

The owner of an exclusive right to sell, place, and operate a patented invention within the limits of a State, conveyed to another party the like exclusive right in certain specified counties in that State, and agreed that during the period covered by the licenses and patents, the grantor would not knowingly sell or permit others to sell the patented goods within those counties, and further, that the grantor would supply the patented articles to the grantee on specified terms and conditions. The contract also guaranteed that the patented articles so supplied should have a life service of five years, and the grantor agreed to defray the expense of incidental repairs necessary thereto. The grantor then assigned all its rights and interest in this contract to a third party. The grantee continued to order the patented articles, as wanted, from the grantor, and the assignee supplied the goods as ordered and they were accepted. The assignee sued the grantee to recover the value of the goods so delivered. The grantee denied all liability and set up as counter claim, a claim for damage by reason of sales of the patented article in the territory covered by the license. *Held*,

(1) That the defendant, having accepted the goods from the plaintiff, was bound to pay for them;

(2) That his liability for them was to be measured by the contract price, and not by the market rate;

(3) That with reference to the sale of the patented articles in the licensed territory, the *scienter* was an essential part of the agreement, and, in the absence of proof of actual knowledge of the sale, by the plaintiff, the defendant could not recover on his counter claim;

(4) That as to sales which were shown to have been made with the plaintiff's knowledge, the measure of damages was the plaintiff's profits, and not the profits which the defendant might have made;

(5) That the defendant could recover, under the agreement as to the life service of the patented articles supplied to him, only for such repairs as he had been obliged to make, and not for estimated repairs during the remainder of the period.

Opinion of the Court.

On February 25, 1889, the defendant in error, a corporation of the State of Illinois, commenced its action in the Circuit Court of the United States for the Southern District of Ohio to recover from the defendant, a corporation created under the laws of Ohio, the sum of $6922.64 for goods and merchandise. The defendant appeared and filed an answer and cross petition. A trial was had before a jury, which, on February 10, 1890, returned a verdict for the plaintiff in the sum of $5752.34. This amount was reduced by the plaintiff, in accordance with the opinion of the court, by the sum of $127.90, and for the balance, with interest, a judgment was entered. To reverse such judgment defendant sued out a writ of error from this court.

Mr. J. W. Warrington for plaintiff in error.

Mr. Lowrey Jackson for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

On November 9, 1887, the Siemens-Lungren Gas Illuminating Company of Chicago, a corporation of Illinois, which had acquired by contract from the Siemens-Lungren Company, of the State of Pennsylvania, the exclusive right and privilege of selling, placing, and operating in the State of Ohio the patented regenerative and other gas lamps, appliances, and fixtures, made, owned, or controlled by the Pennsylvania corporation, entered into a contract with certain individuals, which contract was immediately thereafter transferred by them to the defendant company, giving the like exclusive rights for the counties of Hamilton, Butler, and Montgomery, in the State of Ohio. This contract specified the terms and conditions on which the Chicago company would supply the articles for sale and use in those counties. The Chicago corporation afterwards transferred all its franchises and property, including its rights and interest in this contract, to the plaintiff. The Ohio company carried on its correspondence, and sent its orders for goods to the Gas Illuminating Com-

pany, and, though notified of the transfer to the plaintiff, declined in its letters to recognize such transfer. At the same time it received the goods, and did not return them; and received them knowing that they were sent by the plaintiff. Upon this the defendant invokes the rule laid down in *Arkansas Valley Smelting Co.* v. *Belden Mining Co.*, 127 U. S. 379, and insists that the contract was of such a nature that it could not be assigned by the Gas Illuminating Company to plaintiff without the consent of defendant, which consent was positively refused. But that doctrine has no application under the circumstances of this case. Defendant could not accept these goods from the plaintiff, and then refuse to pay for them. It is immaterial whether there was an assignment from the Gas Illuminating Company to the plaintiff or not, or whether, if there was one, it was ever assented to by the defendant or not. When the defendant ordered the goods from the Gas Illuminating Company, and the plaintiff forwarded the goods upon that order, the defendant might have returned them, and declined to have any dealings with the plaintiff; but it could not accept the goods and use them, and then say it never ordered the goods from the plaintiff, never had any contract with it, and never assented to any assignment to the plaintiff of its contract with the Illuminating Company.

Of course, if the plaintiff undertook to furnish goods on the order of the defendant — an order based upon a contract between the defendant and the Gas Illuminating Company — it furnished them subject to all the terms of that contract, and the defendant may rightfully invoke any stipulation thereof as a defence in whole or in part to the action.

Another question arises on these facts. The contract hereinbefore referred to contained this clause:

"That during the entire period covered by the licenses and patents now owned by the said Siemens-Lungren Company, or which may hereafter be acquired on improvements and reissues, the said Siemens-Lungren Gas Illuminating Company will sell exclusively to said parties of the second part for use in the counties before named all the burners, fixtures, and

appliances, made by said Siemens-Lungren Company and will not knowingly sell or permit other parties to sell for use in said territory any burners, lamps, or goods made, owned or controlled by said Siemens-Lungren Company, but will, upon the contrary, to the best of their ability, prevent the sale of any such articles for use within the territory named to any other than the parties of the second part, their successors or assigns."

There was testimony showing that after the execution of this contract the Middletown Gas Company purchased nine lamps from the plaintiff, and one hundred and twenty-two lamps from the Pennsylvania corporation. Middletown, where this gas company was located, is in Butler County, Ohio, and within the limits of the territory sold to the Cincinnati parties. There was no testimony tending to show that the original Chicago corporation, or this plaintiff, knew of the sale by the Pennsylvania corporation to the Middletown Gas Company. On the contrary, the testimony of plaintiff's two principal officers was that such sale was wholly unknown. Upon this failure to show any knowledge of the sales made by the Pennsylvania corporation the court struck out all the testimony as to such sales. In reference to the sale of the nine lamps by the plaintiff, the court ruled that it was a technical breach of the contract, and charged the jury to allow to the defendant as damages, the profits received by the plaintiff from such sales. There was no direct testimony that the plaintiff was aware at the time of the sales of these nine lamps that Middletown was within the territory which had been sold to the Cincinnati parties, and the letters of the secretary and president of the plaintiff company state that the sales were made inadvertently and in ignorance of that fact, yet the sales were held by the court to be in direct violation of the terms of the contract, and, therefore, giving a right to the defendant to damages. The contention now is, that the court erred in restricting the damages to the profits made by the plaintiff, and it is insisted that the defendant was entitled to recover what it would have made had it sold and placed the lamps in Middletown at the prices at which it was so selling

and placing them, if not to a larger sum which the jury might estimate were the damages resulting from this interference with its monopoly in the purchased territory.

We cannot concur in these views, and are of opinion that the rulings of the trial court were correct. With reference to the sale by the Pennsylvania corporation, the stipulation in the contract is that the Chicago company "will not knowingly sell, or permit other parties to sell, for use in said territory, any burners, lamps," etc. The scienter is an essential term in this covenant. There is no presumption and no evidence that the original Chicago corporation or the plaintiff knew what the Pennsylvania company was doing, and if they did not know of such a sale, the fact that one was made involved no breach of the contract.

Neither was the defendant entitled to any other damages by reason of the sale by the plaintiff than the profits which the latter received. There is no presumption that the Cincinnati company would have been able to sell or place any lamps in Middletown at the prices it demanded. On the contrary, the testimony of the president of the defendant company is that the Middletown company refused to deal with it, and it is against all the rules in respect to damages for a breach of contract to give to the defendant the profits of a sale which it did not make, and which there is no reason to believe it ever would have made. There is no pretence of any wanton and wilful breach by the plaintiff; nothing that suggests punitive damages, or that shows wherein the defendant was damnified other than by the loss of the profits which the plaintiff received. Pass beyond that, and there is only a domain of speculation — a mere guess as to what might have happened. The case of *Seymour* v. *McCormick*, 16 How. 480, 486, 490, is in point. In that case the trial court, among other things, charged the jury as follows:

"The general rule is, that the plaintiff, if he has made out his right to recover, is entitled to the actual damages he has sustained by reason of the infringement, and those damages may be determined by ascertaining the profits which, in judgment of law, he would have made, provided the defendants had not interfered with his rights.

"That view proceeds upon the principle, that if the defendants had not interfered with the patentee, all persons who bought the defendant's machines, would necessarily have been obliged to go to the patentee, and purchase his machine. That is the principle on which the profits that the patentee might have made out of the machines thus unlawfully constructed, present a ground that may aid the jury in arriving at the damages which the patentee has sustained."

But this court was of a different opinion, saying:

"Actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact. What a patentee 'would have made, if the infringer had not interfered with his rights,' is a question of fact and not 'a judgment of law.' The question is not what speculatively he may have lost, but what actually he did lose."

It is true that that was an action for an infringement, and this for a breach of a contract, but still the rule of damages is the same. Actual damages is what the law gave in case of an infringement, *Birdsall* v. *Coolidge*, 93 U. S. 64; actual damages is all the law gives in case of a breach of contract. Indeed, the real difference between that case and this is not so great as would be suggested by a description of the respective causes of action. For here, under the contract made by the plaintiff's assignor with the Cincinnati parties, the defendant became vested with a monopoly of sales within the prescribed territory of like nature to the monopoly given by the government for the whole territory of the United States whenever it issues a patent; and the act of the plaintiff in making a sale within that territory was an infringement similar to that of a sale of a patented article made within the limits of the United States in defiance of the rights of the patentee. Nevertheless, it must be conceded that in the case at bar there is technically a claim for a breach of a contract, and it is undeniable that in some cases the profits that would have been made are proper elements of damage in such an action. This matter has been recently considered by this court in *Howard* v. *Stillwell & Bierce Manufacturing Co.*, 139 U. S. 199, 206, from the care-

ful opinion of Mr. Justice Lamar, in which case we quote as follows:

"The grounds upon which the general rule of excluding profits, in estimating damages, rests, are (1) that in the greater number of cases such expected profits are too dependent upon numerous uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote and not, as a matter of course, the direct and immediate result of the non-fulfilment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms. Sedgwick on Damages, 7th ed. vol. 1, p. 108; *The Schooner Lively*, 1 Gallison, 315, 325, *per* Mr. Justice Story; *The Anna Maria*, 2 Wheat. 327; *The Amiable Nancy*, 3 Wheat. 546; *La Amistad de Rues*, 5 Wheat. 385; *Smith* v. *Condry*, 1 How. 28; *Parish* v. *United States*, 100 U. S. 500, 507; *Bulkley* v. *United States*, 19 Wall. 37. But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into. *United States* v. *Behan*, 110 U. S. 338, 345, 346, 347; *Western Union Tel. Co.* v. *Hall*, 124 U. S. 444, 454, 456; *Philadelphia, Wilmington & Baltimore Railroad Co.* v. *Howard*, 13 How. 307."

Tested by the rules here laid down, it is obvious that the defendant is not entitled to recover as damages the profits which it would have received if it had made a sale of the nine lamps at its price to the Middletown Gas Company, for it is wholly uncertain that it would have been able to make such a sale. Indeed, the testimony of its own president is flatly to the contrary. It does not follow because a party makes a purchase

at a lower price that he would have bought the same article at a higher price. The price is the one thing which oftentimes determines the question of purchase or no purchase. It is true there may be cases in which a necessity compels the purchaser to have the article, and then if he cannot buy it at one price he must at another. But no such necessity appears here, and although the gas company did purchase the nine lamps at a particular price, it does not follow therefrom that it would have purchased them at any higher figures. On the contrary, it is reasonably certain that it would not.

Nor can it be assumed that profits, such as are claimed, were "within the intent and mutual understanding of both parties." It can hardly be presumed that the parties intended that the defendant should receive as damages for breach of the contract the profits of a sale which it could not make, rather than the profits of a sale that was made. There must indeed be some special circumstances before it can be inferred that parties intend that profits based upon a sale, which it is apparent could not have been made, should be the measure of damages. Actual damage will generally be assumed to be the intended measure of compensation, and all that defendant has shown in this case is that the gas company did buy at a given price. The profits at that price it lost by reason of the plaintiff's sale, and that is the only actual damage which appears from the transaction. We see no error in the rulings of the court in this respect.

A third question arises upon the following stipulation in the contract:

"That the said Siemens-Lungren Gas Illuminating Company guarantees the life service of any lamps furnished to be five (5) years, exclusive of any globes broken or other damage done through careless handling, and that it will defray the expenses of any incidental repairs which may be necessary to keep said lamps in good and serviceable condition during the period named. And that upon the expiration of said period of five years they will, if the parties of the second part so desire, guarantee that the said lamps will be guaranteed for an additional period of five years upon being paid the

additional sum of three (3) dollars for each lamp thus guaranteed."

There was testimony tending to show what repairs had been made by the defendant, and their cost, and the court charged the jury that they should deduct from the plaintiff's claim whatever amount the testimony disclosed to be the proper cost of such repairs. Of this no complaint is made, but in addition the defendant asked an instruction that the jury should take into consideration the probable repairs to said lamps for the balance of the period of five years, as guaranteed by said contract, which instruction the court declined to give. It also during the trial sustained an objection to the following question put to the president of the defendant company:

"Q. I will ask you to state whether or not, as the lamp grows older and remains in service longer, there is an increase in the cost and in the repairs?"

Of these rulings the defendant now complains, and insists that where damages are recoverable under a contract, such as this, "to keep the patented articles in repair for a specified time, the recovery should be allowed for the whole time specified, and not merely up to the date of the trial."

A sufficient answer to this contention is that in the count in the cross petition, in which damages are sought to be recovered for a breach of this covenant, the only allegation of damage is in these words: "Defendant alleges that it has paid out for such repairs to lamps so purchased by it, including those stated in the account attached to petition, to date, the sum of sixteen hundred ($1600) dollars, no part of which has been repaid to it." The only claim, therefore, which the defendant made was for the sums which it had already paid out, and the inquiry was, therefore, properly limited to that which it claimed. The suggestion that at the close of the cross petition there was a general prayer for judgment against the plaintiff in the sum of $23,850 will not avail the defendant in this respect, because that prayer commences with the word "wherefore," thus referring to the prior allegations, and the sum thus claimed is merely the aggregate of the separate

amounts of damage alleged in the six different counts of the cross petition. It is unnecessary, therefore, to determine what testimony the defendant might have offered as to future repairs, if the claim in its cross petition had included them, or whether, if any such testimony had been received, the cost of such repairs could have been set off against the already due demand of the plaintiff.

Again, the fourth count in the cross petition, after referring to the agreement of the Chicago company to furnish defendant with the patented lamps of the Pennsylvania company, alleges that "it did furnish to this defendant a large number of lamps purporting to be said patented lamps furnished by said Philadelphia company, but which were in fact an infringement thereof, and of such poor quality as to be unfit for use. Upon trial of the lamps and the subsequent discovery of the infringements thereof, defendant was compelled to retire from use ninety-two lamps thereof which were in use, and they and those having remained unused became useless and worthless property. Defendant paid said Siemens-Lungren Illuminating Company of Chicago the sum of two thousand ($2000) dollars for said lamps, no part of which has since been paid, and that, by reason of its being compelled to remove the said lamps and the consequent loss of business, it has been damaged in the further sum of one thousand dollars."

It appears that, in January or February, 1888, the plaintiff forwarded to defendant one hundred lamps, and it is in respect to these lamps that the claim of damages set forth in this count arises. The testimony was conflicting as to whether these lamps were manufactured by the Pennsylvania corporation or in Chicago, and also to what extent, if any, their construction was defective, or a departure from the form of the patented lamp. It does appear, however, from the testimony of the defendant's president, given at the trial in February, 1890, two years after the purchase, that ten or a dozen of these lamps had been sold for $35 each, and were still in use, having been used by the purchasers for a year and a half or more; and the defendant's employé, who handled these lamps, stated that the trouble was only with the burner, and that

otherwise the lamps were all right. There was no direct testimony as to their value. There was no pretence that the defendant had ever tendered them back to plaintiff, or even that it made any complaint of them for many months after their receipt.

In respect to this matter the court charged that "the rule of damages in such a case is measured by the difference between the contract price and the actual value of the thing delivered." It is true that the court intimated that, according to its recollection, the testimony was silent as to the actual value, and said to the jury that, if that were the fact, the defendant, having kept the lamps, could recover only nominal damages, but an expression of opinion by the judge as to the scope or reach of testimony is, as is well known, no ground of error in the Federal courts. There was no arbitrary direction as to the amount which the jury should, or ought to, award, and the rule, as stated above, was more than once repeated. We see nothing in this of which the defendant can complain, and this, whether the cross petition in this respect be regarded as alleging a delivery of goods of a kind different from those contracted for, or of goods coming within the terms of the contract but defective in quality. Counsel insists that these lamps were absolutely worthless, and that under those circumstances there was no necessity of a return, or of an offer to return. We see nothing to justify any such contention, and an instruction based upon the hypothesis that these goods were absolutely worthless would have been in manifest disregard of that which is shown by even the defendant's testimony.

The final matter is this: In the latter part of July, 1888, plaintiff furnished defendant two hundred and fifty lamps. These lamps were fitted with solid metal burners instead of tube burners used in those theretofore delivered. The contract provided that the plaintiff should furnish the most approved form of lamps made by the Pennsylvania company, and the claim was, on the part of the defendant, that the tube burner was the only burner that could be used successfully in those lamps, that the solid burner was a failure, and that it

would cost $3 each to make the exchange. On the other hand, it was insisted by the plaintiff that the tube burner was the one first used; and that the solid burner was a later invention, and supposed to be an improvement, and so furnished in good faith. It does not appear that the burners had ever been exchanged, or that the defendant had paid any money for the purpose of making an exchange, nor was there any testimony showing how much less in value a lamp with the solid burner was than one with the tube burner. If the defendant never made an exchange of burners, and so never expended any money therefor, and sold the lamp with a solid burner for the same price as one with a tube burner, it is difficult to see how it was damaged, even if it be conceded that the tube burner is a better appliance than the solid burner. That is practically the state of the case, as shown by the testimony and the charge of the court. The defendant never changed burners; never paid the $3, and there was no testimony showing the value of the lamp with the solid burner, or how much less it was worth than one with a tube burner. It does not appear that the defendant ever sold a lamp for less price on account of the solid burner. In addition to all this, a letter from the Pennsylvania corporation (while not entirely clear in its language) seems to carry the idea that, as soon as its bill for two hundred and fifty lamps is paid, it will exchange burners free of cost.

These are all the questions of importance presented in the trial of this case. We see no error in the rulings of the trial court, and, therefore, the judgment is

Affirmed.

CAHA *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 1001. Argued January 15, 16, 1894. — Decided March 5, 1894.

The District Court of the United States in the District of Kansas had jurisdiction over a prosecution for the crime of perjury, in violation of the

provisions of Rev. Stat. § 5392, committed in what is now the Territory of Oklahoma before the passage of the act creating that territory, although the indictment was not found until after the passage of that act.

Within the scope of Rev. Stat. § 5392, local land officers, in hearing and deciding upon a contest in respect of a homestead entry, constitute a competent tribunal, and the contest so pending before them is a case in which the laws of the United States authorize an oath to be administered.

False swearing in a land contest before a local land office, in respect of a homestead entry, is perjury within the scope of Rev. Stat. § 5392.

The courts of the United States take judicial notice of rules and regulations prescribed by the Department of the Interior, in respect of contests before the Land Office.

Wherever, by the express language of any act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice.

THE case is stated in the opinion.

Mr. Fred. Beall and *Mr. L. Michener* for plaintiff in error. *Mr. Henry E. Asp*, *Mr. John W. Shartel*, *Mr. George Gardner*, and *Mr. W. W. Dudley* were on briefs for same.

Mr. Assistant Attorney General Whitney for defendants in error.

MR. JUSTICE BREWER delivered the opinion of the court.

This case comes on error from the District Court of the United States for the District of Kansas. On March 31, 1893, plaintiff in error, having been found guilty of the crime of perjury by the verdict of a jury, was sentenced to confinement in the Kansas state penitentiary for a term of two years, and to pay a fine of ten dollars.

The questions are these: The indictment was returned September 22, 1892. It in two counts charged the defendant with the crime of perjury committed on January 3, 1890, in the land office at Kingfisher, Oklahoma, in falsely testifying

that he was on a sand bar in the South Canadian River at 12 o'clock noon on the 22d of April, 1889; that this false testimony was given in a contest then pending in the land office, in which one Thomas Burch contested defendant's homestead entry on the ground that he had violated the act of Congress of March 2, 1889, and the President's proclamation, by entering upon and occupying the lands opened to settlement under such proclamation prior to 12 o'clock noon of the day named therein, to wit, April 22, 1889.

The two counts are similar, the only material difference being that in the first count the oath is charged to have been administered by J. V. Admire, the receiver of the land office, and in the second by J. C. Roberts, the register of the land office, each being, as averred, authorized to administer the oath by the laws of the United States and the regulations of the land office. To this indictment a demurrer was presented, which, after argument, was overruled, and the first matter for consideration is this ruling. The grounds of the demurrer, still insisted upon, are, first, that the court had no jurisdiction over the alleged offence; and, secondly, that the indictment stated no public offence.

As to the first of these grounds: it is not disputed that the District Court of Kansas had, at the time of the commission of the alleged offence, jurisdiction generally of offences against the criminal laws of the United States committed in the country known as Oklahoma, the place where this offence is charged to have been committed; but on the 2d of May, 1890, Congress passed an act creating the Territory of Oklahoma, 26 Stat. c. 182, p. 81. In section 9 is found this provision:

"Each of the said District Courts shall have and exercise, exclusive of any courts heretofore established, the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States. . . . All acts and parts of acts heretofore enacted, conferring jurisdiction upon United States courts held beyond and outside of the limits of the Territory of Oklahoma as herein defined, as to

all causes of action or offences in said territory, and in that portion of the Cherokee Outlet hereinbefore referred to, are hereby repealed, and such jurisdiction is hereby given to the Supreme and District Courts in said Territory; but all actions commenced in such courts, and crimes committed in said Territory and in the Cherokee Outlet, prior to the passage of this act, shall be tried and prosecuted, and proceeded with until finally disposed of, in the courts now having jurisdiction thereof, as if this act had not been passed."

The contention is that by this section jurisdiction was given to the District Courts of Oklahoma, the indictment not having been found until September, 1892, and the reservation of jurisdiction to the Kansas court being limited to the cases in which prosecutions had already been commenced. We do not so understand the provision. The general grant of jurisdiction to the Oklahoma courts is prospective in its operation. Such is the ordinary rule of construction, and the repeal of the act vesting jurisdiction in the Kansas court is limited by a proviso which includes not only "actions commenced," but "crimes committed." Counsel lay stress upon the words "having jurisdiction thereof," and argue that courts have no jurisdiction of crimes, but only of actions for the punishment of crimes. But this is placing too much stress upon a subordinate part of the sentence. If the scope of the sentence be as thus contended for, the words "crimes committed" are superfluous, and it would have been sufficient to have said "all actions commenced in such courts prior to the passage of this act," etc. For the word "actions" may include both civil and criminal proceedings. But Congress went further, and provided not only that all "actions commenced in such courts," but also that all "crimes committed in said Territory" prior to the passage of the act should be "tried, prosecuted, and proceeded with until finally disposed of." Grammatically, "crimes committed in said Territory" is an independent nominative, and refers to matters different from those embraced within the term "actions commenced in such courts." It is fair, under such cases, in order to determine the meaning, to omit the one nominative and read the sentence as though the other only

were present, and so it will read "all crimes committed in said Territory prior to the passage of this act shall be tried, prosecuted, and proceeded with until finally disposed of in the courts now having jurisdiction thereof, as if this act had not been passed." So reading, the meaning cannot be doubtful. Whatever of jurisdiction the District Court of Kansas had at the time of the alleged offence remained unaffected by the act of May 2, 1890.

Neither can it be doubted that the District Court of Kansas had jurisdiction over a prosecution for the crime of perjury committed at the place named in violation of the provisions of Rev. Stat. § 5392. That section, and under it this indictment was found, reads as follows:

"Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury," etc.

This statute is one of universal application within the territorial limits of the United States, and is not limited to those portions which are within the exclusive jurisdiction of the national government, such as the District of Columbia. Generally speaking, within any State of this Union the preservation of the peace and the protection of person and property are the functions of the state government, and are no part of the primary duty, at least, of the nation. The laws of Congress in respect to those matters do not extend into the territorial limits of the States, but have force only in the District of Columbia, and other places that are within the exclusive jurisdiction of the national government. It was in reference to such body of laws that § 2145, Rev. Stat. was enacted, and the argument which is sought to be drawn by the counsel therefrom against the jurisdiction of the District Court of Kansas has no foundation. It is enough that § 5392 has uniform application throughout the territorial limits of the

United States; that by § 563 the District Courts are given jurisdiction generally "of all crimes and offences cognizable under the authority of the United States committed within their respective districts;" and that by the act of January 6, 1883, c. 13, § 2, 22 Stat. 400, the territory in question was annexed to and made a part of the United States judicial district of Kansas.

Neither is it necessary to consider whether § 5 of the act of March 3, 1857, c. 116, 11 Stat. 250, remained in force after the revision of 1873. The first three sections of that chapter were reënacted in the Revised Statutes; the fifth was omitted, and there is some discussion in the briefs as to whether, under §§ 5595 and 5596 Rev. Stat., said § 5 still remains in force. But, as we said, it is unnecessary to enter into such a discussion. The indictment was returned under § 5392, and its sufficiency is to be determined by the provisions of that section.

Do the facts stated in this indictment constitute an offence under that section? It will be remembered that the perjury is charged to have been committed in a contest in the land office in respect to the validity of a homestead entry, the oath having been administered by one or other of the land officers before whom the contest was carried on. And the contention is that the statute makes no provision for such a contest before those officers; that, as the statute does not authorize any such contest, it cannot be said that the oath was taken in a "case in which a law of the United States authorizes an oath to be administered." If such a contest before the local land officers is not in terms provided for, it is certainly recognized in the statutes. Section 2273, Rev. Stat. is as follows:

"When two or more persons settle on the same tract of land, the right of preëmption shall be in him who made the first settlement, provided such person conforms to the other provision of the law; and all questions as to the right of preëmption arising between different settlers shall be determined by the register and receiver of the district within which the land is situated; and appeals from the decision of district

officers, in cases of contest for the right of preëmption, shall be made to the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior."

Obviously, here is expressly authorized a contest before the local land officers in respect to preëmption entries. And while the same provision is not found in reference to homestead entries, the rightfulness of such a contest before such a tribunal is recognized in the act of May 14, 1880, c. 89, § 2, 21 Stat. 140, 141, as follows:

"In all cases where any person has contested, paid the land office fees, and procured the cancellation of any preëmption, homestead, or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation," etc.

Reënacted substantially in 1892. Act of July 26, 1892, c. 252, 27 Stat. 270. See also act of March 3, 1891, c. 561, § 7, 26 Stat. 1095, 1097, and the recent act of January 11, 1894, § 1. It is evident from these references that, even if there be no statute in terms authorizing a contest before the local land office in respect to homestead entries, the validity of such contest has been again and again expressly recognized by Congress.

Further, we find in the Revised Statutes these sections:

"Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: . . . Second. The public lands, including mines.

"Sec. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all [*agents*] [grants] of land under the authority of the government.

"Sec. 2478. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for.

"SEC. 2246. The register or receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands."

General rules of practice have been adopted and promulgated by the Interior Department, which rules of long standing were codified by Commissioner Sparks, and approved by Secretary Lamar, August 13, 1885, and, as so codified, are still the regulations in force. By these rules of practice express provision is made for a contest before the local land officers in respect to homestead as well as preëmption entries, and for the taking of testimony before such officers, and a regular, formal trial, with the right of appeal to the Commissioner of the General Land Office, and therefrom to the Secretary of the Interior.

We have, therefore, a general grant of authority to the Land Department to prescribe appropriate regulations for the disposition of the public land; a specific act of Congress authorizing contests before the local land offices in cases of preëmption; rules and regulations prescribed by the Land Department for contests in all cases of the disposition of public lands, including both preëmption and homestead entries; and the frequent recognition by acts of Congress of such contests in respect to homestead entries. Clearly then, within the scope of § 5392, the local land officers in hearing and deciding upon a contest with respect to a homestead entry constituted a competent tribunal, and the contest so pending before them was a case in which the laws of the United States authorized an oath to be administered.

This is not a case in which the violation of a mere regulation of a department is adjudged a crime. *United States* v. *Bailey*, 9 Pet. 238, is in point. There was an act of Congress making false testimony in support of a claim against the United States perjury, and the defendant in that case was indicted for making a false affidavit before a justice of the peace of the Commonwealth of Kentucky in support of a claim against the United States. It was contended that the justice of the peace, an officer of the State, had no authority under the acts of Con-

gress to administer oaths, and that, therefore, perjury could not be laid in respect to a false affidavit before such officer. It appeared, however, that the Secretary of the Treasury had established, as a regulation for the government of his department and its officers in their action upon claims, that affidavits taken before any justice of the peace of any of the States should be received and considered in support of such claims. And upon this the conviction of perjury was sustained, Mr. Justice McLean alone dissenting. It was held that the Secretary had power to establish the regulation, and that the effect of it was to make the false affidavit before the justice of the peace perjury within the scope of the statute, and this notwithstanding the fact that such justice of the peace was not an officer of the United States. Much stronger is the case at bar, for the tribunal was composed of officers of the government of the United States; it was created by the Land Department in pursuance of express authority from the acts of Congress. This perjury was not merely a wrong against that tribunal or a violation of its rules or requirements; the tribunal and the contest only furnished the opportunity and the occasion for the crime, which was a crime defined in and denounced by the statute.

Nor is there anything in the case of *United States* v. *Eaton*, 144 U. S. 677, 688, conflicting with the views herein expressed. In that case the wrong was in the violation of a duty imposed only by a regulation of the Treasury Department. There was an act entitled "An act defining butter; also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," which contained several sections forbidding particular acts, and imposing penalties for violation thereof. And in addition there was a general provision in section 18 that "if a party shall knowingly, or wilfully, omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, . . . he shall pay a penalty," etc. There was authority given to the Commissioner of Internal Revenue to make all needful regulations for carrying into effect the act. In pursuance of that authority the Commissioner required the keep-

ing of a book in a certain form, and the making of a monthly return — matters which were in no way referred to in the various sections of the statute prescribing the duties resting upon the manufacturer or dealer in oleomargarine, although subsequently to this statute, and subsequently to the offence complained of, and on October 1, 1890, Congress passed an act, by section 41 of which wholesale dealers in oleomargarine were required to keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue should require. It was held by this court that the regulation prescribed by the Commissioner of Internal Revenue, under that general grant of authority, was not sufficient to subject one violating it to punishment under section 18. It was said by Mr. Justice Blatchford, speaking for the court:

"It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offence; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offence for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in section 41 of the act of October 1, 1890.

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offence in a citizen, where a statute does not distinctly make the neglect in question a criminal offence."

This, it will be observed, is very different from the case at bar, where no violation is charged of any regulation made by the department. All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the department, at which the defendant committed the crime of perjury in violation of section 5392. We have no

doubt that false swearing in a land contest before the local land office in respect to a homestead entry is perjury within the scope of said section.

Some objection is made by counsel to the form of the indictment, in that in its caption there is nothing to show the organization of the court, or who composed it or who were present as constituent parties thereof when the indictment was returned; and nowhere any express recital that it was found by the concurrence of at least twelve jurors; and further, that it was signed by the assistant United States district attorney instead of by the district attorney himself. The record shows that at a term of the District Court the grand jurors of the United States in and for said district came into open court, and, through their foreman, presented the bill of indictment, and that the bill was endorsed "a true bill," with the signature of the foreman immediately thereunder. With reference to all these objections it is enough to refer to section 1025 of the Revised Statutes, as follows:

"No indictment found and presented by a grand jury in any District or Circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

Clearly, there was nothing in any of these matters which tended to the prejudice of the defendant, or rendered it doubtful by what body he was charged with the crime, in what court he was to be tried, or the exact nature of the offence with which he was charged.

Another matter is this: The rules and regulations prescribed by the Interior Department in respect to contests before the Land Office were not formally offered in evidence, and it is claimed that this omission is fatal, and that a verdict should have been instructed for the defendant. But we are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented, and

it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of any act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice. Without attempting to notice all the cases bearing upon the general question of judicial notice, we may refer to the following: *United States* v. *Teschmaker*, 22 How. 392, 405; *Romero* v. *United States*, 1 Wall. 721; *Armstrong* v. *United States*, 13 Wall. 154; *Jones* v. *United States*, 137 U. S. 202; *Knight* v. *United States Land Association*, 142 U. S. 161, 169; *Jenkins* v. *Collard*, 145 U. S. 546.

These are all the matters which we deem of importance, and in them appearing no error, the judgment is

Affirmed.

KING *v.* AMY AND SILVERSMITH MINING COMPANY.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 169. Argued December 14, 15, 1893. — Decided March 5, 1894.

The side lines of the location of a lode claim, under Rev. Stat. § 2322, are those which run on each side of the vein or lode, distant not more than 300 feet from the middle of such vein.

A line in such a location which does not run parallel with the course of the vein, but crosses it, is an end line.

When, in making such a location, the claimant calls the longer lines, which cross the vein, side lines, and the shorter lines, which do not cross it, end lines, this court will disregard, in its decision, the mistake of the locator in the designation of the side and end lines, and will hold the locator to the lines properly designated by him, as it cannot relocate them for him.

Opinion of the Court.

THE case is stated in the opinion.

Mr. C. W. Holcomb, (with whom was *Mr. Walter H. Smith* on the brief,) for appellant and plaintiff in error.

Mr. W. W. Dixon for appellee and defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

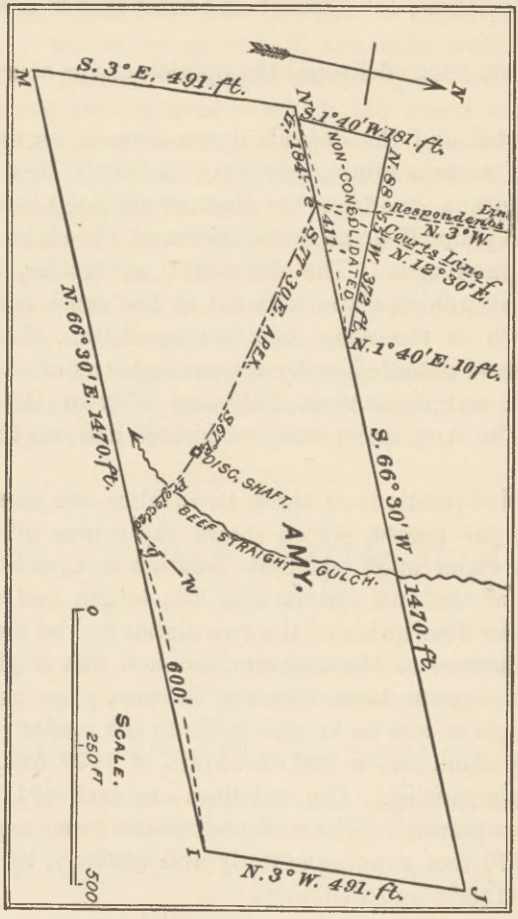
The plaintiff and the defendant are owners, as tenants in common, of certain mining property in Silver Bow County, State of Montana, known as the Non-consolidated lode mining claim. The plaintiff owns three-fourths of the claim and the defendant one-fourth. The defendant is, besides, the sole owner of the mining claim situated in the same county and State, known as the Amy lode mining claim. Both claims are located and patented under the mining laws of the United States contained in sections 2320 and 2322 of the Revised Statutes. The Amy claim was first located and has the earlier patent.

The relative positions of these two claims are seen on the diagram in the record, which shows the course of the vein in the Amy claim upon which its location was made and the boundaries of the two claims, with the length and direction of each. The description of the two claims can be understood only by reference to the diagram, as each line is given. A copy of the diagram is produced on the next page, as without it the description will be unintelligible to the reader.

The Amy claim has a surface length of 1470 feet, and its side lines are parallel. The end lines are each 491 feet, and they are also parallel. The surface location forms a parallelogram of 1470 feet running easterly and westerly, by 491 feet running northerly and southerly.

The Non-consolidated claim lies adjoining the northwest corner of the Amy claim. Its surface shape is that of a triangle, the longest side of which joins the northerly side of the Amy claim, and, commencing seventeen (17) feet from the northwest corner of the latter, extends easterly four

hundred and eleven (411) feet in length. Its northerly side line, commencing (on the northerly line of the Amy) at the point where the first line terminates, runs in a northwesterly direction three hundred and seventy-two (372) feet to the



point where it meets the westerly line of the lode, and extends southwesterly from this point one hundred and eighty-one (181) feet to the place of beginning.

The vein of the Amy claim, on its course or strike, passes

through its northerly side line, as marked on the diagram, into the Non-consolidated ground; its apex crosses that line 184 feet easterly from the west side line of that claim, and does not again enter the Amy claim. The apex of the vein enters the south side of the Amy claim at a point within 600 feet westerly from the southeast corner of the Amy, and the dip of the vein is to the north.

We have in this description of the claims in controversy followed in a large degree that given in the brief of the defendant's counsel, for the subject does not admit of greater clearness of statement.

The plaintiff has brought this action for a partition of the Non-consolidated claim with the defendant, according to the respective rights of the parties, if that be possible; but if the property cannot be thus partitioned advantageously, then for a sale of the premises and a division of the proceeds among the owners, in conformity with such rights.

As stated above, the vein of the Amy, of which the apex lies within the surface lines of the claim, in its course passes through the northerly side line, and enters the Non-consolidated claim; and it is alleged that the vein has been there worked by the owners of that claim and valuable ore taken therefrom. The plaintiff, therefore, prays, in addition to a partition or sale of the Non-consolidated claim, for an accounting for his share, as tenant in common of an undivided three-fourths of that claim, of the ores taken from the underground workings of the vein of the Amy after it had passed into that claim, if any there were.

The defendant admits his cotenancy in the Non-consolidated claim with the plaintiff, but denies the taking of any ore from the vein of the Amy after it had passed into its ground.

The first question for determination is whether the Amy retained any right to the vein, the apex of which was within its surface lines, after it had passed through its northerly side line, or rather through the vertical plane running down that line. If the Amy retained its right to that vein after it had entered the ground of the Non-consolidated claim, it belonged to the defendant as sole owner of the Amy, and as such

owner he could not be called on to account to the plaintiff for any portion of the ores taken from it. If, on the other hand, the Amy did not retain its right to that portion of the vein after it had passed into the Non-consolidated claim, it became a part of that claim, and the proceeds of the ore there taken from it would, with other proceeds of the Non-consolidated claim, be the subject of an accounting between the plaintiff and the defendant, the owners, as tenants in common of that claim. The answer to the question must be found in the construction given to section 2322 of the Revised Statutes, which took effect December 1, 1873. That section is as follows:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surfaces included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

The preceding section 2320 prescribes the extent to which mining claims upon veins or lodes of quartz, or other rock in place, bearing gold, silver, or other valuable deposits on lands of the United States, may be taken up after May 10, 1872. It allows a claim to be located to the extent of fifteen hundred feet along the vein or lode, but provides that no location

shall be made until the discovery of the vein or lode within the limits of the claim located; which is, in effect, a declaration that locations resting simply upon a conjectural or imaginary existence of a vein or lode within their limits shall not be permitted. A location can only rest upon an actual discovery of the vein or lode.

The section also declares that no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at its surface, except as prevented by adverse rights existing on the 10th day of May, 1872, and that the end lines of each claim shall be parallel to each other. A claim located in conformity with the provisions of this section would take the form of a parallelogram, if the course or strike of the vein or lode should run in a straight line; but such veins and lodes are often found upon explorations to run in a course deviating at different points from such line. And from this circumstance much difficulty often arises in determining the lateral rights of the locators.

Section 2324 of the Revised Statutes recognizes the power of miners in each mining district to make regulations not in conflict with the laws of the United States, or of the laws of the State or Territory in which the district is situated, governing the location, manner of locating, and amount of work necessary to hold possession of a mining claim, subject to the requirement that the location must be distinctly marked on the ground so that its boundaries may be readily traced.

It is evident from the provisions cited that the location as made and defined must control not only the rights of the claimant to the vein or lode within its surface lines, but also any lateral rights.

Section 2322, cited above, declares that the locators of all mining locations shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location; and also the exclusive right of possession and enjoyment of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such

surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface location. The surface side lines, extended downward vertically, therefore determine the extent of the claim, except when in its descent the vein passes outside of them, and the outside portions are to lie between vertical planes drawn downward through the end lines.

The difficulty in the present case arises from the course of the vein or lode upon which the Amy location was made. It is evident that what are called side lines of the location, as shown in the diagram, are not such in fact but are end lines. Side lines, properly drawn, would run on each side of the course of the vein or lode distant not more than three hundred feet from the middle of such vein. In the Amy claim, the lines marked as *side* lines, cross the course of the strike of the vein and do not run parallel with it. They, therefore, constitute end lines. It is true the lines are not drawn with the strict care and accuracy contemplated by the statute, and which could only have been done with more perfect knowledge of the true course or strike of the vein from further developments. But, as was said by this court in *Iron Silver Mining Co.* v. *Elgin Mining Co.*, 118 U. S. 196, 207: "If the first locator will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences." The court cannot become a locator for the mining claimant and do for him what he alone should do for himself. The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights, as his imperfect location warrants, under the statute. It cannot relocate his claim and make new side lines or end lines. Where it finds, as in this case, that what are called *side* lines are in fact *end* lines, the court, in determining his lateral rights, will treat such side lines as end lines and such end lines as side lines; but the court cannot make a new location for him, and thereby enlarge his rights. He must stand upon his own location, and can take only what it will give him under the law.

Acting upon this principle there is no lateral right to the holder of the Amy claim by which he can follow its vein into the Non-consolidated claim. Mistakes in drawing the lines of a location can only be avoided, as said in the case cited, by postponing the marking of the boundaries until sufficient explorations are made to ascertain, as near as possible, the course and direction of the vein. . . . "Even then," the court added, "with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the true course of the vein, but, whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of the surface location than that they should be subjected to perpetual readjustment according to subterranean developments subsequently made by mine workers. Such readjustments at every discovery of a change in the course of the vein would create great uncertainty in titles to mining claims."

Applying this doctrine to the case before us, it follows that the vein in controversy, the apex of which was within the surface lines of the Amy claim, did not carry the owner's right beyond the vertical plane drawn down through the north side line of that claim. The Amy claim had no lateral right by virtue of the extension of the vein through what was called the north side of its claim, as that side line so called was, in fact, one of its end lines.

The judgment of the Supreme Court of Montana should therefore be

Reversed, and judgment entered in favor of the plaintiff, for a decree of partition of the Non-consolidated claim between the parties to the suit, who are owners as tenants in common, provided such partition can be made with due regard to the respective rights of the owners, and if it cannot be thus advantageously made, that the premises be sold and the proceeds divided according to their respective rights; and further, that the respective parties render an account of the proceeds received by them, respectively, from the Non-consolidated claim, and that such proceeds be divided between them according to their respective rights.

LOUISVILLE, EVANSVILLE, AND ST. LOUIS RAILROAD COMPANY *v.* CLARKE.

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

No. 191. Argued January 4, 1894. — Decided March 4, 1894.

The right which section 284 of the Revised Statutes of Indiana gives to the personal representative of a deceased person, whose death has been caused by the wrongful act or omission of another, to maintain an action against the latter within two years after the death, accrues when the death so caused occurs, whether it happens before or after the expiration of a period of a year and a day from the date of its cause.

The common law rule in prosecutions for murder, appeals of death, and inquisitions against deodands, does not apply to the right of action given by that statute.

In an action by the personal representative of a deceased person whose death has been caused by the wrongful act or omission of the defendant, evidence as to the income of the deceased previous to his death is admissible.

When, in an action founded upon a state statute, a Federal judge in instructing the jury adopts the construction given to the statute by the highest court of the State, it is no error to add that he had formerly been of a different opinion, and so instructed former juries.

This was an action brought by the executor of a deceased person under Rev. Stats. Indiana, § 284, against the plaintiff in error, defendant below, to recover damages for the death of the plaintiff's testator alleged to have been caused by the wrongful act of the defendant. The accident by which the plaintiff was injured was alleged to have taken place November 25, 1886, and the death to have happened by reason of his injuries February 23, 1888. The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, contending that, as the death did not occur until after the expiration of a year and a day from the infliction of the injury, it could not be held in law to have been caused by the act of the defendant. The demurrer was overruled, the defendant answered, issue was joined, and the trial resulted in a verdict and judgment for the plaintiff, to which this writ of error was sued out. The

overruling of the demurrer was one of the assignments of error. There were also other assignments which are noticed in the opinion of the court.

Mr. Alexander Pope Humphrey for plaintiff in error. *Mr. John E. Iglehart* and *Mr. Edwin Taylor* were with him on the brief.

At common law there were three occasions upon which the courts inquired in respect of the killing of a human being: *First:* Indictments which were public prosecutions; prosecutions brought in the name and behalf of the king. *Second:* Appeals of death, which were proceedings brought not by the king nor in his name, but in the name and for the benefit of private individuals. *Third:* Inquisitions against deodands.

As to the first, where there was a public prosecution, that is, a prosecution brought in the name of the king, against one accused of a wrongful act, causing the death of another, it was necessary to show that the stroke or poison given by the accused had been given within a year and a day from the time of the death of the person alleged to have been slain.

As to the second, these appeals of death were merely the survival of the Saxon weregild, 4 Bl. Com. 313. Though criminal in form, they were civil in purpose, being between private individuals and under the control of private individuals. They could not be brought more than a year and a day after the death. 3 Henry 7, c. 1. See also 6 Ed. 1, c. 9. And in Hawkins' Pleas of the Crown, Bk. 2, c. 23, § 88, it is said that "it seems clear that the appeal of death must not only set forth the day when the hurt was given, but also the day when the party died of it." Thus we see that, in this action at the common law, civil in its nature, and closely resembling the action allowed by the Indiana Statute, not only must it be commenced within a year and a day after the receipt of the injury, but also that the pleadings must set forth the dates.

The third instance at which, at common law, an inquisition could be set on foot, by reason of the death of an individual was in case of a deodand. At common law if the death of a

person was caused by an inanimate object the inanimate object was a deodand, and was seized for the benefit of the Crown and sold for pious uses. Now, what was the rule in reference to the deodand?

In 1 Hawkins' Pleas of the Crown, Bk. 1, c. 26, § 7, it is said in regard to the presumption and rule of law as to inanimate objects causing the death of a human being: "In all these cases, if the party wounded die not of the wound within a year and a day after he received it, there shall be nothing forfeited; for the law does not look upon such a wound as the cause of a man's death, after which he lives so long; but if the party die within that time, the forfeiture shall have relation to the wound given, and cannot be saved by any alienation or other act whatsoever, in the meantime." This rule was enforced in *Regina* v. *Brownlow*, 11 Ad. & El. 119.

It will thus be seen that every application of this rule of a year and a day, was made at common law, which was possible.

This rule of the law is still applicable to every case known at common law, where a civil remedy, or a quasi-civil remedy is given against a person who has killed another.

The statute of Indiana, Sec. 284, Revision of 1881, upon which this action is brought, furnishes a civil remedy for a like criminal offence. It follows inevitably that the law must apply the same rule to the civil action as to the criminal prosecution, or be guilty of the grossest absurdity. That statute is said to have been "intended to accomplish the same end as the statutes 9 and 10 Vict. c. 93, commonly known as Lord Campbell's Act." *Mayhew* v. *Burns*, 103 Indiana, 328.

There was, in England, at the time of the passing of Lord Campbell's Act, no civil remedy by the relations of a person killed by another against the slayer. That act had for its end and object, therefore, the revival of the ancient law relating to appeals of death in a modified form, and to insert into the common law a principle, the reverse of which had been declared to be the common law of England. It gave a new cause of action, namely, for causing the death. It continued the right of action which the deceased had in favor of his relatives only in the sense that it gave them a right of

action for any injury arising from the wrongful act, default or neglect. It did not give them a right of action for the injury which the deceased sustained, and for which he might have recovered damages, had he lived, but for the injury which they suffered by the death of the deceased. And this loss must be a pecuniary loss to the person claiming as beneficiary. *Franklin* v. *Southeastern Railway*, 3 H. & N. 211; *Pym* v. *Great Northern Railway*, 4 Best & Smith, 396.

The interpretation placed upon the act by the English Courts is that the right of action for the benefit of the relatives is conditional — that, if the deceased might have sued for the injury to him, they, after his death, may sue for the injury to them. Hence, if he has compromised and settled his right of action, their right of action falls thereby. *Read* v. *Great Eastern Railway*, L. R. 3 Q. B. 555.

It is plain from the wording and structure of Lord Campbell's Act, that it was the intention to revive in a modified form the old law of weregilds and appeals of death. It gave the pecuniary remedy to the same relations who would have been entitled to sue in the case of appeals of death, and the same time of limitation was fixed as the time within which the action must be brought. It cannot be that such similarity was unintentional. The reason for the abolition of appeals of death was, that they interfered with, and oftentimes delayed, the criminal prosecution, and amounted to a gratification of private resentment, rather than a punishment for the injury committed against the State. The principle of them, however, that there ought to be a remedy to the individual for the injury done him by the killing of a relative on whom he or she was dependent, was recognized as being a just and correct one. In passing the Statute of 9 and 10 Vict., c. 93, the legislature preserved nearly all the features of the old law relating to weregilds and appeals of death, except that the civil remedy was made independent of and in addition to the criminal prosecution, instead of being a substitute therefor.

The year and a day rule is a reasonable one, founded upon principles of justice to the individual, and necessary to the orderly administration of trials. If it be not declared as the

rule applicable to this class of actions, the duties of courts and juries will be likely to be increased to an extent far beyond what has hitherto been required of them, by actions upon this statute for injuries received years ago. The fact that there is no case to be found where this question has been raised, argues that the year and a day rule has been taken as settled law, for the facts certainly have existed many times before this, and the question would certainly have been litigated, if there had been any hope of success.

There is nothing in the statutory limitation of two years to prevent the construction which we claim as being placed upon this statute. Two years from the death of the injured party is allowed within which the action must be brought. *Hanna* v. *Jeffersonville Railroad*, 32 Indiana, 113.

Such a limitation is necessary in order that there may be an end of litigation. The year and a day rule stands upon an entirely different ground, as above shown, absolutely placing a limit to the inquiry into causes of causes. This limit operates from the time of the wrongful act or omission. The two years statute of limitation operates from the accruing of the cause of action, that is, from the death. The two limitations are, therefore, absolutely disconnected, and stand upon different and independent grounds.

For the above reasons we claim that the complaint, by the reason of its showing the death to have occurred more than a year and a day after the act, shows, in contemplation of law, that the wrongful act or omission did not cause the death, and that it is, therefore, insufficient, by reason of the failure to allege the most important fact.

Mr. W. H. H. Miller, (with whom were *Mr. Ferd. Winter* and *Mr. John B. Elam* on the brief,) for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

This action was brought April 28, 1888, by the executor of Augustine Clarke, whose death, the plaintiff alleged, was caused by the wrongful act and omission of the defendant, the Louisville, Evansville and St. Louis Railroad Company,

a carrier of passengers for hire. The gist of the action is the negligence of the company, its agents and servants, in consequence of which the decedent, on the 25th day of November, 1886, while travelling on the defendant's cars, in the State of Indiana, received injuries in his person from which death ensued. The plaintiff's testator died February 23d, 1888.

The action was founded on section 284 of the Revised Statutes of Indiana, (Revision of 1881,) providing:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

It appeared from the complaint that plaintiff's testator lived more than a year and a day after being injured. And the question was presented, upon a demurrer interposed by the defendant, whether, within the meaning of the statute, it could properly be said that death was *caused* by the wrongful act or omission of another if it did not occur until after the expiration of a year and a day from such act or omission. The argument in support of this limitation upon the right of action given by the statute is based upon certain rules at common law in prosecutions for murder, appeals of death, and inquisitions against deodands. Before examining this question it will be well to ascertain the object of the statute as declared by the Supreme Court of Indiana.

In *Lofton* v. *Vogles' Administrator*, 17 Indiana, 105, 107, which was an action under this statute, it was contended that the plaintiff could not maintain his suit without showing that he had criminally prosecuted the defendant to conviction; that such prosecution was a condition precedent to a civil action. It was held that this rule did not prevail in the United

States, as we do not in this country depend upon the injured party, or his representative, to institute criminal prosecutions.

In *Jeffersonville Railroad* v. *Swayne's Administrator*, 26 Indiana, 459, 484, the court, observing that it was a maxim of the common law, too familiar and long established to require the citation of authority to support it, that a cause of action for an injury to the person dies with the party injured, and does not survive to his personal representative, said: "The statute does not profess to revive the cause of action for the injury to the deceased in favor of his personal representative, nor is such its legal effect, but it creates a new cause of action unknown to the common law. The action given by the statute is for causing the death, by a wrongful act or omission, in a case where the deceased might have maintained an action had he lived, for an injury by the same act or omission. The right of compensation for the bodily injury of the deceased, which dies with him, remains extinct. The right of action created by the statute is founded on a new grievance, namely, causing the death, and is for the injury sustained thereby, by the widow and children, or next of kin of the deceased, for the damages must inure to their exclusive benefit."

"The provision that the personal representative may maintain an action, if the deceased could have maintained one, if the injury had caused death," the court said in *Pittsburgh, Fort Wayne &c. Railway* v. *Vining's Administrator*, 27 Indiana, 513, 518, "has been heretofore ruled to be applicable to the cause of action, and not to the person bringing it. In other words, an action may be maintained when the deceased, had he lived, would not have been prevented from recovering by reason of his own want of care."

In *Mayhew* v. *Burns*, 103 Indiana, 328, 333, the court said that the statute "gives to the widow or next of kin, through the personal representative, a right to recover for any injury which they may have sustained by reason of the death of an adult, or one emancipated from parental service, and in whose life they may have had a pecuniary interest."

In *Hanna* v. *Jeffersonville Railroad Co.*, 32 Indiana, 113,

114, the court, discussing the question whether the two years' limitation prescribed by the statute ran from the death of the person injured, or from the qualification of his administrator, said: "The statute was intended mainly to be operative against carriers of passengers and in a very large measure against corporations, whose business is exclusively performed by hired servants, who are being constantly changed, and in whose knowledge the facts of such cases would generally rest, or who must be depended on for such information as would lead to a discovery of the facts and witnesses to establish them. The reasons for requiring the suit to be brought within some short period after the occurrence were, therefore, very forcible and must have been perceived. While a proper regard for the security of human life required that a right of action should be given which did not exist by previous law, the considerations already noted required that the remedy should be promptly sought; else a door would be open wide for injustice and wrong." It was, therefore, held that the time limited for suit began to run from the death.

In *Burns* v. *Grand Rapids & Indiana Railroad*, 113 Indiana, 169, 171, the court, construing the statute, said that "the recovery is not a penalty inflicted by way of punishment for the wrong, but is merely compensatory of the damages sustained by the heirs or next of kin, who had, or are supposed to have had, a pecuniary interest in the life of the intestate."

And in *Hecht* v. *Ohio & Miss. Railway*, 132 Indiana, 507, 514: "The wording of Lord Campbell's Act and the statute of this State differ somewhat, but are in effect the same. The purpose of each was to give to the personal representative of the deceased a right of action if the deceased at the instant of his death would have had a right of action for the same act or omission had he survived." It was, consequently, held that a personal representative could not maintain an action under the statute, if the party injured, in his lifetime, sued and recovered full compensation for the injuries inflicted, and had thereby, if he had lived, precluded himself from maintaining any further action on account of such injuries. The same construction was placed upon Lord Campbell's Act in *Read* v.

Great Eastern Railway, L. R. 3 Q. B. 555; and in *Littlewood* v. *New York City*, 89 N. Y. 24, upon a statute of New York, not differing materially from the Indiana statute.

It thus appears to be the settled construction of this statute that the right of a personal representative to bring an action for the exclusive benefit of the widow and children, or next of kin, of one whose death was caused by the wrongful act or omission of another, depends upon the existence or non-existence of a right in the decedent, immediately before his death, to have maintained an action on account of such act or omission. Consequently, the words of the Indiana statute, "the action must be commenced within two years," means two years from the death of the person injured, not from the time he received the injuries from which death resulted.

In the light of this construction it would seem to be an unreasonable interpretation of the statute to hold that the personal representative has no right of action, in any case, where a year and a day passes after the injury before death occurs. The statute, in express words, gives the personal representative two years within which to sue. He cannot sue until the cause of action accrues, and the cause of action given by the statute for the exclusive benefit of the widow and children or next of kin cannot accrue until the person injured dies. Until the death of the person injured, the "new grievance" upon which the action is founded does not exist. To say, therefore, that where the person injured dies one year and *two* days after being injured, no action can be maintained by the personal representative, is to go in the face of the statute, which makes no distinction between cases where death occurs within less than a year and a day from the injury, and where it does not occur until after the expiration of one year and a day. Although the evidence may show, beyond all dispute, that the death was caused by the wrongful act or omission of the defendant, and although the action by the personal representative was brought within two years after the death, yet, according to the argument of learned counsel, the action cannot be maintained if the deceased happened to survive his injuries for a year and a day. We can-

not assent to this view. Was the death, in fact, caused by the wrongful act or omission of the defendant? That is the vital inquiry in each case. The statute imposes no other condition upon the right to sue. The court has no authority to impose an additional or different one. If death was so caused, then the personal representative may sue at any time within two years from such death.

Ought we to allow this obvious construction of the statute to be defeated by any rule recognized at common law as controlling upon an inquiry as to the cause of death in cases of murder, appeals of death, or inquisitions against deodands?

In cases of murder the rule at common law undoubtedly was that no person should be adjudged "by any act whatever to kill another who does not die by it within a year and a day thereafter; in computation whereof the whole day on which the hurt was done shall be reckoned first." Hawkins' Pleas of the Crown, Bk. 1, c. 13; Id. Bk. 2, c. 23, § 88; 4 Bl. Com. 197, 306. The reason assigned for that rule was that if the person alleged to have been murdered "die after that time, it cannot be discerned, as the law presumes, whether he died of the stroke or poison, etc., or a natural death; and in case of life, a rule of law ought to be certain." 3 Inst. 53. And such is the rule in this country in prosecutions for murder, except in jurisdictions where it may be otherwise prescribed by statute. Wharton's Amer. Cr. L. § 1073; *State* v. *Sorrell*, 1 Devereux Law (N. C.) 139.

An appeal, when spoken of as a criminal prosecution, denoted, according to Blackstone, an accusation by a private subject against another, for some heinous crime — a "private process for the punishment of public crimes," having its origin in a custom, derived from the ancient Germans, of allowing a pecuniary satisfaction, called a *weregild*, to the party injured or his relations, "to expiate enormous offences." 4 Bl. Com. 312, 313. Bacon defines it to be a "vindictive" action, — "the party's private action, seeking revenge for the injury done him, and at the same time prosecuting for the Crown in respect of the offence against the public." Bacon Abridg. Title, Appeal. These appeals could be brought "previous to

an indictment, and if the appellee be acquitted thereon, he could not be afterwards indicted for the same offence." 4 Bl. Com. 315; Comyn's Dig. Title, Appeal, G. 11, 16. While, during the continuance of the custom referred to, a process was given for recovering the *weregild* by the party to whom it was due, "it seems that when these offences by degrees grew no longer redeemable, the private process was still continued, in order to insure the infliction of punishment on the offender, though the party was allowed no pecuniary compensation for the offence." Bk. 4, 314. By statute of 59 Geo. 3, c. 46, appeals of murder, treason, felony, and other offences were abolished.

During the time when appeals of death were allowed, at common law, the rule established by the statute of Gloucester, 6 Edw. 1, c. 9, was that "the appeal must be sued out within a year and a day after the completion of the felony by the death of the party." 4 Bl. Com. 315, 329 n. This, the author said, seemed to be only declaratory of the common law. And Hawkins says: "It seems clear that the appeal of death must set forth the day when the hurt was given, but also the day when the party died of it; as it appears from all precedents of this kind, both in Coke and Raslat, and also from the manifest reason of the thing, that it may appear that the party died within a year and a day after the stroke, in which case only the law intends the death was occasioned by it." Bk. 2, c. 23, § 88. Bacon, referring to the statute of Gloucester, says that, by that statute, "an appeal shall not be abated for default of fresh suit, if the party sue within the year and day after the deed done, the computation whereof, as the law is now settled, shall be made not from the day when the wound is given, but *from the day when the party died;* also, the year and day shall be computed from the beginning of the day, and not from the precise time when the death happened, because regularly no fraction shall be made of a day." Title, Appeal, D. And Comyn: "By the statute of Gloucester, 6 Edw. 1 c. 9, an appeal shall not abate by want of fresh suit, if brought in a year and a day after the fact done; which statute is, by construction, restrained to an

appeal for the death of a man. And, therefore, an appeal upon the death of a man may be within the year and day, though there be not any fresh suit; within a year and day *after the death*, though the blow was given before." 2 Inst. 320, Title, Appeal, D.

The rule of a year and a day was also applied at common law to inquisitions of deodands, brought to forfeit to the king, "to be applied to pious uses and distributed in alms by his high almoner," personal chattels that were the immediate occasion of the death of any reasonable creature. 1 Bl. Com. 300. The rule in those cases was that the law does not look upon such a wound as the cause of a man's death, "after which he lives so long." Hawkins' P. C. Bk. 1, c. 8, § 7.

We have made this full reference to prosecutions for murder, appeals of death, and inquisitions against deodands, because of the earnest contention of counsel that the rule, applied at common law in such cases, should control the construction of the Indiana statute. In our judgment, the rule of a year and a day is inapplicable to the case before us. In prosecutions for murder the rule was one simply of criminal evidence. Appeals of death and inquisitions against deodands, although having some of the features of civil proceedings, were, in material respects, criminal in their nature. Besides, as we have seen, the statute of 6 Edw. 1, c. 9, was construed as giving a year and a day from the death of the party killed, not from the time the wound was inflicted. And we do not understand that any different construction was placed upon the statute of 3 Hen. 8, c. 1, to which counsel referred.

But be that as it may, in prosecutions for murder and appeals of death, the principal object was the punishment of public offences. In cases of murder and appeals of death, human life was involved, while in inquisitions against deodands it was sought to forfeit property that had caused the death of some one. In such cases, the rule of a year and a day might well have been applied. But actions under a statute like the one in Indiana are, in their nature and consequences, wholly of a civil character. What the legislature

had in view was to make provision for the widow and children, or next of kin, of one whose death had been caused by the wrongful act or omission of another. The reasons upon which the rule of a year and a day were applied in the abovementioned cases at common law do not apply with the same force in purely civil proceedings that involve no element of punishment, but only provide compensation to certain relatives of the decedent who have been deprived of his assistance and aid. As the statute, according to the construction placed upon it by the highest court of Indiana, allows the personal representative to sue within two years after the death of the testator or intestate, where death was caused by the wrongful act or omission of the defendant, we cannot, by mere construction, restrict that right to cases in which the death occurred within a year and a day after such act or omission. We repeat that, where death was *caused* by the wrongful act or omission of another, the right of the personal representative, suing for the benefit of the widow and children or next of kin, to recover damages on account of such death, is complete under the statute, and may be asserted by action brought at any time within two years from the death.

It is assigned for error that the court below permitted the plaintiff, against the objection of the defendant, to testify as to the income of the deceased previous to his death. It is conceded by counsel that it was competent to have shown the testator's ability and capacity for labor as well as his skill in his calling. But it is insisted that the evidence as to his income for a particular period was not competent. We are of the opinion that the evidence to which the defendant objected was properly admitted. It tended, in connection with other evidence, to show the extent of the loss sustained by the widow and children on account of the death of the husband and father. The age of the deceased, his probable expectancy of life, his occupation, his ability to labor, his accustomed earnings, were all proper elements of the inquiry as to the compensation proper to be awarded on account of his death. *Wade* v. *Le Roy*, 20 How. 34; *Nebraska City* v. *Campbell*, 2 Black, 590; *District of Columbia* v. *Woodbury*, 136 U. S. 450;

Texas & Pacific Railway v. *Volk*, 151 U. S. 73; *Howard County* v. *Legg*, 110 Indiana, 479; *Hudson* v. *Houser, Administrator*, 123 Indiana, 309; *Collins* v. *Davidson*, 19 Fed. Rep. 83; *Hall* v. *Galveston*, 39 Fed. Rep. 18; *Serenson* v. *Northern Pacific Railroad*, 45 Fed. Rep. 407.

Certain observations made by Judge Woods, at the close of his charge to the jury, are also assigned for error. They were as follows: "Some years ago, in a case in this court involving this question, I instructed that the jury was not restricted in its award of damage to the proof of pecuniary loss suffered by the widow or next of kin, for whose benefit the action was prosecuted, and, if left to myself, should so rule now. The statute provides that the damages awarded shall 'be distributed in the same manner as personal property of the deceased,' and this, it seems to me, is inconsistent with the proposition that the damages to be allowed cannot exceed the proven pecuniary loss. Some of the next of kin might be dependent and shown to have a pecuniary interest in the life of the deceased, and others to have no such interest, and yet the damages allowed must go to those who had no such interest as well, and as much as to those on account of whose interest it was allowable; but the Supreme Court of the State, in a somewhat recent case, as I understand, has put an interpretation upon this statute which is binding upon this and other courts, and in accordance with that decision, as I remember it, I instruct you, and for the purpose of this case you will accept it as the law, that you will allow only the pecuniary loss suffered by the widow and surviving children on account of this death, not exceeding the limit of ten thousand dollars fixed by the statute."

The defendant, of course, makes no objection to the principle of law announced by the court, for the charge was in exact conformity to its request for instructions upon the question of damages. But it insists that the jury were probably influenced, to its prejudice, by the statement that the court below had expressed a different view from that announced by the state court.

We are of opinion that the action of the court below, in respect to this matter, is not ground of error. What the judge

said was in deference to the decision of the state court, whose interpretation of the local statute was accepted as the law of the case. The jury were distinctly informed that they were to follow the rule of damages announced by the state court, notwithstanding the court below had, on a former occasion, acted on a different interpretation of the statute. It is not to be supposed that the jury misapprehended or disregarded the explicit injunction of the court to allow, in the event of a verdict for the plaintiff, only the pecuniary loss suffered by the widow and surviving children on account of the death of the husband and father.

We perceive no error in the record, and the judgment is

Affirmed.

DUNLAP *v.* SCHOFIELD.

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

No. 149. Submitted December 5, 1893. — Decided March 5, 1894.

A patentee of an invention, or of a design, cannot, in a suit against infringers thereof, recover damages within section 4900 of the Revised Statutes, or the penalty imposed by the act of February 4, 1887, c. 105, without alleging and proving either that patented articles made and sold by him, or the packages containing them, were marked "patented," or else that he gave notice to the defendants of his patent and of their infringement.

THIS was a bill in equity, filed May 7, 1889, for the infringement of letters patent issued April 2, 1889, for the term of three and a half years, by the United States to Julius Stroheim for a design for rugs.

The bill alleged that the design was new and original; that Stroheim was the original and first inventor thereof; that it was not, at the time of his application for a patent, in public use or on sale with his consent or allowance; that before the issue of the patent he assigned the invention and the patent

to be obtained therefor to the plaintiffs by an instrument in writing recorded in the Patent Office; that the invention was of great practical use and benefit to the plaintiffs, and they had applied it to large and extensive use, and had expended large sums of money in introducing it, and the public and the users of the invention had acknowledged and acquiesced in its value; that the defendants had infringed, and intended to continue to infringe the patent by making, using and vending the patented design, substantially the same in outline, detail and appearance as shown and described in the patent; and that the plaintiffs, "after the issue of the aforesaid letters patent, notified the said defendants of the issue of said letters patent, of their infringement thereof, and requested them, the said defendants, to abstain and desist from any further violation thereof in infringement of" the plaintiffs' "rights thereunder in the manufacture and sale of rugs bearing said patented design;" and prayed for a discovery, an injunction, an account of profits, damages, and further relief.

The defendants answered under oath, admitting the issue of the letters patent to Stroheim; denying all the other allegations of the bill, and, among other things, denying that "after the issue of the aforesaid letters patent these complainants notified these defendants of the issue of said letters patent, or of their infringement thereof, and requested the said defendants to abstain and desist from infringement of the complainants' alleged rights thereunder, in the manufacture and sale of rugs bearing said patented design." The plaintiffs filed a general replication.

At the hearing upon pleadings and proofs, it appeared by the testimony introduced by both parties that the plaintiffs made and sold many rugs with the patented design upon them; and there was conflicting evidence upon the question of infringement. The court held that the patent was valid, and that the defendants had infringed it by making and selling rugs bearing a design in imitation of and substantially similar to the design shown, described and claimed in the patent.

No evidence was offered by either party upon the question

whether the plaintiffs' rugs were marked "patented," or upon the question whether the plaintiffs had notified the defendants that they were infringing the patent.

The defendants contended that they were not liable in damages, because the plaintiffs had failed to prove their own compliance with section 4900 of the Revised Statutes, which is as follows:

"It shall be the duty of all patentees, and their assigns and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented; either by fixing thereon the word 'patented,' together with the day and year the patent was granted; or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is enclosed, a label containing the like notice; and in any suit for infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article so patented."

The court held that the notice alleged in the bill was not a sufficient compliance with this section, and that the burden of proof was upon the defendants to show that the plaintiffs had not complied with it. 42 Fed. Rep. 323.

The plaintiffs asked for an injunction, and for damages in the sum of $250, as penalty and damages under the act of February 4, 1887, c. 105, (which is copied in the margin,[1])

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[1] An act to amend the law relating to patents, trade-marks and copyright.

SEC. 1. Hereafter, during the term of letters patent for a design, it shall be unlawful for any person other than the owner of said letters patent, without the license of such owner, to apply the design secured by such letters patent, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or to sell or expose for sale any article of manufacture to which such design or colorable imitation shall, without the license of the owner, have been applied, knowing that the same has been so applied. Any person violating the provisions, or either of them, of this section, shall be liable in the amount of two hundred and fifty dollars; and in case the total profit made by him from the manufacture or sale, as afore-

and waived all right to any further damages, or to an account of profits. The court, on May 13, 1890, entered a decree for the plaintiffs accordingly, and the defendants appealed to this court.

Mr. Joseph C. Fraley for appellants.

Mr. Hector T. Fenton for appellees.

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

By section 4900 of the Revised Statutes, (which by virtue of section 4933 applies to patents for designs,) it is made the duty of every patentee or his assigns, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that it is patented, by putting the word "patented" upon it, or upon the package enclosing it; "and in any suit for infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article so patented."

The clear meaning of this section is that the patentee or his assignee, if he makes or sells the article patented, cannot recover damages against infringers of the patent, unless he has given notice of his right, either to the whole public by

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said, of the article or articles to which the design, or colorable imitation thereof, has been applied, exceeds the sum of two hundred and fifty dollars, he shall be further liable for the excess of such profit over and above the sum of two hundred and fifty dollars. And the full amount of such liability may be recovered by the owner of the letters patent, to his own use, in any Circuit Court of the United States having jurisdiction of the parties, either by action at law, or upon a bill in equity for an injunction to restrain such infringement.

Sec. 2. Nothing in this act contained shall prevent, lessen, impeach or avoid any remedy at law or in equity which any owner of letters patent for a design, aggrieved by the infringement of the same, might have had if this act had not been passed; but such owner shall not twice recover the profit made from the infringement. 24 Stat. 387.

marking his article "patented," or to the particular defendants by informing them of his patent and of their infringement of it.

One of these two things, marking the articles, or notice to the infringers, is made by the statute a prerequisite to the patentee's right to recover damages against them. Each is an affirmative fact, and is something to be done by him. Whether his patented articles have been duly marked or not is a matter peculiarly within his own knowledge; and if they are not duly marked, the statute expressly puts upon him the burden of proving the notice to the infringers, before he can charge them in damages. By the elementary principles of pleading, therefore, the duty of alleging, and the burden of proving, either of these facts is upon the plaintiff.

In the present case, although the plaintiffs had manufactured and sold goods with the patented design upon them, they made no allegation or proof that the goods were marked as the statute required. They did allege in their bill that they notified the defendants of the patent and of their infringement; but this allegation was distinctly denied in the defendants' answer, and the plaintiffs offered no proof in support of it. They could not, therefore, recover, even if this were a suit for damages within section 4900 of the Revised Statutes.

But these plaintiffs, waiving all right to an account of profits, or to other damages, sought and were allowed to recover the fixed sum of $250, in the nature of a penalty, imposed by the act of February 4, 1887, c. 105, upon any person who, during the term of a patent for a design, and without the license of the owner, applies the design secured by the patent, "or any colorable imitation thereof," to any article of manufacture for the purpose of sale, or sells or exposes for sale any article of manufacture to which "such design or colorable imitation" has been applied, "knowing that the same has been so applied." 24 Stat. 387. This statute, according to its clear intent and effect, requires that, in order to charge either a manufacturer or a seller of articles to which has been applied a patented design or any colorable

imitation thereof, he must have been "knowing that the same has been so applied," which is equivalent to saying "with a knowledge of the patent and of his infringement." The reasons for holding the patentee to allege and prove either such knowledge, or else a notice to the public or to the defendant, from which such knowledge must necessarily be inferred, are even stronger, in a suit for such a penalty, than in a suit to recover ordinary damages only.

In none of the cases on which plaintiffs rely, and by which the court below considered its judgment as controlled, was there any adjudication inconsistent with this conclusion.

The leading case is *Rubber Co.* v. *Goodyear*, 9 Wall. 788, decided at October term, 1869, which was a bill in equity for an injunction, and for an account of profits, against infringers of a patent for an invention; and the passage in the opinion of this court, which is relied on by the plaintiffs, is that in which Mr. Justice Swayne, after citing the provisions of the act of March 2, 1861, c. 88, § 13, which are reënacted in section 4900 of the Revised Statutes, proceeded as follows: "It is said that the bill contains no averment on this subject, and that the record is equally barren of proof that any such notice was ever given to the defendants, except by the service of process, upon the filing of the bill. Hence, it is insisted that the master should have commenced his account at that time, instead of the earlier period of the beginning of the infringement. His refusal to do so was made the subject of an exception. The answer of the defendants is as silent upon the subject as the bill of the complainants. No such issue was made by the pleadings. It was too late for the defendants to raise the point before the master. They were concluded by their previous silence and must be held to have waived it. It cannot be considered here." 9 Wall. 801.

In that case, as appears in the passage just quoted from the opinion, not only was there no averment in the bill, or in the answer, on the subject of marking or of notice; but no objection to the want of proof of either fact was made by the defendants at the original hearing in the Circuit Court, as appears by its opinion reported in 2 Cliff. 351. The objection

was first taken at the subsequent hearing before a master, and was therefore held to have been waived.

In some later cases in the Circuit Courts of the United States it has been assumed that the defendant was bound to allege and prove that the patented articles were not marked, if he would, upon that ground, avoid liability for damages under the section in question. But in none of those cases was that point in judgment. In *Goodyear* v. *Allyn*, 6 Blatchford, 33, the only question before the court was of granting an injunction, a matter not touched by this section. In *Herring* v. *Gage*, 15 Blatchford, 124, the point decided was that the statute did not apply to the marking of the articles made and used by the infringing defendants. In *New York Pharmical Association* v. *Tilden*, 21 Blatchford, 190, the answer alleged and the proof showed that the plaintiffs' goods were not marked, and the question was as to the sufficiency of a verbal notice to charge the defendants in damages. And in *Allen* v. *Deacon*, 10 Sawyer, 210, the want of marking was alleged and proved by the defendant, and he was also proved to have been duly notified of the infringement. On the other hand, in *McComb* v. *Brodie*, 1 Woods, 153, it was held that if the patentee did not prove that his articles were marked, or that he gave the defendant notice of the infringement, he could recover only nominal damages.

The patent having now expired, so that the injunction is of no further value, the decree is reversed and the case remanded to the Circuit Court with directions to

Dismiss the bill.

CARNE *v.* RUSS.

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

No. 229. Argued and submitted January 25, 1894. — Decided March 5, 1894.

If, at the hearing of a bill in equity to redeem land worth more than $5000 from incumbrances, the only controversy is as to less than that amount of incumbrances, no appeal lies to this court.

Opinion of the Court.

THE case is stated in the opinion.

Mr. George W. Smith for appellants.

Mr. Allan C. Story, for appellee, submitted on his brief.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a bill in equity by Russ, as the owner of land in Chicago, worth more than $40,000, against Ogden and others, to set aside and cancel, as creating a cloud upon his title, a tax deed to Ogden, and a certificate of tax sale procured by the other defendants as his agents.

The bill alleged that the taxes upon which the tax deed and certificate were issued were illegally levied and apportioned, and that the plaintiff had tendered to the defendants the full amount of the taxes paid by them.

The defendants answered, denying the plaintiff's title, the illegality of the taxes, and the tender of payment. But Ogden, in his answer, offered to waive his claim of title to the land and to reconvey it to the plaintiff, if the plaintiff would pay him the sums paid by him, with penalties accrued thereon and ten per cent interest. And the other defendants, in their answers, disclaimed all title in themselves.

At the hearing, the defendants contended that the sums which the plaintiff was in equity bound to pay them amounted to $8705.34. But the Circuit Court held that those sums amounted to $4291.84 only, and that the plaintiff, upon paying this amount, (which he forthwith paid into court,) was entitled to the relief prayed for, and entered a final decree in his favor. The defendants appealed to this court.

Upon the admissions of the answers, and upon the claims made by the defendants in the Circuit Court, and renewed in this court, it clearly appears that the plaintiff's title to the land was not really contested, but that the only matter in controversy was the amount of money which the plaintiff was equitably bound to pay to the defendants, and that the difference between the sum which the Circuit Court held him to pay and the highest sum claimed by the defendants was less

than $5000. The amount in controversy, therefore, is insufficient to support the appellate jurisdiction of this court. Act of February 16, 1875, c. 77, § 3; 18 Stat. 316; *Peyton* v. *Robertson*, 9 Wheat. 527; *Farmers' Bank of Alexandria* v. *Hooff*, 7 Pet. 168; *Ross* v. *Prentiss*, 3 How. 771; *Tintsman* v. *National Bank*, 100 U. S. 6.

Appeal dismissed.

JOHNSON COMPANY *v.* WHARTON.

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

No. 114. Argued November 24, 1893. — Decided March 5, 1894.

A judgment recovered in a Circuit Court of the United States in favor of the plaintiff by the owner of a patent right in an action against a licensee to recover royalties on sales of the patented article, where the sole defence set up was that the articles manufactured and sold by the defendant were not covered by the patent, in which the amount recovered was not sufficient to permit a review by this court, is a bar to an action in the same Circuit Court by the same plaintiff against the same defendant, to recover like royalties on other like sales where the same defence is set up, and no other, and the amount involved is sufficient to authorize a review here.

By written agreement executed November 24, 1885, between William Wharton, Jr., & Co., a limited partnership association, and the Johnson Steel Street Rail Company, a corporation — to be hereafter referred to as the Wharton and Johnson companies — the latter acquired the right to make and sell, upon certain conditions, guard rails constructed according to the specifications attached to letters patent granted to William Wharton, Jr., for an improved guard rail.

The present action was brought upon this agreement of license to recover the stipulated royalties or fees for guard rails sold and delivered by the Johnson Company between January 10, 1888, and June 4, 1889.

In its statement of demand the Wharton Company averred that the Johnson Company commenced and continued the sale of guard rails, and voluntarily rendered statements and paid

Counsel for Plaintiff in Error.

the stipulated fees down to January 1, 1887, but refused to pay those due between January 1, 1887, and January 10, 1888, on the ground that the rails made and sold by it were not covered by the Wharton patent; that in a suit brought by the present plaintiff against the Johnson Company in the Circuit Court of the United States for the Eastern District of Pennsylvania, it was adjudged that the rails sold by the defendant were covered by the Wharton patent, and judgment was entered for the amount of royalties to January 10, 1888; that from and after the latter date, down to the expiration of the patent, June 4, 1889, the defendant continued to sell, under the agreement, rails of the same character as those that had been adjudged to be covered by the above patent.

The Johnson Company, admitting the manufacture and sale by it between January 10, 1888, and June 4, 1889, of certain girder guard rails of steel, averred that those manufactured by it were not such rails as were covered by the Wharton patent. It also admitted that the suit mentioned in the plaintiff's statement was brought and decided as set forth, but insisted that the decision was not binding in the present case, "because the amount involved in the former suit was so small as not to entitle the defendant to a writ of error on the said judgment to the Supreme Court of the United States, whereas the amount involved in this suit is sufficient to so entitle the defendant;" and "that the right of the defendant to have the issues involved in this case adjudicated by the Supreme Court of the United States, if a decision adverse to it is rendered by this [the Circuit] court, cannot be taken away from it by reason of a former trial and judgment between the same parties, where the amount involved did not entitle the defendant to a review of the same."

The court below held the affidavit of defence to be insufficient, and, the damages sustained by the defendant having been assessed at the sum of $6306, judgment was rendered for that sum.

Mr. Wayne McVeagh, (with whom were *Mr. George Hard-*

ing and *Mr. George J. Harding* on the brief,) for plaintiff in error.

The court below, without giving reasons, directed the entry of judgment against the defendant for want of a sufficient affidavit of defence, on the ground that the essential question was *res judicata*, by a prior judgment of the same court in a case between the same parties, where the same legal question had been raised, upon a claim for a prior instalment of license fees.

The defendant's claim, as made in its affidavit of defence, that the prior judgment for a sum below the limit of this court's jurisdiction could not lawfully be made effective to prevent this court from passing upon the essential question on its merits in a case within its jurisdiction, was negatived.

That the lower court's position is erroneous, it is submitted, must appear when the intended and actual function of this court as a court of last resort is considered. It was intended that litigants within the limits of the court's jurisdiction might have the merits of their controversies passed upon by this court. There is no room for the theory that the court, with acknowledged jurisdiction of any particular case, was intended to be a mere organ of expression by way of echo of the views of the lower court. And yet this is the practical result of the conclusion arrived at by the court below, that the prior judgment against the defendant for an amount below the limit of this court's jurisdiction was conclusive of the defendant's rights.

The plaintiff in error recognizes the full scope and force of the law of estoppel of a *res judicata*. And it is not contended here that, generally speaking, the judgment or decree of a lower court of record unappealed from, where the right to a review exists, is not conclusive of the rights of the parties in respect to the matters in issue. *Beloit* v. *Morgan*, 7 Wall. 619, 622; *Cromwell* v. *County of Sac*, 94 U. S. 351.

Where, however, under the Federal Statutes, no right to a writ of error or appeal exists in a particular case, it is respectfully submitted that the plain intent of the law constituting

this court a court of review of the merits of cases within its jurisdiction, denies to the conclusion of a lower Federal court the force of an estoppel in a subsequent case within the limits of this court's jurisdiction, where the question is distinctly raised in the court below. The strictness with which this court maintains the limits of its jurisdiction, based upon the amount in controversy, is well illustrated by those cases which hold that nothing collateral to the judgment or decree can be used to establish jurisdiction where the judgment or decree itself is below the statutory limit. *Troy* v. *Evans*, 97 U. S. 1; *Elgin* v. *Marshall*, 106 U. S. 578, 581; *Opelika City* v. *Daniel*, 109 U. S. 108; *New Jersey Zinc Co.* v. *Trotter*, 108 U. S. 564; *Bruce* v. *Manchester & Keene Railroad*, 117 U. S. 514; *New England Mortgage Security Co.* v. *Gay*, 145 U. S. 123.

But the same strictness of interpretation clearly requires, on the other hand, that, jurisdiction being established, it be made effective to bring within the cognizance of the court all questions of fact and law properly raised in the court below, independent of technical rules of estoppel, the operation of which, however general in extent, cannot be made to deprive litigants of substantive rights.

The practical results of such a rule of law as that affirmed by the court below present a very persuasive argument against its soundness. In very many cases it is quite competent for the plaintiff to divide his causes of action and to limit the amount in his first suit below the sum allowing an appeal. Securing a judgment in his favor for the amount he has thus limited, he is then at liberty to abrogate the defendant's right of appeal in all subsequent suits, without reference to the amounts involved.

It may be said that, in pursuing such a course, he incurs the risk of a final judgment against him, as well as in his favor; but it must be remembered that as he alone is to exercise the option, he will only do so when a previous decision of the court below, or some other information leading him to suppose he can forecast its decision, causes him to believe that he is entirely safe in doing so. Meanwhile his unfortunate adversary is left absolutely at his mercy; for, if the court below

is believed to be the more favorable forum for the plaintiff, the amount for which suit is brought will of course be limited so as to prevent an appeal when the controversy is put at issue in the larger litigation; while, if the plaintiff supposes this court is the more favorable forum for him, he will, equally, of course, sue for an amount which will entitle him to its judgment.

Mr. Frank P. Prichard, (with whom was *Mr. John G. Johnson* on the brief,) for defendant in error.

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

The question, upon the merits, which the defendant's affidavit of defence presented, was whether the girder guard rails manufactured and sold by it were covered by the Wharton patent and by the license granted by the agreement of November 24, 1885. But that precise question, it is admitted, was presented and determined in the former suit between the same parties. And we are to inquire, on this writ of error, whether the court below erred in holding that the judgment in the former suit concluded that question between the parties. The learned counsel for the defendant insists that it did not, and bases his contention solely upon the ground that the former judgment was not, by reason of the limited amount involved, subject to review by this court.

Is it true that a defeated suitor in a court of general jurisdiction is at liberty, in a subsequent suit between himself and his adversary, in the same, or in any other court, to relitigate a matter directly put in issue and actually determined in the first suit, upon its appearing that the judgment in the first suit, by reason of the small amount in dispute, could not be reviewed by a court of appellate jurisdiction? Does the principle of *res judicata*, in its application to the judgments of courts of general jurisdiction, depend, in any degree, upon the inquiry whether the law subjects such judgments to reëxamination by some other court? Upon principle and authority

these questions must be answered in the negative. We have not been referred to, nor are we aware of, any adjudged case that would justify a different conclusion.

The object in establishing judicial tribunals is that controversies between parties, which may be the subject of litigation, shall be finally determined. The peace and order of society demand that matters distinctly put in issue and determined by a court of competent jurisdiction as to parties and subject-matter, shall not be retried between the same parties in any subsequent suit in any court. The exceptions to this rule that are recognized in cases of judgments obtained by fraud or collusion have no application to the present suit.

In *Hopkins* v. *Lee*, 6 Wheat. 109, 113, it was held that a fact directly presented and determined by a court of competent jurisdiction cannot be contested again between the same parties in the same or any other court. "In this," the court said, "there is and ought to be no difference between a verdict and judgment in a court of common law and a decree of a court of equity. They both stand on the same footing and may be offered in evidence under the same limitations, and it would be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it an end could never be put to litigation. It is, therefore, not confined in England or in this country to judgments of the same court or to the decisions of courts of concurrent jurisdiction, but extends to matters litigated before competent tribunals in foreign countries. . . . On a reference to the proceedings at law, and in chancery, in the case now before us, the court is satisfied that the question which arose on the trial of the action of covenant was precisely the same, if not exclusively so, (although that was not necessary,) as the one which had already been directly decided by the court of chancery." And in *Smith* v. *Kernochen*, 7 How. 198, 217: "The case, therefore, falls within the general rule, that a judgment of a court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence conclusive between the same parties or privies upon the same matters when

directly in question in another court." To the same effect are *Pennington* v. *Gibson*, 16 How. 65, 77; *Stockton* v. *Ford*, 18 How. 418; and *Lessee of Parrish* v. *Ferris*, 2 Black, 606, 609.

The whole subject was carefully considered in *Cromwell* v. *County of Sac*, 94 U. S. 351, 352, where it is said: "There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed."

The doctrines of the latter case were applied in *Lumber Co.* v. *Buchtel*, 101 U. S. 638, 639, which case is like this in some respects. That was an action for the recovery of the last instalments of money due on a contract for the purchase of timber lands, the plaintiff having in a previous action against the same defendant obtained a judgment for the first instalment. In the first action the sole defence was that the defendant had been induced to make the contract of guaranty by false and fraudulent representations. The same defence was made in the second action, and an additional one was interposed to the effect that the representations made as to the quantity of timber, and which induced the execution of

the contract, amounted to a warranty upon which defendant could sue for damages. Both grounds of defence, relied on in the second action, were held to be concluded by the judgment in the prior action. In respect to the second ground, it was said: "The finding of the referee, upon which the judgment [in the first action] was rendered — and this finding, like the verdict of a jury, constitutes an essential part of the record of a case — shows that no representations as to the quantity of timber on the land sold were made to the defendant by the plaintiff, or in his hearing, to induce the execution of the contract of guaranty. This finding, having gone into the judgment, is conclusive as to the facts found in all subsequent controversies between the parties on the contract. Every defence requiring the negation of this fact is met and overthrown by that adjudication."

In *Stout* v. *Lye*, 103 U. S. 66, 71, in which one of the questions was as to the conclusiveness of a judgment in a state court upon the same parties to a suit in the Federal court — the two suits involving the same subject-matter, and the suit in the state court having been first commenced — this court, observing that the parties instituting the suit in the Federal court, being represented in the state suit, could not deprive the latter court of the jurisdiction it had acquired, said: "The two suits related to the same subject-matter, and were in fact pending at the same time in two courts of concurrent jurisdiction. The parties also were, in legal effect, the same, because in the state court the mortgagor represented all who, pending the suit, acquired any interest through him in the property about which the controversy arose. By electing to bring a separate suit the Stouts voluntarily took the risk of getting a decision in the Circuit Court before the state court settled the rights of the parties by a judgment in the suit which was pending there. Failing in this, they must submit to the same judgment that has already been rendered against their representative in the state court. That was a judgment on the merits of the identical matter now in question, and it concluded the 'parties and those in privity with them, not only as to every matter which was offered and

received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell* v. *County of Sac*, 94 U. S. 351, 352. It is true the mortgagor did not set up as a defence that the bank had no right to take the mortgage, or that he was entitled to certain credits because of payments of usurious interest, but he was at liberty to do so. Not having done so, he is now concluded as to all such defences, and so are his privies."

In all of these cases, it will be observed, the question considered was as to the effect to be given by the court of original jurisdiction to the judgment in a previous case between the same parties or their representatives, and involving the same matters brought up in a subsequent suit. In no one of them is there a suggestion that the determination of that question by the court to which it was presented should be controlled by the inquiry whether the judgment in the first action could be reviewed upon appeal or writ of error.

The counsel for the plaintiff in error, in support of his position, referred to the clause of the Constitution declaring that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish, and to the clause providing that the judicial power of the United States shall extend to *all* cases in law or equity mentioned in that instrument. But, except in the cases specially enumerated in the Constitution and of which this court may take cognizance, without an enabling act of Congress, the distribution of the judicial power of the United States among the courts of the United States is a matter entirely within the control of the legislative branch of the government. And it has never been supposed that Congress, when making this distribution, intended to change or modify the general rule, having its foundation in a wise public policy, and deeply imbedded in the jurisprudence of all civilized countries, that the final judgment of a court — at least, one of superior jurisdiction — competent under the law of its creation to deal with the parties and the subject-matter, and having acquired jurisdiction of the par-

ties, concludes those parties and their privies, in respect to every matter put in issue by the pleadings and determined by such court. This rule, so essential to an orderly and effective administration of justice, would lose much of its value if it were held to be inapplicable to those judgments in the Circuit Courts of the United States which, by reason of the limited amount involved, could not be reviewed by this court.

The inquiry as to the conclusiveness of a judgment in a prior suit between the same parties can only be whether the court rendering such judgment — whatever the nature of the question decided, or the value of the matter in dispute — had jurisdiction of the parties and the subject-matter, and whether the question, sought to be raised in the subsequent suit, was covered by the pleadings and actually determined in the former suit. The existence or non-existence of a right, in either party, to have the judgment in the prior suit reëxamined, upon appeal or writ of error, cannot, in any case, control this inquiry. Nor can the possibility that a party may legitimately or properly divide his causes of action, so as to have the matter in dispute between him and his adversary adjudged in a suit that cannot, after judgment, and by reason of the limited amount involved, be carried to a higher court, affect the application of the general rule. Whatever mischiefs or injustice may result from such a condition of things, must be remedied by legislation regulating the jurisdiction of the courts, and prescribing the rules of evidence applicable to judgments. Looking at the reasons upon which the rule rests, its operation cannot be restricted to those cases, which, after final judgment or decree, may be taken by appeal or writ of error to a court of appellate jurisdiction.

We are of opinion that the question whether the rails manufactured by the Johnson Company were covered by the Wharton patent, having been made and determined in the prior action between the same parties — which judgment remains in full force — could not be relitigated in this subsequent action.

There is no error in the judgment, and it is

Affirmed.

UNION PACIFIC RAILWAY COMPANY *v.* McDONALD.

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

No. 224. Argued January 23, 1894. — Decided March 5, 1894.

A railway company which operated a coal mine near one of its stations in Colorado, was in the habit of depositing the slack on an open lot between the mine and the station in such quantities that the slack took fire and was in a permanent state of combustion. This fact had been well known for a long time to the employés and servants of the company, but no fence was erected about the open lot, and no efforts were made to warn people of the danger. A lad 12 years of age and his mother arrived by train at the station and descended there. Neither had any knowledge of the condition of the slack, which, on its surface, presented no sign of danger. Something having alarmed the boy, he ran towards the slack, fell on and into it, and was badly burned. Suit was brought to recover damages from the railway company for the injuries thus inflicted upon him. *Held,*

(1) That the company was guilty of negligence, in view of the statutory obligation to fence;

(2) That the lad was not a trespasser, under the circumstances, and had not been guilty of contributory negligence;

(3) That the case was within the rule that the court may withdraw a case from the jury altogether and direct a verdict, when the evidence is undisputed, or is of such conclusive character that the court would be compelled to set aside a verdict returned in opposition to it.

THE case is stated in the opinion.

Mr. Samuel Shellabarger and *Mr. A. A. Hoeling, Jr.*, (with whom were *Mr. John F. Dillon* and *Mr. J. M. Wilson* on the brief,) for plaintiff in error.

Mr. J. Warner Mills for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The Union Pacific Railroad Company seeks the reversal of the judgment below for the sum of $7500, the amount assessed against it, by the verdict of a jury, as compensation to the

defendant in error for personal injuries alleged to have been sustained by him in consequence of the want of due care upon the part of the company in managing and controlling certain premises belonging to it, on which the plaintiff received such injuries.

The evidence, on behalf of the plaintiff, tended to establish the following facts: At the time and before the injuries in question were received the defendant owned and operated a railroad, immediately on the line of which was the village of Erie, Colorado, containing about six hundred inhabitants. Within a few hundred feet of its depot at that village the company operated a coal mine. Between the shaft-house of the mine and the depot building were the tracks of the railroad. A narrow, rough, uneven foot-path to the coal mine extended from the depot building, over the railroad tracks, and close to a slack pit or trench. In working the mine, the company's agents and employés had deposited along and close by the track, between the shaft-house of the coal mine and the depot building, a very large quantity of coal slack, which extended up and down the track. The slack was piled up so as to generate heat and cause it to take fire underneath by spontaneous combustion, and was not spread out in thin layers upon the surface of the ground. It was in a long trench formed on the east side of the railroad in excavating and throwing up dirt for the track, and the top of which was on a level with the ground around it. The path, above referred to, was described by a witness as "a little bit above the fire, sort of rim running around the fire, about eighteen inches wide."

For a long time prior to the injuries complained of this slack burned continuously under its surface. A few inches below the surface was a bed of burning coals, extending nearly the whole length of the pit. The surface was a mere covering of ashes, sufficient in depth to conceal from view the fire underneath. Except when there was rain, snow, or wind, no smoke would be emitted from the slack pit, nor would there be any visible indications of the existence of the burning coals under the ashes covering the slack.

The burning portion of the slack, thus concealed and covered by what appeared to be dead ashes, was within two or three hundred yards of the most populous part of the town, and came within a few feet of the platform of the depot building. In 1884 the fire burned within twenty feet of the depot building.

For some time, perhaps as long as two years, before the day on which the plaintiff was injured, the company's agents and officers had knowledge of the existence of this slack pit, and of its dangerous condition as above stated. Cattle had been known to stray into it and get burnt. This fact was known to the company's agents.

The children of the miners were accustomed to go to the mine just as it suited them. They were allowed to pick up coal and carry it to their homes. A witness, who was a coal miner and had worked on this mine, testified that "he had frequently, nearly every day, seen children play around there, and they were allowed to go around the machinery where the shaft was; and this was allowed during all the years this mine was operated. During the time he worked there, he never heard of any objections to children coming on the premises, or of their being driven off." Another witness who had worked in the mine in 1884, and had been acquainted with it before and after that time, and who was asked to state what he knew about strangers, men and women, being allowed to go about the mine, said: "Well, in general, strangers coming to the town, about the first look they take is over to the mine and engine; they are so near the town, and for curiosity they often walk over; never heard of anybody, children or others, being driven away from the works; the slack pile was covered with ashes and the fire could not be seen; the path was about 18 inches wide and near the level of the trench; it was rough and slanting down toward the fire." On cross-examination this witness stated that "the pile had been burning in that way for about two or three years, and the path above it could not be easily seen; that while you would undoubtedly see it, still a person could not follow it clearly, plainly, and easily, and ladies going to the graveyard would avoid it and did not

want to travel it; when on the path the heat from the burning slack could be felt only when the wind blew; the defendants used to dump their fine slack in there from time to time and burn it, and continued to burn it in that way."

The slack pit had no fence around it, nor was it guarded in any way. There was nothing in its appearance, when the weather was clear, to indicate that there was fire beneath the surface of ashes.

On the 3d of September, 1884, the plaintiff, a lad about 12 years of age, visited Erie with his mother. Neither the mother nor the child had any knowledge of this slack pit. After dinner of that day, in the afternoon, the plaintiff obtained the consent of his mother to visit the coal mine in company with a "trapper" boy of the town, with whom he had become acquainted. While at or near the shaft-house his attention was attracted to a man in the act of sending a pair of mules down the shaft. About that time five or six boys came from the coal pit, having lamps on their hats, and dirty faces. One of them yelled, "Let's grease him," another, "Let's burn him." They started towards the plaintiff, who, becoming frightened, ran away, intending to take the small path that skirted the slack pit, the only one leading from the mouth of the coal pit or from the shaft-house to the depot building and the village. In attempting to pass some persons who happened to be on the bank or near the edge of the slack pit, he slipped and fell into the burning slack, breaking through the covering of ashes. He came very near sinking with his entire body into the bed of fire underneath the ashes, and would have perished instantly, if he had not been pulled out by a grown person near by at the time.

The person who rescued him testified that the day was a nice, calm one; that he, witness, started for his home, and hearing some one screaming, he saw the boy fall into the burning slack while running from the trappers who had scared him. "These trappers," the witness said, "were boys down in the mine for the purpose of leading the mules. The boy, George McDonald, was running in the direction of the path that led to the town. He ran into the fire, and fell onto his hands and

face. He [witness] was standing about four feet off from him in the foot-path. He went in and pulled him out, and found his hands all burned, skin hanging from the hands and fingers, and was burned in his back and clothes; that he helped carry him to the hotel, the boy not being able to walk; that at the time of the accident there was nothing to indicate that there was any fire there; that a man who had never seen it would walk right in it; would not know there was any fire, nothing but brown ashes; came up within forty feet of the depot. Children used to go around there at all hours of the day; some to get coal, others to bring their fathers' dinner, and some would go over just to see the place, and this condition of affairs was so allowed or conducted during all the time witness was there; that the path was up and down and on a slant toward the slack pile. The Jackson, Marfell & Mitchell mines used to throw their slack out, but they used to scatter it so it would not burn." On cross-examination the same witness stated that the path was used by the miners in going to and from town to the shaft, and that there was no other path; that when the boy fell into the fire he was running toward the town.

As the result of the injuries received by him, the plaintiff's hands and arms became weakened and in part disabled, and his face badly scarred and disfigured. His general health was greatly and permanently impaired. His kidneys became seriously weakened and diseased. He suffered intense pain, and was confined to his bed for a long period of time, disabled in the use of his hands in any way.

At the time the plaintiff was injured there was in force a statute of Colorado, passed May 3, 1877, entitled "An act to compel owners of coal mines to fence their slack piles and abandoned pits." That statute was as follows: "§ 1. That the owner and operators of coal mines from which fine or slack coal is taken and piled upon the surface of the ground, in such quantities as to produce spontaneous combustion, shall fence said ground in such manner as to prevent loose cattle or horses from having access to such slack piles. § 2. All owners of lands having abandoned coal pits or shafts on the same, of

sufficient depth to endanger the life of cattle, horses, or other stock, shall fence or fill said pits or shafts in such a manner as to afford permanent protection to all such stock endangered thereby. § 3. Every person violating sections one (1) and two (2) of this act shall be deemed guilty of a misdemeanor and shall be fined in a sum not less than twenty (20) dollars nor more than one hundred (100) dollars, to be collected as other fines are collected, and shall be further liable to any party injured thereby in the amount of the actual injury sustained." Gen. Laws Colorado, 1877, p. 126, §§ 137, 138, 139; Mills' Annotated Stats. §§ 3202, 3203, 3204.

The defendant examined two witnesses. Neither of them testified to any material facts inconsistent with those above stated. They were introduced for a purpose to which we shall presently refer.

At the close of all the testimony the defendant asked the court to instruct the jury "that there is not sufficient evidence to warrant the jury in finding that the plaintiff has received any permanent injuries or impairment of his capacity to earn wages, and that because such serious injuries, if any, are not shown to have followed after the other is not sufficient to warrant the jury in finding that the one is the cause of the other."

The court, in its charge to the jury reviewed the evidence, and said: "It is not claimed the plaintiff had any notice or knowledge of the fact that there was any fire in the place where he received his injury, or that by the exercise of reasonable care and diligence he could have seen or discovered the fire. The law made it the duty of the defendant to fence its slack pit, and if it did not do so, and as a result of its negligence in failing to comply with its legal duty in this regard the plaintiff received the injuries complained of, the defendant is liable. Persons are entitled to the protection which would accrue from a compliance with the statute, and the plaintiff had a right to presume the space between the railroad tracks was not a burning slack pit because it was not fenced. It was the legal duty of the defendant to fence the burning slack, and its omission to do so was negligence.

The defendant being guilty of negligence, your next inquiry will be whether the plaintiff was guilty of any such negligence as will prevent him from recovering, for it is a principle of law that one injured by the negligence of another cannot recover damages for such injury if by his own negligence he contributed to the injury. Upon the undisputed facts of the case it was not an act of negligence for the plaintiff to visit the defendant's coal mine as he did, and he was not a trespasser there in a sense that would excuse the defendant for the acts of negligence by which he was injured, and which I have heretofore adverted to; nor was it an act of negligence for the plaintiff under the circumstances to run away from the miners. A boy may lawfully run to avoid injury or when frightened or in play; and the fact that the plaintiff was running on the occasion of his injury does not constitute negligence on his part. He undoubtedly had a right to run toward the hotel where his mother was stopping. Nor was it negligence in him when he did run not to follow exactly a rough, irregular, and narrow path leading from one railroad track to the other. There was nothing in the surroundings to inform him, or any other person having no previous knowledge of the facts, that he would incur any risk or danger in not keeping in the path in crossing the space between the railroad tracks, and if you find he did not see the fire and could not, with the exercise of reasonable diligence, discover it, and did not know it was there, and that the surface of the pit apparently presented a safe footing and passage, then he was not guilty of any negligence in attempting to run across it. The disputed issue in the case is the question of damages; what damages you shall award; and first, gentlemen, you will compensate the plaintiff for the pain and suffering he endured by reason of the injuries he received on this occasion."

After instructing the jury in respect to the measure of damages, the court said: "The plaintiff's attorney has said to you, gentlemen, that he claimed, and that you ought to award, more than a compensation. He is not content with compensatory damages — that is, the damages you shall find

and award to him for his pain and his suffering, for his expenses, for his loss of time, for the disability that he sustained, if any. He says those are not elements enough, and that, in addition, you should award him damages as a punishment to this defendant for not having complied with the statute. That you cannot do, gentlemen. That claim is not supported by the law. It is, moreover, in the very teeth of the statute of the State under which it is claimed, for that statute in terms says that the persons or the corporation neglecting to fence these slack pits shall be liable to any party injured thereby in the amount of the actual injury sustained, thus in terms cutting off exemplary damages."

The defendant excepted "to the refusal of the court to instruct that there was not sufficient evidence as to the question of serious or permanent injury, and leaving the question of serious impairment to them, and also to the instruction not given, and to the giving of the instruction as to all questions connected with permanent injury, and to the withdrawing the question of negligence of defendant and contributory negligence of the plaintiff from the jury." 35 Fed. Rep. 38.

Before examining the grounds of defendant's exceptions to the action of the court below in giving and refusing instructions, we will consider the general question presented by the case, namely, whether the owner or occupant of premises is liable, under any circumstances, and, if so, under what circumstances, for injuries received by a person while on such premises, and by reason of their dangerous condition.

In *Bennett* v. *Railroad Company*, 102 U. S. 577, 580, it was said that "the owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons — they using due care — for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or those who were likely to act upon such invitation." This rule, the court said, was founded in justice and necessity, and was illustrated by many cases.

In the present case there was no express invitation to the plaintiff to come upon the premises of the railroad company for any purpose. But if the company left its slack pit without a fence around it, or anything to give warning of its really dangerous condition, and knew or had reason to believe that it was in a place where it would attract the interest or curiosity of passers-by, can the plaintiff, a boy of tender years, be regarded as a mere trespasser, for whose safety and protection while on the premises in question, against the unseen danger referred to, the railroad company was under no duty or obligation whatever to make provision?

A leading case upon this subject, cited and approved by this and many other courts, is *Lynch* v. *Nurdin*, 1 Q. B. 29, 35, 36. The facts in that case were these: The defendant's carman went into a house, leaving his horse and cart standing in a street for about half an hour, without any person to take care of them. The plaintiff, a lad about seven years of age, with several other children, were playing with the horse around the cart. During the carman's absence he got upon the cart. Another boy led the horse on while the plaintiff was attempting to get off the shaft. The plaintiff fell and was run over by the wheel, and his leg broken. The court was asked to direct the jury that there was no evidence in support of the plaintiff's case, his own negligence having brought the mischief upon him. This request was refused, and it was left to the jury to say, first, whether it was negligence in the defendant's servant to leave the horse and cart for half an hour in the manner disclosed; and, secondly, whether that negligence occasioned the accident. The case came before the Queen's Bench upon a rule *nisi* for a new trial on the grounds of misdirection, and because the verdict was against the evidence. Lord Denman, Chief Justice, delivering judgment, referred to the contention that the mischief was not produced by the mere negligence of the servant, but, at most, by that negligence in combination with two other active causes, namely, the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart, and so committing a trespass upon the

defendant's chattel. On the former of these causes he deemed it unnecessary to dwell at length, observing: "For if I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." He then referred to the additional fact, appearing in that case, that the plaintiff had no right to enter the cart, and, if he had abstained from doing so, would have escaped injury, and proceeded to inquire whether the plaintiff, being thus a co-operative cause of his own misfortune, was thereby deprived of his remedy. He said: "The legal proposition that one who has by his own negligence contributed to the injury of which he complains cannot maintain his action against another in respect of it, has received some qualifications. Indeed, Lord Ellenborough's doctrine in *Butterfield* v. *Forrester*, 11 East, 60, which has been generally adopted since, would not set up the want of a superior degree of skill or care as a bar to the claim of redress. Ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation; and this would evidently be very small indeed in so young a child. But this case presents more than the want of care: we find in it the positive misconduct of the plaintiff an active instrument towards the effect." After reviewing the adjudged cases, and observing that the question of negligence must depend upon the circumstances of each case, he said that the jury "would naturally inquire whether the horse was vicious or steady; whether the occasion required the servant to be so long absent from his charge, and whether, in that case, no assistance could have been procured to watch the horse; whether the street was at that hour likely to be clear, or thronged with a noisy multitude; especially whether large parties of young children might be reasonably expected to resort to the spot. If this last-mentioned fact were probable, it would be hard to say that a case of gross negligence was not fully established. But the question

remains, can the plaintiff, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is, that supposing that fact ascertained by the jury, but to this extent, that he merely indulged in amusing himself with the empty cart, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting with prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it." Upon these grounds the action was held to be maintainable by the infant.

We have referred quite fully to the case of *Lynch* v. *Nurdin*, because it was cited in *Railroad Co.* v. *Stout*, 17 Wall. 657, 661, in connection with other cases in support of the rule, laid down in that case, that while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such injuries arising from its negligence or from its tortious acts.

In *Railroad Co.* v. *Stout*, the principal question was whether a railroad company was liable for an injury received by an infant, while upon its premises, from idle curiosity, or for purposes of amusement, if such injury was, under the circumstances, attributable to the negligence of the company. The facts in that case were these: The railway company owned and used for its roadbed and depot grounds a tract of unenclosed land, in the town of Blair, Nebraska, upon which the company had its depot house, a quarter of a mile from which was a turn-table belonging to it. The plaintiff, a boy a little over six years of age, together with one or two other boys, went to the company's depot, about a half a mile distant, without any definite purpose in view. Upon arriving there, the boys, at the suggestion of one of them, proceeded to the

turn-table, about a quarter of a mile distant, travelling along the defendant's roadbed or track. When they reached the turn-table, which was not attended or guarded, nor at that time fastened or locked, revolving easily on its axis, two of the boys commenced to turn it. The plaintiff's foot, while he was attempting to get on it, was caught between the end of the rail on the turn-table, as it revolved, and the end of the iron rail on the main track of the defendant's road, whereby it was badly cut and crushed, resulting in a serious and permanent injury. It appeared in evidence by one of the employés of the company that he had previously seen boys playing at the turn-table, but this fact was not communicated to the officers of the company having charge of the turn-table. The plaintiff had never been at the turn-table before.

Judge Dillon, Circuit Judge, in his charge to the jury, after observing that negligence was the omission to do something that a reasonable, prudent man, guided by those considerations that ordinarily regulate the conduct of human affairs, would do, or doing something that a prudent or reasonable man would not do under all the circumstances of the particular transaction under judicial investigation, and that if the turn-table, in the manner it was constructed and left, was not dangerous in its nature, the defendants would not be guilty of any negligence in not locking or guarding it, said: "The machine in question is part of the defendants' road and was lawfully constructed where it was. If the railroad company did not know, and had no good reason to suppose, that children would resort to the turn-table to play, or did not know, or had no good reason to suppose, that if they resorted there they would be likely to get injured thereby, then you cannot find a verdict against them. But if the defendants did know, or had good reason to believe, under the circumstances of the case, that the children of the place would resort to the turn-table to play, and that if they did they would or might be injured, then, if they took no means to keep the children away, and no means to prevent accidents, they would be guilty of negligence, and would be answerable for damages caused to children by such negligence."

That charge was held by this court to be an impartial and intelligent one. And after observing that the jury were at liberty to find for the plaintiff, if from the evidence it could justly be inferred that the railroad company, in the construction, location, management, or condition of the turn-table, had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, Mr. Justice Hunt, delivering the unanimous judgment of this court, said: "That the turn-table was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injure him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury by his foot being caught between the fixed rail of the roadbed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents. So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turn-table upon other occasions, and within the observation and to the knowledge of the employés of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case. As it was, in fact, on this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turn-table when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. This was a heavy catch which, by dropping into a socket, prevented the revolution of the table. There had been one on this table, weighing some eight or ten pounds, but it had been broken off and had not been replaced. It was proved to have been usual with railroad companies to

have upon their turn-tables a latch or bolt, or some similar instrument. The jury may well have believed that if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty would have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given; that it was negligent; and that its negligence caused the injury to the plaintiff."

The principles announced in *Railroad Co.* v. *Stout* have been approved in many adjudged cases. In *Keffe* v. *Milwaukee & St. Paul Railway*, 21 Minnesota, 207, 211, which was also the case of an injury received by a child of tender years, while playing upon an unfastened and unguarded turn-table of a railroad company, the court, overruling a motion based on the pleadings for judgment rendered in favor of defendant, said: "Now, what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years. If the defendant had left this turn-table unfastened *for the purpose* of attracting young children to play upon it, knowing the danger into which it was thus alluring them, it certainly would be no defence to an action by the plaintiff, who had been attracted upon the turn-table and injured, to say that the plaintiff was a trespasser, and that his childish instincts were no excuse for his trespass. . . . It is true that the defendant did not leave the turn-table unfastened *for the purpose* of injuring young children; and if the defendant had no reason to believe that the unfastened turn-table was likely to attract and injure young children, the defendant would not be bound to use care to protect from injury the children that it had no good reason to suppose were in danger. But the complaint stated that the defendant knew that the turn-table, when left unfastened, was easily revolved; that, when so left, it was very attractive, and, when put in motion by them, dangerous to young children; and knew also that many children were in the habit of going upon it to play. The defendant, therefore, knew that by

leaving this turn-table unfastened and unguarded, it was not merely inviting young children to come upon the turn-table, but was holding out an allurement, which, acting upon the natural instincts by which such are controlled, drew them by those instincts into hidden danger." It was held that, under the circumstances, the child was not in fault in following the temptation set before it, and that the company violated its duty in not protecting him against the danger into which the child was thus led.

The Minnesota case is referred to by Judge Cooley in his Treatise on Torts. Alluding to the doctrine of implied invitation to visit the premises of another, he says: "In the case of young children, and other persons not fully *sui juris*, an implied license might sometimes arise when it would not on behalf of others. Thus, leaving a tempting thing for children to play with exposed, where they would be likely to gather for that purpose, may be equivalent to an invitation to them to make use of it; and, perhaps, if one were to throw away upon his premises, near the common way, things tempting to children, the same implication should arise." c. 10, p. 303.

An instructive case upon the general subject is *Powers* v. *Harlow*, 53 Michigan, 507, 514, 515. That was an action by an infant to recover damages for injuries received while he was on the premises of the defendant, a small parcel of which was under lease to the boy's father. The defendant had sometimes used dynamite for removing stumps that obstructed the cultivation of his lands. This dynamite was put up in boxes, in which were smaller boxes, containing exploders. One of these boxes was placed by the defendant's servant in a temporary shed on his farm. There was no enclosure about the shed. The word "powder" was written on the box, but neither the plaintiff nor his father could read, nor had either been told that anything dangerous was stored there. The shed was distant from any public highway, but of the several parcels of land leased by the defendant, the one leased by the plaintiff's father was nearest to the shed, (within ten rods or less,) and to the farm road used by the defendant's lessees in reaching the parcels respectively cultivated by them.

According to the facts the lessor had not restricted the lessee to any particular route in reaching the part leased by him. The tenant was within the limits of his right if he did not depart altogether from the direct line between the end of the farm road and the lot which had been leased to him. The defendant's superintendent went to the box in the shed for dynamite and exploders as he had occasion to use them. The evidence also tended to show that the handling of the exploders by persons who were ignorant of their nature, or were careless, or under circumstances rendering them liable to accidental concussion, would be extremely hazardous.

The Supreme Court of Michigan, speaking by Chief Justice Cooley, said: "Under the circumstances disclosed in this case the invitation to the tenant to come upon the land was an invitation which embraced his family also. The tenant was a laboring man, apparently of small means; and it is customary for such men to be assisted in their manual labor by the members of their families; and the defendant must have understood that the persons who rented of him these small patches of land would be likely to avail themselves of the services of their children in cultivating them." Again, in the same case: "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken. . . . A man of ordinary prudence, if told that so dangerous an article was so carelessly stored, might well have deemed the statement incredible. We cannot under these circumstances say that the plaintiff's father was chargeable with fault in not suspecting danger and warning his children away from it, or that the child himself was blameworthy in acting upon the childish instincts and propensities which combined with the negligence of defendant's servant to bring the danger upon him." To the same general

effect are many other cases, some of which, for convenience of reference, are given in the margin.[1] In nearly all of those cases that of *Lynch* v. *Nurdin* is cited with approval.

It has been sometimes said that the case of *Lynch* v. *Nurdin* was overruled by *Mangan* v. *Atterton*, L. R. 1 Ex. 239; *S. C.* 4 H. & C. 388. But, in reference to the latter case, Lord Chief Justice Cockburn, with whom concurred Manisty, J., said in *Clark* v. *Chambers*, 3 Q. B. D. 327, 338 (1878): "The defendant had there exposed in a public market place a machine for crushing oil cake without its being thrown out of gear or the handle being fastened, or any person having the care of it. The plaintiff, a boy of four years of age, returning from school with his brother, a boy of seven, and some other boys stopped at the machine. One of the boys began to turn the handle. The plaintiff, at the suggestion of his brother, placed his hand on the cogs of the wheels, and the machine being set in motion, three of his fingers were crushed. It was held by the Court of Exchequer that the defendant was not liable, first, because there was no negligence on the part of the defendant, or, if there was negligence, it was too remote; and, secondly, because the injury was caused by the act of the boy who turned the handle and of the plaintiff himself, who was a trespasser. With the latter ground of the decision we have in the present case nothing to do; otherwise we should have to consider whether it should prevail against the cases cited, with which it is

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[1] *Robinson* v. *Cone*, 22 Vermont, 213; *Daley* v. *Norwich & Worcester Railroad*, 26 Connecticut, 591; *Rauch* v. *Lloyd*, 31 Penn. St. 358; *Gillis* v. *Pennsylvania Railroad*, 59 Penn. St. 129, 142; *Hydraulic Works* v. *Orr*, 83 Penn. St. 332, 335; *Norfolk & Petersburg Railroad* v. *Ormsby*, 27 Gratt. 455, 476; *Morrison* v. *Cornelius*, 63 N. C. 346, 349; *Morgan* v. *Cox*, 22 Missouri, 373, 378; *Borland* v. *Missouri Railroad*, 36 Missouri, 484, 490; *Walsh* v. *Miss. Valley Transp. Co.*, 52 Missouri, 434, 439; *Macon & Western Railroad* v. *Davis*, 18 Georgia, 679, 686; *Government Street Railroad* v. *Hanlon*, 53 Alabama, 70, 79; *Fraler* v. *Sears Union Water Co.*, 12 California, 555, 559; *Richmond* v. *Sacramento Valley Railroad*, 18 California, 351, 356; *Bellefontaine & Indiana Railroad* v. *Snyder*, 18 Ohio St. 399, 410; *Morris* v. *Litchfield*, 35 N. H. 271, 278; *Weick* v. *Lander*, 75 Illinois, 93, 97; *Central Railroad Co.* v. *Moore*, 4 Zabr. (24 N. J. Law) 824.

obviously in conflict. If the decision as to negligence is in conflict with our judgment in this case, we can only say we do not acquiesce in it. It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so, because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion."

We adhere to the principles announced in *Railroad Co.* v. *Stout*, *supra*. Applied to the case now before us, they require us to hold that the defendant was guilty of negligence in leaving unguarded the slack pile, made by it in the vicinity of its depot building. It could have forbidden all persons from coming to its coal mine for purposes merely of curiosity and pleasure. But it did not do so. On the contrary, it permitted all, without regard to age, to visit its mine, and witness its operation. It knew that the usual approach to the mine was by a narrow path skirting its slack pit, close to its depot building, at which the people of the village, old and young, would often assemble. It knew that children were in the habit of frequenting that locality and playing around the shaft-house in the immediate vicinity of the slack pit. The slightest regard for the safety of these children would have suggested that they were in danger from being so near a pit, beneath the surface of which was concealed (except when snow, wind, or rain prevailed) a mass of burning coals into which a child might accidentally fall and be burned to death. Under all the circumstances, the railroad company ought not to be heard to say that the plaintiff, a mere lad, moved by curiosity to see the mine, in the vicinity of the slack pit, was a trespasser, to whom it owed no duty, or for whose protection it was under no obligation to make provision.

In *Townsend* v. *Wathen*, 9 East. 277, 281, it was held that

if a man place dangerous traps, baited with flesh, in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept in his neighbor's premises, would probably be attracted by their instinct into the traps, and in consequence of such act his neighbor's dogs be so attracted and thereby injured, an action on the case would lie. "What difference," said Lord Ellenborough, C. J., "is there in reason between drawing the animal into the trap by means of his instinct which he cannot resist, and putting him there by manual force?" What difference, in reason we may observe in this case, is there between an express license to the children of this village to visit the defendant's coal mine, in the vicinity of its slack pile, and an implied license, resulting from the habit of the defendant to permit them, without objection or warning, to do so at will, for purposes of curiosity or pleasure? Referring to the case of *Townsend* v. *Wathen*, Judge Thompson, in his work on the Law of Negligence, Vol. I, p. 305 n., well says: "It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life." Indeed, the present case is stronger than the one supposed by the writer, in that the defendant was aware of the fact that children often visited its mine.

The evidence of the two witnesses, introduced by the defendant, that a boy was warned off the coal shaft on the morning of the day when plaintiff fell into the slack pit, had no reference to the plaintiff. The boy to whom they referred was one who was at the shaft-house in the forenoon. The plaintiff did not go there until the afternoon. Both of these witnesses saw the plaintiff, at the time of the trial, and were unable to identify him as the boy to whom the warning

was given. But if this warning was given to the plaintiff, it had reference only to the danger of his being on the platform of the shaft-house, and not to any danger of his being near that house or the vicinity of the coal mine.

Nor is there any force in the suggestion that the plaintiff was negligent in falling into the burning slack. The conduct of the persons who came out of the coal pit, with lamps upon their heads and with dirty faces, yelling "Let's grease him," "Let's burn him," frightened the lad, and caused him to run in the direction of the town where his mother was staying. He ran towards the only path that was open to him, and made such efforts as he could to escape those who threatened to harm him. His falling into the slack heap was accidental, and in no proper or just sense the result of negligence. The question of negligence upon the part of an infant must be determined with reference to his age and to the situation in which, at the time of the injury, the circumstances placed him. The authorities cited — indeed, all the adjudged cases — agree, as declared by the Court of Appeals of New York, that in applying the rule that a person who seeks to recover for a personal injury, sustained by another's negligence, must not himself be guilty of negligence that substantially contributed to the result, the law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care to be reasonably expected in view of his age and condition. *Reynolds* v. *N. Y. Central &c. Railroad*, 58 N. Y. 248, 252. And so, as declared by the same court, persons in sudden emergencies, and called to act under peculiar circumstances, are not held to the exercise of the same degree of caution as in other cases. *Thurber* v. *Harlem Bridge &c. Railroad*, 60 N. Y. 326, 336. Even in the case of an employé of a railroad company, claiming to have been injured as the result of the company's negligence, this court has said that in determining whether he has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might be reasonably expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion.

Kane v. *Northern Central Railroad Company*, 128 U. S. 91, 95. Where human life or personal safety is involved, and the issue is one of negligence, the law will not lightly impute negligence to an effort, made in good faith, to preserve the one or to secure the other, unless the circumstances, under which that effort was made, show recklessness or rashness.

Equally without merit is the suggestion that the mother was negligent in permitting the plaintiff to visit the coal mine. There was, in fact, very little danger, under ordinary circumstances, in visiting the mine, except that which came from its contiguity to the burning slack pile. But of the existence of that concealed danger both the plaintiff and his mother were ignorant. If the negligence of a parent can be imputed to the child so as to prevent the latter from maintaining an action for personal injuries received by him from others, — upon which question we express no opinion, — it is sufficient to say that negligence cannot be attributed to the plaintiff's mother because of her consenting that her son might visit the coal mine in company with one of the trapper boys of the village, who was, presumably, capable of caring for him while away from the mother.

At the close of the charge by the court there was a general exception to the withdrawal from the jury of the questions of the defendant's negligence and the plaintiff's contributory negligence.

The court correctly said that there was no controversy about the leading facts of the case, and that the defendant was guilty of negligence. As the facts were undisputed, the question of liability upon the ground of negligence was one of law, and as the facts showed negligence by the railroad company, which was the primary, substantial cause of the injury complained of, it was not error in the court to so declare.

The only question that could arise upon this part of the case is whether the court should have instructed the jury — as, in effect, it did — that the failure of the company to put a fence around the slack pit, as required by the statute of Colorado, was negligence, of which the plaintiff could com-

plain in this action for personal injuries sustained by him. Primarily, that statute was intended for the protection of cattle and horses. But it was not, for that reason, wholly inapplicable to the present case upon the issue as to negligence. In *Hayes* v. *Michigan Central Railroad*, 111 U. S. 228, 240, which was an action by an infant for personal injuries sustained by the alleged negligence of a railroad company in not properly guarding its line within the limits of the city of Chicago, this court, speaking by Mr. Justice Matthews, said: "In the analogous case of fences required by the statute, as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery." The non-performance by the railroad company of the duty imposed by statute, of putting a fence around its slack pit, was a breach of its duty to the public, and, therefore, evidence of negligence, for which it was liable in this case, if the injuries in question were, in a substantial sense, the result of such violation of duty.

Nor did the court err in saying to the jury that the disputed issue was the question of damages. Looking at all the facts, there was an entire absence of any just ground for imputing contributory negligence to the plaintiff. If the jury had so found, the court could properly have set aside the verdict as being against the evidence. Upon the question of negligence, the case is within the rule that the court may withdraw a case from the jury, altogether, and "direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial

discretion, would be compelled to set aside a verdict returned in opposition to it." *Delaware, Lackawanna &c. Railroad* v. *Converse*, 139 U. S. 469, 472, and authorities there cited; *Elliott* v. *Chicago, Milwaukee & St. Paul Railway*, 150 U. S. 245; *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, 241.

Judgment affirmed.

UNITED STATES *v.* NORTHERN PACIFIC RAILROAD COMPANY.

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

No. 135. Argued December 14, 1893. — Decided March 5, 1894.

Congress contemplated by the act of July 2, 1864, 13 Stat. 365, "granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific coast, by the northern route" the construction of a main trunk line, which would not touch at any point at or near Portland, and the western end of which would be east and northeast of a direct line between Portland and Puget's Sound; and also of a branch line leaving the main trunk line at some suitable place, not more than three hundred miles from its western terminus, and extending, *via* the valley of the Columbia River, to a point at or near Portland.

As to Portland, the purpose of Congress by the passage of that act was, to connect it with the east by a branch road through the valley of the Columbia that would strike a main trunk line connecting Puget's Sound with Lake Superior, and not to connect Portland with Puget's Sound by the most eligible route between those places.

The grant to the Oregon Central Railroad Company by the act of May 4, 1870, c. 69, 13 Stat. 94, had taken effect before the grant to the Northern Pacific Railroad Company by the joint resolution of May 31, 1870, 16 Stat. 378, was made, and consequently the lands in question in this case were not included in that grant to the Northern Pacific Railroad Company.

When the lands so granted to the Oregon Central Railroad Company were forfeited to the United States, they were thereby restored to the public domain, and did not pass to the Northern Pacific Company by the said grant of May 31, 1870.

THE case is stated in the opinion.

Mr. Solicitor General for plaintiffs in error.

Mr. James McNaught, (with whom was *Mr. Fred. M. Dudley* on the brief,) for defendants in error.

Mr. Justice Harlan delivered the opinion of the court.

This writ of error brings up for review a judgment in favor of the defendants in error in an action brought by the United States to recover the value of certain lumber manufactured from logs alleged to have been unlawfully cut and removed by them, in the year 1886, from the public lands, namely, from the northwest quarter of section seven, township eight north, range five west of the Willamette meridian, in the then Territory of Washington. It was adjudged below, upon a special finding of facts, that, at the time of the alleged wrong, the title to these lands had passed from the United States, and that the defendant, Aaron Kinney, was then the owner of them. 41 Fed. Rep. 842. If the title had so passed, the judgment must be affirmed; otherwise, reversed.

From the special finding, based upon a written stipulation between the parties, the case is as follows:

By an act of Congress, of July 2, 1864, the Northern Pacific Railroad Company was incorporated, with authority to construct and to maintain a continuous railroad and telegraph line, "beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound, with a *branch via the valley of the Columbia River, to a point at or near Portland*, in the State of Oregon, *leaving the main trunk line* at the most suitable place, not more than three hundred miles from its western terminus." The same act granted to the company every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections of land per mile, on each side of its line, as the company should adopt, through the territories of the United

States, and the alternate sections per mile where the road passes through any State, "and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption, or other claim or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." By the sixth section it is provided that "the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preëmption before or after they are surveyed, except by said company, as provided in this act." 13 Stat. 365, c. 217, §§ 1, 3, 6.

On the 6th day of March, 1865, Josiah Perham, president of the Northern Pacific Railroad Company, addressed to the Secretary of the Interior a communication in these words: "Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map, in red ink, the general line of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound in Washington Territory, *via* Columbia River, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys; and I respectfully ask that the same may be filed in the office of the Commissioner of the General Land Office, together with a copy of the charter and organization of said company, and that under your directions the lands granted to said company may be marked and withdrawn from sale in conformity to law."

The route indicated by the map was entirely north of the 45th degree of north latitude, and within the territory of the United States, but no action was taken by the Secretary of the Interior in respect to that map or the request contained in the communication of Mr. Perham.

By a joint resolution of Congress, approved April 10, 1869, it was provided that "the Northern Pacific Railroad Company be, and hereby is, authorized *to extend* its *branch* line from a point *at or near Portland*, Oregon, to some suitable point on Puget Sound, to be determined by said company, and also to connect the same with its *main* line *west of the Cascade Mountains* in the Territory of Washington; said extension being subject to all the conditions and provisions, and said company in respect thereto being entitled to all the rights and privileges conferred by the act incorporating said company, and all acts additional to and amendatory thereof: *Provided*, That said company shall not be entitled to any subsidy in money, bonds, or additional lands of the United States in respect to said *extension* of its *branch* line as aforesaid, *except such lands* as may be included *in the right of way* on the line of such extension as it may be located: *And provided further*, That at least twenty-five miles of said extension shall be constructed before the second day of July, eighteen hundred and seventy-one, and forty miles per year thereafter, until the whole of said extension shall be completed." 16 Stat. 57.

On the 4th day of May, 1870, Congress, for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and a suitable point of junction near Forest Grove to the Yamhill River near McMinnville, in the State of Oregon, granted to the "Oregon Central Railroad Company, a corporation of Oregon, then engaged in constructing said road, and to their successors and assigns, a right of way, etc.; . . . and, also, each alternate section of the public lands, not mineral, except coal or iron lands, designated by odd numbers, nearest to said road, to the amount of ten such alternate sections per mile on each side thereof, not otherwise disposed of or reserved or held by valid preëmption or homestead right at the time of the passage of this act.

And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up said deficiency." That act further provided: "That the Commissioner of the General Land Office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed. And whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands." The company was required to file within one year after its passage, and with the Secretary of the Interior, its assent to the act; and it was made a condition of the grant that a section of twenty or more miles of the proposed railroad and telegraph line be constructed within two years, and the entire road and telegraph line within six years from the same date. 16 Stat. 94, c. 69.

The Oregon Central Railroad Company filed with the Secretary of the Interior its acceptance of the above grant — on what day the findings of fact do not state — and on the 31st of January, 1872, filed its map of definite location of a proposed line of road from Astoria to Castor Creek, near Forest Grove. It is stated in the findings of fact that the only provision in the charter of the Oregon Central Railroad Company, at the time of the above grant to it, conferring power or right to locate and construct a railroad, was that contained in the following clause: "The object and business of the corporation shall be to construct and operate a railroad from the city of Portland through the Willamette Valley to the southern boundary of the State, under the laws of Oregon

and the law of Congress recently passed granting lands in aid of such purpose."

On the 31st day of May, 1870, twenty-seven days *after* the date of the above grant to the Oregon Central Railroad Company, Congress passed a joint resolution providing: "That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; . . . and also *to locate* and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its *main* road to some point on Puget Sound *via* the valley of the Columbia River, with the right to locate and construct its *branch* from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preëmpted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, Anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points." 16 Stat. 378.

The Northern Pacific Railroad Company filed with the Secretary of the Interior and the Commissioner of the General Land Office on the 13th day of August, 1870, another map, showing the general route of its main line from a point on Puget Sound, following almost identically the same route as that indicated on the map filed by it on the 6th day of March, 1865; and on the day of the filing of the last map, to wit, August 13, 1870, twenty sections of land per mile on each side of the line indicated on it were withdrawn from sale for the benefit of the company. And on the 13th day of September, 1873, the company duly filed its map of definite location of the line of its road from Kalama to Tenino, in Washington Territory, a distance of sixty-five miles. No road has been constructed by that company down the Columbia River. But during the years 1871, 1872, and 1873 it constructed its line from Kalama, on the Columbia River in Washington Territory, in a northerly direction to Tenino, forming a portion of a direct line of road since that time extended and completed to Puget Sound at Tacoma, the western terminus of the Northern Pacific Railroad. The road from Tacoma to Portland runs for about one-half the distance up the valley of Columbia River to the last-named point, the entire length of that line being 105 miles.

During the years 1872 to 1880 a line of road was constructed by the Oregon Central Railroad from Portland southward through the Willamette Valley towards the southern boundary of the State to Corvallis in that valley, a distance of about ninety-seven miles, which road, so constructed, passed through McMinnville and near Forest Grove. But no line was ever constructed by that company from a point of junction near Forest Grove to the Yamhill River or elsewhere.

The land from which the logs in question were cut lies north of the 45th degree of latitude within twenty miles of the line indicated upon the map filed, January 31, 1872, by the Oregon Central Railroad Company with the Secretary of the Interior; is within forty miles of the line selected by the Northern Pacific Railroad Company for the main line of its

road from Lake Superior to Puget Sound by way of the valley of the Columbia River, as indicated upon the map forwarded to the Secretary of the Interior by that company on the 6th of March, 1865, as well as of the line selected by it, after the passage of the joint resolution of May 31, 1870, as the main line of its road down the Columbia River to Puget Sound, as indicated upon the map filed with the Secretary of the Interior on the 13th day of August, 1870; and is within the same distance of the line of road as constructed from Kalama to Tenino.

Congress, by an act approved January 31, 1885, forfeited to the United States, and restored to the public domain, so much of the lands granted to the Oregon Central Railroad Company by the act of May 4, 1870, as were adjacent to and coterminous with the uncompleted portions of that company's road and not embraced within the limits of the grant to that company for the completed portions. 23 Stat. 296, c. 46, § 1.

The lands in question (and other tracts) were listed by the Northern Pacific Railroad Company on March 31, 1885, but the General Land Office, November 9, 1885, rejected the listing. Upon appeal to the Department of the Interior that action was confirmed October 29, 1887. 6 L. Dec. 292.

After the withdrawal of the above lands in the interest of the Northern Pacific Railroad Company, in August, 1870, and up to November 9, 1885, the Land Office and the Department of the Interior refused all applications for settlement upon lands north of the Columbia River within the limits of the grant to that company.

The Northern Pacific Railroad had located, constructed, and was operating its road from Portland to Tacoma at the time it executed a deed for this land to J. B. Montgomery, the "grantee" of the defendant Aaron Kinney.

The general conclusion of law from the above facts was declared by the Circuit Court to be that upon the filing its map of general location, and the subsequent completion by the Northern Pacific Railroad Company of its road, the title to the land in question vested indefeasibly in that corpora-

tion, and by subsequent conveyances passed to the defendant Kinney.

The first and principal question is, whether the act of July 2, 1864, contained a grant of lands in aid of the construction by the Northern Pacific Railroad Company of a railroad and telegraphic line *from Portland* to Puget Sound?

Although that act allowed the company to adopt the most eligible route, within the territory of the United States, north of the forty-fifth degree of latitude, it is clear that Congress contemplated the construction of a main trunk line between Lake Superior and Puget Sound, which would not touch any point "at or near Portland," and the western end of which would be east and northeast of a direct line between Portland and Puget Sound, and, in addition, a branch line leaving the main trunk line, at some suitable place, not more than three hundred miles from its western terminus, and extending "*via* the valley of the Columbia River to a point at or near Portland." If the main line, as originally indicated by the act of 1864, had been established on the route between Portland and Puget Sound, the branch line could not have left the main line at some point not more than three hundred miles from its western terminus, and extended *via* the valley of Columbia River to a point at or near Portland. The authority given to the company to adopt the most eligible route did not authorize it, by a map of general route, to cover an unlimited extent of country, north of the forty-fifth degree of latitude. On the contrary, as said in *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1, 13, "when the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant." It may be that the indefiniteness of the map of general route presented by the Northern Pacific Railroad Company in 1865 constituted the reason why that map was not accepted

by the Interior Department. Besides, it is not found as a fact in this case that the most eligible railroad route for the main line, between Lake Superior and Puget Sound, looking at the purpose of Congress in making the grant of 1864, was down the Columbia River and *via* some point at or near Portland. It is clear that the purpose of Congress, by the act of 1864, was not to connect Portland with Puget Sound, by a road established upon the most direct or eligible route between those places; but, so far as Portland and its vicinity were concerned, to connect them with the east by a branch road, through the valley of the Columbia River, that would strike the main trunk line connecting Puget Sound and Lake Superior. There was no purpose, *by that act*, to make a grant of lands for a road to be located and constructed from a point "at or near Portland" to Puget Sound.

This interpretation of the act of 1864 is supported by the joint resolution of April 10, 1869, authorizing the Northern Pacific Railroad *to extend* "its *branch* line from a point *at or near Portland, Oregon, to some suitable point on Puget Sound*," and "also to connect the same with its main line *west of the Cascade Mountains, in the Territory of Washington.*" By the same resolution it was expressly declared that the company should not be entitled to any subsidy in money, bonds, or additional lands of the United States, in respect to that extension of its branch line, except such lands as might be included *in the right of way* on the line of such extension. It is said that the company did not take action under this resolution, and did not accept it in any form. Be this as it may, — upon this point the finding of facts being silent, — the resolution of 1869 shows that Congress, at that time, to the knowledge, it must be presumed, of the railroad company, interpreted the act of 1864 as not containing a grant of lands to aid in the construction of a road from Portland to Puget Sound.

Coming next to the joint resolution of May 31, 1870, which was accepted and acted upon by the company, we find, in connection with authority to issue bonds in aid of the construction and equipment of its road, to be secured by mort-

gage, that express authority was given, for the first time, to the Northern Pacific Railroad Company "to locate and construct under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its *main* road to some point on Puget Sound, *via* the valley of the Columbia River, with the right to locate its *branch* from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound." Again, in the same resolution: "And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by January 1, 1872, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points." Undoubtedly, this resolution gave authority to locate and construct a main road *via* the Columbia River Valley to Puget Sound. A road so located and constructed would, or might, have passed the city of Portland. But if, as the company now insists, the act of 1864 gave ample authority to locate and construct a road extending from Lake Superior to Puget Sound, along the valley of the Columbia River, *and by the way of Portland or its vicinity*, the resolution of 1870 was entirely unnecessary in so far as it gave authority to the company to locate and construct its road through the Columbia River Valley to some point on Puget Sound. We cannot agree that this resolution is to be held, in this respect, as simply a recognition by Congress of an existing right, in the company, to locate and construct a road from Portland to Puget Sound, with the right to obtain lands, in aid thereof, as provided in the act of 1864. On the contrary, it should be regarded as giving a subsidy of lands in aid of the construction of a *new* road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound.

This view is supported by the action of the Interior Department in the case of the *Northern Pacific Railroad Co.* v. *Mc Rae*, 6 L. Dec. 400. The question there was, whether the company had a grant of lands for its road *from Portland* to Puget Sound. The Commissioner of the Land Office held that the company had no grant for that portion of its road

from or near Portland to Puget Sound. Upon appeal by the company to the Secretary of the Interior, that ruling was reversed. Mr. Justice Lamar, then Secretary of the Interior, after referring to the act of 1864, and to the joint resolution of May 31, 1870, well said: "By this resolution the designation of the lines of the road were changed; that which by the granting act was known as the branch line (*via* the valley of the Columbia River to a point at or near Portland in the State of Oregon) was changed to main road, or main line, and that which had been designated as main line (across the Cascade Mountains to Puget Sound) was changed to branch line. So, by the joint resolution of 1870 the company was authorized to locate and construct its main line *via* the valley of the Columbia River, through some point at or near Portland, Oregon, to a suitable point on Puget Sound, with the privileges, grants, and duties provided for in its act of incorporation. Now, the grant provided for in its act of incorporation is every alternate section of public land not mineral, (except coal and iron,) designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad whenever it passes through any State. I am clearly of opinion that by the joint resolution of May 31, 1870, Congress intended that the grant of twenty sections per mile on each side of the road to aid in the construction of said road should be extended to the whole line of the road including that part of the main line *via* the valley of the Columbia River through Portland to Puget Sound. This conclusion, based alone upon the language of the joint resolution, would be confirmed, if confirmation were necessary, by the debates in Congress upon said resolution while it was pending, and make clear the manifest purpose of said resolution."

It cannot be inferred from the opinion of Mr. Justice Lamar[1] that the company, in the case before him, contended

[1] The part of the opinion of Mr. Justice Lamar which refers, in detail, to the debates in Congress on the resolution of May 31, 1870, is as follows:

"In the course of the debate Senator Howard said: 'It asks no more at the hands of Congress, as I said before, than what is promised to them in their original charter of 1864 — not a single acre, I repeat, with the excep-

that it had a grant of land for any line, whether main or branch, between Portland and Puget Sound, except that made by the joint resolution of May 31, 1870.

But does the grant contained in the resolution of 1870 embrace the particular land in dispute? The act of 1864 granted to the Northern Pacific Railroad Company only public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption or other claims or rights at the time its line of road was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office. And by the resolution of 1870 it was declared that if at the time of the final

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tion of the *new* donations upon the line *from Portland to Puget Sound*, which is authorized by this resolution. That line from Portland to Puget Sound *was not embraced in the original charter*. It was authorized and the right of way given to this company at the last session of Congress, (joint resolution of April 10, 1869,) but simply the right of way and no lands to enable the company to build it. On that line, and on that alone, are lands required additional to those contemplated in the original charter.' Cong. Globe, 41st Congress, 2d Sess. p. 2546. As reported from the committee, the resolution contained this language: 'Under the provisions and with the privileges and duties provided for in its act of incorporation and amendment thereto.' During the debate in the Senate, Mr. Howard said: 'I now move to strike out in the fifteenth line the words, "and the amendments thereto," so as to make it sure that this *new* line, which is to pass *from Portland to Puget Sound*, will be entitled to the subsidy in lands; otherwise it might leave it very uncertain.' The amendment was agreed to. (Page 2583.) Subsequently, Senator Howard moved to amend the sentence, 'under the provisions and with the privileges and duties provided for in its act of incorporation,' by inserting after the word 'privileges' the word 'grants,' saying, 'so as to remove any ambiguity that might arise.'

"In the House, in reply to the question, How much additional land will be granted should this bill become a law? Mr. Wheeler said: 'That depends upon the fact whether the lines will be longer than the original ones. This can only be determined by actual survey. If more land is taken, it will be only for the additional distance and for the quantity per mile granted by the charter.' (Page 3263.) Mr. Wilson said: 'This is no increase of land over that which has already been given to this road. It only gives them additional land for an additional piece of road, which they now propose to construct from Portland up to Puget Sound. The old grant is not increased one acre.' (Page 3266.) I am clearly of the opinion that the Northern Pacific Railroad Company has a grant of lands from Portland to Puget Sound, (Tacoma,) and your decision is, therefore, reversed."

location of the company's main line or branch there were not enough lands per mile within the prescribed limits, the deficiency could be supplied from lands, within ten miles beyond those limits, other than mineral and other lands, as excepted in the charter of the company, "to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preëmpted, or otherwise disposed of subsequent to the passage of the act of July 2, 1864." It is, therefore, clear that no public land disposed of after the passage of the act of July 2, 1864, was intended to be embraced in the grant of May 31, 1870.

The lands here in question were disposed of by the United States after the passage of the act of 1864, and before the

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In addition to what appears in the opinion of Mr. Justice Lamar, it may also be stated that Senator Stewart of Nevada, in supporting the resolution, said: "There is no grant additional to that contained in the original law, *except in the extension of the road on the western end from Portland to Puget Sound.*" 41st Cong. 2d Sess. Pt. 3, p. 2543. Senator Sherman: "The first part of this bill gives the company authority to make a mortgage, . . . and it also provides for a *new* land grant *from Portland to Puget Sound.*" In answer to inquiries by Senator Thurman, Senator Howard, having the resolution in charge, stated that its passage was earnestly desired by the Northern Pacific Railroad Company. Senator Thurman inquired whether, if the proposed resolution passed, "the main line must diverge down the Columbia River at the same point at which the branch would diverge under the original charter?" To this Senator Howard replied: "I think that would be the construction to be given to the two acts together, the charter and the present resolution." He then said: "I now move to strike out, in the fifteenth line, the words *and amendments thereto*, so as to make it sure that this *new* line, which is to pass *from Portland to Puget Sound, will be entitled to the subsidy in lands.*" This motion was adopted. Ib. p. 2546. In the House of Representatives, Mr. Wheeler, Chairman of the Committee on Railroads, from which the resolution was reported, said, in explanation of its provisions: "Second. The company wants to change the route of the main line and branch as defined by the original act of incorporation. It wants *now* to build its *main line by the way of the valley of the Columbia River instead of over the Cascade Mountains, as intended at the outset.* . . . The route by the valley of the Columbia River is far the more feasible, and can be built in much shorter time and with the means which this bill will enable the company to command. This change takes the road direct to Portland, thus giving it business when it is completed to that point, and enabling it to use the river for the transportation of materials during the progress of construction." 41st Cong. 1st Sess. Pt. 4, p. 3263.

passage of the joint resolution of May 31, 1870; for they are within twenty miles of the line of the Oregon Central Railroad Company, as shown on its map of definite location, filed January 31, 1872, and based upon the grant to it of May 4, 1870. It is true that the Northern Pacific Railroad Company, on the 13th day of August, 1870, acting under the joint resolution of May 31, 1870, filed a map of the general route of its main line from a point on Puget Sound; that, on the same day, twenty sections per mile on each side of the line indicated on it were withdrawn from sale for the benefit of the company; and that this was followed by a map, filed September 13, 1873, of the definite location of its line from Kalama to Tenino. But it is well settled that, in respect to the public lands, within, at least, common granted or primary limits, priority of grant, not priority of location, determines the question of ownership, as between parties claiming the same lands under different grants. *Missouri, Kansas and Texas Railway* v. *Kansas Pacific Railway*, 97 U. S. 491; *United States* v. *Missouri &c. Railway*, 141 U. S. 358, 369; *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, 598, 606.

So that the rights of the Oregon Central Railroad Company, whose grant preceded that to the Northern Pacific Railroad Company of May 31, 1870, by nearly one month, attached, as of the date of its grant, although the latter company filed a map of general route before the former filed a map of definite location. The lands in question had been disposed of by the United States prior to the passage of the joint resolution of May 31, 1870, namely, by the act of May 4, 1870, granting lands to the Oregon Central Railroad Company in aid of the construction of its road. And as they were embraced by the latter grant, and were not included in any other grant then existing, they were not public lands within the meaning of the grant of May 31, 1870, to the Northern Pacific Railroad Company, and were, consequently, excepted out of that grant as having been previously disposed of by the United States.

When, therefore, Congress by the act of 1885, forfeited to the United States and restored to the public domain so much

of the lands granted by the act of May 4, 1870, for the benefit of the Oregon Central Railroad Company, as were adjacent to and coterminous with the uncompleted portions of the road, the United States was reinvested with the title for its own benefit exclusively. And the title did not pass to the Northern Pacific Railroad Company by reason of the failure of the Oregon Central Railroad Company to construct its road, or because of the subsequent forfeiture of the latter's rights by the act of 1885. The restoration to the public domain of the lands so forfeited took from the Northern Pacific Railroad Company no lands granted to it by the act of 1870. In *United States* v. *Southern Pacific Railroad Co.*, 146 U. S. 570, 606, in which one of the questions was as to the right of the Southern Pacific Railroad Company to appropriate lands that had been previously granted to the Atlantic and Pacific Railroad Company, but which lands were forfeited by Congress, after the date of the grant to, and the filing of the map of definite location by, the former company, this court said: "So when intent is to be considered, the question is whether Congress intended, the title having once vested in the Atlantic and Pacific, that the Southern Pacific Company should stand waiting to take the lands at some future time, however distant, when the Atlantic and Pacific Company's title should fail. Again, there can be no question, under the authorities heretofore cited, that if the act of forfeiture had not been passed by Congress, the Atlantic and Pacific could yet construct its road, and that, constructing it, its title to these lands would become perfect. No power but that of Congress could interfere with this right of the Atlantic and Pacific. No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they be restored to the public domain. The forfeiture was not for the benefit of the Southern Pacific; it was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant; and now, finding that the Atlantic and Pacific was guilty of a breach of a con-

dition subsequent, it elected to enforce a forfeiture for that breach and a forfeiture for its own benefit."

One other point pressed by the defendant deserves notice. It is that the Oregon Central Railroad Company was without power under its charter to construct a railroad from Portland to Astoria, and, therefore, could not obtain the benefit of the grant made by Congress of the lands in dispute. That corporation is not here seeking the aid of the court to invest it with title to real estate it could not legally acquire for the purposes of its charter. If it were, it might be the duty of this court to inquire as to its right, under the laws that created it, to take and hold such title. *Case* v. *Kelly*, 133 U. S. 21. The question is whether Congress embraced these lands in its grant to that company of May 4, 1870. If it did, then the title passed to it from the United States, subject to be defeated by breach of condition subsequent and subject, it may be, to any proceeding the State of Oregon might institute to compel a corporation created by its laws to keep within the limits of the powers granted to it. Whether the Oregon Central Railroad Company could, under its charter, take title to those lands was and is a matter that concerned only that corporation and the State of Oregon. It is sufficient, for this case, to say that the lands here in dispute were not included in the grant of 1864 or in that of May 31, 1870, to the Northern Pacific Railroad Company. If, as we hold, Congress did not intend to include them in the latter grant, and even if we should also hold that the Oregon Central Railroad Company was incompetent, under its charter, to take title to them, the lands, never having been granted prior to May 4, 1870, to any corporation, would not, contrary to the intention of Congress, have fallen under the grant of May 31, 1870, to the Northern Pacific Railroad Company, but would have remained part of the public domain.

It results that the court below erred, and that judgment should have been rendered for the United States.

The decree is reversed, and the cause remanded with directions to enter judgment for the United States, upon the special finding of facts.

KEOKUK AND WESTERN RAILROAD COMPANY *v.* MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 182. Argued December 21, 22, 1893. — Decided March 12, 1894.

A railroad corporation, chartered in Missouri in 1857, with a provision that its property should be exempt from taxation for a period of twenty years after its completion, which took place in 1872, was consolidated with an Iowa corporation in 1870, under a general law of Missouri, and in 1886 the consolidated road was sold under a decree of foreclosure of a mortgage to purchasers who conveyed it to an Iowa corporation. *Held*, that the new organization held the Missouri road subject to the provision in the constitution of Missouri adopted in 1865, that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to counties, or to municipal corporations within this State."

The consolidation of the Missouri corporation, under the Missouri act of March 2, 1869, with an Iowa corporation, operated to extinguish the old company, and to form a new one as of the date of the consolidation, and the provisions concerning exemption from taxation in the old charter did not pass to the new company.

A mortgagee is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the mortgage, unless he or his representative is a party to the litigation.

A suit for taxes for one year is no bar to a suit for taxes for another year.

In order to work an estoppel, the operation of it must be mutual.

This was an action at law brought in the Circuit Court of Missouri for the county of Scotland, by the State, suing for the use of the collector of revenue for Scotland County, against the Keokuk and Western Railroad Company to charge the property then in its hands as owner with an alleged lien for state and county taxes levied on the property of the Missouri, Iowa and Nebraska Railway Company for the year 1886. The Keokuk and Western Railroad Company, defendant, became the purchaser of the property of the corporation against which the tax was levied, in December, 1886, through a sale thereof under a supplemental decree of foreclosure rendered July 8,

1886, and by other deeds of conveyance made by the Missouri, Iowa and Nebraska Railway Company, and by the Central Trust Company of New York.

The answer set forth the following facts in defence:

1. That the Alexandria and Bloomfield Railroad Company was chartered by special act of February 9, 1857, to build a railroad from Alexandria, Missouri, in the direction of Bloomfield in the State of Iowa, to the northern boundary of the State of Missouri. The act further provided that the construction of the road should be commenced within ten years after the passage of the act, and completed within ten years thereafter, and that "the stock of said company shall be exempt from taxation for a period of twenty years after its completion." By a subsequent act of February 19, 1866, the corporate name of such railroad company was changed to the Alexandria and Nebraska City Railroad Company. It appeared upon the trial that the road was completed to the state line in December, 1872.

2. March 2, 1869, the legislature passed a general law, authorizing any railroad company in Missouri to consolidate with a railroad company of an adjoining State, making one company of the two, "whose stock shall be so consolidated, under such terms and conditions and stipulations as may be mutually agreed between them, in accordance with the laws of the adjoining State in which the road is located, with which connection is thus formed." The fourth section of this act provided as follows: "Any such consolidated company shall be subject to all the liabilities, and bound by all the obligations of the company within this State, which may be thus consolidated with one in the adjacent State as fully as if such consolidation had not taken place, and shall be subject to the same duties and obligations to the State, and be entitled to the same franchises and privileges under the laws of this State, as if the consolidation had not taken place." Pursuant to this act, the Alexandria and Nebraska City Railroad Company, on May 3, 1870, consolidated with the Iowa Southern Railway Company, an Iowa corporation, under the name of the Missouri, Iowa and Nebraska Railway Company, forming a continuous

line from Alexandria, on the Mississippi, to a point in the State of Iowa near Nebraska City on the Missouri River.

3. Subsequently, and on August 19, 1886, the Missouri, Iowa and Nebraska Railway Company was sold under a decree of foreclosure entered in the Circuit Court of the United States for the Southern District of Iowa, to Morris K. Jesup and Henry C. Thatcher, who, subsequently, and in December of the same year, conveyed the same to the Keokuk and Western Railroad Company, defendant.

4. Defendant further set forth in its answer, by way of estoppel, that, in 1873, plaintiff brought suit against the Missouri, Iowa and Nebraska Company to recover the taxes for the year 1872, upon the property described in the petition in this action; that defendant answered, claiming the exemption provided by the ninth section of the original Alexandria and Bloomfield charter; that such suit was decided in favor of the railroad company, and affirmed upon appeal to the Supreme Court of Missouri, and reported in 65 Missouri, 123.

5. Defendant also pleaded by way of further estoppel that, in 1881, one Secor and other stockholders of the Missouri, Iowa and Nebraska Company filed a bill in the Circuit Court of the United States for the Eastern District of Missouri, praying an injunction against said company paying the taxes alleged to be due upon their property in Scotland, Clarke, and Schuyler Counties, and to enjoin the county court and the collectors of revenue from claiming such taxes for the year 1881, or any previous years; that a temporary injunction was granted which was made final and perpetual, and which is still in full force and effect; that in such suit complainant claimed the same exemption contained in the Alexandria and Bloomfield charter, which the court held to be valid; and that such case was reported in 9 Fed. Rep. 809, *Secor* v. *Singleton.*

It further appeared that a new constitution was adopted by the State of Missouri in 1865, which contained the following provisions:

"Art. 11, Sec. 3. All statute laws of this State now in force, not inconsistent with this constitution, shall continue in force

until they shall expire by their own limitation, or be amended or repealed by the general assembly. 2 Consts. & Char. 1154.

"Art. 11, Sec. 16. No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to counties, or to municipal corporations within this State." Ib. 1155.

Upon the hearing of this case, the Circuit Court of Scotland County denied the exemption claimed by the defendant, and rendered judgment against it for the taxes in question, which judgment was affirmed on appeal by the Supreme Court of the State, 99 Missouri, 30, whereupon, after an unsuccessful motion for a rehearing, defendant sued out this writ of error.

Mr. F. T. Hughes and *Mr. John F. Dillon*, (with whom was *Mr. Thomas De Witt Cuyler* on the brief,) for plaintiff in error.

Mr. John C. Moore and *Mr. F. L. Schofield* for defendant in error.

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

The question in this case is whether the defendant, the Keokuk and Western Railroad Company, was entitled to the exemption of its property from taxation contained in the original charter to the Alexandria and Bloomfield Railroad Company, of which road it is the successor in interest.

(1) It will be observed that the constitutional provision upon which the State relies for the enforcement of this tax for the year 1886 was adopted in 1865, before the consolidation of the Alexandria and Bloomfield Company, under its changed name of the Alexandria and Nebraska City Railroad Company, with the Iowa Southern Company, which took place in 1870, and before the completion of the road in 1872. That the exemption from taxation contained in the original charter to the Alexandria and Bloomfield Company would have continued the full twenty years from the completion

of the road in 1872, had such consolidation not taken place, is, for the purpose of this case, conceded. Indeed, it was so held by the Supreme Court of the State, in *State* v. *Macon County*, 41 Missouri, 453. The court, construing sections 3 and 14 of article 11 of the constitution, held the provisions of section 14 to be a limitation upon the *future* power of the general assembly, and not intended to retroact so as to have any controlling application to laws in existence when the constitution was adopted. See also *State* v. *Cape Girardeau Railway*, 48 Missouri, 468; *State* v. *Coffee*, 59 Missouri, 59; *Atlantic &c. Railroad* v. *St. Louis*, 66 Missouri, 228.

The question then arises whether the Alexandria and Bloomfield Railroad Company, whose charter contained the exemption, is still in existence, or was dissolved by the consolidation, and a new corporation was thereby called into being, which held its property subject to the constitutional provisions of 1865, denying the power of the general assembly to exempt property from taxation. In the numerous cases which have arisen in this court as to the effect of a consolidation upon the existence and status of the constituent corporations, it has been held that the question of the dissolution of such corporations depended upon the language of the statute under which the consolidation took place — the presumption in each case being that each of the two lines of road will be held respectively to the privileges and burdens originally attaching thereto. *Tomlinson* v. *Branch*, 15 Wall. 460. If, upon the one hand, the identity of the prior corporations is preserved, an exemption from taxation, which one of them possessed, falls to that portion of the new corporation to which, under its former name, it had been attached. If, upon the other hand, the consolidation worked a dissolution of the prior corporations, their former privileges and franchises also ceased to exist. Thus, in the earliest of these cases, *Philadelphia &c. Railroad* v. *Maryland*, 10 How. 376, it was held that the Baltimore and Port Deposit Railroad Company, whose charter contained no exemption from taxation, did not acquire such exemption by consolidation with the Delaware and Maryland Railroad Company, whose charter exempted the road from taxation,

"except upon that portion of the permanent and fixed works which might be in the State of Maryland." A general rule was laid down in this case to which this court has steadily adhered, that the taxing power of the State should never be presumed to be relinquished, unless the intention to do so be declared in clear and unambiguous terms. This case was subsequently reaffirmed in the *Delaware Railroad Tax*, 18 Wall. 206.

In *Tomlinson* v. *Branch*, 15 Wall. 460, it was held that when a railroad company, to which, by its charter, an exemption from taxation was granted for a limited period, was by act of the legislature "merged" in another company, which thereby became invested with all its rights, property, and privileges, the exemption applied to the property with its limitation of time, and although the company in which it was merged had been granted a perpetual exemption from taxation in its charter, this perpetual exemption would not be extended to property so acquired, without express words, or necessary intendment to that effect. In *Central Railroad* v. *Georgia*, 92 U. S. 665, the act of the legislature authorized the Central Railroad and the Macon Railroad "to unite and consolidate" their "stocks" and all their "rights, privileges, immunities, property, and franchises" under the name and charter of the Central Railroad, in such manner that each owner of shares of stock of the Macon road should be entitled to receive an equal number of shares of the consolidated companies. It was held this consolidation was not a surrender of the existing charters of the two companies, and did not work the extinction of the Central Company, nor the creation of a new company, and also that the consolidated company continued to possess all the rights and immunities which were conferred upon each company by its original charter. The Central Company having been exempted from taxation beyond a limited amount by its original charter, it was held not to be within the power of the legislature to impose an increased tax after the consolidation was effected; but as the Macon Company had no provision in its charter limiting its liability to taxation, the power of the legislature remained

unimpaired to tax its franchises, property, and income after its consolidation with the Central. It was said in the opinion of the court that "if in the statute there be no words of grant of corporate powers, it is difficult to see how a new corporation is created. If it is, it must be by implication; and it is an unbending rule that a grant of corporate existence is never implied." It was held that the act did not work the dissolution of the existing corporations, and at the same time the creation of a new company, the court giving among other reasons that there was no provision for the surrender of the certificates of stock of the shareholders of the Central, and none for the issue of other certificates to them. It will be observed in this case that the road whose charter contained the exemption from taxation was preserved intact by the consolidation; and it was held that its exemption continued, while the other road was undoubtedly intended to go out of existence; and as the Macon road held its property and franchise subject to taxation, the Central, succeeding to the franchises and property, held them alike subject. Other cases to the same effect, and holding that the act of consolidation did not operate as a dissolution of the constituent companies, are *Chesapeake & Ohio Railroad* v. *Virginia*, 94 U. S. 718; *Green County* v. *Conness*, 109 U. S. 104; and *Tennessee* v. *Whitworth*, 117 U. S. 139.

Upon the other hand, we have held that the consolidation acts of Ohio and Maine worked a dissolution of the constituent companies and the incorporation of a new company, and that such company was subject to intermediate acts declaring the charters of corporations subject to be altered, amended, or repealed by the legislature. *Shields* v. *Ohio*, 95 U. S. 319; *Railroad Company* v. *Maine*, 96 U. S. 499. A leading case is that of *Railroad Company* v. *Georgia*, 98 U. S. 359, 362, wherein two railroad companies, each of which enjoyed by its charter a limited exemption from taxation, were consolidated by an act of the legislature passed April 18, 1863, which authorized a consolidation of their stocks, conferred upon the consolidated companies full corporate powers, and continued to it the franchises, privileges, and immunities which the com-

panies had held by their original charters. It was held that by the consolidation the original companies were dissolved and a new corporation created, which became subject to the provisions of a statutory code, adopted January 1, 1863, permitting the charters of private corporations to be changed, modified, or destroyed at the will of the legislature. It was further held that a subsequent legislative act taxing the property of such new corporation as other property in the State was taxed was not a law impairing the obligation of a contract. It was said that the consolidation provided for was not a merger of one company into another, and the case of *Railroad Company* v. *Georgia*, 92 U. S. 665, was distinguished from it in this particular. "Nor was it," says Mr. Justice Strong, "a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence as well as its corporate name. But the act authorized the consolidation of the stocks of the two companies, thus making one capital in place of two. It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company." In *St. Louis, Iron Mountain &c. Railway* v. *Berry*, 113 U. S. 465, a like effect was given to the consolidation of two roads by an agreement which provided that all the property of each company should be taken and deemed to be transferred to the consolidated company "as such new corporation without further act or deed." It was held that this created a new corporation, with an existence dating from the time the consolidation took effect, and that it was subject to constitutional provisions with reference to taxation in force at that time. See also *McMahan* v. *Morrison*, 16 Indiana, 172.

Looking at the act in question in this case, we find that, by section 1, any Missouri railroad company whose tracks should connect with the road of an adjoining State was authorized to make and enter into an agreement with such connecting company for the consolidation of the stock of the respective companies whose tracks should be so connected, *making one company of the two*, whose stock should be so consolidated upon such terms, conditions, and stipulations as might be

mutually agreed between them; that, by section 2, "such consolidation shall not be made, unless the terms and provisions thereof shall be approved by a majority of the stock, or the holders of a majority of the capital stock in each of said companies whose stock shall be consolidated;" that, by section 3, the board of directors were authorized to adopt by resolution a new corporate name for the consolidated company, and call in the certificates of stock then outstanding in each company, and exchange them for stock in the new company; and providing that a copy of the consolidation agreement, and the name adopted for the new company, "shall be filed with the Secretary of State, and shall be conclusive evidence of such consolidation, and of the corporate name of the consolidated company." It is difficult to see how the legislature could provide more clearly for the extinguishment of the prior companies, and the formation of a new one, than by providing that the two companies shall become one; that new certificates of stock shall be issued in exchange for the stock of the constituent companies; and that the consolidation agreement shall be recorded with the Secretary of State as the charter of a new company. In our opinion this was the effect of the act in question.

It is impossible to conceive of a corporation existing without stock, or certificates representing the interests of the corporators in the organization. Now, if the act provides that these certificates shall be surrendered, and certificates in another company issued in their place, what becomes of the prior companies? Who are their stockholders — who their officers? If the stock in the new company is sold, what interest in the prior companies passes by the sale? There can be but one answer to these questions. The property and franchises of the prior companies are gone as much as if they had formally surrendered their charters. The new company may doubtless receive by transmission from its constituent companies their property, rights, privileges, and franchises, including any immunity from taxation; but it receives them as an heir receives the estate of his ancestor, or as a grantee receives the estate of his grantor, by inheritance, succession, or

purchase. The result is not a mere union or partnership of two companies, nor the merger of the franchises of one in another, but the extinguishment of one and the creation of another in its place. Speaking of a similar act of Ohio, which declared that the consolidated companies "shall be deemed and taken to be one corporation, possessing within the State all the rights, privileges, and franchises, and subject to all the restrictions, liabilities, and duties of such corporations of this State so consolidated," Mr. Justice Swayne observed in *Shields* v. *Ohio*, 95 U. S. 319, 322, 323: "It [the consolidation] could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporations subsisted. All — the old and the new — could not coexist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution. This being done, *eo instanti* the new corporation came into existence."

It follows from this that, when the new corporation came into existence, it came precisely as if it had been organized under a charter granted at the date of the consolidation, and subject to the constitutional provisions then existing, which required (art. 11, sec. 16) that no property, real or personal, should be exempted from taxation, except such as was used exclusively for public purposes; in other words, that the exemption from taxation contained in section 9 of the original charter of the Alexandria and Bloomfield Railway Company did not pass to the Missouri, Iowa and Nebraska Company. As was said of an Arkansas corporation in *St. Louis, Iron Mountain &c. Railway* v. *Berry*, 113 U. S. 465, 475, "it came into existence as a corporation of the State of Arkansas, in pursuance of its constitution and laws, and subject in all respects to their restrictions and limitations. Among these was that one which declared that 'the property of corporations, now existing, or hereafter created, shall forever be subject to taxation the same as property of individuals.' This rendered it impossible in law for the consolidated corporation to receive by transfer from the Cairo and Fulton Railroad Company, or otherwise, the exemption sought to be enforced

in this suit." See also *Memphis & Little Rock Railroad* v. *Commissioners*, 112 U. S. 609; *Shields* v. *Ohio*, 95 U. S. 319; *Louisville & Nashville Railroad* v. *Palmes*, 109 U. S. 244.

Nor was the exemption saved by section 3 of article 11, providing that "all statute laws of this State now in force, not inconsistent with this constitution, shall continue in force until they shall expire by their own limitation, or be amended or repealed by the general assembly." This referred to statutes in force at the time the constitution was adopted, the operation of which is continued, notwithstanding the constitution. In this case, however, the exemption contained in section 9 of the charter of the Alexandria and Bloomfield Railway Company ceased to exist, not by the operation of the constitution, but by the dissolution of the corporation to which it was attached.

It is further insisted, however, that, under section 4 of the act of March 2, 1869, there was a further provision that the consolidated company should be "subject to all the liabilities, and bound by all the obligations of the company within this State," and "be entitled to the same franchises and privileges under the laws of this State, as if the consolidation had not taken place." Whether, under the name "franchises and privileges," an immunity from taxation would pass to the new company may admit of some doubt, in view of the decisions of this court, which, upon this point, are not easy to be reconciled. In the *Chesapeake & Ohio Railway* v. *Miller*, 114 U. S. 176, it was held that an immunity from taxation enjoyed by the Covington and Ohio Railway Company did not pass to a purchaser of such road under foreclosure of a mortgage, although the act provided that "said purchaser shall forthwith be a corporation," and "shall succeed to all such franchises, rights, and privileges . . . as would have been had . . . by the first company but for such sale and conveyance." It was held, following in this particular *Morgan* v. *Louisiana*, 93 U. S. 217, that the words "franchises, rights, and privileges" did not necessarily embrace a grant of an exemption or immunity. See also *Picard* v. *Tennessee &c. Railroad*, 130 U. S. 637. Upon the other hand, it was held in *Tennessee* v.

Whitworth, 117 U. S. 139, that the right to have shares in its capital stock exempted from taxation within the State is conferred upon a railroad corporation by state statutes granting to it "all the rights, powers, and privileges" conferred upon another corporation named, if the latter corporation possesses by law such right of exemption, citing in support of this principle a number of prior cases. See also *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 297.

But the decisive answer to this objection is that the legislature had no power, in 1869, to extend to a new corporation created by the consolidation an exemption contained in an act passed in 1857, before the constitution was adopted, and hence that, under the terms of this act, we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation. The construction claimed by the defendant would be directly in the teeth of the constitutional provision that no property shall be exempted from taxation. While, as heretofore observed, an exemption from taxation contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, it doubtless applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of 1869.

(2) The question of estoppel remains to be considered. In 1873, the county of Scotland brought suit in the Circuit Court of Scotland County against the Missouri, Iowa and Nebraska Railway Company to recover the taxes of 1872 upon the property in question in this case, and was defeated, the court holding it to be exempt under section 9 of the charter of the Alexandria and Bloomfield Railway Company. It was conceded in that case that the Missouri, Iowa and Nebraska Railway Company had succeeded to all the privileges and liabilities of the Alexandria and Bloomfield Company. It appeared that in the seventh section of a general act concerning corporations, which act antedated the charter of the Alexandria and Bloomfield Railroad Company, it had been declared that "the charter of every corporation that shall hereafter be granted by the legislature, shall be subject to alteration, suspension,

and repeal, in the discretion of the legislature;" and that on March 10, 1871, long subsequent to the charter of the Alexandria and Bloomfield road, the legislature had passed an act providing for the uniform assessment and collection of taxes upon railroad companies. On appeal to the Supreme Court of Missouri, that court held that the object of the general corporation laws of 1845 and 1855 was to confer certain powers and privileges and impose certain duties and liabilities, in the absence of any stipulations or provisions inconsistent with those contained in special charters subsequently granted; that, if there were any inconsistencies in the charter of 1857 with such act, it must be understood that the restrictions of this act were intended to be removed, for reasons satisfactory to the legislature — in other words, that one legislature could not bind its successors, and, if the legislature of 1857 thought proper to disregard the provisions of the general act concerning corporations, there was no principle upon which such power could be questioned. It followed from this that the exemption from taxation contained in the charter of 1857 was valid, and was a grant which could not be taken away by the act of 1871, subjecting all railways to the payment of taxes. The question upon which the case now under consideration was subsequently decided, namely, that the Missouri, Iowa and Nebraska Railway Company did not succeed to the exemption from taxation provided in the original charter of the Alexandria and Bloomfield Company, was not discussed in that case, since the exemption was conceded to inure to the latter company.

To the argument that this judgment constitutes an estoppel there are two answers:

First. There was no such privity of estate between the defendant in the suit, namely, the Missouri, Iowa and Nebraska Company, and the defendant in this suit as makes the judgment in that case *res judicata* in this. The mortgage of the Missouri, Iowa and Nebraska Railway Company, under the foreclosure of which this defendant purchased this road, was executed June 1, 1870, and neither the trustee under that mortgage, the Farmers' Loan and Trust Company, nor the bond-

holders, whom this mortgage secured, were parties to that action, which was begun in 1873 to recover the taxes of 1872. While a mortgagee is privy in estate with a mortgagor as to actions begun before the mortgage was given, he is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the execution of the mortgage, unless he or some one authorized to represent him, like the trustee of a mortgage bondholder, is made party to the litigation, although it would be otherwise if the mortgage were executed pending the suit or after the decree. A leading case on this point is *Campbell* v. *Hall*, 16 N. Y. 575, in which it was held that a second mortgagee of land was not estopped by a judgment in an action between his mortgagor and a prior mortgagee, rendered after the execution of the second mortgage, but might litigate the amount due upon the first mortgage, notwithstanding the judgment. Speaking of the rule that a grantee is estopped by a judgment against his grantor, because he holds by a derivative title from his grantor, and cannot, therefore, be in a better situation than the party from whom he obtained his right, the court observed: "This being the reason for the rule, it follows that it can have no application except where the conveyance is made after the event out of which the estoppel arises. The principle in such cases is that the estoppel attaches itself to and runs with the land. The grantor can transfer no greater right than he himself has, and hence the title which he conveys must necessarily be subject, in the hands of the grantee, to all the burdens which rested upon it at the time of the transfer. On the other hand, nothing which the grantor can do or suffer to be done after such transfer can affect the rights previously vested in the grantee." See also *Mathes* v. *Cover*, 43 Iowa, 512; *Bryan* v. *Malloy*, 90 N. C. 508; *Scates* v. *King*, 110 Illinois, 456; *Dooley* v. *Potter*, 140 Mass. 49; *Coles* v. *Allen*, 64 Alabama, 98; *Todd* v. *Flournoy*, 56 Alabama, 99; *Shay* v. *McNamara*, 54 California, 169.

Second. A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court

upon that question might raise an estoppel in another suit upon the principle stated in *Cromwell* v. *County of Sac*, 94 U. S. 351. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. This was an action upon certain bonds and coupons issued by the county of Sac. Defendant pleaded a judgment rendered in favor of the county in a prior action brought by one Smith upon earlier coupons upon the same bonds, accompanied by proof that the plaintiff Cromwell was at the time the owner of the coupons in that action, and that the suit was prosecuted for his sole use and benefit. The court held that there was a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. It was said that "it is not believed there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions." The same principle was reaffirmed in *Nesbit* v. *Riverside Independent District*, 144 U. S. 610, and *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 302. In the case of *Davenport* v. *Chicago, Rock Island &c. Railway*, 38 Iowa, 633, 640, the Supreme Court of Iowa held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the State from collecting the taxes for a subsequent year, each year's taxes constituting a distinct and separate cause of action. "The cases," said the court, "are unlike those where two causes of action, (as two promissory notes,) forming the subject-matter of successive actions between the same parties, *both growing out of the same transaction*, in which a defence set up in the first suit, and held good, will

conclude the parties in the second. . . . Taxes of separate years do not in any just sense grow out of the same transaction. They are like distinct claims on two promissory notes made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties." It could never be tolerated that the State should be forever barred in its collection of taxes by an erroneous decision.

Nor did the judgment in that case establish a rule of property upon which the plaintiff was entitled to rely, and upon the faith of which it claims to have purchased the road, inasmuch as it appears that the point upon which this case turns, namely, the right of the Missouri, Iowa and Nebraska Railway Company to the exemption in the original charter was conceded in that case, and the only rule of property established was that the Alexandria and Bloomfield Company was entitled to such exemption, notwithstanding the general act concerning corporations enacted prior thereto, which declared that the charter of every corporation should be subject to alteration or repeal, and the act of March 10, 1871, which provided a general law for the collection of taxes from railway companies. This, if anything, was the rule of property declared in that case; and as this rule is not relied upon in this case, and the tax is defended upon a ground not put in issue there, but conceded by counsel in favor of the company, it is difficult to see how that case can be regarded as establishing any rule of property of which the defendant can avail itself in this action.

(3) What is known as the Secor decree was obtained in a suit brought by Secor and other stockholders of the Missouri, Iowa and Nebraska Railway against the company itself, and also against the county court and officers of certain counties to enjoin the collection of taxes for 1881, or any previous years. The case was decided upon the authority of the above case of *Scotland County* v. *Railroad Co.*, 65 Missouri, 123, and an injunction granted in pursuance of the prayer of the bill. In addition to the fact above stated

that a suit for taxes for one year is not an estoppel to a suit for taxes for a different year, there is the same absence of that privity of estate so indispensable to an effective estoppel, which we hold to be fatal in respect to the judgment in the state court. If the plaintiff herein, the Keokuk and Western Railroad Company, would not have been affected by an adverse decree in the Secor suit, it cannot take advantage of the same by way of estoppel. The operation of an estoppel must be mutual.

There was no error in the judgment of the Supreme Court of Missouri, and it is therefore

Affirmed.

Mr. Justice Harlan and Mr. Justice Brewer dissented.

KEOKUK AND WESTERN RAILROAD COMPANY *v.* SCOTLAND COUNTY.

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

No. 183. Argued December 21, 22, 1893. — Decided March 12, 1894.

Keokuk & Western Railroad Company v. *Missouri*, ante, 301, followed.

This was a bill to enjoin the county courts and collectors of revenue for the counties of Clarke, Scotland, and Schuyler, in the State of Missouri, from levying and collecting taxes on the railway property owned by the plaintiff in these counties.

Mr. Felix T. Hughes and *Mr. John F. Dillon*, (with whom was *Mr. Thomas De Witt Cuyler* on the brief,) for appellant.

Mr. F. L. Schofield, (with whom were *Mr. John A. Whiteside* and *Mr. T. L. Montgomery* on the brief,) for appellees.

Mr. Justice Brown delivered the opinion of the court.

Statement of the Case.

This case differs from the one just decided, *ante*, 301, only in the fact that this is a bill in equity, filed by the corporation whose property is sought to be taxed, to restrain the defendants from levying or collecting any taxes for the years 1883 to 1887, inclusive, upon the ground that the Circuit Court for the Eastern District of Missouri in the *Secor case*, and also the Supreme Court of the State, had held the property of the company not to be subject to taxation.

As the questions involved in the two cases are precisely the same, the decree of the court below dismissing the bill was correct, and the same is, therefore,

Affirmed.

Mr. Justice Harlan and Mr. Justice Brewer dissented.

KEOKUK AND WESTERN RAILROAD COMPANY *v.* SCOTLAND COUNTY.

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

No. 414. Argued December 21, 22, 1893. — Decided March 12, 1894.

A railroad company which derives its title to its road from a foreclosure of a mortgage, given before the commencement of a suit by stockholders to enjoin the collection of taxes upon the property so sold and conveyed, does not occupy a relation to the plaintiffs in that suit, which entitles it to file a bill of revivor, or to invoke the decree in the suit as an estoppel.

The purchaser under a mortgage is not entitled to the benefit of an estoppel under a decree obtained in a suit begun after the execution of the mortgage.

This was a bill in equity filed by the Keokuk and Western Railroad Company to revive a suit begun August 6, 1879, by Charles A. Secor and other stockholders of the Missouri, Iowa and Nebraska Railway Company against the judges of the county courts of Scotland, Schuyler, and Clarke Counties, the object of which suit was to enjoin the collection of taxes

upon such railway company for the year 1879 and several years prior thereto.

The bill of revivor, which was filed February 17, 1890, set forth the commencement of the suit by Secor against the county courts above named, and the rendition of a decree May 10, 1882, by which the defendants were enjoined from levying or collecting taxes of the railway company "until the expiration of the exemption limited in the charter of said railway company, to wit, December 1, 1892," and that the same was in full force and effect. The bill further alleged the execution of a mortgage in 1870 by the railway company to the Farmers' Loan and Trust Company of New York, the foreclosure of the same, the purchase of the road in 1886 by Morris K. Jesup and Henry C. Thatcher, a purchasing committee of the bondholders, and the conveyance of the same to the plaintiff, the Keokuk and Western Railroad Company, in December, 1886, whereby the Missouri, Iowa and Nebraska Railroad Company became dissolved, and Secor and the other stockholders ceased to have any interest therein, and "that by virtue of said mortgage, decree, and foreclosure sale all of the title in and to said property has become vested in your orator." The bill further alleged a change in the officers of the respective defendant counties, the beginning of three suits by the collector of revenue of Scotland County, to enforce, as a lien upon plaintiff's property, the taxes levied upon the Missouri, Iowa and Nebraska Railroad Company for the years 1872 to 1878, 1880, 1881, 1882, and 1887, and that the same were in violation and contempt of the injunction issued in the *Secor case*. The bill prayed that such suit might be revived against the counties and their officers in the name of the plaintiff, as the same was at the dissolution of the Missouri, Iowa and Nebraska Railway Company, and that the collector of revenue of Scotland County be punished for contempt in instituting the suits for the collection of the taxes in violation of the decree upon the original bill.

On March 3, 1890, defendants interposed a demurrer to the bill for the county of Scotland, which was sustained on March 25, upon the ground that the plaintiff did not occupy such a

relation to the parties to the original suit as to entitle it to file a bill of revivor, and that the decree in such original suit could not be invoked as an estoppel between the Keokuk and Western Railroad Company and the several counties which were made defendants to the bill. The court put its decision upon the ground that the plaintiff acquired its title by the foreclosure of a mortgage executed in 1870, and that it did not appear that the mortgagee or any representative of the mortgagee was made a party to the suit of Secor *et al.* against the railway company and the several counties. Coupled with the order sustaining the demurrer was a general order granting plaintiff leave to amend its bill.

Plaintiff thereupon, and on April 28, 1890, filed an amended bill, setting up that in September, 1880, the Missouri, Iowa and Nebraska Railroad Company leased its road for a term of years to the Wabash Railway Company, the lease containing an agreement that the Missouri, Iowa and Nebraska Company should execute a mortgage to the Mercantile Trust Company of New York to secure certain bonds which were to be guaranteed by the Wabash Company, and covenanting that it would cause the holders of the bonds of 1870 to accept the bonds so guaranteed by the Wabash Company in lieu of the prior bonds, and averring that the decree of foreclosure of the bonds of 1870 was not executed or the railroad property sold thereunder. That in pursuance of such lease the mortgage to the Mercantile Trust Company was executed March 1, 1881, and 2269 bonds were issued and guaranteed by the Wabash Company; that all of the 1870 bonds were exchanged for the guaranteed bonds, with the exception of 17; that the Wabash Company paid interest upon the same until June, 1884, the decree of foreclosure remaining unexecuted, when the Wabash Company became insolvent; that in 1886 the Farmers' Loan and Trust Company filed a supplemental bill of foreclosure against the Missouri, Iowa and Nebraska Railroad Company, the Mercantile Trust Company, the Wabash Company, and the Humeston and Shenandoah Railway Company, upon which a final decree of foreclosure was entered and the property ordered to be sold; that upon the confirmation of such

sale the Missouri, Iowa and Nebraska Company, the Humeston and Shenandoah Company, and the Mercantile Trust Company were each ordered to execute and deliver to the purchaser deeds of the property; that in pursuance of such decree the property was sold in 1886, and Jesup and Thatcher became the purchasers; that these purchasers having conveyed the property to the plaintiff the same was turned over to it in December, 1886; that subsequently, in pursuance of such decree, the Missouri, Iowa and Nebraska Company and the Mercantile Trust Company executed to Jesup and Thatcher their respective deeds of conveyance of all their interest in the railway property, and that Jesup and Thatcher afterwards, for a valuable consideration, and in further execution of their said trust, conveyed the same to the plaintiff. Plaintiff further averred that the mortgage of the Mercantile Trust Company was made after the original injunction proceedings were commenced; that by the title acquired through the foreclosure of the same, and the several deeds of conveyance to it, plaintiff became entitled to all the rights and privileges of the injunction decree in the original suit, and to have the same revived against the defendants. To this amended bill the officers of Scotland County filed an answer, denying that any title was acquired by the plaintiff through the lease of 1880, or the mortgage of 1881, but that all such title was acquired through the foreclosure of the mortgage of 1870, and the sale thereunder in 1886. The answer further averred that the whole of the contract, lease, and mortgage of 1880 and 1881 was an abortive attempt to provide against a foreclosure and sale under the mortgage of 1870, and having failed, the whole of said proceedings were practically rescinded by order of the court in which the foreclosure proceedings were carried on.

On January 10, 1891, upon the supplemental bill, the answers, replication, and proofs, a final decree was entered dismissing the bill of revivor upon the ground that plaintiff's title to the property related back to the mortgage of 1870, and that it acquired no title under the mortgage of 1881.

From this decree an appeal was taken to this court.

Mr. Felix T. Hughes and *Mr. John F. Dillon*, (with whom was *Mr. Thomas De Witt Cuyler* on the brief,) for appellant.

Mr. F. L. Schofield, (with whom were *Mr. John A. Whiteside* and *Mr. T. L. Montgomery* on the brief,) for appellees.

Mr. Justice Brown delivered the opinion of the court.

This case raises the question whether the Keokuk and Western Railroad Company, which is now the owner of the property and franchises of the Missouri, Iowa and Nebraska Railroad Company, is entitled to revive a suit originally begun by Secor and other stockholders of the last-named company, against the officers of three counties in Missouri, to enjoin the collection of taxes upon property formerly belonging to the Missouri, Iowa and Nebraska Railroad Company and now owned by the plaintiff.

(1) Upon demurrer to the original bill, the court held that the plaintiff, deriving its title from the foreclosure of a mortgage given before the suit which it sought to revive had been begun, did not occupy such a relation to Secor and the other stockholders, plaintiffs in the original suit, as entitled it to file the bill or invoke the decree in that court as an estoppel. In the case just decided of the *Keokuk and Western Railroad Company* v. *State of Missouri*, *ante*, 301, we held the principle of that ruling to be correct. Upon the same day that the order sustaining the demurrer was entered, viz., March 25, 1890, leave was granted to amend the bill, whereupon, and obviously for the purpose of meeting the objection raised by the court that the only title to the property claimed by the plaintiff was one derived from the foreclosure of the mortgage of 1870, plaintiff, on April 18, 1890, procured a deed from Jesup and Thatcher of their interest under the foreclosure of the mortgage of 1881 to the Mercantile Trust Company, and, on April 28, filed an amendment to its bill of revivor, setting up this and other deeds as evidence of title through the mortgage of 1881, which was given after the original injunction proceedings were commenced by Secor, and claiming that, by

its title through the foreclosure of this mortgage, and through the various deeds of conveyance following the same, plaintiff was entitled to the benefit of the injunction decreed in the Secor suit, and to have the same revived and enforced against the defendants.

The court, however, found from the record evidence that the plaintiff derived its title to the property in controversy through the mortgage of June 1, 1870; that its title to the property in question related back to that mortgage, and hence the complainant was not entitled to the benefit of the original decree. In this conclusion we also concur. The facts in this connection, so far as we gather them from the pleadings, appear to have been that a bill to foreclose the mortgage of June 1, 1870, was filed December 30, 1879, a decree of foreclosure rendered thereon October 22, 1880, and the property ordered to be sold. Pending this foreclosure, and on February 12, 1880, the Missouri, Iowa and Nebraska Railway Company, the mortgagor, with the consent of a majority of the bondholders under the mortgage of June 1, 1870, entered into the contract with the Wabash Company to lease its road, and to induce the bondholders to surrender their bonds, and take in exchange therefor bonds of the Wabash Company which were to be secured by a new mortgage upon the Missouri, Iowa and Nebraska Company. Pursuant to such contract, the lease was executed on September 3, 1880, for a term of ninety-nine years, and the Wabash Company entered into possession of the road. On March 1, 1881, in pursuance of the contract and lease, a mortgage was executed to the Mercantile Trust Company to secure the payment of 2269 bonds made by the Wabash Company, with a provision that all the bonds that should be received by the trustee in the course of the exchange for the bonds secured by the mortgage of 1870 should be retained by the trustee for the protection of the bondholders.

The Wabash Company, having become insolvent in 1885, the Farmers' Loan and Trust Company, for the purpose of enforcing their decree of foreclosure of October 22, 1880, filed a supplemental bill setting forth the proceedings sub-

sequent to the decree, and the failure of the lessee company to pay the rental, alleging that it never was the intention of the bondholders under the first mortgage that their bonds should be cancelled, or the decree of October 22, 1880, vacated or annulled, or the right to execute the same be in any way abrogated or impaired; but that it was the design that the old bonds, having been exchanged, should remain in the hands of the Mercantile Trust Company, to be used in pursuance of the trust. The bill further charged that the decree of October, 1880, was still in full force, and that the rights of the parties interested could not be fully protected otherwise than by a judicial sale of the road and other property covered by the first mortgage. The bill prayed for the enforcement of the decree of October 22, 1880, and for the same relief that the plaintiff might have had in case the matters subsequent to the decree had not occurred, and that the former decree might be promptly and immediately executed.

A decree upon this supplemental bill was entered on July 8, 1886. The decree adjudged that *the facts set forth in the supplemental bill of complaint were true;* that the decree of October, 1880, was still in full force, and was not reversed, vacated, or discharged. After setting forth the subsequent proceedings connected with the Wabash lease, the exchange of the bonds, etc., the failure of the mortgagor to pay the bonds and mortgages mentioned in the decree, it ordered the mortgaged premises *described in the decree of October, 1880,* to be sold. The sale was made August 19, 1886, and was subsequently, confirmed, and a deed executed by the master to Jesup and Thatcher, purchasers, who subsequently, and on November 26, 1886, executed a deed to the Keokuk and Western Railroad Company.

From the maze of bills, supplemental bills, bills of revivor, decrees, and deeds involved in this case we think the following facts clearly appear — (1) That the decree of October 22, 1880, was a decree for the foreclosure of the mortgage of 1870, and of that alone; (2) that the supplemental bill of the Farmers' Loan and Trust Company was filed to enforce

that decree; (3) that, in the decree of July 8, 1886, rendered upon such supplemental bill, 17 bonds issued under the mortgage of 1870, which had never been exchanged, were provided for as valid liens under that mortgage, and under that alone; (4) that the bonds held by the Mercantile Trust Company, as trustee, which had been exchanged for the prior bonds, were also recognized as claims secured by such mortgage; (5) that in such decree no mention was made of the mortgage of 1881, except by way of recital, and as part of the history of the case; (6) that the sale ordered was a sale in pursuance of the prior decree; (7) that in the master's deed to Jesup and Thatcher, and in their deed to the Keokuk and Western Railroad Company, no allusion whatever was made to the mortgage of 1881.

There was, it is true, a proviso in the last decree that, by way of a more ample protection to the purchasers, the defendants, the Missouri, Iowa and Nebraska Railway Company, the Humeston and Shenandoah Railway Company, and the Mercantile Trust Company should execute deeds of the property to the purchasers, and that in pursuance of such order the deeds of 1890 were executed. But it is clear that nothing in fact passed by such deeds, since the deeds of the master to Jesup and Thatcher, and their deed to the Keokuk and Western Railroad Company had already conveyed all the interests of the defendants to the property in question.

The truth is that in these proceedings the mortgage of 1881 was treated as an abandoned security, and was practically ignored in the foreclosure proceedings which culminated in the sale of the road. The deeds of 1890 were evidently an afterthought for the purpose of procuring some kind of title under the mortgage of 1881, and of meeting the decision of the court sustaining the demurrer to the original bill of revivor.

(2) Plaintiff, however, makes a further claim that, under the law of Missouri for the taxation of railroads, the property and all interests therein are taxed as a whole to the company and no one else, and that proceedings against the company by suit or otherwise will divest the mortgagees of their rights

as well as the company itself, notwithstanding they are not made parties to the proceedings; that the bondholders or their trustees are privies to such tax proceedings at law, and that inasmuch as the Secor suit was a bill in equity to prevent a multiplicity of tax suits, which would become necessary in the various years in which the tax was to be collected, during the limited exemption, it follows that if the railroad company becomes the legal representative of the bondholders, or their trustee in the tax suit at law, the same would be true in a proceeding in equity to enjoin such taxes.

Granting the general principles above stated to be correct, that a lien for taxes upon the property is a lien upon all the interests in such property, and that proceedings to enforce such lien will oust the mortgagees of their lien, we do not think the latter part of the proposition follows, that these bondholders or their trustees were privies to the suit in equity to enjoin such taxes. Indeed, it is difficult to see how the fact that the mortgagees would be bound in a proceeding by the State to enforce its lien for taxes would have any bearing upon the point in controversy. The bill sought to be revived is a bill to enjoin the taxes for 1879 and prior years, and the question was whether the plaintiff was entitled to the benefit of the decree in that case. This depended, not upon the question whether the lien of the State for taxes overrode the mortgagees' lien, but whether under the settled principles of law the purchaser under the mortgage is entitled to the benefit of an estoppel under a decree obtained in a suit begun after the execution of his mortgage. We hold that it would not have been estopped by that decree, if such decree had been adverse to Secor in that suit, and hence as estoppels must be mutual, it cannot claim the benefit of an estoppel in this case. The Secor bill was a bill to enjoin the collection of taxes for certain years; if the court had decided that the plaintiffs were not entitled to such injunction, but that the taxes were valid, we know of no reason why the Keokuk and Western Railroad Company would thereby be estopped to maintain a bill of its own for the same purpose, as it derived its title to the property in question from a mortgage long antecedent to the com-

mencement of the suit by Secor. This seems to have been the view taken by the Supreme Court of Missouri in *Stafford* v. *Fizer*, 82 Missouri, 393, in which that court held that although the lien of the State for taxes ranks all other liens whether prior or subsequent, yet in a suit to enforce such lien, the holder of a junior incumbrance must be made a party, if it is desired to divest him of his rights; otherwise he will be entitled to redeem from the purchaser under the tax lien. See also *Gitchell* v. *Kreidler*, 84 Missouri, 472.

The decree of the court below was correct, and it is, therefore,

Affirmed.

DOWELL *v.* APPLEGATE.

ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

No. 209. Argued January 18, 1894. — Decided March 5, 1894.

A final decree of a Federal court, being unmodified and unreversed, cannot be treated as a nullity when assailed collaterally by one who was a party to the suit in which it was rendered.

In a suit by A to subject lands of B to sale in satisfaction of his claims, a decree in the complainant's favor is final, if not appealed from, and B cannot have the same issue retried in an independent suit, based upon a title which he might have set up in the first suit, but did not.

When the Supreme Court of a State fails to give proper effect to a decree of a Circuit Court of the United States, this court has jurisdiction over its judgment to correct the error.

THE case is stated in the opinion.

Mr. B. F. Dowell and *Mr. John H. Mitchell* for plaintiff in error.

Mr. J. N. Dolph for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case involves the title to a tract of land in Douglas County, Oregon, containing forty acres, part of what is known

as the donation land claim of Jesse Applegate, number thirty-eight, in township twenty-two south, of range five west of the Willamette meridian.

The defendant in error, Daniel W. Applegate, holds under a deed executed to him by William H. H. Applegate and wife, dated October 8, 1874, and recorded October 31, 1874. He brought this suit in the Circuit Court of Douglas County, Oregon, to obtain a decree removing the cloud upon his alleged title created by a deed made to the defendant Dowell by a master in chancery, pursuant to an order of the Circuit Court of the United States for the District of Oregon, in a suit determined by that court in which Dowell was plaintiff and Daniel W. Applegate was one of the defendants. At a sale held in conformity with the final decree in that suit, Dowell became the purchaser of the land in question. That sale was duly confirmed, and a deed executed to him. From that decree of sale no appeal was taken.

Dowell bases his claim to the land upon the decree and orders in the above suit in the Circuit Court of the United States; and the controlling question before this court is as to the effect of that suit.

The state court did not give to the decree and orders in the Federal court the effect claimed for them; and it is necessary to a clear understanding of the grounds upon which it refused to do so, that we ascertain the precise nature of the proceedings in the latter court.

From the recitals in a supplemental bill filed by Dowell in the suit in the Federal court, it appears that that suit was commenced on the 11th day of October, 1879, in the Circuit Court of Douglas County, Oregon, and was subsequently removed into the Circuit Court of the United States for the District of Oregon. Upon whose application, or upon what grounds, it was so removed, the record before us does not clearly show. But it does appear that Dowell, on the 6th day of April, 1881, in order to conform his pleadings to the practice in the courts of the United States, sitting in equity, filed a bill in the Federal court disclosing the grounds of his suit. The defendants were Jesse Applegate, and his wife,

Cynthia Ann Applegate, William H. H. Applegate, Daniel W. Applegate, Peter Applegate, Sallie Long, John C. Drain, Jonas Ellensberg, and Charles Putnam.

The bill filed by Dowell made the following case: In a suit brought on the official bond of one May, Secretary of State of Oregon, executed September 6, 1862, — his sureties being Jesse Applegate, O. Jacobs, and James Kilgore, — judgment was entered, June 24, 1874, in favor of the State for the sum of $1622.50, and the costs, expenses, and disbursements of the action. That judgment was unsatisfied in whole or in part when Dowell brought his suit.

On the 4th day of August, 1874, in a suit instituted in the Circuit Court of Marion County, Oregon, against Dowell and Jesse Applegate, who were sureties on the official bond of May, dated August 4, 1866, for another term of the office of Secretary of State, the State recovered judgment for the sum of $8929.85, together with the costs, expenses, and disbursements of the action. That judgment was duly entered August 11, 1877, on the judgment-lien docket of Douglas County. Prior to June 27, 1878, Dowell paid on it the sum of $10,837.75; and, on that day, he recovered a judgment in the Circuit Court of Douglas County against Jesse Applegate, as his co-surety, for the sum of $4882.19, with costs, expenses, and disbursements. That judgment was also, and on the day of its rendition, entered on the judgment-lien docket of Douglas County.

A balance of $1385.61 due the State on its judgment was paid by Dowell, November 16, 1878. He gave notice, November 28, 1878, in conformity with the statutes of Oregon, that he claimed the benefit of the judgment of the State against Jesse Applegate for contribution for said sum, with costs and expenses, and that notice was duly entered of record. An execution was issued April 4, 1879, on the State's judgment, with costs, etc., and under it the lands levied on were sold, May 31, 1879, to Jesse Applegate for upwards of $1200. This left due to Dowell on that execution $284.61, with interest from May 31, 1879.

The amount due Dowell, January 1, 1881, from Jesse Apple-

gate, on both of the above judgments, with interest and costs, was $6584.09. Execution was issued, September 17, 1879, in his favor for $4882.31, and was duly returned "no property found." A second execution issued October 7, 1879, with a like result.

Jesse Applegate was, at one time, the owner in fee of the north half of a donation land claim, with a life estate in the south half that had been set apart to his wife — such claim having been taken up in 1849 under the laws of the provisional government of Oregon, and afterwards under the act of Congress, approved September 27, 1850, entitled "An act to create the office of surveyor-general of the public lands in Oregon and to provide for the survey, and to make donations to settlers, of the said public lands." The tract of land so taken up contained 642 acres, and was known on the surveys and maps of the United States as Jesse Applegate's donation land claim No. 38, in township 22. He was, also, the owner of other lands in Douglas County, Oregon.

Dowell's bill referred to deeds purporting to have been executed in 1867 and 1869 by Jesse Applegate and wife to W. H. H. Applegate, Daniel W. Applegate, Peter Applegate, Sallie Applegate, and Charles Putnam — children and grandchildren of the grantors — for lands aggregating more than a thousand acres, a large part of which was within the above donation claim. It also referred to a deed executed June 24, 1871, by W. H. H. Applegate, conveying to Charles and John C. Drain, for $2000 in cash paid, 200 acres in the south half of that claim.

In respect of all of the above deeds the charge was that they were fraudulent and void as against the State of Oregon and Dowell; that the respective deeds to William H. H. Applegate and Daniel W. Applegate, dated in 1867, were antedated for the purpose of deceiving, cheating, delaying, and defrauding the State and Dowell, and were, in fact, not made and delivered until 1869. In respect to the deed of June 24, 1871, the charge was that the price paid by the grantee was $2000, "yet the deed, to conceal the value of the land and to cheat and defraud the creditors of Jesse Applegate

and to make the price correspond with the said deed of Jesse Applegate and his wife to the said William H. H. Applegate, on its face only expresses the consideration of $500, and it, in place of having a revenue stamp of $2, as was required by the act of Congress at the date of said deed, only has a revenue stamp of 50 cents on it." Dowell's bill also averred that all of said deeds were "illegal and a fraud under the statute of the United States entitled 'An act to provide internal revenue to support the government and to pay interest on the public debt,' approved 30th day of June 1864, and the amendments thereunto; that an inadequate consideration was expressed in each of said deeds by the grantors and grantees with the intent of evading the provisions of said statute; that the grantors and grantees well knew the land conveyed by each deed was at the date thereof worth in cash more than $1000, and each of them have a revenue stamp on them of 50 cents and no more, not one-half the amount required by said act of Congress, and the recording of each of them was in violation of the spirit-meaning of sections 152, 156, and 158 of said statute; that none of said stamps have been cancelled by writing the date when the deed was so used or stamps affixed on the same, and none of them have the initials of the person using them or affixing the same prior to the placing said deed on the records of Douglas County in the State of Oregon."

The relief sought by Dowell was a decree declaring the above-mentioned deeds to be illegal, fraudulent, and void as to him; ordering the sale of the lands described in the bill under the judgments in favor of himself and the State; that an account be taken of the rents, issues, and profits of each tract for the six years preceding the commencement of the suit; that the grantees be compelled to pay the rents, issues, and profits on the tracts severally deeded to them; and that plaintiff have such other relief as in equity and good conscience was proper.

Daniel W. Applegate, May 2, 1881, filed an answer to Dowell's bill, putting in issue most of its material allegations and denying that Dowell was entitled to the relief asked for in the bill. He denied that his deeds, or either of them, were

"a fraud under the statutes of the United States or any statute relating to internal revenue," or that the consideration was expressed in either of them with an intent to evade the provisions of that or any other statute. He admitted that each deed made to him had on it a stamp of fifty cents only, but alleged that stamps were put on each in good faith and without any intent to evade the requirements of the statute of the United States, and that the recording of such deeds was not in violation of any law.

He made no reference in his answer to, and, so far as the record before us discloses, did not introduce in evidence, the deed for the forty acres made to him, October 8, 1874, by William H. H. Applegate, *although that deed is made by his bill in the present action the foundation of his claim to that tract.*

By the final decree in Dowell's suit, rendered January 5, 1883, it was adjudged that on and prior to April 19, 1869, Jesse Applegate and Dowell were jointly and severally liable to the State of Oregon in the sum of five thousand and five hundred and forty-six dollars, as sureties on the official bond of August 4, 1866, of May, Secretary of State, by reason of the defalcation of that officer, which sum was equal to the value of all the property and assets then owned and possessed by Jesse Applegate; that there was due to Dowell, on the accounts mentioned in his bill, $7488.48, for which sum with interest, he, by virtue of his judgment obtained June 27, 1878, had a lien upon all the real property of Jesse Applegate, in Douglas County, from and after the entry and docketing of that judgment; that "on and prior to April 19, 1869, Jesse Applegate was the owner in fee simple of 121.55 acres of the north half of the donation claim numbered thirty-eight;" that "the conveyance of said 121.55 acres by said Jesse Applegate to his sons William H. H. Applegate and Daniel W. Applegate, by deeds dated April 19 and 20, 1869, respectively, was voluntary, and without valuable consideration, and in fraud of the rights of the plaintiff herein, and is, therefore, as to him and his assigns, declared to be null and void." The decree also declared void, as against Dowell and his assigns,

a deed to Peter Applegate for two tracts containing together 41.31 acres, deeds to Daniel W. Applegate and Peter Applegate for 225 acres in the south half of the above donation claim, and a deed to Sallie Applegate.

The decree further provided that unless Jesse Applegate, Peter Applegate, Daniel W. Applegate, William H. H. Applegate, and Sallie Applegate paid the sum adjudged to be due to Dowell, within a named time, the master of the court should sell, as upon execution at law, *all the interest of Jesse Applegate in the above-mentioned tract of* 121.55 *acres*, and in the lands embraced in the deeds to Peter Applegate and Sallie Applegate, containing, respectively, 41.31 and 160 acres, and that the purchaser should be entitled to the possession of the premises purchased, upon the receipt of the master's conveyance therefor. *The tract in dispute is part of the tract of* 121.55 *acres.* The bill was dismissed as to Putnam and Ellensberg.

In respect to a conveyance to William H. H. Applegate for 160 acres in the north half of the donation claim numbered 38, and the conveyance of the same date to Daniel W. Applegate of 146 acres in the south half of that claim, they were held to be valid, the court finding that they were made in good faith, and at a time when the grantor was otherwise able to meet his pecuniary obligations.

A sale took place under the decree of the Federal court on the 26th of April, 1883, Dowell becoming the purchaser of the lands, ordered to be sold, at the price of $7400. The sale was in all things confirmed by the court, and the master, December 6, 1883, pursuant to its order, made and acknowledged a deed to Dowell, which was duly approved, was acknowledged March 28, 1884, and recorded August 19, 1884.

The present suit was brought by Daniel W. Applegate on the 17th day of August, 1886, — more than three years after the decree in the Federal court, — for the purpose, as we have already stated, of obtaining a decree enjoining Dowell from asserting any title or claim, by virtue of the latter's deed under the decree of the Federal court, to the tract of 40 acres conveyed to the plaintiff herein by William H. H. Applegate,

by deed dated October 8, 1874. The bill, admitting *that that tract was embraced in the deed made by the master to Dowell*, avers that the conveyance by William H. H. Applegate to Daniel W. Applegate was prior in time to the commencement of the suit in the Federal court, and its validity was in nowise put in issue or determined by the decree of that court.

The answer of Dowell, in the present suit, as stated at the outset, bases his claim upon the decree of the Federal court and the sale under it at which he purchased. Referring to the deeds made by Jesse Applegate to his sons William H. H. Applegate and Daniel W. Applegate, the answer charges that they were made with the intent to cheat, delay, and defraud the State of Oregon and the defendant; and that those deeds, as well as the deed from William H. H. Applegate to Daniel W. Applegate, were without any valuable consideration whatever; and that defendant purchased the land in question without any actual notice of the latter deed. The answer further avers that the deed, under which plaintiff now claims the tract of 40 acres, was put in issue in the suit in the Federal court, and was determined by the decree of that court.

The reply of Daniel W. Applegate controverts all the material allegations of Dowell's answer and denies that the Circuit Court of the United States for the District of Oregon had any jurisdiction to hear and determine the suit brought by Dowell, or to render the decree under which the lands here in question were sold.

Upon the hearing of the present cause in the Circuit Court of Douglas County, the bill was dismissed, the court being of opinion that the decree of the Federal court in the suit brought by Dowell was a bar to the present one. This decree was reversed by the Supreme Court of Oregon. *Applegate* v. *Dowell*, 15 Oregon, 513. Upon a second trial of this cause in the court of original jurisdiction, there was a decree in favor of Daniel W. Applegate, which decree, upon the appeal of Dowell, was affirmed upon the authority of the previous decision in the Supreme Court of Oregon. *Applegate* v. *Dowell*, 17 Oregon, 299. Among the findings of the Circuit Court of Douglas County, at the last trial of this case, were

the following: "That no evidence was offered or admitted sustaining or tending to sustain the allegations in the answer of defendant [Dowell], that the plaintiff and his brother William H. H. Applegate, at the time of the deed of Jesse Applegate to William H. H. Applegate, and the pretended deed from William H. H. Applegate to plaintiff, well knew that Jesse Applegate was largely indebted to the State of Oregon as one of the sureties of S. E. May, late Secretary of State, and both of said deeds were made with the intent to cheat and defraud the State of Oregon and B. F. Dowell, one of Jesse Applegate's co-sureties, out of said debt; that the said William H. H. Applegate and Daniel W. Applegate received said deeds with the intent to cheat, delay, and defraud the State of Oregon and B. F. Dowell out of said debt; that both of said deeds were made and delivered to William H. H. Applegate and Daniel W. Applegate without any valuable consideration whatever; and that the deed of William H. H. Applegate to his brother Daniel W. Applegate was made and delivered without any valuable consideration whatever, or any of said allegations." The Circuit Court of Douglas County, for that reason only, found those allegations and each of them to be untrue.

From this history of the litigation between the parties, it appears that Dowell, in his answer in this suit, asserted his right to the forty acres in dispute under and by virtue of the decree and proceedings in the Circuit Court of the United States. That right having been denied by the judgment of the Supreme Court of Oregon, affirming the judgment of the Circuit Court of Douglas County, it is necessary to inquire —

First, whether the decree and proceedings in the Federal court were, as claimed, void for the want of jurisdiction to hear and determine the suit which was instituted by Dowell in the Circuit Court of Douglas County, Oregon, and was subsequently removed into the Circuit Court of the United States for the District of Oregon;

Secondly, whether, if such decree and proceedings were not void, the state court gave due effect to them, when adjudging

that Dowell took nothing by his purchase of the lands in dispute under that decree.

If these questions be determined in favor of Dowell, then the judgment below was erroneous in that it denied a right specially set up and claimed by him under the authority of the United States.

1. Dowell, we have seen, brought his suit in the Circuit Court of Douglas County on the 11th day of October, 1879, and his bill in the Federal court, which took the place of the bill filed in the state court, was filed April 6, 1881. The present transcript does not contain all the proceedings in the Circuit Court of Douglas County prior to the removal of the cause into the Federal court. Nor does it contain the petition for removal. But the state court below had before it, in the present suit, the bill filed by Dowell in the Federal court, April 6, 1881, his supplemental bill of September 25, 1881, the answer of Daniel W. Applegate of May 2, 1881, and the final decree of January 5, 1883. It was also informed, by the findings of fact in the Circuit Court of Douglas County, of the sale made by the master in chancery under that decree, the confirmation of that sale by the court, the execution of the deed to Dowell, and that the tract described in Applegate's complaint in this suit is a part of the premises described in the above decree of sale and in the master's deed to Dowell.

In the bill and supplemental bill of Dowell, he and the defendants to the suit in the Federal court are described as citizens of Oregon. But there is no finding, nor anything in the present transcript, showing the citizenship of the parties at the time Dowell brought his suit in the state court, nor at the time of the filing of the petition for removal. It is therefore contended that this court cannot assume that the parties to the suit in the Federal court were all citizens of Oregon at the time that suit was brought, or when it was removed from the state court. *Stevens* v. *Nichols*, 130 U. S. 230; *Crehore* v. *Ohio & Miss. Railway*, 131 U. S. 240; *La Confiance Compagnie* v. *Hall*, 137 U. S. 61.

If it be assumed that all the parties to Dowell's suit were

citizens of Oregon when it was commenced, as well as when it was removed into the Federal court, — and such, probably, was the case, — it is yet quite apparent that jurisdiction was taken by that court on the ground that the deeds by Jesse Applegate and wife which obstructed Dowell in his efforts to reach the lands described in them, were charged to have been insufficiently stamped under the acts of Congress then in force providing internal revenue for the support of the government and to pay the interest on the public debt, and that the failure to put sufficient stamps on those deeds and to properly cancel them was with the intent to evade such acts. We may so interpret the record, because in the opinion of Judge Deady, in *Dowell* v. *Applegate, &c.*, 7 Sawyer, 232, 239, when that case was before the Federal court upon demurrer interposed by some of the original defendants, he stated that the removal to the Federal court was "on the ground that its determination involved the construction of certain provisions of the internal revenue act of June 30, 1864, c. 173, 13 Stat. 223, and the amendments thereto."

It thus appears, upon the face of the record of the suit in the Federal court, that the case depended, in part, upon the construction of certain acts of Congress, and upon the effect of the alleged fraudulent omissions of the grantors in the deeds attacked to conform to those acts. If all those deeds were void, by reason of such omissions, then the difficulties in the way of Dowell's reaching the lands embraced by them would probably have disappeared.

If the Federal court erred in assuming or retaining jurisdiction of Dowell's suit, — a question not necessary to be examined, — would it follow that its final decree, being unmodified and unreversed, can be treated as a nullity when assailed collaterally by one who was a party to the suit in which it was rendered?

In *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 173, 185, it was said by Chief Justice Marshall that "all courts from which an appeal lies are inferior courts, in relation to the appellate court before which their judgments may be carried; but they are not, therefore, inferior courts in the technical sense of those

words. They apply to courts of a special and limited jurisdiction, which are erected on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded."

In *Skillern's Executors* v. *May's Executors*, 6 Cranch, 267, it appears that after the reversal by this court of a decree of the Circuit Court of the United States for the District of Kentucky, and after the cause was remanded to the court below, it was discovered to be one not within the jurisdiction of that court. The question arose whether the court could dismiss the action for want of jurisdiction, after this court had acted thereon. It was held that "the merits of the cause having been finally decided by it, and its mandate requiring only the execution of its decree, the Circuit Court was bound to carry that decree into execution, although the jurisdiction of that court be not alleged in the pleadings."

In *Cameron* v. *McRoberts*, 3 Wheat. 591, a suit brought in the District Court of Kentucky, then having the jurisdiction of a Circuit Court, the pleadings stated that McRoberts, the plaintiff, was a citizen of Kentucky, and that the defendant Cameron was a citizen of Virginia. The citizenship of other defendants was not stated. The defendants all appeared and answered, and a decree was pronounced for McRoberts. Subsequently Cameron filed a bill of review, and moved to set aside the decree and to dismiss the suit, "because the want of jurisdiction appeared on the record," and upon the allegation that the parties to the bill were all citizens of Kentucky. It was held that the court below had not power over its decree, so as to set the same aside on motion after the expiration of the term at which it was rendered, and that if a joint interest vested in Cameron, and the other defendants, the court had no jurisdiction over the cause, although jurisdiction could be exercised as to Cameron, if a distinct interest vested

in him, so that substantial justice, so far as he was interested, could be done without affecting the other defendants.

In *McCormick* v. *Sullivant*, 10 Wheat. 192, 199, certain defendants filed a plea in bar to a suit brought against them, setting up the proceedings and decree in a former suit brought by the plaintiffs in the District Court of Ohio, exercising the powers and jurisdiction of a Circuit Court. A special replication to this plea was filed, setting forth the record of the former suit, and alleging that the proceedings in that suit were *coram non judice*, the record not showing that the complainants and defendants in that suit were citizens of different States. This court said that the reason assigned in the replication why the former decree could not operate as a bar "proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not, on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities." It was, therefore, held that the decree in the first suit, whilst it remained unreversed, was a bar to the last suit as to the defendants who were also parties to the first suit.

In *Ex parte Tobias Watkins*, 3 Pet. 193, 207, Chief Justice Marshall said that "it is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world," and that an "apparent want of jurisdiction can avail the party only on a writ of error."

Similar views were expressed in *Bank of the United States* v. *Moss*, 6 How. 31, 39, and *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 557, 559, in the latter of which cases it was said that "although the judgments and decrees of the Circuit Courts might be erroneous, if the records fail to show the facts on which the jurisdiction of the court rested, such as that the plaintiffs were citizens of different States

from the defendant, yet they were not nullities, and would bind the parties until reversed or otherwise set aside."

These cases establish the doctrine that, although the presumption in every stage of a cause in a Circuit Court of the United States is that the court is without jurisdiction unless the contrary affirmatively appears from the record, *Börs* v. *Preston*, 111 U. S. 252, 255, and the authorities there cited, yet, if such jurisdiction does not so appear, the judgment or final decree cannot, for that reason, be collaterally attacked, or treated as a nullity.

These authorities, above cited, it is said, do not meet the present case, because the ground on which, it is claimed, the Federal court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court. As said in *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, above cited, if the Circuit Court "kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal."

This disposes of the first objection urged against the decree in the Federal court under which Dowell purchased. That

decree cannot be treated, in this suit, as void for want of jurisdiction.

2. We now proceed to consider what effect should be given to the decree and proceedings in the suit in the Federal court. Although the bill in that suit refers to various deeds executed by Jesse Applegate and wife for lands that Dowell sought to have sold, and charged that they were made with the intent to delay and defraud both the State of Oregon and Dowell, the fundamental question presented was whether the lands themselves, fully identified by the pleadings, could be rightfully sold in satisfaction of Dowell's demands. To that issue, directly made, Daniel W. Applegate was a party. He met all the material allegations of Dowell's bill by denials that put upon the latter the burden of showing that he was entitled to the relief sought by him. The issue thus made was determined adversely to Applegate as to some of those lands.

The court, as we have seen, adjudged that on and prior to April 19, 1869, Jesse Applegate was the owner in fee of 121.55 acres of the north half of said donation claim, and that the deeds of April 19 and 20, 1869, from Jesse Applegate to W. H. H. Applegate and Daniel W. Applegate, covering said 121.55 acres, were voluntary, without consideration, and in fraud of the rights of Dowell, and, therefore, as to him and his assigns, null and void. It was further adjudged that all the interest of Jesse Applegate, on the 1st of January, 1869, in that 121.55 acres (and in other lands referred to in the decree) be sold by the master commissioner of the court. It cannot be said that this decree was not within the scope of the pleadings in the suit in the Federal court. And it certainly covered the lands now in dispute, for it is admitted that the 40 acres described in the deed of October 8, 1874, from W. H. H. Applegate to the present plaintiff are part of the 121.55 acres directed by the decree of the Federal court to be sold, and which was, in fact, sold — Dowell becoming the purchaser.

Upon what principle can it be held that that decree, being unmodified and unreversed, does not conclude the parties to the suit in which it was rendered, in respect to the liability

of the lands described in it for the demands of Dowell as ascertained and settled by the court? It is said that the deed of October 8, 1874, under which Daniel W. Applegate claims the 40 acres, was not distinctly put in issue by the pleadings or determined by the decree. But its validity was involved in the larger question presented by the pleadings as to the right of Dowell to subject to his demands the interest of Jesse Applegate in all the lands referred to, — those covered by donation claim numbered thirty-eight, and those not within that claim. The decree directing the sale of all the interest of Jesse Applegate in the 121.55 acres on the 1st of January, 1869, was an adjudication, as between Dowell and the defendants in that suit who asserted title to those lands, that no claim asserted by either of them could stand against the right of Dowell to have those lands sold.

It is disclosed by the present suit that when Daniel W. Applegate answered Dowell's bill he held the deed of October 8, 1874. If Daniel W. Applegate became, when taking that deed, a *bona fide* purchaser of the 40 acres of land now in dispute, and if the title so acquired was superior to Dowell's right to have that land sold for his demands against Jesse Applegate, it behooved him to assert that title in defence of the suit brought against him. The very nature of that suit required him to assert whatever interest he then had in the lands or any part of them that was superior to any claim of Dowell upon them, whether by judgment liens or in any other form. So far from pursuing that course, he forebore — purposely, as may now be inferred — to claim anything in virtue of the deed of October 8, 1874, and long after the decree under which Dowell purchased, he comes forward with a new, independent suit, based alone upon that deed, as giving him a superior title. His object is — certainly, the effect of his suit, if it be sustained, will be — to retry the issues made in Dowell's suit so far as they involved the latter's claim to have the 40-acre tract subjected to his demands. The decree in the Federal court was an adjudication, as between all the parties to the suit in that court, that Dowell was entitled in satisfaction of his

claims against Jesse Applegate, to subject to sale *all* the lands his bill sought to reach, which the decree directed to be sold. And that decree, never having been modified by the court that rendered it nor by this court upon appeal, necessarily concludes every matter that Daniel W. Applegate was entitled, under the pleadings, to bring forward in order to prevent the sale of the lands claimed by him, by whatever title. Having remained silent as to the deed of October 8, 1874, and having allowed the suit in the Federal court to proceed to final decree upon the question as to whether the lands described in the bill could be subjected to Dowell's demands — which description included the 40 acres here in dispute — and having been defeated upon that issue, and the decree having been fully executed, he cannot have the same issue retried in an independent suit based solely upon a title that he was at liberty to set up, but chose not to assert, before the decree was rendered.

The argument to the contrary seems to rest principally, if not altogether, upon the ground that the present suit is upon a cause of action entirely different from that presented in the suit in the Federal court. In that view, our attention is called to the cases of *Cromwell* v. *County of Sac*, 94 U. S. 351, *Russell* v. *Place*, 94 U. S. 606, and *Bissell* v. *Spring Valley Township*, 124 U. S. 225, 231. Those cases hold that a judgment by a court of competent jurisdiction as to parties and subject-matter is a finality in respect to the claim or demand in controversy, "concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." "Thus, for example," the court said in *Cromwell* v. *County of Sac*, "a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it is subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action and established by competent evidence, the subsequent allega-

tion of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed." In that case it was further held — and the same principle was announced in the other cases — that "where the second action, between the same parties, is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." To the same effect were prior decisions of this court. *Hopkins* v. *Lee*, 6 Wheat. 109, 113; *Smith* v. *Kernochen*, 7 How. 198, 217; *Pennington* v. *Gibson*, 16 How. 65, 77; *Lessee of Parrish* v. *Ferris*, 2 Black, 606, 609. And the same doctrines were subsequently reaffirmed in *Lumber Co.* v. *Buchtel*, 101 U. S. 638, 639, and *Stout* v. *Lye*, 103 U. S. 66, 71, and, at the present term, in *Johnson Company* v. *Wharton Company*, *ante*, 252. To these we may add the case of *Stockton* v. *Ford*, 18 How. 418, 420, in which it was said: "One of the questions now sought to be agitated again is precisely the same as this one in the previous suit, namely, the right of the plaintiff to the judicial mortgage under the execution and sale against Prior. The other is somewhat varied; namely, the equitable right or interest in the mortgage of the plaintiff, as the attorney of Prior, for the fees and costs provided for in the assignment to Jones. But this question was properly involved in the former case, and might have been there raised and determined. The neglect of the plaintiff to avail himself of it, even if it were tenable, furnishes no reason for another litigation. The right of the respective parties to the judicial mortgage was the main question in the former suit. That issue, of course, involved the whole or any partial interest in the mortgage. We are satisfied, therefore, that the former suit constitutes a complete bar to the present."

So far from the above cases sustaining the decision of the Supreme Court of Oregon, they support the views we have expressed. The present suit is not a second one between the same parties, upon a different claim or demand. It seeks, by additional evidence, to reopen the controversy that arose, and

was determined, in the suit in the Federal court as to the right of Dowell to have all the lands described in his bill subjected to his claims. While the position of the parties is reversed, Daniel W. Applegate, who contested that right, in the suit of the Federal court, — so far as that suit related to the lands then claimed by him, including the 40 acres here in dispute, — seeks, under the guise of a new suit, to obtain a re-examination of that question. And he seeks such reëxamination, not upon any ground of fraud in obtaining that decree, but in the light simply of the conveyance of October 8, 1874, from W. H. H. Applegate, which conveyance, although existing before Dowell commenced his suit, indeed, before Dowell acquired any judgement lien of record, he deliberately refrained from bringing to the attention of the Federal court, in some appropriate form, in support of his defence. The presenting in this suit of the fact of that conveyance, for the purpose of showing that the 40 acres in question should not have been subjected to sale for Dowell's demands, does not, within the rule announced in the cases above cited, make a different claim or demand. On the contrary, the matter now presented was embraced by the issues in the suit in the Federal court, and was there determined, when that court, upon final hearing, adjudged that the 121.55 acres (which embraced the 40 acres now in dispute) should be sold to pay Dowell's claims. This case, consequently, comes within the rule, that "a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented."

For the reasons given we are unable to concur in the views expressed by the state court as to the effect to be given to the decree of the Federal court. We are of opinion that due legal effect is not accorded to it, unless it be adjudged, as this court does now adjudge, that never having been modified and being in full force and unreversed when the present suit was instituted, that decree conclusively establishes, as between Dowell and Daniel W. Applegate, that the former was entitled to have the lands, now in dispute, sold for his demands; and,

consequently, that the title acquired by Dowell, under that decree, cannot be here questioned by Applegate.

Under this view, it is immaterial that Dowell did not, in the present case, offer evidence in support of the allegations of fraud against Jesse Applegate in respect to the various deeds made by him, and to which reference was made in the suit and decree in the Federal court. That decree being conclusive, as between Dowell and Daniel W. Applegate, of the question now presented, it was not incumbent upon Dowell to introduce any evidence in this case beyond the record of the former suit.

We are of opinion that the Supreme Court of Oregon failed to give proper effect to the decree and proceedings in the Circuit Court of the United States for the District of Oregon, and erred in not reversing the final judgment of the Circuit Court of Douglas County, with directions to dismiss the complaint of Applegate.

The decree is, therefore, reversed, and the cause remanded for further proceedings in conformity with this opinion.

Mr. Justice Field dissented from the judgment in this case.

WESTERN NATIONAL BANK *v.* ARMSTRONG.

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

No. 251. Argued February 2, 1893. — Decided March 12, 1893.

The borrowing of money, by a bank, though not illegal, is so much out of the course of ordinary and legitimate banking business as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.

Whether a vice-president of a national bank who had, without authority from the board of directors, paid into the bank a large sum of money and received certificates of paid-up stock for a still larger amount could, on the subsequent insolvency of the bank without ratification of such

Statement of the Case.

increase, recover back his subscription money, or was to be treated as a general creditor, is a question which a court cannot settle in an action to which he is not a party.

In December, 1888, the Western National Bank of New York, organized under the laws of the United States, and having its place of business in the city of New York, filed a bill of complaint, in the Circuit Court of the United States for the Southern District of Ohio, against David Armstrong, as receiver of the Fidelity National Bank of Cincinnati, Ohio. The bill alleged that the Fidelity National Bank was indebted to the complainant bank in the sum of $207,290, on account of a loan made on May 28, 1887, by the New York bank to the Ohio bank, "at the special instance and request of E. L. Harper, who was then the vice-president and general manager of the said Fidelity National Bank, with full authority to make said loan on its behalf." The bill further alleged that said loan was secured by collateral notes, signed by one A. P. Gahr, and endorsed by said E. L. Harper, and by the endorsement and delivery to the complainant by E. L. Harper of certificates for 1600 shares of the capital stock of the said Fidelity National Bank; that said notes were, when they fell due and still are, entirely worthless by reason of the insolvency of said Gahr and Harper; that said stock certificates did not and do not represent stock of the Fidelity National Bank, but were wholly invalid and void, because they did not constitute a part of the original and authorized stock of said bank, but were a part of a proposed increase of the capital stock of said bank, on account of which E. L. Harper had paid into the bank upwards of $180,000, but which increase had never been voted for by the stockholders of said bank, nor had notice of said intended increase of said capital, with a certificate that the full amount of the same had been fully paid in, ever been sent to the Comptroller of the Currency of the United States, nor had the Comptroller ever assented to such increase of capital, as required by law; but that, nevertheless, said Harper had procured from the president and cashier of said bank the certificates of stock so as aforesaid pledged with the complainant; that when said certificates were so issued to

Harper the stock of the Fidelity National Bank had an established market value of $153 per share, and that the complainant bank relied on said certificates as one of the securities for said loan when it made the same; that said money, so paid in by Harper on account of proposed stock, was held by said Fidelity National Bank on special deposit and in trust for said Harper until such increase of stock should be duly authorized. The relief prayed for was that David Armstrong, receiver of the Fidelity National Bank, which had become insolvent, should allow the claim for said loan, and pay, out of the assets in his hands, dividends, the same as to other creditors of said bank, and that the complainant bank should be subrogated to the rights of Harper on account of the moneys so paid in for stock proposed to be issued, and which the complainant alleged to constitute a preferred claim.

Armstrong, receiver, entered an appearance, and demurred to those portions of the bill in which were alleged the facts respecting the proposed issue of additional stock, and in which the complainant prayed to be subrogated to Harper's supposed rights in respect to the same. The alleged grounds of the demurrer were a want of necessary parties, in that the Fidelity National Bank and E. L. Harper were not made parties to said bill, and for multifariousness.

Subsequently, in November, 1889, the court below sustained the demurrer to so much of said bill as was recited therein — being the said allegations seeking subrogations — and gave leave to answer the remainder of said bill.

An answer was duly filed, denying that the Fidelity company was indebted to the complainant bank; that the complainant had, on May 28, 1887, or at any time, loaned the Fidelity National Bank the sum of two hundred thousand dollars or any other sum, and alleging that the notes mentioned in the bill, made by A. P. Gahr and endorsed by E. L. Harper, were discounted by the complainant bank for said Harper, and that the proceeds of such discount were received by said Harper; that the said notes were at no time the property of the Fidelity National Bank, and that the Fidelity National Bank

never had any interest in said transaction, and was in no way responsible therefor.

The cause was put at issue, evidence taken, and, on April 8, 1890, a final decree was entered dismissing the bill at the cost of the complainant. The case comes to this court on appeal from said decree.

Mr. Edward Colston, (with whom were *Mr. Judson Harmon* and *Mr. George Hoadly, Jr.*, on the brief,) for appellant.

Mr. John W. Herron for appellee.

Mr. Justice Shiras delivered the opinion of the court.

Whether the transaction of May, 1887, was a discount by the Western National Bank of New York in favor of E. L. Harper of the four notes made by A. P. Gahr and endorsed by Harper, or was a loan by said bank to the Fidelity National Bank, is the question principally discussed in the briefs and oral arguments of the respective parties.

In disposing of the case we are not assisted by any findings or opinion by the court below, and we are left to conjecture the grounds upon which that court proceeded in dismissing the bill of complaint.

The theory that the case was that of a simple discount by the New York bank of four promissory notes, made by Gahr and endorsed by Harper, and secured by the assignment by Harper of certificates of 1600 shares of the stock of the Fidelity National Bank, comports with the form of the notes themselves. Such a transaction would have been an ordinary one, and in the course of the usual business of such a bank. The letter of May 16, 1887, in which the proposition was made to the New York bank to make the loan, was signed by E. L. Harper in his own name, without any official designation. That the $200,000 were placed on the books of the New York bank to the credit of the Ohio bank was not inconsistent with this version of the case, because it appears that this was done at the request of Harper.

On the other hand, it is claimed that because the letter of May 16, 1887, was written on the letter paper of the Fidelity National Bank, and because the proceeds of the discount were placed to the credit of the Ohio bank, and were drawn out by drafts of that bank, the transaction was thereby shown to have been made on behalf of the Ohio bank. And C. N. Jordan, vice-president of the New York bank, testified that he understood the proposition to come from the Ohio bank for a loan to it, and that he would not have submitted the matter for approval to the board of the New York bank had he not so understood it.

There are other features of the correspondence that are pointed to by the parties as making for their respective contentions. It may be conceded that the New York bank acted upon the theory that the loan was to the Ohio bank, and took the notes and certificates of stock as collateral. But the liability of the Ohio bank is not a necessary consequence of such a concession. It has further to be shown that the Ohio bank was really a party to the transaction, either by having authorized Harper to effect the loan on its behalf, or by having ratified his action and having accepted and enjoyed the proceeds of the discount.

There is no evidence whatever that the board of directors of the Fidelity National Bank gave any authority to Harper to borrow money on behalf of the bank, much less to borrow so enormous a sum on so long a time. In this respect the complainant's case stands barely on the assertion in the bill that "Harper was the vice-president and general manager of the Fidelity National Bank, with full authority to make said loan on its behalf." The only evidence we find in the record tending to support such averment is found in the answer by J. Harvey Waters, the general book-keeper of the Fidelity National Bank, on cross-examination, wherein he stated that E. L. Harper was the vice-president and managing officer, and that by "managing officer" he meant that Harper was "the general manager of the business of the bank." No such office as that of "general manager" is known or named in the National Bank Acts, nor does any such office exist by

usage. The most that can be claimed in this case is that Harper acted as the principal executive officer of the bank. It cannot be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing $200,000 at four months' time.

It might even be questioned whether such a transaction would be within the power of the board of directors. The powers expressly granted are stated in the eighth section of the National Bank Act (Rev. Stat. § 5136, par. 7): A national bank can "exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes."

The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted. Still, as was said by this court, in the case of *First Nat. Bank* v. *Nat. Exchange Bank*, 92 U. S. 122, 127, "authority is thus given in the act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others."

Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.

Even, therefore, if it be conceded that it was within the

power of the board of directors of the Fidelity National Bank to borrow $200,000 on time, it is yet obvious that the vice-president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers.

Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money, and that the bank cannot be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown. It is scarcely necessary to say that a ratification, to be efficacious, must be made by a party who had power to do the act in the first place; that is, in the present case, the board of directors; and that it must be made with knowledge of the material facts. There is not the slightest evidence shown in this record that the board of the Fidelity National Bank, by any act, formal or informal, undertook to ratify Harper's action in the premises, or that they ever had any knowledge of the transaction.

It is true that a corporation may become liable upon contracts assumed to have been made in its behalf by an unauthorized agent by appropriating and retaining, with knowledge of the facts, the benefits of the contracts so made on its behalf. But there is no room for such a contention in the present case. The money advanced by the New York bank was, indeed, at Harper's request, placed to the credit of the Ohio bank, but it was shown that it was withdrawn partly by Hopkins, the assistant cashier, and partly by Harper himself, by drafts in the name of the bank, but that the moneys thus drawn never came into the actual possession or use of the bank. The moneys were appropriated by Harper to his own use, or, at all events, it does not appear that the bank ever got a penny of the borrowed money or any benefit or advantage whatever by reason of the transaction. The mere placing of the money in the name of the Ohio bank involved no ratification by the bank unless it was so placed with their knowledge and assent, nor did the withdrawal of the money

by drafts drawn by Harper or by his direction in the name of the bank constitute a receipt by the bank of such money, unless it was, in point of fact, received and used by the bank or for its benefit. Not this, but the contrary was shown.

So far, then, as the case of the plaintiff in error depends on the alleged loan of money to the Fidelity National Bank, we find no error in the decree of the court below in dismissing the bill.

This brings us to the consideration of the other phase of the case, namely, that which arose on the claim of the New York bank as the holder of 1600 shares of the stock of the Fidelity National Bank, transferred to it as security by Harper, to be subrogated to the supposed right of Harper to be repaid the moneys paid in by him on account of his subscription for an increase of stock, not voted for by the stockholders, and not approved by the Comptroller of the Currency.

The court below sustained the demurrer to this portion of the bill. Two grounds were asserted in the demurrer — one, the insufficiency of parties, in that neither the Fidelity National Bank nor Harper were made parties; the other, that of multifariousness. It is now contended before us that Harper was not a necessary party because, as is averred in the bill and admitted by the demurrer, he had pledged and assigned this stock to the complainant bank, and it is argued that the bank thereby became vested with whatever rights Harper had to have his money returned to him as a special deposit. It is also contended that asserting such a right of subrogation is so far within the equities of the bill, and so necessary an incident of the transaction, as to relieve the bill of the charge of being multifarious.

It is not easy to see why, if the complainant were really entitled to be subrogated to the rights of Harper in respect to the hypothecated stock, such a claim might not be set up in the same bill in which it seeks to be allowed, as a lender of money to the Fidelity National Bank, to participate in the payments made by the receiver.

But, however that may be, it seems to us that Harper, having procured an issue to himself of certificates of paid-up stock,

was in no position, when the bank became insolvent, before the necessary steps to legitimate the increase of stock had been taken, to demand back his money, as if it were trust money, or constituted a preferred claim against the assets of the bank in the hands of the receiver. The utmost that he could claim would be to be treated as a general creditor, and entitled as such to participate in the payments made by the receiver.

In the case of *Winters* v. *Armstrong*, *Armstrong* v. *Stanage*, 37 Fed. Rep. 508, which was the case of a suit by the receiver of the Fidelity National Bank to recover, from a subscriber to the preferred increase of stock of that bank, the amount of a promissory note given in payment of such subscription, it was held by Mr. Justice Jackson, then Circuit Judge, that, as the necessary steps had not been taken to legitimate such increase of stock before the bank became insolvent, there was a failure of consideration, and the receiver could not enforce payment of the note. We, however, agree with the court below in thinking that such a question could not be raised in the present case, to which Harper was not a party. Harper had paid in the full amount of his subscription, and had procured the issue to himself of certificates for his stock, and had parted with the legal title to the stock by transferring the certificates to the New York bank. In such circumstances it might be claimed, with some appearance of justice, that Harper and his transferee were precluded from opening up the transaction and procuring a rescission of the subscription. If that were so, the holder of such stock, whether Harper or the New York bank, might have been compelled to contribute to the payment of the indebtedness of the insolvent bank. *National Bank* v. *Case*, 99 U. S. 628.

So, too, even if it were held that Harper was not precluded from surrendering his stock and recovering back the money paid on account of it, it might yet be made to appear that Harper, if he were answerable for the mismanagement which resulted in the bank's insolvency, could not, in a court of equity, and as against the creditors of the bank, recover back his subscription money. But it is plain that such questions as

these could not be adjudicated in the absence of Harper as a party, and we therefore think the court below did not err in sustaining the demurrer for that reason.

Upon the whole, we are of opinion that the decree of the court below, in sustaining the demurrer, and in dismissing the bill, should be

Affirmed.

ISRAEL *v.* ARTHUR.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 903. Submitted January 29, 1894. — Decided March 12, 1894.

This court has no jurisdiction to revise the decision of the highest court of a State, in an action at law, upon a pure question of fact, although a Federal question might arise if the question of fact were decided in a particular way.

The decision by the highest court of a State that a woman divorced from her husband in a proceeding instituted by him and by a decree which does not bind her, who marries another husband, and lives with him as his wife, is thereby estopped, after the death of the first husband, from setting up a claim to a widow's share in the distribution of his estate, presents no Federal question for revision by this court.

MOTION to dismiss. Abbie A. Israel, under the name of Abbie A. Arthur, filed her petition in the county court of Laramie County, Colorado, in the matter of the estate of John Arthur, deceased, May 17, 1881, alleging that John Arthur died intestate and without children; that she was his widow; that James B. Arthur had been appointed administrator and was in possession of decedent's property, and committing breaches of his duty as such; that he, as a brother of John Arthur, and certain other brothers and sisters, and descendants of a deceased sister, claimed to be entitled to the estate as heirs at law; and that the relationship of petitioner to the decedent and her rights in his estate were ignored; and she prayed that she might be declared the sole distributee of said estate, and heir at law of John Arthur, deceased, and that the administrator be required to account accordingly. The defendant an-

swered, denying any misappropriation of the estate, and that the petitioner was then or ever had been the widow of John Arthur; and for a second defence, defendant, admitting the intermarriage of petitioner with John Arthur, alleged that on February 9, 1875, a decree was duly entered by the county court of Laramie County in favor of John Arthur and against petitioner, dissolving the bonds of matrimony theretofore existing between them; and for a further defence alleged that on June 12, 1877, a second decree of divorce was duly made and entered in said court in favor of John Arthur and against petitioner. Replication was filed July 21, 1881, denying the new matter in the answer. On March 30, 1884, petitioner filed her amended and supplemental petition to her original petition, wherefrom it appeared that the judgment of the county court on the trial of the issues made as above stated was against petitioner, but that that judgment was reversed by the Supreme Court of Colorado, as were also the decrees of divorce of 1875 and 1877, both of which were held to be null and void and of no effect for want of jurisdiction. *Israel* v. *Arthur*, 7 Colorado, 5; Id. 12; 6 Colorado, 85.

The amended and supplemental petition detailed alleged misfeasances and wastes of the administrator and reiterated petitioner's claim to the proceeds of the estate as the widow of John Arthur, and prayed relief. The amended and supplemental answer of the defendant, filed April 9, 1884, admitted that the decrees of divorce were voidable at the option of petitioner for want of due and legal service upon her, but averred that after the decrees were rendered, petitioner, with full knowledge thereof, "ratified, affirmed, assented to, and acquiesced in the same and each of them in this, to wit, in that after the same had been rendered and in the lifetime of the said John Arthur, the said defendant, by force and virtue of the said decrees and under and in pursuance thereof, entered voluntarily into a contract of marriage with one James H. Israel and caused and procured the said contract of marriage to be duly and legally solemnized, and thereunder took upon herself and assumed the relations of wife to the said James H. Israel, and thenceforward and at all times thereafter continuously, by virtue of

the said solemnization of said marriage contract, lived and cohabited with the said James H. Israel as his wife until and ever since the death of the said John Arthur."

The answer also set forth the particulars of the elopement of petitioner with and marriage to Israel, and grounds why it had been impossible for the administrator to learn the facts in time to plead them to the original petition.

In a further answer, filed the same day, the charges of waste and misfeasance were denied. To this answer a demurrer was interposed April 28, 1884. A further supplemental answer was filed August 28, 1884, setting up that the administrator had in all things faithfully discharged the duties of his trust and administered the estate and was ready to make his final accounting whenever required by order of court. To this answer a replication was filed by petitioner September 23, 1884.

The record proper does not show the action either of the county court or of the Supreme Court on these pleadings, but in the opinion of the Supreme Court of Colorado in this case it appears that judgment was rendered in favor of the petitioner and the cause again taken to the Supreme Court, which held that the facts set up in the amended answer were sufficient to debar or estop petitioner from claiming any property rights as the widow of John Arthur, deceased.

Upon the cause being again remanded to the county court the petitioner filed a new replication, January 27, 1891, to the amended and supplemental answer of the administrator, averring the alleged decrees of divorce to be absolute nullities, and that the Supreme Court of the State had so declared, and that the administrator was thereby estopped from saying that she was not the widow of John Arthur when he died; and the replication proceeded as follows:

"And this petitioner avers that she is a citizen of the United States and a citizen of the State of Colorado, and, as widow of said John Arthur, deceased, as aforesaid, she became at his death the sole heir of his said estate, consisting of certain lands, tenements, and hereditaments and personal property at the said county of Laramie, and as such heir-at-law of him,

the said John Arthur, the said lands, tenements, and hereditaments immediately vested in her and she is now and ever since has been seized of the same and entitled to the possession, use, and enjoyment of the same; that the personal estate of him, the said John Arthur, was and is more than sufficient to pay all the debts of him, the said John Arthur, and that she, the said petitioner, as such sole heir, is the sole distributee of the said personal estate after the payment of said debts and the cost of administration, and the same and the right thereto became thereupon vested in her and thence hitherto has been vested in her as an indefeasible right guaranteed to her by the laws and constitution of the State of Colorado and by the Constitution of the United States, and that she has never been summoned or impleaded in any court or action in which any of her said rights or property have been adjudged lost, forfeited, or taken from her by any due process of law; that the Supreme Court of this State in its judgments heretofore rendered has declared and adjudged that this petitioner was the widow of the said John Arthur at the time of his decease, and that such decisions constitute the law of this case, and that by virtue of the laws of the State of Colorado she is, as such widow, the sole heir of him, the said John Arthur; that a judgment of this court dismissing her said petition and giving her said property to others would, if affirmed by the Supreme Court of this State, be the taking of her private property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States; that a judgment of this court dismissing her said petition for the commission of supposed crimes averred in said supplemental answer to have been committed by her would, if affirmed by the Supreme Court of this State, constitute an *ex post facto* law of the State of Colorado, in contravention of section ten, article one, of the Constitution of the United States; that a judgment of this court dismissing her said petition for the supposed crimes alleged in said supplemental answer to have been committed by her would, if affirmed by the Supreme Court of this State, constitute a law of attainder of the State

of Colorado, in contravention of section ten, article one, of the Constitution of the United States; that a judgment of this court dismissing her said petition and transferring her said property to others would, if affirmed by the Supreme Court of this State, constitute an act of judicial legislation without the sanction of law and against the rights of this petitioner guaranteed to her by both the constitution of this State and the Constitution of the United States.

"And this petitioner denies that after the said pretended decrees of divorce were rendered, she with full or any knowledge that they had been rendered, or otherwise or at all, ratified or affirmed or assented to or acquiesced in the same or either of them; denies that there were any decrees to ratify, affirm, assent to, or acquiesce in, and avers that the pretended judgments and decrees of divorce mentioned in said amended and supplemental answer were *nil* and could not be ratified or affirmed or assented to or acquiesced in by her.

"Denies that said pretended judgments or decrees of divorce had or were of any force or virtue; denies that in the lifetime of the said John Arthur, by force and virtue of said pretended decrees or under or in pursuance thereof or otherwise, she entered voluntarily or otherwise into a contract of marriage with one James H. Israel; denies that she caused or procured any contract of marriage to be duly or legally or at all solemnized between herself and the said James H. Israel in the lifetime of the said John Arthur; denies that any contract of marriage could have been duly and legally solemnized between her and the said James H. Israel in the lifetime of her late husband, the said John Arthur, deceased; and this said petitioner denies that in the lifetime of said John Arthur, upon the supposed knowledge that the said pretended decrees of divorce had been rendered coming to the said petitioner and the said James H. Israel, she desired to use the said supposed privilege conferred by said pretended decrees or to accept the supposed benefit thereof, and denies that she procured a marriage to be solemnized between her and the said James H. Israel in the lifetime of her late husband, John Arthur, deceased, and she avers that said pretended decrees of

divorce conferred no privilege she could use and provided no benefits whatever which she could have accepted."

She further denied that she and Israel went away from the place where they were living to some place unknown or remote therefrom, or were married secretly in due form of law in the lifetime of John Arthur, or that she had ever admitted or confessed that she had been duly or at all married to Israel after the rendition of the pretended decrees and in the lifetime of Arthur, as averred in the answer.

On June 8, 1891, the case came on for trial in the county court, and the following appears in the bill of exceptions:

"Thereupon on behalf of the petitioner it was stipulated and admitted by the respondent that the decrees set up in the respondent's amended and supplemental answer were rendered as therein alleged, and that the same are and were void when rendered, and that the only question now being tried is as to whether the plaintiff is estopped by her conduct as alleged in said answer to dispute or contest the validity of said decrees or whether she has ratified them by her conduct."

The testimony introduced on both sides is then set forth. The county court found in favor of defendant, and gave judgment, June 23, 1891, with costs, "that the petitioner, Abbie A. Israel, of right ought to be and is estopped to aver or claim that she is the widow or heir of the said John Arthur, deceased, or the distributee of his estate. Wherefore it is considered, adjudged, and decreed by the court that the petition of the said petitioner be and the same is hereby denied and dismissed." The cause was taken by writ of error to the Supreme Court of Colorado, and on June 17, 1893, that court rendered its judgment, affirming the judgment of the county court. The court reviewed the evidence, and held that the proof was sufficient to warrant the trial court in finding that plaintiff in error had actually contracted and consummated the marriage between herself and the second husband before the death of the first, and that the substance of the issue formed upon the amended complaint was proved; and the ruling in *Arthur* v. *Israel*, 15 Colorado, 147, that the amended answer was sufficient in law to debar or estop petitioner

from claiming any property rights as the widow of John Arthur, deceased, was reaffirmed. *Israel* v. *Arthur*, 18 Colorado, 158. A petition for rehearing was filed and overruled, and thereupon a writ of error was allowed to this court, which defendant in error moved to dismiss.

Mr. George A. King for the motion.

Mr. Westbrook S. Decker and *Mr. T. J. O'Donnell* opposing.

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

It is not sufficient for the maintenance of our jurisdiction to review the judgments of state courts, that a right, title, privilege, or immunity under the Constitution of the United States may have been claimed, but such right, title, privilege, or immunity must have been denied. Assuming that plaintiff in error, by her replication of January 27, 1891, duly set up a right of protection under the Constitution, yet if she were debarred from asserting property rights in the estate of John Arthur, as his widow, then that right was not denied for want of the subject-matter to be protected.

The Supreme Court of Colorado ruled in *Arthur* v. *Israel*, 15 Colorado, 147, that public policy required "that, so far as may be consistent with fundamental principles of law, one who has attempted to profit by a supposed divorce, and has exercised the resulting privilege of remarriage, shall not, for the mere purpose of obtaining property, be permitted to repudiate his election;" and that "when, therefore, the wife, without cause, deserts her husband and home, and for years lives in adultery with another man, and afterwards, upon learning that a divorce has been obtained by her deserted husband, causes a marriage ceremony with her paramour to be solemnized, and continuously lives and cohabits with him as his wife, she may not, upon the subsequent decease of her abandoned husband, take advantage of the fact that the divorce decree is void for want of proper service of process, and successfully assert against other heirs her right under the

statute of descents and distribution to deceased's estate as his widow." And on the subsequent writ of error it sustained the judgment of the county court against plaintiff in error upon the facts.

With the conclusion on the facts we have nothing to do, and the conclusions of law were conclusions in matters of local and general law which suggest no Federal question.

By stipulation of record plaintiff in error admitted at the trial that, the invalidity of the divorce decrees being conceded, the only question to be tried was whether she was "estopped by her conduct as alleged in said answer to dispute or contest the validity of said decrees, or whether she has ratified them by her conduct."

That question was determined against her, and the judgment rested solely on the ground that she could not under the facts be allowed, as to John Arthur's personal estate, to assert the property rights conferred by law upon a widow. To review that judgment would be to overhaul the application by a state court of principles of public policy and of estoppel, which it is not within our province to do. This was so held in *Marrow* v. *Brinkley*, 129 U. S. 178, and in effect in many other cases. *Adams County* v. *Burlington & Missouri Railroad*, 112 U. S. 123; *Chouteau* v. *Gibson*, 111 U. S. 200; *Beaupré* v. *Noyes*, 138 U. S. 397.

In *Eustis* v. *Bolles*, 150 U. S. 361, it was ruled that a decision by the Supreme Judicial Court of Massachusetts that a creditor of an insolvent debtor who proved his debt in insolvency proceedings under the state statutes and accepted the benefits thereof, thereby waived any right he might otherwise have had to object to the validity of the insolvency statutes as impairing the obligation of contracts, presented no Federal question for review. And it has been often held, at least in actions at law, that this court has no jurisdiction to revise the decision of the highest court of a State upon a pure question of fact, although a Federal question might arise if the question of fact were decided in a particular way. *Dower* v. *Richards*, 151 U. S. 658, and cases cited.

Writ of error dismissed.

MICHIGAN *v.* FLINT AND PÈRE MARQUETTE RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 913. Submitted January 29, 1894. — Decided March 12, 1894.

The decision of the highest court of a State, in a suit brought by the State to establish its title to lands within the State, claimed and occupied by a railroad company, that the State was estopped by its acts, conduct, silence, and acquiescence from setting up such claim, presents no Federal question for revision by this court.

Motion to dismiss. This was a bill of information filed on behalf of the State of Michigan in the Ingham Circuit Court, December 13, 1887, against the Flint and Père Marquette Railroad Company and others, claiming title to certain lands under and by virtue of the grant by act of Congress of September 28, 1850, c. 84, commonly known as the swamp land grant. 9 Stat. 519.

The claims of the respective parties appear in the pleadings, which were in substance as follows:

The bill alleged that the grant transferred to the several States named, and among others the State of Michigan, the whole of the swamp and overflowed lands therein made unfit for cultivation and remaining unsold on the 20th of September, 1850, and that it was the duty of the Secretary of the Interior to make lists and plats of the land, and, at the request of the governor of the State, to issue patents; that the effect of the grant was to vest title in the State, and that the State afterwards asserted title to all the land, and that such title was recognized by the United States. It was further averred that on or about November 21, 1850, certain instructions were prepared relative to the designation and description of said swamp lands by the Commissioner of the General Land Office, of which a copy was sent to the surveyor-general and another copy to the governor, by which the surveyor-general was instructed to make out lists and to regard the field-notes on

file in his office as the basis thereof, if the State was willing to adopt them, and if not, and the State furnished him with satisfactory evidence that any lands were of the character embraced by the grant, to so report them; that the surveyor-general transmitted a copy of his instructions to the governor and desired information whether the state authorities would accept the field-notes or conclude to have a survey "to determine the boundaries of the swamp and overflowed lands."

It was further alleged that the governor suggested delay, and that on January 3, 1851, the surveyor-general gave his opinion that the field-notes would show a greater amount of swamp lands than an actual resurvey.

The bill then stated that the survey spoken of indicated the sections or subdivision of sections of government lands which were of a swampy character, and that pursuant to the propositions and suggestions aforesaid the legislature of Michigan passed an act, approved June 28, 1851, adopting the notes of the surveyor on file in the office of the surveyor-general, as the basis upon which the State accepted the lands, and that such legislation was well known to the Land Department in Washington, and understood to be the basis agreed upon for the adjustment of the lands granted by said grant.

That this proposition and these acceptances by the State "operated and had the legal effect to perfect in the State of Michigan full, complete, and absolute title to all the lands shown by the surveyor-general's minutes to be swamp and overflowed lands, and all subdivisions of land the greater part of which appeared by said minutes to be of a swampy nature."

It was further averred that the surveyor-general thereupon proceeded to prepare plats, and designate upon said plats the lands of a swampy nature and character which came within the grant; that the maps and plats are now on file in the office of the Michigan land commissioner, and are the identification of the swamp lands granted to the State of Michigan by the said act, and "which this informant submits are effective and binding both upon the United States and all persons claiming from them, as well as the State of Michigan;" that the action

of the State and the lists were reported to the General Land Office.

The bill then stated that the title of the State of Michigan having been perfected in this manner, afterwards Congress, by act of June 3, 1856, granted lands to Michigan to aid in the construction of certain railroads, and, among others, the Flint and Père Marquette Railroad, and that a large quantity of the lands selected by the railroad company were lands which were shown by the minutes of the surveyor-general to be swamp.

That the proposal by the Commissioner of the General Land Office as to the method of identification, the action taken thereon, and the selection of swamp lands, were with the approval of the Secretary of the Interior; that by reason thereof and sundry subsequent confirmatory acts of Congress the title of the State became complete; and that by the means particularly detailed in the bill these lands became diverted from the swamp land grant, and passed to the railroad company as railroad lands. The prayer was that the lands might be declared to be swamp lands, and that the railroad company had no right in them; that the title of the State be confirmed, and that the defendants be required to account for land and timber sold; and for an injunction to prevent further sales.

The answer denied that the State of Michigan had any power or control over the lands or any of them, and stated that defendant trustees held the title for the railroad company; that this title came from the United States through the State of Michigan by an act of the legislature of February 14, 1857, and sundry subsequent conveyances; denied that the effect of the grant was, as stated in the information, to vest title in the State prior to identification; and that the correspondence spoken of in the bill could have the effect to increase the rights of the State of Michigan beyond the terms of the act of Congress granting said lands.

The answer further stated that it was a matter of common knowledge that many of the surveys in Michigan were false and fraudulent, in many cases surveys not having been made

in the field at all, but the field-notes and maps which were returned being wholly false and fictitious; that in consequence resurveys were made pursuant to the authority of Congress; that Congress made appropriations for that purpose, and that the notes of the resurvey, and the maps of the resurvey, became the notes of the survey; that the Federal authorities and the state authorities accepted the resurveys as the only valid surveys, and had acted upon these resurveys as such from that time until the filing of this bill.

It was denied that any of the lands mentioned and referred to in the bill were in fact swamp or overflowed lands within the meaning of the act of Congress; and stated that there had been a reorganization of the Flint and Père Marquette Railroad Company, and that a new corporation had been organized to take the title of the original company, and that all the lands mentioned had been certified by the Secretary of the Interior and the Commissioner of the General Land Office to the State of Michigan as lands identified as being within the act of June 3, 1856, for the benefit of the Flint and Père Marquette Railroad Company.

It was further averred that no patents were issued under the grant of June 3, 1856, to the railroad company, but that the title passed by statute, which title was made complete by the identification and certification of the United States Land Office at Washington; that the greater portion of these lands had been offered for sale for more than twenty years, and more than four-fifths of them had been in fact sold, and that many of the parcels had been occupied by purchasers for more than fifteen years, and that the title of these purchasers had never been questioned until the filing of this information.

The answer claimed that the certification of the lands under the railroad grant was itself an adjudication by the Secretary of the Interior that the lands were not of the character described in the Swamp Land Act of 1850, and was a conclusive adjudication that said lands were included within the railroad grant of 1856.

The answer further stated that if the State did become the owner, as specified in the bill, so much time had elapsed

Counsel for Parties.

that the State was prohibited by law, by its own statute of limitations, from bringing any suit for the recovery of the lands; that the claim of the State was stale; and that so much time had elapsed, and other rights had become so involved by the issue of bonds by the railroad company secured upon these lands, and by the sale of so large a portion of the lands to parties who bought in good faith, that the State should be held estopped from now raising the question at issue; and further, because the State of Michigan had, by virtue of special acts of its legislature, caused lists to be made of these lands and sent to the assessing officers, and that for many years, under the authority of the State of Michigan, they had been specially assessed as railroad lands, and the railway company had paid many thousands of dollars for taxes imposed upon them under these acts of the legislature.

The answer also alleged that application was made by the railway company in 1870 to the commissioner of the state land office to know whether any of these lands were claimed by the State as swamp lands, and the company was then advised by the commissioner of the state land office that the State did not lay any claim to any of the lands in question; and reiterated the averment of estoppel.

Proofs were taken and upon hearing a decree was entered in the court below in favor of complainant, declaring the title to be in the State; that the cloud thereon arising from the claim of defendants be removed; and referring the cause to a commissioner to take evidence of taxes paid by defendants on the lands and the value of the timber cut therefrom; whereupon the cause was taken by appeal to the Supreme Court of Michigan, which reversed the decree and directed the bill to be dismissed with costs. *State* v. *Flint & Père Marquette Railroad*, 89 Michigan, 481. The cause was then brought by writ of error to this court.

Mr. W. L. Webber for the motion.

Mr. A. A. Ellis, Attorney General of the State of Michigan, opposing.

Statement of the Case.

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

The Supreme Court of Michigan held that the State might be estopped by its acts, conduct, silence, and acquiescence; that the only question necessary to be considered and determined was the question of estoppel; and, after a full consideration of the facts applicable to this branch of the case, reached the conclusion that the claim of the State had no foundation in equity, justice, or good conscience; that it had become stale; and that the State was estopped to assert title in itself to the lands in question. As its judgment thus rested upon the decision of a question which was not Federal, this court has no jurisdiction to review it, and the writ of error must be dismissed. *Adams County* v. *Burlington & Missouri Railroad*, 112 U. S. 123; *Israel* v. *Arthur*, *ante*, 355.

Writ of error dismissed.

MADDOCK *v.* MAGONE.

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

No. 244. Argued February 1, 1894. — Decided March 12, 1894.

In construing a tariff act, when it is claimed that the commercial use of a word or phrase in it differs from the ordinary signification of such word or phrase, in order that the former prevail over the latter it must appear that the commercial designation is the result of established usage in commerce and trade, and that at the date of the passage of the act that usage was definite, uniform, and general, and not partial, local, or personal.

THIS was an action to recover duties paid under protest. The bill of exceptions, omitting formal parts, was as follows:

"The plaintiff imported in the year 1886 into the port of New York certain goods, consisting of mugs, plates, cups, and saucers, made of china, of small size, and claimed by him to be dutiable as toys. Duty was assessed by the defendant and paid by the plaintiff at the rate of sixty per cent ad valorem

under protest as follows: 'Against your decision and assessment of duties as made by you and the payment of more than 35% ad valorem on our importation below mentioned, consisting of certain china toys, claiming that under existing laws and particularly by Sch. "N," act March 3, 1883, as toys said goods are liable at no more than 35% ad valorem and not at 60% ad valorem, as charged by you.'

"Due appeal was made and suit was brought in due time.

"Plaintiff further introduced evidence tending to show that the articles in question were in fact toys, and in addition that they were known in trade and commerce in March, 1883, and prior thereto, as toys, and were bought and sold under the denomination of toy plates, toy teas, and toy cans.

"In behalf of the defendant evidence was introduced tending to show that these articles were not handled by toy houses, but that they were bought and sold under the name of A B C plates, A B C mugs, A B C cans, and the cups and saucers were known as Minton teas or after-dinner coffees, and were also used in restaurants to serve coffee in, and that they were used by children to eat and drink out of, and not merely for the purpose of amusement.

"The court, at the conclusion of the evidence, submitted the question to the jury as follows:

"'You are to answer the question by yes or no whether these goods are or are not toys. You have heard the evidence, and all that it is necessary for me to do in leaving the case in your hands is to give you the definition of the word "toy": "A toy is a plaything; a thing the main use or purpose of which is the amusement of children." Bearing that definition in mind and as instructed by the evidence, you will determine as to these articles whether they are or are not toys.'

"Thereupon counsel for plaintiff requested the court to charge that if these articles were known as toys in trade and commerce in March, 1883, and prior thereto, the plaintiff is entitled to recover; which request the court refused so to charge, and plaintiff's counsel duly excepted, and the exception was duly allowed."

The record states that "after hearing the evidence for the

respective parties and the argument of counsel, the jury say that they find the goods in suit are not toys, and, by direction of the court, that they find a verdict for the defendant." Judgment was thereupon entered on the verdict in favor of the defendant, with costs, and this writ of error taken out.

Mr. Edwin B. Smith for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendant in error.

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

Plaintiff contended that the articles in question 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 the collector assessed them 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. 488, 495, 512.

After giving the ordinary definition of the word "toy," the court left to the jury the question whether these goods were or were not toys. No exception was reserved to this part of the charge nor to the action of the court in that regard. The evidence on behalf of the plaintiff tended to show that the articles were in fact toys, and on behalf of the defendant that they were "used in restaurants to serve coffee in, and that they were used by children to eat and drink out of, and not merely for the purpose of amusement;" but the plaintiff, in addition to the contention that they were in fact toys, attempted to establish that such was their commercial designation. Accordingly he offered evidence tending to show that "they were known in trade and commerce in March, 1883, and prior thereto, as toys, and were bought and sold under the denomination of toy plates, toy teas, and toy cans;" while defendant's evidence tended to show "that these articles were not handled by toy houses, but that they were bought and sold under the name of A B C plates, A B C mugs, A B C

cans, and the cups and saucers were known as Minton teas or after-dinner coffees."

Plaintiff requested the court to charge "that if these articles were known as toys in trade and commerce in March, 1883, and prior thereto, the plaintiff is entitled to recover." The court refused so to charge and this refusal is the subject of the only exception in the record.

In *Cadwalader* v. *Zeh*, 151 U. S. 171, 176, it was said that "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." But it is also true that, as observed by Mr. Chief Justice Waite in *Swan* v. *Arthur*, 103 U. S. 597, 598, "while tariff acts are generally to be construed according to the commercial understanding of the terms employed, language will be presumed to have the same meaning in commerce that it has in ordinary use, unless the contrary is shown."

The inquiry was whether, in a commercial sense, the articles were so known, trafficked in, and used, under the denomination of toys, that Congress, in the use of the particular word, should be presumed to have had that designation in mind as covering such articles.

Necessarily the commercial designation is the result of established usage in commerce and trade, and such usage, to affect a general enactment, must be definite, uniform, and general, and not partial, local, or personal.

The sole instruction requested by plaintiff was that he was entitled to recover if these articles were known as toys in trade and commerce at the time of the passage of the act and prior thereto. The prevalence of the usage related to the date of the act, and although if a special meaning were attached to certain words in a prior tariff act, it would be pre-

sumed that Congress intended that they should have the same signification when used in a subsequent act in relation to the same subject-matter, *Reiche* v. *Smythe*, 13 Wall. 162, this presumption is not conclusive, and the instruction was not objectionable because not referring to the date of the first appearance of toys in tariff legislation.

But the difficulty is that if these articles were only so known in one trade or branch of trade or in one part of the country; partially and locally, and not uniformly and generally; the conclusion announced by the instruction would not follow. Recovery could not be had on a theory involving different rates of duty at different ports of entry, or distinct and differing designations.

Plaintiff did not attempt to prove that the articles were handled by toy houses, though evidence was adduced by him that they were known as toys and bought and sold as "toy plates, toy teas, and toy cans," but not by toy dealers according to defendant's evidence; and if it were admitted that their signification as toys was confined to a particular locality, or to a particular class, as, for instance, to those who imported them, (in which case there might be danger that the designation would vary with the rates,) and not to those who dealt in them, and that a different meaning obtained elsewhere or among the latter, then the usage relied on would fail to be made out.

The instruction, without qualification in the direction of the essential elements of such a usage, was altogether too broad, and plaintiff cannot complain of the refusal to give it in the terms in which it was requested.

The jury found a special verdict that the articles were not toys, and then, by direction of the court, found a general verdict for the defendant. To this no exception was taken, but plaintiff contends that the general verdict was based upon the special verdict, and so was given upon an immaterial issue, and that it was error, there being evidence to establish commercial usage, to direct the general verdict as the legal result of the special finding. This, however, does not appear, and as the judgment was the logical, legal conclusion from the

general verdict, and no exception to the direction was preserved, there is nothing open to our review on this branch of the case. *Judgment affirmed.*

Mr. Justice Gray was not present at the argument and took no part in the decision of this case.

BERBECKER *v.* ROBERTSON.

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

No. 245. Argued February 1, 1894. — Decided March 12, 1894.

Under the act of March 3, 1883, c. 121, 22 Stat. 488, brass upholstering nails were subject to the duty of 45 per cent *ad valorem* imposed upon manufactures, articles, or wares, not specially enumerated or provided for in the act, composed wholly or in part of iron, steel, copper, lead, nickel, pewter, tin, zinc, gold, silver, platinum, or any other metal.

This was an action to recover duties paid under protest upon importations of nails, described in the bill of particulars as "upholstering nails," between September 21, 1883, and January 22, 1884.

Schedule C of the act of March 3, 1883, c. 121, contained the following provisions, 22 Stat. 488, 498, 501:

"Horse-shoe nails, hob nails, and wire nails, and all other wrought iron or steel nails, not specially enumerated or provided for in this act, four cents per pound."

"Britannia ware, and plated and gilt articles and wares of all kinds, thirty-five per centum ad valorem."

"Manufactures, articles, or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, copper, lead, nickel, pewter, tin, zinc, gold, silver, platinum, or any other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem."

These paragraphs are numbered in the tariff index as 168, 210, and 216.

The collector applied the last paragraph to these nails and

the plaintiffs protested that one or the other of the preceding clauses gave the applicable rate. At the trial a verdict was found, under the direction of the court, for a portion of the duties collected, and plaintiffs consequently recovered a judgment, but a judgment for less than the amount they claimed. The only witness was one of the plaintiffs, and the bill of exceptions, containing his testimony and the subsequent rulings, is as follows:

"I am interested in manufacturing. I have been in manufactories abroad, and have seen these goods made, and know how it is done. The heads of the nails are tumbled in barrels of water and chemicals to give them a nice gold color. Before they go into the barrels they are the natural color of brass. These samples are known in trade and commerce as gilt nails and are bought and sold as such.

"Being cross-examined by counsel for defendant:

"I cannot describe the exact color of brass except I went into a brass mill and showed you a piece of brass. (Referring to a nail in a board:) If I saw it at a distance I should probably say it was brass, but still it does not look like the nails before they go into the barrel. Before they go into the barrel there is no lustre on them, or very little. I do not see anything here that looks like the sheet brass of which the nails are made. With regard to the contents of the barrel referred to by me in my direct examination as 'water and chemicals,' I do not care to state what the chemicals are, because it is a trade secret, but I am willing to state it to the judge alone, so that nobody else hears it. It is a liquid substance of the color of water. It looks like water and nothing else. The process through which these exhibits are put is called by some polishing; not polishing by means of rubbing, but it is done by friction, by the shaking of them up, by the rolling of the nails in the barrel. The length of time they are rolled depends upon what color you want to get on them; sometimes an hour, sometimes two hours, and sometimes it takes longer. I roll them until I get the color I want. Increased rolling tends to darken the color sometimes and sometimes to lighten it.

Counsel for Plaintiff in Error.

"These nails are bought and sold in this country under the name of gilt nails. That is the proper name for these. They may be sometimes sold under another name, but meaning a gilt nail of first and second quality. We do not sell them as upholstery nails. I cannot tell what other parties do. I cannot swear to that. I know only how they are labelled, and if by accident they should be billed as upholstery nails, I should consider it a mistake. I cannot swear that they are not bought and sold in trade and commerce of this country as upholstery nails, because I do not know what other parties do. I can only speak for myself and at the same time as to what is the general usage in the trade. The general usage has been, I know, as long as I have been in the business, whenever a person asked me what was the price of nails, of gilt nails, or they might have asked for upholstery nails, I knew that they meant gilt nails. They are bought and sold in this country under the name of gilt nails. They may possibly have been ordered from a large dealer by a dealer in this country under the name of 'upholstery nails.' They are sometimes bought and sold in trade and commerce of this country as 'French nails,' 'chair nails,' and as 'furniture nails.'

"Defendant's counsel then moved to strike out the testimony as to the fact that they were called 'gilt nails.' The court granted the motion, and plaintiffs' counsel duly excepted, and the exception was duly allowed.

"Plaintiffs thereupon rested, and counsel for the defendant moved the court for the direction of a verdict for the defendant upon so much as was sought to be recovered upon the nails which did not appear to be actually gilt or not to have gold upon them, which motion the court then and there granted and directed the jury to find a verdict for the defendant; to which ruling and direction the counsel for the plaintiffs then and there duly excepted, and the exception was allowed, and the jury thereupon found a verdict for the defendant."

Judgment having been entered on the verdict, a writ of error was duly taken out.

Mr. Edwin B. Smith for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

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

Upon this record, it is apparent that these nails did not fall within the first of the three paragraphs, as they are referred to in the evidence as made of sheet brass. Counsel produced in argument some nails with wrought iron shanks and brass heads, which he claimed were the same as those in question, but they were not before us as exhibits, and, moreover, appeared to be in the nature of brass ornamentation.

Nor did the nails come within the second of the paragraphs, "Britannia ware, and plated and gilt articles and wares of all kinds," unless the principle of commercial designation could be properly applied and such designation was made out, for we concur in the view that gilt articles and wares taken in connection with Britannia and plated ware mean articles actually gilded by overlaying, and not merely made to look gilt by rolling them in a secret chemical solution. We are not prepared to hold that, under such circumstances, this paragraph would be applicable, even if nails thus manipulated were commercially designated as "gilt nails;" but, if applicable, we are still of opinion that the judgment must be affirmed.

It has just been held that the usage from which it may be inferred that Congress intended to use particular words in a particular sense in a tariff act, must be definite, uniform, and general, and that such designation is to be determined as of the date of the act. *Maddock* v. *Magone*, *ante*, 368.

Tested by this rule, the evidence was entirely insufficient to show such a usage in respect of denominating this class of nails, "gilt nails," contemporaneous with the tariff act of March 3, 1883, or otherwise.

True, plaintiff testified that the articles "are known in trade and commerce as gilt nails and are bought and sold as such," but his testimony on cross-examination practically

limited his personal knowledge of usage in the trade to his own practice; he could not say that they were not bought and sold in trade and commerce as upholstery nails; and he admitted that they were sometimes so bought and sold as French, chair, and furniture nails. The evidence of a definite, general, and uniform usage was so slight, if any at all, that a verdict based upon it would be set aside, and the Circuit Court committed no error in striking it out and in directing a verdict for defendant as to these particular nails.

Something was said about the lack of precision in the motion "to strike out the testimony as to the fact that they were called 'gilt nails,'" and the effect of not making it until the conclusion of the testimony of the witness; but as no further evidence was offered, the motion practically amounted to a demurrer to evidence, and if it was not sufficiently comprehensive, that was cured by the direction of the verdict. The Circuit Court was right, and the judgment is

Affirmed.

MR. JUSTICE GRAY was not present at the argument, and took no part in the decision of this case.

DUNCAN *v.* MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 1038. Submitted January 12, 1894. — Decided March 5, 1894.

The privileges and immunities of citizens of the United States, protected by the Fourteenth Amendment, are privileges and immunities arising out of the nature and essential character of the Federal government, and granted or secured by the Constitution.

Due process of law, and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.

An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by

Statement of the Case.

which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offence or its consequences, alters the situation of a party to his disadvantage.

The prescribing of different modes of procedure, and the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime are not considered within the constitutional prohibition.

To give this court jurisdiction over a judgment of the highest court of a State, the title, right, privilege, or immunity relied on must be specially set up or claimed at the proper time and in the proper way, and the decision must be against it; whereas, in this case, the question was not suggested until after judgment, and after an application for rehearing had been overruled, and only then in the form of a motion to transfer the cause.

MOTION to dismiss. Under the constitution of Missouri, in force at the time of the commission of the homicide to which this case relates, the judicial power of that State was vested in a Supreme Court and other inferior courts as therein mentioned, the Supreme Court consisting of five judges, any three of whom constituted a quorum. Constitution of Missouri, 1875, Art. VI.

In 1889 the general assembly of Missouri passed a concurrent resolution submitting to the qualified voters of the State an amendment to the constitution, concerning the judicial department, to be voted upon at the general election to be held on the Tuesday next following the first Monday in November, A.D. 1890, which vote was had accordingly, and the amendment ratified and adopted. This amendment provided among other things as follows:

"SECTION 1. The Supreme Court shall consist of seven judges, and, after the first Monday in January, 1891, shall be divided into two divisions, as follows: One division to consist of four judges of the court and to be known as division number one; the other to consist of the remaining judges and to be known as division number two. The divisions shall sit separately for the hearing and disposition of causes and matters pertaining thereto, and shall have concurrent jurisdiction of all matters and causes in the Supreme Court, except that division number two shall have exclusive cognizance of all criminal cases pending in said court: *Provided,* That a cause therein may be

transferred to the court as provided in section four of this amendment. The division of business of which said divisions have concurrent jurisdiction shall be made as the Supreme Court may determine. A majority of the judges of a division shall constitute a quorum thereof, and all orders, judgments, and decrees of either division, as to causes and matters pending before it, shall have the force and effect of those of the court."

"SEC. 4. When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a Federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision." Laws Missouri, 1889, 322.

All provisions of the constitution of the State and all laws thereof, not consistent with the amendment, were declared rescinded upon its adoption.

In accordance with the amendment, the Supreme Court became thereafter composed of seven members, (two being added as provided,) divided into divisions one and two.

Harry Duncan was indicted at the January term, 1891, of the St. Louis Criminal Court, for the murder of one James Brady, October 6, 1890, and, after he had been arraigned and pleaded not guilty, the cause was removed, on his application, to the Circuit Court of St. Louis County, wherein it was tried at September term, 1892, and resulted in his conviction and sentence to death. From this judgment he prosecuted an appeal to the Supreme Court, where the cause was heard by Division No. 2. The errors assigned on Duncan's behalf embraced the various points which had been saved upon the trial, but no Federal question was raised either in the appellate or the trial court. The Supreme Court, Division No. 2, on May 16, 1893, delivered an opinion discussing the errors relied on, (reported in advance of the official series, 22 S. W. Rep. 699,) and affirmed the judgment. On May 26, Duncan applied for a rehearing, which was denied May 30. No

reference to any Federal question was made in the opinion or in the application for a rehearing.

Thereupon, June 7, a motion was filed on behalf of Duncan for the transfer of the cause to the Supreme Court in banc, upon the grounds that the cause was determined solely by a minority of the Supreme Court; that a Federal question was involved in that the amendment to the constitution of Missouri was in conflict with the Constitution of the United States; that the offence with which Duncan stood charged was committed October 6, 1890, and before the adoption of the amendment, and that said amendment and the proceedings thereunder were in violation of section 10, article 1, of the Constitution of the United States inhibiting the passage of *ex post facto* laws; and in contravention of the Fourteenth Amendment in that thereby the privileges and immunities of appellant were abridged; he was denied the equal protection of the laws; and would be deprived of life without due process of law; and that such amendment and proceedings were in conflict with fundamental principles. The motion was denied, and, subsequently, this writ of error was allowed by the Chief Justice, and now comes before the court on a motion to dismiss.

Mr. R. F. Walker, Attorney General of the State of Missouri, for the motion.

Mr. E. M. Hewlett and *Mr. Walter M. Farmer* opposing.

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

The amendment to the constitution of the State of Missouri provided for the separation of the Supreme Court into two divisions for the transaction of business, and that when a Federal question was involved, the cause, on the application of the losing party, should be transferred to the full court for decision. Doubtless, the particular division would direct, of its own motion, the transfer of cases involving a Federal ques-

tion without a hearing in the first instance, as was also allowed by the amendment, but to justify transfer, whether before or after judgment, the question must be involved in the sense of arising for decision.

But it is conceded that the record in this cause as it came into the Supreme Court, Division No. 2, disclosed no Federal question to be determined, thereby inviting the division to transfer the cause, or, after the disposal of which, the losing party would be entitled to such transfer. On the contrary, the contention is in effect that division number two had no jurisdiction whatever, because the amendment, if operative on Duncan, was unconstitutional; and this involved the conclusion that there was no appellate court to which the case could be taken, as the prior provision in that regard had been repealed. Yet the objection was not raised before or at the hearing on the merits, nor on the application for rehearing, but was first taken, after judgment affirmed and application denied, on a motion to transfer the cause and as a reason for the transfer, although that motion, in respect of the question sought to be raised, could derive no force from the amendment whose validity was denied. Indeed, if the motion had been granted, and the judgment of the Circuit Court had thereupon been affirmed by the full bench, it is difficult to see why plaintiff in error might not as well then have questioned the jurisdiction of the Supreme Court, as constituted with seven judges under the amendment, as he now does the power of division number two with three judges.

A writ of error from this court to review a final judgment in any suit in the highest court of a State in which a decision in the suit could be had can only be maintained under the circumstances defined in section 709 of the Revised Statutes.

The judgment brought up by the writ in this case is the judgment of the Supreme Court of Missouri, entered by Division No. 2, and it is obvious that the validity of the constitutional amendment was not drawn in question in the cause on the ground of repugnancy to the Constitution of the United States, and its validity sustained by that decision. But the question of validity arises, if at all, in connection with the

claim that a right, title, privilege, or immunity under the Constitution of the United States was specially set up by plaintiff in error, and denied.

The argument seems to be that the constitution secured to plaintiff in error the right to have his case adjudicated on appeal by a Supreme Court of five judges, as provided by the state constitution at the time of the commission of the offence with which he stood charged, although his motion accepted the jurisdiction of a bench of seven, and he objects that that right was denied to him in the adjudication of his case by a court composed of three judges in accordance with the amendment. And he insists that the amendment is as to him obnoxious to the objections that it denies due process and the equal protection of the laws, and abridges his privileges and immunities in contravention of the Fourteenth Amendment. But the privileges and immunities of citizens of the United States, protected by the Fourteenth Amendment, are privileges and immunities arising out of the nature and essential character of the Federal government, and granted or secured by the Constitution; and due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government; and there is no suggestion of deprivation in these regards, except as covered by the point really pressed, that the amendment to the state constitution was, as to Duncan, *ex post facto*, and therefore void.

It may be said, generally speaking, that an *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offence or its consequences, alters the situation of a party to his disadvantage; *Cummings* v. *Missouri*, 4 Wall. 277; *Kring* v. *Missouri*, 107 U. S. 221; but the prescribing of different modes of procedure and the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of

crime, are not considered within the constitutional inhibition. Cooley Const. Lim. (5th ed.) 329.

Accordingly, in *State* v. *Jackson*, 105 Missouri, 196, the precise questions sought to be raised here were decided by the Supreme Court of Missouri, at April term, 1891, of that court, adversely to the position taken by plaintiff in error, the case having been transferred to the court in banc in order that these questions, which were raised by motion for rehearing in division number two, where the judgment of the lower court had been affirmed, (105 Missouri, 201) might be considered by a full bench. The case had been before the Supreme Court on two former occasions, (95 Missouri, 623; 99 Missouri, 60,) and the constitutional amendment in question was adopted after the appellant took his last appeal. The Supreme Court held that it could not "be doubted that it was entirely competent for the people to adopt such a change in their organic law as to take away from this court as a whole all cognizance of criminal causes, and to confer such jurisdiction on a portion or division of this court, though less in numbers and different in *personnel* from this court as organized when the crime in question was committed;" and that the amendment was not contrary to the Fourteenth Amendment nor to section ten of article one of the Federal Constitution as applied to one convicted of murder, who had appealed before the amendment took effect.

But we are not called on to place our decision upon concurrence in that view, since we are of opinion that the plaintiff in error did not bring himself within the provisions of section 709 of the Revised Statutes. To give jurisdiction to this court, the title, right, privilege, or immunity relied on must be specially set up or claimed at the proper time and in the proper way, and the decision must be against it; whereas, in this case, the question was not suggested until after judgment, and after an application for rehearing had been overruled, and only then in the form of a motion to transfer the cause. Whether that motion was held to come too late for the purposes of transfer we are not informed, but its denial was in no aspect equivalent to a decision against a right under the Constitution of the United States specially set up or claimed at the proper

time and in the proper way. *Texas & Pacific Railway* v. *Southern Pacific Co.*, 137 U. S. 48; *Caldwell* v. *Texas*, 137 U. S. 692, 698; *Butler* v. *Gage*, 138 U. S. 52; *Leeper* v. *Texas*, 139 U. S. 462.

The writ of error is

Dismissed.

UNITED STATES *v.* ALGER.

UNITED STATES *v.* STAHL.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 885, 886. Petitions for rehearing. Distributed March 3, 1894. — Decided March 19, 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, though in a different branch of the service, is only entitled to longevity pay as of the lowest grade, having graduated pay, held by him since he originally entered the service.

United States v. *Alger*, 151 U. S. 362, and *United States* v. *Stahl*, 151 U. S. 366, reaffirmed.

THESE were petitions for a rehearing of two cases decided January 22, 1894, and reported in 151 U. S. 362 and 366.

In Alger's case the petition said: "In this case the claimant was appointed cadet midshipman September 22, 1876; graduated June 22, 1882, and promoted to midshipman the same day; commissioned ensign June 26, 1884. He resigned November 10, 1890, and on November 11, 1890, was appointed professor of mathematics, to rank from November 1, 1890. The claimant was given credit on his commission as ensign for his service as cadet midshipman and midshipman, and was paid the pay of an ensign after five years of service, from June 26, 1884, to the date of his resignation, but claims that 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. The claimant sues for 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, to wit, from September 22, 1876, to November 10, 1890, by virtue of the provisions of the act of March 3, 1883, and the Court of Claims gave him judgment for the amount claimed, but this court has reversed this judgment as erroneous."

In Stahl's case the petition set forth a resignation, August 10, 1887, of the office of assistant engineer, and the appointment of the petitioner, August 11, 1887, as assistant naval constructor.

Mr. William A. Maury, for both petitioners, said, in his brief, entitled in Stahl's case:

If the case had been orally argued, it is more than probable that the attention of the court would have been called to some important considerations of a public and general character which do not seem to have been mentioned or weighed.

In the first place, the act of the appellee in resigning his commission as assistant engineer preparatory to his appointment as an assistant naval constructor was in obedience to a requirement of the Navy Department as a necessary step in an officer's transfer from one branch of the service to another, and if the appellee had not been mindful of this practice by sending in his resignation, it would have been required by the department before issuing his commission as an assistant naval constructor. This is conclusively established by the letter of the Secretary of the Navy of February 28, 1894, which, together with the letters that called it forth, is printed at the end of this brief, and in which the Secretary states that "it has been the invariable practice of the Navy Department to require officers serving in one branch of the naval service to resign from the navy before accepting appointment to any other branch of the service." . . .

In view, then, of this well-established practice, of which it is conceived this court will take notice, the intimation, if not direct imputation, in the government's brief that the appellee's act in resigning was a mere subterfuge for a sordid purpose

was an unjust and unwarrantable reflection upon the appellee and the other honorable gentlemen of the navy who are in his situation, as well as disrespectful to a great department of the government, and, no doubt, misled the court into some suspicion of improper conduct on the part of the appellee.

It is an equally well-known fact that in the Navy Department and in the navy generally it has been understood from the passage of the act of 1883 down, that a transfer from one branch of the service to another entitled the officer transferred to longevity pay under the act, whether such officer had already had the benefit of the act or not before his transfer.

In other words, the Secretary of the Navy, in the performance of his duty of interpreting and applying the laws appertaining to that arm of the service, has always held that the proceeding of transferring an officer from one branch of the service to another involved, first, a severance of all connection with the service and then a reëntry into it. And hence when the appellee was transferred to the construction corps, his name was placed at the foot of the list of assistant naval constructors in obedience to section 1485, Revised Statutes, which provides that "The officers of the staff corps of the navy shall take precedence in their several corps, and in their several grades, and with officers of the line with whom they hold relative rank, according to length of service in the navy."

In short, the appellee, so far as his rank or precedence in the construction corps is concerned, was treated precisely as though his transfer had been his first entry into the navy.

This is also established incontrovertibly by the letter of the Secretary of the Navy of February 28, 1894, and the other letters already referred to and hereto annexed.[1]

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[1] *Letter of Assistant Naval Constructor W. L. Capps.*

NAVY DEPARTMENT,
BUREAU OF CONSTRUCTION AND REPAIR,
WASHINGTON, D. C., *February* 14, 1894.

SIR: 1. A recent decision of the Supreme Court seriously affects the status of commissioned officers who have resigned from one branch of the service and have been appointed to another, inasmuch as it deprives such officers of the benefits of their previous service in computing longevity in the lowest grade having graduated pay.

In his letter the Secretary says that "it has further been the uniform practice to place the names of such officers [transferred to one corps from another] without regard to their previous rank, at the foot of the list of officers in the new

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2. The immediate effect of this decision is to reduce the pay of officers at the head of the list of assistant naval constructors to an amount less than that allowed their juniors in the same grade who entered the naval service and the construction corps several years after those at the head of the list.

3. Moreover, in the case of Naval Constructors Armistead, Baxter, and Stahl, and Assistant Naval Constructor Capps, it checks against their pay the amount claimed to have been overpaid them by reason of crediting these officers with their previous service in the line and engineer corps of the navy.

4. The invariable practice of the Navy Department has been to regard transfer from one branch of the service to another as a reëntry into the service, as is clearly shown by the department's requirement that officers should resign their commissions before being appointed to another corps, and placing them at the bottom of the list of officers of the corps to which they are transferred, even though juniors in the line and engineer corps may become seniors in the construction corps, as has already happened in several instances.

5. A similar method is in force in the army, where transfer from the line to a staff corps involves resignation of the former commission and necessitates an officer's going to the bottom of the list to which transferred. As in the navy, this sometimes results in a change of relative position, seniors in the line becoming juniors in the corps to which last appointed.

6. The above methods of resignation and transfer have been unquestioningly accepted by the officers transferred as just and fair, and the accounting officers of the Treasury and Court of Claims have, in the cases of certain officers of the construction corps, allowed them the benefits of their previous service and paid them accordingly, such pay having been received for the past six years.

7. Should the present construction of the Supreme Court as regards the status of these officers be considered final, it will work very great injustice to certain professors of mathematics and naval constructors who resigned their commissions in other branches of the service and were then appointed to their present corps, believing that established rulings of the Treasury and Navy Departments would not be disturbed, and that they would continue to receive in their new grades the benefits of their previous service, and not be placed at a disadvantage as compared with their juniors in rank in the new corps, who are also their juniors in length of service in the navy.

8. In view of the above facts I beg to request permission from the department to seek relief from Congress, and also request that in its endorse-

corps. In such cases it has been the practice to require a new oath of office to be taken, which is not required in case of an ordinary promotion. It appears from the above statement that the department has always held that such transfer con-

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ment the department may call attention to its practice in making such appointments, considering them as reëntries into the service, and may make such other remarks as it may deem proper concerning the justice of affording relief to the officers so injuriously affected by the decision of the Supreme Court.

Very respectfully,

W. L. Capps,
Assistant Naval Constructor, U. S. N.

The Secretary of the Navy.

Letter of the Chief of the Bureau of Construction.

Navy Department,

Bureau of Construction and Repair,
Washington, D. C., *February* 14, 1894.

Sir: 1. In forwarding the enclosed communication from Assistant Naval Constructor Capps, I desire to express my hearty approval of any measure which may afford relief to those officers who have been so unfortunately affected by a recent decision of the Supreme Court.

2. If the present decision of the court holds, its immediate effect upon the construction corps will be to place certain officers in a most anomalous condition as regards pay, since it will reduce their compensation below that received by those several years their juniors, and in October, 1895, the seven senior assistant constructors will be receiving less pay than the assistant constructor now at the bottom of the list, although the latter entered the naval service from four to ten years after the above-mentioned seniors.

3. Naval Constructors Armistead, Baxter, and Stahl having been promoted, their present pay will not be affected, but their accounts will be charged with the amount claimed to have been overpaid them as assistants. Assistant Naval Constructor Capps, not yet having received his promotion to the grade of naval constructor, will have his pay immediately reduced to that received by the junior member of the corps, and in addition will have charged against him the total amount claimed to have been overpaid him by the accounting officers of the Treasury during the past six years by reason of his having been credited with his previous service in the line of the navy.

4. The above payments having been made by the accounting officers of the Treasury in conformity with previous decisions of the Court of Claims and the established rulings of the Navy Department as to reëntry into the service, it would seem a very great hardship to compel these officers to make restitution of the money paid by the government's authorized agents, in conformity with legal decisions, said payments having been received by

stitutes a reëntry into the navy, and accordingly officers so transferred have been placed at the foot of the list of the corps which they enter."

Now, this practice of the department, of which the court

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the officers themselves in good faith as their right in virtue of their previous experience in the service.

5. I do not consider it proper for me to deal in the least with the question of law involved, but in equity it seems that an unwitting injustice has been done to officers whose high class-standing, special qualifications, and previous service caused their selection for appointment to other corps of the service in the interests of the government, and yet who find themselves after a lapse of several years deprived of all the benefits of their previous service and placed in a worse position as regards pay than those many years their juniors.

6. Aside from the interests of individuals involved in this case, I beg to impress upon the department the urgent necessity of taking such measures as it may deem just and expedient to rectify a wrong which would tend to impair the efficiency of the construction corps by giving least compensation to those whose greater experience and responsibility certainly entitle them to most consideration.

Very respectfully,

PHILIP HICHBORN,
Chief Constructor, U. S. N., Chief of Bureau.

The SECRETARY OF THE NAVY.

Letter of the Secretary of the Navy.

NAVY DEPARTMENT,

WASHINGTON, *February* 28, 1894.

SIR: Referring to your letter of the 14th instant, forwarded through the chief of the Bureau of Construction and Repair, in which you state that the recent decision of the Supreme Court in the case of *The United States, Appellant*, v. *Albert W. Stahl* seriously affects the status of commissioned officers who have resigned from one branch of the service and have been appointed to another, inasmuch as it deprives such officers of the benefits of their previous service in computing longevity in the lowest grade having graduated pay, and ask permission to seek relief from Congress, I have to state that, after a careful consideration of the facts set forth in your letter and in that of the chief of the bureau, the department deems it entirely proper that you should seek such relief, and your request is therefore granted.

In the decision in question and in that of *The United States* v. *Philip R. Alger*, therein cited, the court holds that where an officer resigns from one corps of the navy for the purpose of accepting an appointment in another, his service is to be regarded as continuous service.

will take notice, seems wholly at war with the idea advanced in the Government's brief that the appellee's service in the engineer and construction corps is one continuous service; for upon that theory we should expect to find the appellee transferred to an equivalent rank in the construction corps to what he had held in the engineer corps, instead of being sent to the foot of the list, as he undoubtedly was.

In view, then, of this rooted and well-known practice of the Navy Department, it is somewhat surprising that the counsel for the government should have argued, with apparent confi-

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The chief of the Bureau of Construction and Repair, in his communication above mentioned, states that the immediate effect of this decision upon the construction corps "will be to place certain officers in a most anomalous condition as regards pay, since it will reduce their compensation below that received by those several years their juniors, and in October, 1895, the seven senior assistant constructors will be receiving less pay than the assistant constructors now at the bottom of the list, although the latter entered the naval service from four to ten years after the above-mentioned seniors."

It has been the invariable practice of the Navy Department to require officers serving in one branch of the naval service to resign from the navy before accepting appointment to any other branch of the service, and it has further been the uniform practice to place the names of such officers, without regard to their previous rank, at the foot of the list of officers in the new corps.

In such cases it has been the practice to require a new oath of office to be taken, which is not required in case of an ordinary promotion.

It appears from the above statement that the department has always held that such transfer constitutes a reëntry into the navy, and accordingly officers so transferred have been placed at the foot of the list in the corps which they enter.

Under these circumstances, and inasmuch as a change in the practice of the department in respect to the rank and pay of officers who by reason of special qualifications and previous service have been selected for appointment to other corps would result in serious hardship to such officers, the department, concurring in the recommendation of the chief of the Bureau of Construction and Repair on the subject, gives its approval to your request for permission to seek relief from Congress.

Very respectfully,

H. A. Herbert,
Secretary of the Navy.

Assistant Naval Constructor W. L. Capps, U. S. N.,
Navy Department.

dence, that the continuity of the appellee's service in the navy was not interrupted by his transfer from the engineer to the construction corps any more than if he had been promoted to another grade in the engineer service. This line of argument can only be accounted for as being the result of an apparent failure of counsel to recognize the distinction between transfer and promotion, which they seem to treat as interchangeable terms, although radically different.

In doubtful cases this court is accustomed to pay no little deference to the meaning placed on a statute by the department of the government whose duty it is to apply it to its subject-matter, and it is respectfully submitted that it would seem that under this rule of decision the meaning placed on the act of 1883 by the Navy Department, ever since its passage, and supported by the judgment of the Court of Claims, should be allowed controlling effect in the face of any doubt that may becloud the meaning of Congress.

In view, then, of these considerations, now seemingly brought to the court's attention for the first time, it is respectfully submitted, as an additional argument entitled to weight, that it would be severe if officers who have been transferred in the naval service and received longevity pay on the faith of this long-prevailing interpretation of the act of 1883 should now be compelled, upon a mere mistake of law, to refund what they have honestly and innocently received as their due.

As the chief of the Bureau of Construction and Repair says in his letter of February 14, 1894, hereto annexed, "the above payments having been made by the accounting officers of the Treasury in conformity with previous decisions of the Court of Claims and the established rulings of the Navy Department as to reëntry into the service, it would seem a very great hardship to compel these officers to make restitution of the money paid by the government's authorized agents in conformity with legal decisions, said payments having been received by the officers themselves in good faith as their right, in virtue of their previous experience in the service."

But, aside from the inexpediency of unsettling what has been once settled, the interpretation here contended for

should be adhered to, because, as we hope to show, it is closely interwoven with the good of the service, while, on the other hand, that insisted upon by the government would, if carried into effect, produce inequalities in pay which would be derogatory to the rank of the officers who have been transferred from one branch of the service to another under the old view of the act of 1883, and subject them to a demoralizing influence, springing from a sense of disappointment and of disparaging discrimination in favor of their juniors in the service, and would, furthermore, tend to cripple the service by placing a serious obstruction in the way of appointments in the future from one branch of it to another.

To show, in the striking way of concrete examples, how unjustly the view of the statute contended for by the government would operate, let us take for illustration the cases of Assistant Naval Constructors Lloyd Bankson and Richmond P. Hobson.

Bankson, who was appointed from the rank of assistant engineer on July 1, 1889, and who has been in the service sixteen years and four months, all told, would draw pay under the ruling of the court at the rate of $2200 per annum, whereas Hobson, who was appointed from the rank of naval cadet on July 1, 1891, and who has been in the service eight years and eight months only, is by the operation of the act of 1883 entitled to pay at the rate of $2600 per annum. Thus Bankson, who, by virtue of seniority, ranks Hobson in the construction corps, receives $400 less pay, which must ever be a solecism and a contradiction to the military apprehension.

By applying the interpretation contended for by the counsel for the government to the following examples taken from the corps of professors of mathematics, it will be more manifest still that the act so construed will defeat the underlying principle of longevity pay by placing a premium on leaving the service and then returning to it after some considerable interval with impaired efficiency.

In 1873 W. W. Hendrickson, a lieutenant commander in the navy, resigned for the purpose of accepting an appointment as professor of mathematics, was so appointed, and was

allowed by the Treasury Department the benefits of his previous thirteen years' service. In 1877 H. D. Todd, who had also resigned when a lieutenant commander, in 1866, but who had spent the intervening eleven years in civil life, was appointed a professor of mathematics, and he also was allowed by the Treasury Department the benefit of his previous naval service; but, under the view contended for by the government, the former officer would be deprived of the benefits of his service in the line of the navy, while the latter, his junior in rank, would continue to receive credit for all his service and would thus have the higher rate of pay for the very reason which should give him the lower.

It would also seem proper to bring to the attention of the court the fact that there are only fifteen officers who could in any way be affected by the recent decision of the court, and they are officers who were appointed to their present positions, by reason of special qualifications, their previous service in other branches of the navy being considered of great benefit to the government in the performance of their new duties. In view of this fact it would seem a special hardship to deprive them of the benefits of such previous service in computing their pay, while other transferred officers whose service was interrupted by a period of civil employment of greater or less length and whose professional knowledge must have deteriorated somewhat in the interval receive all the benefits of their previous service.

There would seem to be little room for doubt, therefore, that the enforcement of this new reading of the statute would necessarily have a disparaging effect on the rank of all officers in Bankson's situation and would prove a source of more or less demoralization, besides tending, as we have already said, to hamper the service by discouraging transfers in cases where, under the ruling of the court, the officer transferred would not be entitled to a time credit on his new commission, because an officer could hardly be expected to be willing to accept a transfer which would entail such sacrifices. And this, it is proper to remark, is *a very important consideration* in favor of adhering to the old interpretation, for *all appointments to*

the construction corps are made from the line and engineer corps and not from the civil walk.

The good of the service is for that reason deeply implicated in the old practice.

In his letter to the Secretary of the Navy of February 14, 1894, hereto annexed, the chief of the Bureau of Construction says:

"If the present decision of the court holds, its immediate effect upon the construction corps will be to place certain officers in a most anomalous condition as regards pay, since it will reduce their compensation below that received by those several years their juniors, and in October, 1895, the seven senior assistant constructors will be receiving less pay than the assistant constructor now at the bottom of the list, although the latter entered the naval service from four to ten years after the above-mentioned seniors."

Again, he says:

"I do not consider it proper for me to deal in the least with the question of law involved, but in equity it seems that an unwitting injustice has been done to officers whose high class-standing, special qualifications, and previous service caused their selection for appointment to other corps of the service in the interests of the government and yet who find themselves, after a lapse of several years, deprived of all the benefits of their previous service and placed in a worse position as regards pay than those many years their juniors."

It will be seen that the Secretary of the Navy, in his letter hereto annexed, is in entire agreement with the chief of the Bureau of Construction.

This court being powerless to reach the firmly rooted practice of the Navy Department that treats a transfer as a reëntry into the service, that being a matter which falls within the inviolable domain of executive discretion, it is respectfully submitted that the only way to preserve consistency and avoid the anomalies and evils above pointed out seems to be, by adhering to the interpretation placed on the act by the department having full authority over the whole subject, and a more intimate acquaintance with the bearings of

the act than any other expositor or department of the government could expect to have.

As there is no intimation in the law that the right to longevity pay is dependent on any particular time during which the officer has been out of the service when he last entered it, and as the officer transferred is during the interval between resignation and reappointment, however short the interval may be, as much out of the service, according to the settled practice of the Navy Department, as though he had laid down his first commission without any expectation of reappointment, it would seem that the court may restore harmony by giving the old interpretation its sanction without doing violence to a single word of the statute.

But, aside from the act of 1883, it is respectfully submitted that the appellee ought to have an opportunity to argue the question whether the United States is entitled to recover back money paid him under a mistake of law and with full knowledge of all the facts.

This precise question was not raised by the counsel for the government, and, it would seem, could not have been properly raised in the state of the pleadings, the government not having pleaded the alleged excessive payments by way of set-off, and the claimant, being therefore completely without notice by the pleadings that any such question as his liability to refund money paid to him as compensation, under a mistake of law, would be raised, should be allowed to discuss the question, especially as it is *res integra* in this court.

The Court of Claims has held that the government cannot, any more than an individual, recover back money upon the ground that it was paid under a mistake of law. *Hedrick* v. *United States*, 16 C. Cl. 88; see also *Miller's Case*, 19 C. Cl. 338, 354; *Palen's Case*, 19 C. Cl. 389, 394; *Hartson's Case*, 21 C. Cl. 451.

But this court has never decided the point, though it has several times referred to it. *United States* v. *Philbrick*, 120 U. S. 52, 59; *McElrath* v. *United States*, 102 U. S. 426, 441; *United States* v. *Burchard*, 125 U. S. 176.

It is respectfully submitted that the reasons above given

appear to be sufficient to entitle the appellee to a rehearing, or, at the very least, entitle him to request the court to strike from its opinion, in the case of *United States* v. *Philip R. Alger*, the reasoning and observations in which are understood to apply to the case of the appellee as well, the intimation that it is a possible hypothesis in the case that the appellee might have sent in a formal resignation "for the purpose of eluding the statute and claiming longevity pay on the higher scale."

Mr. Justice Gray delivered the opinion of the court.

These two cases were decided at the present term in favor of the United States, upon the ground that under the act of March 3, 1883, c. 97, (22 Stat. 473,) an officer of the navy, who resigns one office the day before his appointment to a higher one, though in a different branch of the service, is only entitled to longevity pay as of the lowest grade, having graduated pay, held by him since he originally entered the service. 151 U. S. 362, 366.

The principal grounds of the petitions for rehearing, and the only ones which require to be noticed, were not suggested in the briefs upon which the cases were submitted for decision. Those grounds are that, by the settled practice of the Navy Department, (as shown by documents now laid before the court for the first time,) officers in one branch of the service are required to resign from the Navy before accepting an appointment in any other branch of the service; the longevity pay of officers so transferred from one branch of the service to another is computed upon the theory that the new appointment is a new entry into the service; and the names of such officers are placed, without regard to their previous rank, at the foot of the list of officers of the same grade in the new corps.

As it now appears that the resignation of every officer, under such circumstances, is absolutely required by the Navy Department, it is evident that no case of the kind could be open to the suggestion made, by way of hypothesis only, and not as applicable to either of these claimants, in the former

opinion in *Alger's case*, that 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 unbecoming in the officer or his advisers.

But the habitual requirement of such a resignation by the Navy Department, as a preliminary to the new appointment, puts beyond doubt (what was before in some degree a matter of inference from the specific facts found) that each resignation was tendered with no intention of leaving the service; and confirms us in the opinion heretofore announced, that the actual service of each claimant from the time he first entered the navy was for a single and continuous period, within the meaning of the longevity pay act.

If the meaning of that act were doubtful, its practical construction by the Navy Department would be entitled to great weight. But as the meaning of the statute, as applied to these cases, appears to this court to be perfectly clear, no practice inconsistent with that meaning can have any effect. *Swift Co.* v. *United States*, 105 U. S. 691, 695; *United States* v. *Graham*, 110 U. S. 619; *United States* v. *Tanner*, 147 U. S. 661.

This case does not present for judicial determination (if it could be so presented in any form) the question whether the practice of the Navy Department with regard to the rank and precedence of such officers conforms to section 1485 of the Revised Statutes, which directs that "the officers of the staff corps of the Navy shall take precedence in their several corps and in their several grades, and with officers of the line with whom they hold relative rank, according to length of service in the Navy."

In the petitions for rehearing, illustrations are given of the inequality of the operation of the longevity pay act, as construed by this court. But as that act, upon any possible construction, distinguishes the case of continuous from that of interrupted service, it is impossible that there should not be some cases of apparent disproportion in the allowances for length of service. The duty of the courts is to apply the general rule prescribed by Congress. If injustice attends the application of the rule in particular cases, Congress alone can

Counsel for Parties.

afford a remedy, by changing the rule for the future, or granting additional compensation for the past.

Petitions for rehearing denied.

Mr. Justice White, not having been a member of the court when these cases were argued, took no part in the decision of these petitions.

MURPHY *v.* PACKER.

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

No. 107. Argued January 16, 17, 1894. — Decided March 19, 1894.

Evidence of the payment of the purchase money due to the State of Pennsylvania on a land warrant, clothes the person paying it with the ownership of the warrant, and with the right to maintain ejectment for the land.

A recital in a patent from Pennsylvania to B of a conveyance by A to B before the warrant issued, is no evidence against persons claiming under C to whom a previous patent had issued for the same land upon the warrant to A.

When county commissioners in Pennsylvania buy in for the county land sold for nonpayment of taxes, and the land, while owned by the county, is illegally assessed for taxes, and sold for nonpayment of them, and conveyance is duly made to the purchaser, who remains in possession forty years, the county is estopped from asserting title in itself.

When a valid title to real estate in Pennsylvania becomes vested in a person by reason of the ownership of a land warrant and his payment of the purchase money to the State, a stranger to his title, claiming under another and distinct title, cannot avail himself of the act of April 22, 1856, Purdon's Digest, 1064, 11th ed., with regard to implied or resulting trusts.

Ejectment. The case is stated in the opinion.

Mr. A. Ricketts for plaintiff in error.

Mr. James Ryon for defendant in error. *Mr. John W. Ryon* and *Mr. S. P. Wolverton* were with him on the brief.

Opinion of the Court.

MR. JUSTICE SHIRAS delivered the opinion of the court.

This was an action of ejectment brought, in the Circuit Court of the United States for the Western District of Pennsylvania, by Elisha A. Packer, a citizen of the State of New York, against Charles G. Murphy, a citizen of the State of Pennsylvania, to recover possession of a tract of land containing four hundred and sixty-two acres, situate in the county of Cumberland and State of Pennsylvania. The plaintiff's evidence to show title in himself consisted of six warrants for tracts of land of some four hundred acres each, one of which, to Nathaniel Brown, dated November 26, 1793, embraced the land in question; also survey under said warrant made on the 21st day of October, 1794; also, papers on file in the land office of Pennsylvania, namely, a purchase voucher No. 12,969, and a "purchase blotter" No. 12,969, dated June 14, 1794, stating that Dr. Thomas Ruston applied for and took out the warrant to Nathaniel Brown and five other warrants, and paid the purchase money.

Under the well-settled law of Pennsylvania this evidence of payment of the purchase money by Dr. Ruston availed to clothe him with the ownership of the warrants and with a right to maintain ejectment. *Campbell* v. *Galbraith*, 1 Watts, 70, 78; *Ross* v. *Barker*, 5 Watts, 391; *Sims* v. *Irvine*, 3 Dall. 425; *Evans* v. *Patterson*, 4 Wall. 224; *Huidekoper* v. *Burrus*, 1 Wash. C. C. 109, 114. With the ownership of the land embraced in the Nathaniel Brown warrant and survey thus in Dr. Ruston, the plaintiff put in evidence the record of a suit against said Ruston at No. 44, April session, of the Circuit Court of the United States for the Eastern District of Pennsylvania, showing a judgment obtained on October 13, 1796, sale of said tract of land, and conveyance by the United States marshal on October 11, 1803, to Nicholas Le Fevre. This was followed by proof of the will of Nicholas Le Fevre and of proceedings thereunder, in the orphans' court of Philadelphia and Columbia Counties, whereby the title of Le Fevre to the Nathaniel Brown tract became vested in one Joseph Probst on May 9, 1837. By various deeds, wills, and sheriff's sales

put in evidence, but which need not be set forth here, the Nathaniel Brown tract became finally vested, on March 20, 1883, in Elisha A. Packer, the plaintiff below. The plaintiff likewise put in evidence showing that the Nathaniel Brown tract had been sold for unpaid taxes by the treasurer of Northumberland County on June 13, 1840, and conveyed to Charles Pleasants on August 16, 1840; and also, for unpaid taxes, had been sold and conveyed by the treasurer of Columbia County to James Pleasants by deed dated August 17, 1842. These tax titles to Charles and James Pleasants were shown to have become vested, before the bringing of this suit, in the plaintiff below.

These various documents and proceedings on which the plaintiff relied as showing title in himself were particularly set forth, in accordance with a rule of the Circuit Court pertaining to trials of ejectment, in a statement or brief of title. This statement was not formally controverted by the defendant below, who filed a statement of his own title, which was substantially as follows: (1) the warrant to Nathaniel Brown, November 26, 1793; return of survey of the same, October 21, 1794, this being identical with plaintiff's title; (2) a patent for the Nathaniel Brown tract, dated April 13, 1797, to one Peter Grahl, reciting a conveyance by Nathaniel Brown to Grahl, dated November 27, 1793; (3) assessments of Nathaniel Brown tract, as unseated lands, for unpaid taxes for the years 1826 and 1827; (4) sale for unpaid taxes and conveyance by the treasurer of Columbia County, on June 2, 1828, to the commissioners of said county; (5) minutes of commissioners of Columbia County of unseated lands, showing sale to said commissioners in 1828 and sale made by said commissioners of said tract to Charles G. Murphy, the defendant, by deed, acknowledging the receipt of $305, dated September 18, 1882.

At the trial the plaintiff, as above stated, sustained his brief or statement of title by putting in evidence the warrant, survey, and subsequent deeds, documents and proceedings vesting in him the title to the Nathaniel Brown tract. So far as we are advised by the record the defendant did not object to the plaintiff's evidence, but proceeded to offer evidence to

sustain the history of his own title contained in his brief or statement of title. The offers of the defendant were rejected by the court below, and a peremptory charge was given to the jury to find a verdict for the plaintiff, which was done, and a judgment was entered in favor of the plaintiff, to which the writ of error in this case was sued out.

Error is alleged in the action of the court in refusing to admit the defendant's offers of evidence, and in instructing the jury that the plaintiff was entitled to a verdict.

The first offer of the defendant below was a patent from the Commonwealth of Pennsylvania to Peter Grahl, dated April 13, 1797, with recital therein of a conveyance by Nathaniel Brown to Peter Grahl, dated 27th November, 1793, more than six months before the warrant issued or was paid for. The defendant did not offer any such conveyance in evidence, but relied upon the recital in the patent. Such recital was not evidence against Dr. Ruston and those claiming under him. In the case of *Herron* v. *Duter*, 120 U. S. 464, which was an action in ejectment for the land embraced in one of the other warrants owned by Dr. Ruston, and called the Lewis Walker, in the Circuit Court of the United States for the Eastern District of Pennsylvania, the court below rejected a precisely similar offer, namely, a patent to Peter Grahl, with a recital therein of a conveyance by Lewis Walker to Peter Grahl, and such action of the court below was, on error, approved by this court. It was held, following the doctrine of the Pennsylvania cases, that a legal title in Dr. Ruston had been established by the warrant, survey, and payment of the purchase money, and that it was not competent for the Commonwealth of Pennsylvania to affect that title by a subsequent patent to a stranger. To the same effect are *Maclay* v. *Work*, 5 Binn. 154; *Woods* v. *Wilson*, 37 Penn. St. 379.

We, therefore, think that the court below was right, in the present case, in rejecting the defendant's first offer.

The next assignment of error is founded upon the refusal of the court to admit the defendant's offer of the sale book of the commissioners of Columbia County, showing sale of

Nathaniel Brown tract, August 31, 1882, to C. G. Murphy, the defendant, together with a deed of said commissioners to said Murphy, dated and acknowledged September 18, 1882. The plaintiff objected to this offer as irrelevant and incompetent to affect the plaintiff, because the defendant offered no evidence to show title in the county commissioners of Columbia County but a tax title or sale in 1828, and that whatever title was acquired at such sale in 1828 was divested by the tax sale to Pleasants in 1842, and because at the sale in 1882 the presumption had become conclusive that the taxes of 1826, 1827, and 1828 had been paid, and the land redeemed from the sale of 1828.

This action of the court below was justified by the ruling of the Supreme Court of Pennsylvania, in the case of the *Diamond Coal Company* v. *Fisher*, 19 Penn. St. 267, where the very question presented to us in this assignment of error was considered, and it was held that the county was estopped from asserting title in itself under a tax sale, when the commissioners had bought in the land, as against a purchaser from the county treasurer, notwithstanding that the directions of the act of 1815, which prescribes the duties of the commissioners in reference to the holding and disposal of the lands sold to them, were disregarded.

The learned counsel for the plaintiff in error challenges the soundness of the decision of the Supreme Court of Pennsylvania in the case of *Diamond Coal Company* v. *Fisher*, and cites the case of *Herron* v. *Murphy*, 22 Weekly Notes of Cases, 181, to the contrary, as overruling the former case.

If, indeed, the decision in the case of *Herron* v. *Murphy* must be read as contended for by the plaintiff in error, we might be constrained thereby to sustain this assignment of error. But our examination of that case does not satisfy us that the case of *Diamond Coal Company* v. *Fisher* was thereby overruled. The case of *Herron* v. *Murphy* does not appear in the regular reports of the decisions of the Supreme Court of Pennsylvania, and from this we are, perhaps, permitted to infer that the court did not consider the case of sufficient importance to be reported, which could scarcely have been the

case if it was intended to thereby overrule *Diamond Coal Company* v. *Fisher*, which appears in the official reports. Moreover, in *Herron* v. *Murphy* the case of *Diamond Coal Company* v. *Fisher* is not noticed or referred to, nor any other case, and the principal questions considered by the court were whether the acknowledgment of a deed by a county treasurer after his term of office had expired was invalid, and the admissibility in evidence of the minute book of the commissioners' office. The defendant's evidence in the case appears to have been ruled out because their abstract of title had not given notice of the treasurer's sale. However this may be, we are unable to accept the contention of the plaintiff in error that it was the intention of the Supreme Court of Pennsylvania, in the case of *Herron* v. *Murphy*, to overrule the doctrine announced in *Diamond Coal Company* v. *Fisher*.

The course of the court below, in the present case, in rejecting evidence to show a commissioners' sale nearly sixty years after the sale to them in 1828, without any evidence of claim during this time upon the part of the county to the land, is also sought to be sustained by the contention that, by this long lapse of time, the presumption had become conclusive that the taxes for 1826, 1827, and 1828, for which the lands were sold to the commissioners in 1828, had been paid, and the lands redeemed from the sale of 1828. To sustain this contention the case of *Woodburn* v. *The Farmers' Bank*, 5 W. & S. 447, 450, is cited, in which it was intimated, if not directly held, that a presumption of payment would arise from lapse of time against the lien of county taxes. We are not, however, called upon to adopt this view of the case, because we think the ruling in *Diamond Coal Co.* v. *Fisher* sufficiently disposes of the second assignment of error.

Another assignment of error is based on the refusal of the court below to admit defendant's offer of a subsequent treasurer's sale in 1846. The evidence to sustain this offer was the treasurer's sale book for 1846, but on inspection the entry in that book does not show any sale to any one else, but does show that on November 19, 1847, the taxes on the Nathaniel Brown tract were paid by James Pleasants, and the land re-

deemed. It is, indeed, claimed by the plaintiff in error that the entry of payment and redemption by James Pleasants was irregular and unauthorized. But the defendant seems to have made no offer to show that the entry was unwarranted and illegal, and we think, in the absence of evidence, it is a fair presumption, after so long a period, that an entry of this kind in the book of the treasurer was properly made. Nor can we accept the claim that such entry, even if admissible to show payment of taxes, does not show a redemption by James Pleasants; for the entry itself, as shown by the copy thereof in the brief of the plaintiff in error, discloses that the payment of the taxes was entered under a heading in the words, "By whom redeemed and when." Such an entry and heading contained in a county treasurer's book might well be regarded, after so long a period, as an admission of such facts to affect the county, and might properly have been offered as such on the part of the plaintiff below. At any rate, and this is all that concerns us now, no injury was suffered by the defendant below in the court's rejection of his offer.

The effect of this alleged tax sale of 1846 is again raised in the sixth prayer for instructions on behalf of the defendant, asking the court to charge the jury that if the land, after the sale to James Pleasants in 1842, was again sold to the commissioners by the treasurer in 1846, such sale divested the title of Pleasants, and that his subsequent payment of the taxes for which the land was sold would not operate to reinvest him with the title. The answer to this is that the redemption act of 1815 (Purdon's Digest, 11th ed. 1682, pl. 52) provides that upon the redemption the commissioners shall reconvey all the county's title to the owner, and it has been held that the entry of "redemption" in the tax books is received as evidence of the fact, and that the redemption is good and revests the title without a deed from the commissioners. *City of Philadelphia* v. *Miller*, 49 Penn. St. 440, 456. However, as the defendant's evidence was not before the jury, this and the other prayers for instructions, so far as they were based on the defendant's rejected evidence, are not before us for consideration.

Syllabus.

But it is contended that even if Dr. Ruston did pay the purchase money for the Nathaniel Brown tract, such payment merely inured to the benefit of Ruston by way of a resulting trust, and that the act of assembly of April 22, 1856, (Purd. Dig. 11th ed. 1064,) forbids the assertion of any implied or resulting trust after the lapse of five years, unless such trust shall have been acknowledged in writing by the party to be charged therewith.

It is difficult to see how this statute affects the present controversy. If, indeed, Nathaniel Brown, in whose name the warrant had issued, had taken hostile possession of the tract, and excluded Dr. Ruston, the beneficial owner, and if at that time the act of 1856 had been in force, such a question might have arisen. But as we have seen that, under the well-settled law of Pennsylvania, a legal title became vested in Ruston by his ownership of the warrant and his payment of the purchase money, and as his title has, by instruments in writing and by proceedings of record, become vested in the defendant in error, a stranger to that title, claiming under another and distinct title, originating in a commissioners' sale in 1882, cannot avail himself of the statute referred to.

Finding no error in the rulings of the court below, its judgment is

Affirmed.

Mr. Justice White, not having been a member of the court when this case was argued, took no part in its decision.

CORINNE MILL, CANAL AND STOCK COMPANY *v.* TOPONCE.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 257. Submitted March 6, 1894. — Decided March 19, 1894.

The jury having in this case practically affirmed the truth of the plaintiff's story, this court accepts the result.

When services in the management of a farm and household in Utah are performed under a general retainer, without any express agreement as to the

time or measure of compensation or the term of the employment, and such services continue for a series of years, no payments being made, and there is a mutual, open and current account between the manager and the proprietors, into which the matter of compensation enters as one of the items, the cause of action must be deemed to have accrued at the date of the last item proved in the account on either side.

The facts in this case were as follows: On June 9, 1888, the defendant in error as plaintiff commenced his action in the District Court of the county of Weber, in the Territory of Utah. His complaint consisted of five counts. The first, for moneys paid out for the defendant; the second, for feeding and caring for certain stock of the defendant; the third, for his services as general manager of the defendant; the fourth and fifth, respectively, a claim for work and labor, and one for board alleged to have been due from defendant to Lea Owsley, and by him assigned to plaintiff.

The defendant answered, denying all but the claim in the fourth count of the complaint, and pleading also certain counter-claims. The case went to trial before a jury, which returned both a special and a general verdict, and on such verdicts judgment was rendered, March 19, 1889, in favor of the plaintiff, for the sum of $11,339.56. Subsequently, on July 12, 1890, this judgment was affirmed by the Supreme Court of the Territory, and thereupon defendant sued out this writ of error.

Mr. C. W. Bennett and *Mr. John A. Marshall* for plaintiff in error.

Mr. James N. Kimball for defendant in error.

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

There are but two questions presented, and they grow out of the claim set forth in the third count of plaintiff's complaint. That claim is for the sum of $14,750 for services as general manager of the defendant corporation from January 1, 1883, to December 1, 1887. During all this time the plaintiff

was a director and the vice-president. It is conceded that there was no express contract or authority for compensation, and it is insisted that all that he did in behalf of the company was within the proper scope of his duties as an officer, or, if not, was done upon the understanding that such services were to be gratuitously rendered.

In the assignment of errors there is no complaint of the instructions of the court as to the law governing in such cases, but the contention is that the court did not, when requested, peremptorily instruct the jury to disregard that claim, and also that the jury erred in finding, as they did, that there was due to the plaintiff the sum of $9538.40 for such services.

The court charged in substance that for services rendered in the discharge of his duties as vice-president and director he could not recover; that before recovery could be had the jury must find that the services rendered "were clearly outside of his duties as vice-president and director, and that they were rendered under such circumstances as raises an implied promise to pay for the services on the part of the company."

With reference to this question of fact it may be premised that the plaintiff and John W. Kerr owned substantially all the stock of the plaintiff corporation in about equal proportions; the other stockholders, who were also directors, apparently holding just enough stock to enable them to qualify as directors.

The charter was comprehensive in its terms, but the business which was actually carried on by the corporation was that of a ranch, stock, and mill. It had part of the time a ranch of 80,000 acres of land near Corinne, Utah, which, however, before the time of the trial had been reduced by sales to some 60,000 acres. It also had some sheep in Wyoming. Now, the plaintiff testified in reference to the property in Utah as follows: "I had charge of the entire business — had charge of the land, sold and purchased the land, purchased horses and sold them, sold land, and done everything;" and on cross-examination, in reply to a question as to what his duties consisted in and what his labors were, he said: "Well, knocking around, tending to the business of the company. Chasing fel-

lows off the land, trying to guard the land, tending to the stock on the ranch, digging ditches, superintending putting up fences, all contracts, and so forth."

Lea Owsley, who was foreman at the ranch, testified that the plaintiff was "general manager of the business;" "made all contracts of everything that came on the ranch;" "collected the bills;" "bought the feed, hay, and grain," and "had general charge of everything — land, cattle, ranch, and everything."

Neither the charter nor the by-laws of the corporation cast any special duties on the vice-president or director. The vice-president was only required to act in the absence of the president, and no special duties of management were in terms cast upon the president. It was provided that he preside at all meetings, sign all certificates of stock, contracts, checks, etc., "and generally do and perform such other duties as are incidental to his office and not in conflict with these by-laws and the articles of association." No duty was cast on any individual director as such. The board of directors, as a body, were charged with the usual duty of care of the affairs of the corporation, but all the power and duty cast upon them was upon them as a board, and not individually. Obviously, therefore, under the testimony which we have referred to, from the plaintiff and the foreman of the ranch, the services which the plaintiff performed were not those of a director or vice-president, but outside thereof, and similar to those of a general manager.

It is unnecessary to refer to the testimony which tends to weaken the scope of these general statements of the plaintiff and the foreman, because such conflict presents but a mere question of fact, upon which the verdict of the jury is conclusive. It is enough to sustain the verdict that there was positive, direct testimony to the existence of the facts as found. Neither is it clear, as contended by the defendant, that this claim for compensation as general manager was an afterthought, and in retaliation for a claim made by Kerr, the president, for interest; for, while it is conceded by the plaintiff that there was a dispute between Kerr and himself as to

the matter of interest, yet his version of that is substantially this: When he commenced work as general manager nothing was said in respect to his compensation, but some time afterwards, when sheep were purchased by the corporation from Kerr, and the price agreed upon, a question was raised as to interest upon the deferred payments, and then, as he says, Kerr agreed to waive interest on condition that he waived any claim for compensation for his services as manager, and yet, notwithstanding this agreement, Kerr afterwards insisted upon and recovered interest from the corporation.

It is unnecessary to consider the contradictory testimony or to attempt to determine the actual facts in reference to this matter. It is enough that the jury by their verdict have practically affirmed the truth of plaintiff's story; and that shows an understanding on the part of the parties in interest that he was to receive compensation for his services as manager, and that the two parties who owned substantially all the stock and properties of the corporation attempted to make an arrangement in respect to such compensation, which arrangement proved a failure, and proving a failure left the corporation under the implied obligation to pay for the services. We concur with the Supreme Court of the Territory, when it says: "It was the peculiar province of the jury, under proper instructions from the court as to the law governing plaintiff's right to recover for the services claimed to have been rendered, to determine from the evidence whether or not he was entitled to compensation therefor. The jury found the issue in plaintiff's favor. Plaintiff claimed $250 per month from January 1, 1883, to December 1, 1887, amounting to $14,750. The jury allowed him $8850 and $688.40 interest, amounting to $9538.40. While the evidence to sustain this verdict is not entirely satisfactory, and while, if submitted to this court originally on the printed testimony, a different conclusion might possibly be reached, yet, the jury having found for the plaintiff on part of his claim, and the judge who heard the case in the court below having refused to set the verdict aside, we do not think it is so far unsupported by the evidence as to justify this court in doing so."

The other matter is this: This action was commenced, as stated, in 1888, and the claim for compensation as manager was for a term extending from January 1, 1883, to December 1, 1887, and the contention is that part of this claim was barred by the statute of limitations. The statutory provisions applicable thereto are the following:

"Within two years. 1st. An action upon a contract, obligation, or liability not founded upon an instrument of writing; also on an open account for goods, wares, and merchandise, and for any article charged in a store account: *Provided*, That action in said cases may be commenced at any time within two years after the last charge is made, or the last payment is received." (Section 3145, Compiled Laws Utah, 1888.)

"In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side." (Section 3149, Compiled Laws Utah, 1888.)

Now, whatever might be the rule, if all that was involved in this case was a simple claim for compensation as manager, there was within the very terms of the statute a "mutual, open, and current account," between the parties, and into that account the matter of such compensation entered as one of the items, and so the court did not err in refusing this instruction asked by the defendant: "When services in the management of a farm and household are performed under a general retainer, without any express agreement as to the time or measure of compensation or the term of the employment, and such services continue for a series of years, no payments being made, the law for the purpose of determining when the statute of limitations begins to run will not imply an agreement that the payment of compensation shall be postponed until the termination of the employment, but will regard the hiring as from year to year, and the wages as payable at the same time."

Not only was there an account presented by the plaintiff for $4882.23, for moneys paid out at the instance and request of the defendant, from January 1, 1883, to December 1, 1887,

and also one for the further sum of $1133.25, for feeding, caring for, and keeping its horses during the same time, but also in its answer the defendant presented by way of counter-claim, first, an account against plaintiff and Owsley, as partners, for the pasturage of certain cattle, varying in number from 56 to 299, from the year 1883 to June 10, 1888, at twenty-five cents per head a month, on which only $414.40 was admitted to have been paid; also a claim against plaintiff and said Owsley jointly for the sum of $325.75 for horses sold and delivered to them; and finally, as a last counter-claim, defendant alleged: "That prior to and at the commencement of this action the plaintiff was and still is indebted to defendant in the sum of $3614.51, a balance upon an account for money loaned, paid out and expended to and for plaintiff, and for goods and materials furnished to him, and for divers and sundry other items and matters of charge, all on open running current account and at plaintiff's request, between January 27, 1883, and June 10, 1888. That said sum of $3614.51 was, at the commencement of this suit, and is due from and unpaid by plaintiff to defendant, and no part thereof has been paid."

On the trial the defendant offered the account taken from its books, running from January 27, 1883, to June 10, 1888, an account consisting of hundreds of items, and filling twelve pages of the printed record. Obviously, there were between the parties open, mutual, and current accounts, and as one item in those accounts was this claim for compensation as manager, and this, whether that was to be payable monthly or annually, we see no error in the record, and the judgment is

Affirmed.

Mr. Justice White, not having been a member of the court when this case was argued, took no part in its decision.

HALSTEAD *v.* GRINNAN.

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

No. 128. Argued December 4, 5, 1893. — Decided March 19, 1894.

The facts admitted or proved in this case show that the plaintiff was guilty of laches in failing to file his bills for so long a time, and it is held that they were properly dismissed by the court below.

Laches is an equitable defence, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to assert them, where he has had for a considerable period knowledge of their existence, or might have acquainted himself with them, by the use of reasonable diligence.

The length of time during which a party neglects the assertion of his rights which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not subject to an arbitrary rule.

On January 24, 1885, plaintiff filed in the District Court of the United States for the District of West Virginia his bill of complaint against A. G. Grinnan, the Forest Hill Mining and Manufacturing Company, Robert Soutter, trustee; William Wyant, and the unknown heirs of William K. Smith, deceased. At that time there was no Circuit Court in the district, the District Court having the powers of a Circuit Court, but before the final disposition of this case a Circuit Court was established by the act of Congress of February 6, 1889, c. 113, 25 Stat. 655, and to it the case was transferred. On November 30, 1887, the plaintiff, by leave of court, filed an amended and supplemental bill. Intermediate those dates, and on May 4, 1887, there was filed in that court the records of two cases transferred from the State Circuit Court of Greenbrier County, entitled, respectively, "*A. G. Grinnan* v. *S. C. Long et al.*," and "*F. B. Chewning* v. *J. F. Cowan et al.*" The plaintiff Halstead had been made party defendant in those cases, and notified by publication, and, after decrees by default against him, he appeared in each case by petition, praying for an opening of the decree and a rehearing, and, while those appli-

cations were pending, removed the case as above stated to the United States court. To the original and supplemental bills in the case commenced in the District Court, Grinnan and Wyant duly answered. Proofs were taken, and the three cases being heard together, on May 26, 1888, a final decree was entered as follows:

"John Halstead *v.* Wm. Wyant and Others.	In Equity.	Heard together.
A. G. Grinnan *v.* S. C. Long and Others.	In Equity.	
F. B. Chewning *v.* J. F. Cowan and Others.	In Equity.	

"These causes this day came on to be heard together and were argued by counsel; whereupon, upon consideration hereof, it is adjudged, ordered, and decreed that the bill and amended and supplemental bill in the first above-mentioned cause be, and the same are hereby, dismissed, and that the defendants therein recover of the complainant, John Halstead, their costs about their defence in that behalf expended.

"And it is further adjudged, ordered, and decreed that the petition for rehearing filed by said Halstead in said second and third suits above mentioned and the rule awarded said Halstead in said suits against the defendant, William Wyant, be each of them, and the same are, hereby dismissed; and it is further adjudged, ordered, and decreed that the defendants in said petition and said rule respectively recover their costs against said Halstead; but in taxing the costs recovered in this decree but one attorney's fee shall be allowed."

A petition for rehearing having been denied, an appeal was taken to this court.

The burden of this controversy rests in these facts: On June 15, 1859, A. G. Grinnan, W. K. Smith and A. G. Grinnan as

trustee, conveyed to the Forest Hill Mining and Manufacturing Company (hereinafter called the Forest Hill Company) a tract of land in the county of Fayette, in the then State of Virginia, (now West Virginia,) containing 2000 acres, more or less, and also another tract and a right of way described in the deed, as follows:

"Also a certain piece or parcel of a certain tract of land known as the Huddleston tract, to be surveyed off the western side of said tract by a line running from the northerly to the southerly side of said tract, to be bounded on the south by the tract hereinabove conveyed, and on the north by the Great Kanawha River, and containing one hundred acres, more or less. Also the perpetual right of way to the said party of the second part, their successors and assigns, through a tract of land known as the 'Elk Ridge' tract, lying between the tract of 2000 acres, hereinabove conveyed, and Armstrong's Creek, with the privilege of the said party of the second part of entering thereupon by their agents and servants, and constructing upon and over the same such roads or railroads as they may deem necessary for convenient access to and from the lands hereby conveyed."

This Huddleston tract was conveyed by Huddleston to Grinnan by metes and bounds, and in the deed was estimated to contain 200 acres, though in fact it contained nearer 250 acres. It was bounded on the north by the Kanawha River, its west line straight but its east line quite a zigzag, with considerable frontage on the Kanawha, but narrowing towards the southern end, and for some little distance towards that end bordering on the tract of 2000 acres previously described in the deed to the Forest Hill Company.

On the same day of the conveyance to it the Forest Hill Company placed a trust deed upon the property to secure the payment of sixteen promissory notes and eighty bonds. On June 6, 1864, the trustee, in execution of the trust and in consideration of the sum of $3500, conveyed the property to plaintiff. In this trustee's deed the description of the Huddleston tract and the right of way is as follows:

"Also a lot, piece, or parcel of land (containing 100 acres,

more or less, provided in said deed to be surveyed off the west side of the tract of land known as the Huddleston tract, as the same was ascertained and bounded by the survey made subsequently to the execution of the said deed and in pursuance thereof) adjoining the above; also the right of way through and across the Elk Ridge tract, also adjoining the above, which said lands and right of way are more fully described in a deed from William K. Smith and wife and Andrew G. Grinnan and wife and the said Andrew G. Grinnan, trustee, to the aforesaid Forest Hill Mining and Manufacturing Company, bearing the same date as the deed or conveyance in trust first above mentioned."

The survey, thus referred to, was made in the year 1859 by Thomas S. Robson, the county surveyor of Fayette County. By this survey a tract of 105 acres was set off to the Forest Hill Company, on the west side of the Huddleston tract, but so surveyed that no part of the land given to the company touched the 2000-acre tract heretofore referred to. The contention of the plaintiff was that such survey was inaccurate in that the part set off to the Forest Hill Company did not at any point touch the 2000-acre tract, and, therefore, did not comply with the terms of the deed; and the prayer was that he be decreed the owner of an undivided one-half interest in the Huddleston tract, and that a partition and new survey be made setting off to him the one-half, so as to connect with the aforesaid tract of 2000 acres.

The defendant Wyant claimed to have purchased the balance of the Huddleston tract, not set apart to the Forest Hill Company, at a judicial sale, in April, 1883, at the price of $60.50 per acre, amounting to over $9000; that he bought relying upon a map shown at the sale of the commissioner which conformed to the survey made by Robson, and in ignorance of any claim of the plaintiff; that he entered into possession and had expended about $7000 in building houses and opening mines. This commissioner's sale was by virtue of a decree rendered in the cases heretofore referred to as transferred from the State court and consolidated with the suit in the District Court, and in which cases prior to the decree plaintiff had been served by publication.

Mr. A. Burlew for appellant.

Mr. W. Mollahan for A. G. Grinnan, appellee.

Mr. J. F. Brown for William Wyant, appellee.

Mr. Eppa Hunton filed a brief for F. B. Chewning's estate and for A. H. Smith, appellees.

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

The plaintiff, by this suit, invoked the aid of a court of equity to set aside a survey which had stood unchallenged for over twenty-five years. Such a long delay suggests laches, and a careful examination of the testimony satisfies us that the Circuit Court did not err in sustaining this defence. The defence itself is one which, wisely administered, is of great public utility, in that it prevents the breaking up of relations and situations long acquiesced in, and thus induces confidence in the stability of what is, and a willingness to improve property in possession; and at the same time it certainly works in furtherance of justice, for so strong is the desire of every man to have the full enjoyment of all that is his, that, when a party comes into court and asserts that he has been for many years the owner of certain rights, of whose existence he has had full knowledge and yet has never attempted to enforce them, there is a strong persuasion that, if all the facts were known, it would be found that his alleged rights either never existed, or had long since ceased. We have had before us lately several cases in which this defence has been presented, and in which the rules determining it have been fully stated and its value clearly demonstrated. *Hammond* v. *Hopkins*, 143 U. S. 224, and cases cited in the opinion; *Felix* v. *Patrick*, 145 U. S. 317; *Foster* v. *Mansfield, Coldwater &c. Railroad*, 146 U. S. 88; *Johnston* v. *Standard Mining Co.*, 148 U. S. 360. The length of time during which the party neglects the assertion of his rights, which must pass in order to show

laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defence, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them. There must, of course, have been knowledge on the part of the plaintiff of the existence of the rights, for there can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend. And yet, as said by Mr. Justice Brown, speaking for the court in *Foster* v. *Mansfield, Coldwater &c. Railroad*, 146 U. S. 88, 99, "The defence of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

In this case there is no question as to plaintiff's knowledge. In the deeds from Grinnan and Smith to the Forest Hill Company, and from that company to the trustee, the description is of a piece, or parcel, of a certain tract "to be surveyed off the western side of said tract by a line running from the northerly to the southerly side of said tract." And in the deed from the trustee to plaintiff, which was made on June 6, 1864, the description is of a lot, piece, or parcel of land containing 100 acres, more or less, "as the same was ascertained and bounded by the survey made subsequently to the execution of the said deed, and in pursuance thereof," so that in the deed made to the corporation, of which he was a stockholder, twenty-five years before the commencement of this suit, was a provision for a survey, and in the deed to himself, made more than twenty years before this suit, was a declaration that the survey called for by the previous deed had been made. When, therefore, he took title, he took it with notice that a survey had been made, and would not now be heard to

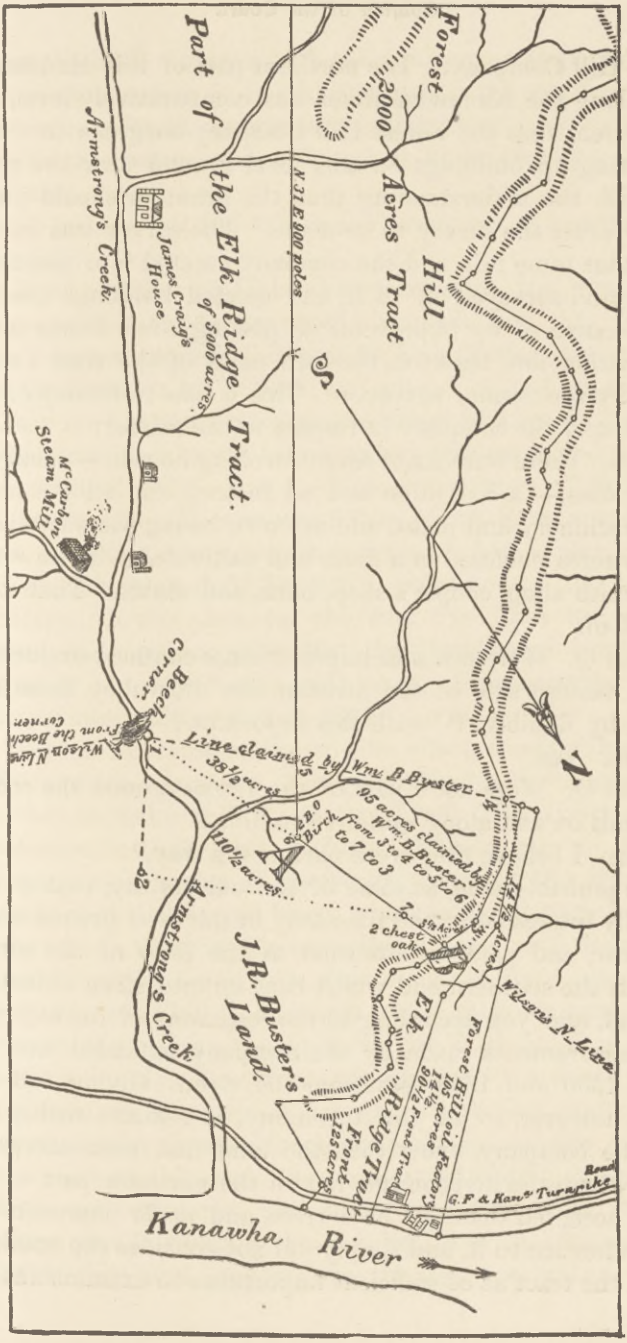
say that he had no knowledge of that fact. Further, the survey which was made by the county surveyor, Robson, was made in 1859. In 1861 the same surveyor made a plat showing the Forest Hill tract of 2000 acres, and the Huddleston tract, as surveyed, with the adjoining lands, which plat, or so much of it, at least, as is material, is inserted on the opposite page.

A mere glance at this plat shows that the Huddleston tract is so surveyed that the part set off to the Forest Hill Company at no point touches the 2000-acre tract, but is separated therefrom by a narrow strip — a part of the land reserved to Grinnan and Smith. Now, in reference to this map, the plaintiff alleges, in his amended and supplemental complaint, as follows:

"The map filed with the deposition of T. S. Robson, marked 'T. S. R. No. 2,' was made from a survey made by said Robson in 1861, and your orator believes that it shows correctly the location of the Forest Hill tract of 2000 acres and the Huddleston tract and the division made by him in 1859 and their relations to each other. Your orator avers that he saw this map for the first time in about 1867. It will be seen by this map, which is asked to be read and considered as a part of this bill, that the division of the Huddleston tract made by T. S. Robson in 1859 is so made that the part retained by Grinnan intercepts that part laid off to the Forest Hill Company from the Forest Hill tract of 2000 acres, so that they do not join each other."

In other words, he admits that eighteen years before he brings this suit he saw the map which discloses the survey, and it is apparent at a glance, as he himself alleges, that the part set off to the Forest Hill Company does not at any point touch the 2000-acre tract.

But beyond this direct admission there is testimony tending to show that both he and his grantor had knowledge at a much earlier date. The Forest Hill Company was organized in the year 1859. The plaintiff was a stockholder in the company. Dr. Hale was its president, and, after the deed to plaintiff and up to the time of this suit, he continued to reside, as the agent of the plaintiff, on this 105 acres, set off to the


Part of
the Elk Ridge
of 5000 acres
Tract.
Forest
2000
Acres Tract
Hill
Armstrong's Creek.
James Craig's House
N. 31 E. 800 poles
Mc Carbon
Steam Mill
Beech corner
Wilson N. Line from the Beech Corner
Line claimed by Wm. B. Buster 38½ acres
95 acres claimed by Wm. B. Buster
Birch from 3 to 4 to 5 to 6
Birch from 3 to 7 to 3
110½ acres
2 chest oak
Armstrong's Creek
J. R. Buster's Land.
Elk
Ridge Land
Front 125 acres
Front 100 acres
Forest Hill Road
Wilson's N. Line
G. F. & Kan.a Turnpike
Kanawha River

Forest Hill Company. The northern part of this Huddleston tract along the Kanawha River was comparatively level, and it is evident that the Forest Hill Company bought with a view of putting up buildings on this level ground near the river, and with the understanding that the grantors should immediately cause the survey to be made. The survey was in fact made that same fall, and the company entered into possession of the land surveyed off to it, and erected buildings thereon, in the course of its improvements placing some fences along the division line between the two parts of the tract as surveyed by the county surveyor. This is the testimony of the president of the company in respect to the matter:

"Ans. There were six or seven dwelling-houses, — small cottage houses, — a coal mine and oil factory, and all the necessary machinery and plant, and my own house, some twelve or fifteen acres enclosed in a fence and cultivated. There was a blacksmith shop, cooper's shop, barn, and stable. That is all I think of.

"25th Q. Were not said improvements confined exclusively to the western side of the division line drawn by Robson as shown by Exhibit 'B' with this deposition?

"Ans. Yes.

"26th Q. Were not a part of the fences around the enclosures built on and along said division line?

"Ans. I believe they were part of the way."

It is probably true, as some of the officers say, that it was specially interested at the time only in the level ground along the river, and paid no attention to the lines of the survey towards the southern end which runs up into steep mountainous land, and yet, according to the testimony of the engineer, the improvements made by the company extended back between 1500 and 1800 feet from the river. Giving full credence, however, to all this testimony, it remains undisputed that the company knew that the land had been surveyed; knew where the division line ran on the northern part of the tract; accepted that line as correct, and made improvements with reference to it, and simply did not consider the southern end of the tract as of sufficient importance to examine and see

where the lines were run. If the company was in fact ignorant of the location of the division line at the southern end of the tract, it was an ignorance resulting from its own indifference to the matter, and although it knew that the line had been run.

Still further, we find this in the testimony of the president, Dr. Hall:

"It was a part of their agreement with the Forest Hill Company that the survey should be made and that the lines should be run properly. I was in New York when Grinnan had the lines run by Robson, and when I came back in 1859 I learned for the first time that the lines had been run and the division had been made. This survey was made and lines run in the fall of 1859. . . . The whole tract of 2000 acres was surveyed by Robson some time about February, early in 1861, and after that survey was made we had a plat given us not only showing the 2000 acres, but also the 100 acres of frontage. It was then for the first time that we knew or indeed had any suspicion that the Huddleston frontage did not unite with the Forest Hill tract. This occurred just at the beginning of the war, in 1861."

There is more testimony to like effect coming from other officers of the company. The plaintiff also, in his deposition, testified as follows: "When the Forest Hill Company took possession, in 1859, I was told that Robson ran the lines for the purpose of laying off the westerly half of the Huddleston tract so that they would know where to locate their buildings. I don't know of anything more being done until Robson surveyed the entire tract, as is shown by his map, dated 1861." In the amended bill it is alleged "that said company had no occasion to examine the lines run by T. S. Robson in 1859, except to see that they were properly run for a short distance back from the Kanawha River, about 1000 feet, where it was interested, and about to locate its buildings for the manufacture of coal oil and erect the necessary dwelling-houses for its officers and employés, and where it did so erect them. It took no part in running the division lines in 1859 except to see that they were properly run through the bottom land on

the Kanawha River, for the reasons above stated, and did not accompany said surveyor any further on his survey, but said company supposed, as a matter of course, until the mistake was discovered by it, that A. G. Grinnan had had the Huddleston tract divided according to the requirements of his deed to and agreement with said company."

It also appears from his own testimony that plaintiff's attention was called to the fact that the two tracts did not join, that he was urged to buy the intervening land but declined on account of the price, $30 an acre, and also because he supposed his deed gave him a right of way through the Huddleston tract to the Kanawha River as through the Elk Ridge tract to Armstrong Creek. We quote from his deposition as follows:

"For several years A. G. Grinnan had been urging me to buy his adjoining tract, and I told him I had already too much unproductive property on hand, but in the year 1880 I wrote him to this effect: That I would like to make the connection between the front and back land more complete, so that it would show to better advantage on the map, and that I would give him one hundred dollars for so much of the land as he owned running back from about where the Wilson line crosses the tract; that it was part of the frontage intended to connect the two tracts, and had not the Forest Hill Company been obliged to suspend their operations on account of the war, there is no doubt but they would have claimed it as their right. I had somehow gotten the impression from seeing Robson's map that I could only claim the right of way, because the survey was not corrected whilst the company held possession, and that impression was not removed from my mind until I hunted up the Forest Hill Company's deed after A. G. Grinnan had sold to Wyant what did not belong to him without giving me any notice, as any fair-minded man would have done, knowing it would depreciate the value of my property many thousands of dollars. An examination of the deed showed, to my surprise, that the right of way did not apply to the front tract, but that the deed called for a connection of the two tracts."

But it is unnecessary to multiply these quotations from and

references to the testimony and pleadings. It will be difficult to find a clearer case of ample and long-continued knowledge of the exact situation; and if ever the knowledge of a mistake created a duty of taking some action to correct it, it surely did in the present instance.

We have thus far considered this case on the assumption that the survey made by Robson in 1859 was erroneous, and failed to give to the Forest Hill Company that which it claimed and was entitled to, yet there is testimony casting doubt at least upon this matter. That of the surveyor is that both the grantor and the grantee were represented at the time of the survey, and that it was made in accordance with their instructions, those instructions being to give an equal frontage on the river; that the deed to the Forest Hill Company was not produced, nor his attention called to the particular language of the description in that deed, nor anything said with reference to forming a connection with the 2000-acre tract.

Further, while the deed to the Forest Hill Company requires that this tract be surveyed off the western side of the Huddleston tract "by a line running from northerly to southerly side of said tract, to be bounded on the south by the tract hereinabove conveyed, and on the north by the Great Kanawha River," it is apparent from the plat that the 2000-acre tract referred to does not join the Huddleston tract on its south line, but only along the irregular east line. Now, if one call in the deed is explicitly followed, and the partition line run from the north to the straight line on the south, the land to the west of that will not connect with the 2000-acre tract, unless, indeed, the part reserved to Smith and Grinnan is separated into two parcels, the one south and the other north of the place of such connection. Apparently the exact situation of these two tracts was not at the time of the deed accurately known, and it was supposed that the 2000-acre tract ran along the whole southerly side of the Huddleston tract, and so it appears on some of the maps which were known to the parties at the time of the conveyance; and it was in view of such supposed location that this description was intro-

duced. One call, as we see, was explicitly followed in the survey, that of a line from the northerly to the southerly side of the tract. The amount to be set off was exceeded, 105 acres being surveyed off to the Forest Hill Company, and if that part was not bounded on the south by the 2000-acre tract, it was because on the south the 2000-acre tract did not join the Huddleston tract.

Stress is now laid upon the supposed importance of having access to the 2000-acre tract from the Kanawha River, and the claim is that such access was one of the main inducements to the purchase of this 100 acres, but so far as can be judged from the testimony, the steep, mountainous character of the land at the southern end of the Huddleston tract would interfere greatly with easy access from the Kanawha River, and the bringing of coal or other products of this 2000-acre tract to the water was apparently provided for by a right of way through the Elk Ridge tract to Armstrong Creek. In addition, the conduct of the parties at the time indicates that the main thought in the purchase of this 100 acres was of the level ground near the Kanawha River, and the desire of the company was to get as large a portion of that as possible, ignoring wholly the survey in the southern part of the tract. It is, therefore, to say the least, a doubtful question whether there was any mistake in the survey as made, and also whether the surveyor did not, in obeying the immediate directions of the respective parties, make a survey which conformed as nearly as was practicable to the calls in the deed. It is unnecessary, however, to lay stress upon this matter, and we only notice it to show that there were likely other reasons, besides those given by the plaintiff, why no challenge of the survey was made until this late day.

It only remains to notice the fact that Wyant purchased in 1883, at a judicial sale, the balance of the Huddleston tract; that at such judicial sale, conducted by a commissioner duly appointed by the court, a plat and description corresponding to the survey made by Robson in 1859 were presented as the basis of the sale, and that, relying upon that survey and description, Wyant made his purchase and paid his money, in

ignorance of any claim of plaintiff, or of any question as to the correctness of the survey; that he entered into possession and expended several thousand dollars in improvements before any challenge of his rights was made by plaintiff. Under those circumstances injustice would be done to him to disturb the survey and his possession of the property. As this situation of affairs was brought about through the negligence of the plaintiff, the court rightfully held him guilty of laches, and properly dismissed his bills. The decree is

Affirmed.

MR. JUSTICE WHITE, not having been a member of the court when this case was argued, took no part in its decision.

MORGAN ENVELOPE COMPANY *v.* ALBANY PERFORATED WRAPPING PAPER COMPANY.

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

No. 254. Argued March 8, 9, 1894. — Decided March 19, 1894.

An inventor who acquiesces in the rejection by the Patent Office of his claim in one form, and accepts a patent with the claim changed so as to correspond with the views of that office, is estopped to claim the benefit of the rejected claim.

Letters patent No. 325,410, granted to Oliver H. Hicks September 1, 1885, for a package of toilet paper known as the oval roll or oval king package, is void for want of patentable invention.

Letters patent No. 325,174, issued to said Hicks August 25, 1885, for a toilet-paper fixture, and letters patent No. 357,993, issued to said Hicks February 15, 1887, for an apparatus for holding toilet paper, are not infringed by selling such fixture or apparatus, bought of the patentee, with paper manufactured by the seller.

When a patentee has once received his royalty, he cannot treat the subsequent seller or user as an infringer.

THIS was a bill in equity to recover damages for the infringement of three letters patent issued to Oliver H. Hicks of Chicago, and assigned to the appellant, viz.: Patent No. 325,410,

issued September 1, 1885, for a "package of toilet paper," known as the "Oval Roll" or "Oval King" package. (2) Patent No. 325,174, issued August 25, 1885, for a "toilet-paper fixture." (3) Patent No. 357,993, issued February 15, 1887, for an "apparatus for holding toilet paper." These are known as the "Oval King" fixtures.

The answer made the usual denials of novelty and infringement.

Upon a hearing upon pleadings and proofs, the court dismissed the bill, except as to the fifth claim of patent No. 357,993, upon which a decree was ordered for plaintiff without costs. From this decree plaintiff appealed to this court.

Mr. Melville Church and *Mr. Charles E. Mitchell*, (with whom was *Mr. J. B. Church* on the brief,) for appellant.

Mr. Esek Cowen for appellee.

Mr. Justice Brown delivered the opinion of the court.

Prior to the inventions covered by the patents in this case, toilet paper had been put up in packages of sheets cut to a convenient size, sometimes attached together by a wire, or in cylindrical rolls of continuous length, either perforated transversely at proper intervals for the convenient detachment of the sheets, or in similar rolls not perforated, but designed to be cut by a device having a sharp edge, to which the rolls were attached. All these methods proved to be objectionable on account of the temptation offered to greed or wastefulness, in the facility with which unnecessary amounts of paper could be detached, which were either carried off or allowed to fall on the floor. Where perforated paper was employed in roll form, the litter was increased by the dropping of small particles of paper intended to have been removed by the perforating machine, but which remained attached until the paper was unwound, when they fell upon the floor and became very difficult to remove.

(1) In the specification of his patent No. 325,410, which is for a package of toilet paper, the patentee states that he had in view to furnish a toilet paper in the form which would prevent in a large measure this vast amount of wastage. "In carrying out this object I have put up one or more lengths of paper in the form of a continuous band (as contra-distinguished from a roll) of oblong or oval shape, the short rounded ends of the bundle thus produced serving as guides for determining the proper points at which the paper has to be separated in order to produce sheets of a size desirable for use, and affording also the most advantageous surfaces upon which to tear the paper. The band I make of a thickness calculated to produce sheets severed at the point stated of practical and economical lengths from the time the bundle is opened until it is consumed."

The band he makes of an oblong or oval shape so that it may be mounted in a fixture shown in a previous patent for that purpose, or used detached from the fixture, one hand of the user being slipped into the interior, and the other hand being employed to grasp the pendant end of the paper, and by drawing the paper tightly over one of the short rounded ends of the bundle, causing it to separate at that point and produce a sheet of convenient length. His claim was for "a bundle of paper consisting of one or more lengths formed into a continuous band whose internal diameter is greater than the thickness of the paper, substantially as described." The invention in question, as described in the specification and illustrated in the drawings annexed to the patent, is for a band of paper rolled in an oval instead of the usual cylindrical shape, with a view of affording a convenient method of tearing off sheets of a proper size, the fracture in each case being at the end of the roll. It is difficult to see, however, how any waste is thereby prevented, since it is nearly, if not quite as easy, to unwind long strips of this paper from an oblong as from a cylindrical roll. So, too, if the patent were construed as for an oblong roll, the fact that from time immemorial, cotton and woollen goods and silks have been almost universally wound about a flat board or core, precisely as described in the patent, would indicate that there is no novelty in the oblong or oval shape,

and that the patent, if supported at all, must be for the different purpose for which toilet paper is wound in this form.

Upon examining the claim, however, in connection with the original application, it appears that, if the patent involved any invention at all, it is not limited to bands of oval or oblong shape, since the claim contained in the original application was for "a bundle of toilet paper consisting of one or more lengths of paper formed into a flexible continuous band of oblong or oval shape, the short rounded ends of such band serving as guides for determining the proper points at which the paper is to be separated in order to produce sheets of a size desirable for use, and affording, also, the most advantageous surfaces upon which to tear the paper, substantially as described." This claim, which corresponds with the specification and drawings, and was Hicks' real invention, was rejected as indefinite, because it failed to point out any construction over an ordinary paper roll, and was also rejected upon a prior patent to one Peacock. The patentee thereupon amended his application by changing his claim to "a bundle of paper consisting of one or more lengths formed into a continuous band whose internal diameter" (by which we understand the internal diameter, when rolled into a cylindrical form) "is greater than the thickness of the paper, substantially as described."

If this claim be good, it would seem to follow that any band of paper wound in such manner that the internal diameter is greater than the thickness of the paper, would be an infringement, whatever be its shape, or for whatever purpose used. The size of the roll, too, is not made material, except that it must bear a certain relation to its inner diameter. Certainly it would apply to all toilet paper, even if wound in a cylindrical form, as the language of the claim, though not of the specification, indicates that it should be. It would also follow that, even if the roll of paper, when purchased, had an internal diameter less than the thickness of the paper, such internal diameter would become relatively greater with the progressive using of the paper, until its thickness was so far reduced as to become less than the internal diameter, when it would fall within the description of the claim. Indeed, it is difficult to

see what function is performed by a band of paper so constructed, or what difference it makes whether the internal diameter is greater or less than the thickness of the paper, unless the paper be made in an oval form.

It is insisted in this connection, however, that under the words "substantially as described" the patentee is entitled to claim a band of oval or oblong shape, and that, looking at his specification and drawing in connection with the claim, it is obvious that the latter should be so limited. But the patentee having once presented his claim in that form, and the Patent Office having rejected it, and he having acquiesced in such rejection, he is, under the repeated decisions of this court, now estopped to claim the benefit of his rejected claim or such a construction of his present claim as would be equivalent thereto. *Leggett* v. *Avery*, 101 U. S. 256; *Shepard* v. *Carrigan*, 116 U. S. 593; *Crawford* v. *Heysinger*, 123 U. S. 589, 606; *Union Metallic Cartridge Co.* v. *United States Cartridge Co.*, 112 U. S. 624.

It is true that these were cases where the original claim was broader than the one allowed, but the principle is the same if the rejected claim be narrower. Why the claim of the present patent was allowed after the rejection of the narrower claim does not appear. The objections made to the claim as originally presented seem to be equally applicable to this.

But construing this claim as for an oval or oblong roll, it is clearly anticipated by the patent granted March 6, 1883, to one Peacock, for a toilet-paper case, used for carrying toilet paper, which was wound in an oval form about a spool or core, precisely as described in plaintiff's patent. Apparently it differs from the Hicks roll only in being smaller and having its core hinged to a stiff case, in which the paper for convenience was carried.

There was also put in evidence by the defendant a device known as the Wheeler Pocket Companion, which was a small package of toilet paper of an oval form, differing from those covered by the Hicks patent only in size, and in the fact that no attention was paid to the relation of the inner to the outer convolutions, and no intent shown that when one convolution

was torn off the end of the next one would drop down into position to be grasped. While neither of these devices is a precise anticipation of the Hicks patent in the manner in which they are used, it is impossible to say that a mere enlargement of these devices to the size contemplated by Hicks would constitute invention, although by such enlargement the roll became capable of being used in a somewhat different manner.

(2) Patents No. 325,174 and No. 357,993 are practically the same, and are for a combination of the paper roll described in the former patent, with a mechanism for the delivery of the paper to the user in an economical manner. The object of both inventions is said to be "to so arrange the paper as to prevent more than a given quantity of it to be withdrawn from the roll at a single operation, and so that in the act of withdrawing such given quantity it shall be automatically severed from the roll, leaving pendent from the roll a free end, which shall serve as a means of withdrawing a like quantity by the next user." This is accomplished by the combination of an oscillating roll of toilet paper actuated in one direction by a pull upon its free end, of a knife or cutter coöperating with the roll to sever the unwound portion when the roll has reached the limit of its motion in one direction, and a stop for so limiting the motion of the roll. The principal difference between the two patents is that No. 325,174 is limited to an appliance in which a knife or cutter for arresting the roll of paper, when oscillated, is employed; while the latter one, No. 357,993, is broad enough in its scope to include a structure in which a mere stop, which has no cutting action at all, is employed to arrest the roll.

Each patent contains five claims, and in all of them, except the fourth and fifth of the first patent and the fifth of the second, the paper roll is included as an element of the combination.

No question is made but that the mechanism of these patents, by which the paper is served out to the user, involves a patentable novelty; but it is claimed, first, that the roll of paper being perishable, and the machine being constructed for

the purpose of delivering this paper to users in convenient lengths, such a roll is not a proper part of the combination; second, that conceding it to be a part of the combination, there was no infringement.

The first defence raises the question whether, when a machine is designed to manufacture, distribute, or serve out to users a certain article, the article so dealt with can be said to be a part of the combination of which the machine itself is another part. If this be so, then it would seem to follow that the log which is sawn in the mill; the wheat which is ground by the rollers; the pin which is produced by the patented machine; the paper which is folded and delivered by the printing press, may be claimed as an element of a combination of which the mechanism doing the work is another element. The motion of the hand necessary to turn the roll and withdraw the paper is analogous to the motive power which operates the machinery in the other instances.

But without expressing an opinion upon this point, we think the facts of this case fail to sustain the charge of infringement. Defendants neither made, sold, nor used the mechanism invented by Hicks to serve out the toilet paper, except as they purchased it of the patentee, and the only acts proven against them were in selling oval rolls of paper of their own manufacture, with fixtures manufactured and sold by the plaintiff, in combination with its (the plaintiff's) paper to persons other than the defendants, the fixtures having been obtained by defendants from the original purchasers of the patented combination; and also of selling oval rolls of paper of defendant's own manufacture to persons who had previously purchased fixtures and paper from the plaintiff, with the knowledge and intention that the paper so sold was to be used in connection with the plaintiff's fixtures. In this connection it appeared that it had not been the practice of the plaintiff to sell its fixtures independently of its paper, and that they sold only to such parties as dealt in and used their paper. Purchasers were also required to buy a given quantity of paper to a given number of fixtures, to be sold only in connection with the paper, the rule being not to sell more than

one fixture to one case of paper. The fixtures were also sold to hotels and other public buildings, with the understanding that their paper would be subsequently purchased of the plaintiff company. It appears to have been its invariable rule to refuse to sell fixtures except to persons also ordering paper.

So far as fixtures sold by defendants, which had been originally manufactured and sold by the patentee to other parties, are concerned, it is evident that, by such original sale by the patentee, they passed out of the limits of the monopoly, and might be used or sold by any one who had purchased them from the original vendees. The patentee having once received his royalty upon such device, he cannot treat the subsequent seller or user as an infringer. *Bloomer* v. *McQuewan*, 14 How. 539. As was said by Mr. Justice Clifford in *Chaffee* v. *Boston Belting Company*, 22 How. 217, 223: "When the patented machine rightfully passes to the hands of the purchaser from the patentee, or from any other person authorized to convey it, the machine is no longer within the limits of the monopoly. . . . By a valid sale and purchase, the patented machine becomes the private individual property of the purchaser, and is no longer protected by the laws of the United States, but by the laws of the State in which it is situated." See also *Bloomer* v. *Millinger*, 1 Wall. 340; *The Paper Bag Cases*, 105 U. S. 766, 771. In this latter case one Morgan had purchased a machine for making paper bags of the patentee, and it was held that, having the absolute ownership of the machine, he had the right either to use it during the existence of the letters-patent, or to transfer such ownership and right to another. It was said that "the power to sell the machine and transfer the accompanying right of use is an incident of unrestricted ownership." *Birdsell* v. *Shaliol*, 112 U. S. 485; *Woodworth* v. *Curtis*, 2 Woodb. & Min. 524; *Goodyear* v. *Beverly Rubber Co.*, 1 Cliff. 348.

The real question in this case is, whether, conceding the combination of the oval roll with the fixture to be a valid combination, the sale of one element of such combination,

with the intent that it shall be used with the other element, is an infringement. We are of opinion that it is not. There are doubtless many cases to the effect that the manufacture and sale of a single element of a combination, with intent that it shall be united to the other elements, and so complete the combination, is an infringement. *Saxe* v. *Hammond*, Holmes, 456; *Wallace* v. *Holmes*, 9 Blatchford, 65; *Barnes* v. *Straus*, 9 Blatchford, 553; *Schneider* v. *Pountney*, 21 Fed. Rep. 399. But we think these cases have no application to one where the element made by the alleged infringer is an article of manufacture perishable in its nature, which it is the object of the mechanism to deliver, and which must be renewed periodically, whenever the device is put to use. Of course, if the product itself is the subject of a valid patent, it would be an infringement of that patent to purchase such product of another than the patentee; but if the product be unpatentable, it is giving to the patentee of the machine the benefit of a patent upon the product, by requiring such product to be bought of him. To repeat an illustration already put: If a log were an element of a patentable mechanism for sawing such log, it would, upon the construction claimed by the plaintiff, require the purchaser of the sawing device to buy his logs of the patentee of the mechanism, or subject himself to a charge of infringement. This exhibits not only the impossibility of this construction of the patent, but the difficulty of treating the paper as an element of the combination at all. In this view the distinction between repair and reconstruction becomes of no value, since the renewal of the paper is in a proper sense neither the one nor the other.

The case of the *Cotton-Tie Company* v. *Simmons*, 106 U. S. 89, 93, presents no difficulty whatever. In that case the owner of a patent for a metallic cotton bale tie, each tie consisting of a buckle and band, granted no licenses to manufacture the ties, but supplied the market with them, and stamped upon the metal of each buckle the words, "Licensed to use once only." After the bands had been once used and severed, defendants, who had bought the bands and the buckles as scrap iron, rolled and straightened the pieces of the bands, and rivetted together

their ends. They then cut them into proper lengths, and sold them with the buckles, to be used as ties, nothing having been done to the buckles. It was held that they thereby infringed the patent. The gist of the decision is that the use of a tie once, and its subsequent severance, were intended to operate as a destruction of it, and that the defendants had no right to put the same parts together for use a second time. Says Mr. Justice Blatchford: "Whatever rights the defendants could acquire to the use of the old buckle, they acquired no right to combine it with a substantially new band to make a cotton-bale tie. They so combined it when they combined it with a band made of the pieces of the old band in the way described. What the defendants did in piecing together the pieces of the old band was not a repair of the band or tie in any proper sense. The band was voluntarily severed by the consumer at the cotton-mill, because the tie had performed its function of confining the bale of cotton in its transit from the plantation or the press to the mill. Its capacity for use as a tie was voluntarily destroyed."

It is evident that the use of the tie was intended to be as complete a destruction of it as would be the explosion of a patented torpedo. In either case, the repair of the band or the refilling of the shell would be a practical reconstruction of the device. In this case, however, the purchaser of the new roll does precisely what the patentee intended he should do: he replaces that which is in its nature perishable, and without the replacement of which the remainder of the device is of no value. The replacement is of a product which it is the object of the mechanism to deliver. The case is more nearly analogous to that of *Wilson* v. *Simpson*, 9 How. 109, in which the invention involved was a planing machine, and the patent sued upon covered the combination with the cutting knives or planes of a pressure roller to effect the planing of the planks. It was proved that one of the machines would last in use for several years, but that its cutting knives would wear out, and must be replaced at least every sixty or ninety days. It was said by Mr. Justice Wayne, (p. 125,) that "the right to replace them was a part of the invention transferred to the assignee for the

time he bought it, without which his purchase would be useless to him, except for sixty or ninety days after a machine had been put in use. It has not been contended, nor can it be, that such can be a limitation of the assignee's right in the use of the invention. . . . If, then, the use of the machine depends upon the replacement of the knives, . . . frequently replacing them, according to the intention of the inventor, is not a reconstruction of the invention, but the use only of so much of it as is absolutely necessary to identify the machine with what it was in the beginning of its use, or before that part of it had been worn out. The right of the assignee to replace the cutter knives is not because they are perishable materials, but because the inventor of the machine has so arranged them as a part of his combination, that the machine could not be continued in use without a succession of knives at short intervals. Unless they were replaced, the invention would have been of little use to the inventor or to others."

The true distinction is stated by Mr. Justice Clifford in *Aiken* v. *Manchester Print Works*, 2 Cliff. 435, where the invention was of a knitting-machine, with which the vendor was accustomed to send a package of the needles used in the machine, which needles were the subject of a separate patent. It was held that the purchase of the knitting-machine, and the needles accompanying the same, did not confer upon the purchaser any right, after the needles were worn out and became useless, to manufacture other needles, and use the same in the knitting-machine so sold and purchased. The case of *Wilson* v. *Simpson* was distinguished from this in the fact that the cutters and knives in that case were not subject to a patent, and of course the respondent had a right to use them as materials to repair his machine; "but," says the court, "unfortunately for the defendants in this case, the needle is subject to a patent, and in making and using it they have infringed the right of the plaintiff." As we have already held that the paper roll in this case was not the subject of a valid patent, it follows that the defendants cannot be held as infringers for the manufacture and sale of such roll.

Considerable stress is laid by plaintiff upon the fact that Mr.

Wheeler, president of the defendant corporation, in February, 1885, and before the first patent was issued, bought one of the plaintiff's fixtures, known as the Oval King fixture, together with some of its paper, and despatched them to England with instructions to his agents to file an application for a patent there, which patent was subsequently issued. That, before a patent was issued, Hicks himself applied for protection in England, and learning of the filing of the application there by Wheeler, filed a protest against the issuance of a patent to the latter, who thereupon to thwart his obtaining a patent, made an affidavit that he did not obtain the knowledge of the invention from Hicks or any other person, but by seeing it in public use in the United States. Wheeler's own testimony in this case indicates that this affidavit contained a *suppressio veri* if not a *suggestio falsi*. But, however reprehensible his conduct may have been in this connection, it does not affect the issue between the parties here. It does not show that the Hicks patent upon the roll is a valid patent, or that the conduct of the defendants in making and selling such roll is an infringement upon the combination patents.

The decree of the court below is, therefore,

Affirmed.

Mr. Justice White, not having been a member of the court when this case was argued, took no part in its decision.

UNITED STATES *v.* BASHAW.

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

No. 779. Submitted January 8, 1894. — Decided March 19, 1894.

An action cannot be maintained against the United States by a District Attorney, to recover for services rendered and expenses incurred in prosecuting for fines, penalties, and forfeitures, under Rev. Stat. §§ 838

and 3085, for violations of the Customs laws or the Internal Revenue laws, unless the Secretary of the Treasury first determines what sum he deems just and reasonable therefor.

THOMAS P. BASHAW brought an action against the United States in the Circuit Court for the Eastern District of Missouri to recover compensation for certain services rendered by him during the years 1887 and 1888 in the capacity of District Attorney for the United States in that district. The petition contained five counts, of which the second and third were based upon services for investigating certain alleged violations of the internal revenue laws of the United States, which had been referred to him for examination by the collector for the district, under section 838 of the Revised Statutes. The claim under the second count was for $825, being for the examination of 165 cases at $5 for each case, in which the District Attorney had decided that proceedings could not probably be sustained, or that the ends of justice did not require them to be instituted. The claim under the third count was for $235 for similar services in respect of 47 cases. In each count it was alleged that plaintiff had made out and submitted his claim to the District Judge of the Eastern District of Missouri, and that the same had been duly allowed and certified by him, and that afterwards plaintiff presented the claim for payment "to defendant in its Department of the Treasury, to the accounting officers of the Treasury, whereupon said defendant, by its said Department, wrongfully neglected and refused to pay the same."

The Circuit Court found in favor of the United States as to the first and third counts, and in favor of plaintiff on the second, third, and fifth counts, and gave judgment for $1070, which included the sum of ten dollars under the fifth count, as to which no question is raised. The court made certain findings of fact and conclusions of law.

The second finding of fact was as follows:

"2. The court further finds the facts to be as stated in the second and third counts of the petition, that is to say, the court finds that between the 28th day of January, 1887, and first day of July, 1888, the collector of internal revenue for

the first collection district of Missouri reported to the plaintiff herein (who was then United States District Attorney for the Eastern District of Missouri) divers and sundry cases of alleged violations of the internal revenue laws of the United States, to the number of 165; that the plaintiff inquired into and examined each of said cases, and that upon such inquiry and examination decided that proceedings therein could not probably be sustained, and that the ends of justice did not require that such proceedings should be prosecuted, and that he thereupon made a report of the facts in such cases to the Commissioner of Internal Revenue for his direction. The court finds that the plaintiff's services were reasonably worth the sum of five dollars in each of said cases, to wit, total sum of eight hundred and twenty-five ($825.00) dollars.

"That between the first day of July, 1888, and the 31st day of December, 1888, he made like examination and report in forty-seven other cases of alleged violations of the internal revenue laws which were reported to him by said collector of internal revenue; that the plaintiff's services in each of the said forty-seven cases was likewise reasonably worth the sum of $5.00 per case, or the total sum of two hundred and thirty-five ($235.00) dollars."

The record did not show that the accounts were allowed and certified by any Judge, but it appeared from letters of the Assistant Secretary of the Treasury, in evidence, that the claim for $825 was rejected in these terms: "In accordance with the rulings of this department and the opinion of the Attorney-General, this account cannot be allowed because the cases were not tried or disposed of before a Judge;" and that for $235, in the same language, with these words added: "And consequently no Judge can give the certificate which the law requires and which is necessary as the basis of the Secretary's allowance."

Judgment having been rendered, the case was carried by appeal to the United States Circuit Court of Appeals for the Eighth Circuit, and the judgment was by that court affirmed. The opinion is reported in 4 U. S. App. 360. An appeal was then taken to this court.

Statement of the Case.

By the seventh section of the act of Congress of July 18, 1866, c. 201, entitled "An act further to prevent smuggling and for other purposes," 14 Stat. 178, 179, it was made the duty of the District Attorney, upon the report of the collector of customs thereby required, to "cause suit and prosecution to be commenced and prosecuted without delay for the fines and personal penalties by law in such cases provided, unless upon inquiry and examination he shall decide that a conviction cannot probably be obtained, or that the ends of public justice do not require that a suit or prosecution should be instituted, in which case he shall report the facts to the Secretary of the Treasury for his direction; and for expenses incurred and services rendered in prosecutions for such fines and personal penalties, the District Attorney shall receive such allowance as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such prosecution was had;" etc.

By act of Congress of March 3, 1873, c. 244, 17 Stat. 580, the seventh section of the former act was amended and the same provisions in substance extended to internal revenue cases; and it was made the duty of the District Attorney on report of the collector of customs or the collector of internal revenue, as the case might be, "to cause the proper proceedings to be commenced and prosecuted without delay for the fines, penalties, and forfeitures by law in such case provided, unless, upon inquiry and examination he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that proceedings should be instituted, in which case he shall report the facts in customs cases to the Secretary of the Treasury, and in internal revenue cases to the Commissioner of Internal Revenue, for their direction; and for the expenses incurred and services rendered in all such cases the District Attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable upon the certificate of the judge before whom such cases are tried or disposed of: *Provided*, That the annual compensation of such District Attorney shall not exceed the maximum amount now prescribed by law;" etc.

These provisions were carried forward into the Revised Statutes as section 838, under Title 13, "The Judiciary," and section 3085, under Title 34, "Collection of Duties." These sections are as follows:

"SEC. 838. It shall be [the] duty of every district attorney to whom any collector of customs, or of internal revenue, shall report, according to law, any case in which any fine, penalty, or forfeiture has been incurred in the district of such attorney for the violation of any law of the United States relating to the revenue, to cause the proper proceedings to be commenced and prosecuted without delay, for the fines, penalties, and forfeitures in such case provided, unless, upon inquiry and examination, he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that such proceedings should be instituted; in which case he shall report the facts in customs cases to the Secretary of the Treasury, and in internal revenue cases to the Commissioner of Internal Revenue, for their direction. And for the expenses incurred and services rendered in all such cases, the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of: *Provided*, That the annual compensation of such district attorney shall not exceed the maximum amount prescribed by law, by reason of such allowance and payment."

"SEC. 3085. District attorneys, upon receiving the report of a collector, shall cause suit and prosecution to be commenced and prosecuted without delay for the fines and personal penalties by law in such case provided, unless upon inquiry and examination they shall decide that a conviction cannot probably be obtained, or that the ends of public justice do not require that a suit or prosecution shall be instituted, in which case they shall report the facts to the Secretary of the Treasury for his direction. For expenses incurred and services rendered in prosecutions for such fines and personal penalties, they shall receive such allowance as the Secretary of the Treasury shall deem just and reasonable, upon

the certificate of the judge before whom such prosecution was had."

Mr. Assistant Attorney General Dodge and *Mr. James H. Nixon* for appellants.

Mr. Lewis E. Stanton, *Mr. C. C. Lancaster*, and *Mr. J. W. Emerson* for appellee.

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

The Circuit Court of Appeals held that the words, in respect of payment for expenses and services, "in all such cases," in section 838, referred to the cases previously mentioned in the section, namely, the cases reported by the collector to the district attorney for examination; that, therefore, the attorney would be entitled to be paid for expenses and services in all cases reported to him and examined, regardless of the results of such examination; that it ought not to be supposed that Congress, while intending to protect the individual citizen, as well as the United States, against the institution of proceedings not called for in the furtherance of justice, at the same time placed the government in the attitude of making the question of compensation depend upon a conclusion reached in its favor; that as the phraseology of the seventh section of the act of July 18, 1866, was changed by the act of March 3, 1873, by striking out the words "in prosecutions for such fines and personal penalties," and inserting "in all such cases," the presumption was that a change of meaning was intended; and that section 838, embodying the act of 1873, should not be narrowed to conform to the act of 1866; but no reference was made to the carrying forward of the latter into section 3085. It was conceded that the basis for the action of the Secretary of the Treasury was the certificate of the proper judge, but considered that the giving of such certificate was not necessarily limited to the judge before whom the cases were "tried and disposed of," and that where, on examination, no prosecution was had, the judge who was

competent to try "such cases" was competent to grant the certificate. The court held that the question of payment or no payment was not left to the discretion of the Secretary, and that: "The right to compensation is acquired by the rendition of services in the examination of cases reported to the attorney for examination by the collectors of customs and of revenue. The amount to be paid is to be ascertained by proving the facts before the proper judge, obtaining his certificate, and the approval of the Secretary of the Treasury."

Certain considerations, however, confront us at the threshold, which are fatal to the judgment, and render any determination of the principal question discussed uncalled for.

The findings of the Circuit Court do not show, nor is it anywhere disclosed by the record, that, prior to the presentation of the claims to the Secretary, the facts were proven before any judge and the amounts claimed certified by him; and it affirmatively appeared that the Secretary had not determined what sum he deemed just and reasonable to be paid.

The rejection of the claims was placed, it is true, upon the ground that they could not be allowed for want of certificate, in accordance with the rulings of the department and the opinion of the Attorney General; but the facts remain that the Secretary had made no allowance, and that this record fails to show that the exercise of his discretion in that regard, even from plaintiff's standpoint, had been properly invoked.

And in this connection it is proper to observe that our attention is called, by the brief of counsel for the government, to rulings of Secretary Bristow, August 29 and December 9, 1874; of Secretary Folger, February 26 and 28, 1884; and of Secretary Fairchild, of December 18, 1886; that the Secretary of the Treasury can make no allowance for services where legal proceedings were not commenced, because he could not do so unless there was a judge's certificate, and such certificate could not be given except in cases that were tried or disposed of before the judge so certifying, and the practice under the act of 1873 and the Revised Statutes seems to have been uniformly in accordance with these rulings. The department held, in short, that the statute did not apply to cases not tried and disposed of. The

opinion of Attorney General Brewster, of March 2, 1885, (18 Opins. 126,) and of Attorney General Garland, in a letter to the Secretary of the Treasury, of November 17, 1885, (31 Internal Revenue Record, 382,) are to the same effect. The latter was of opinion that sections 838 and 3085 should be read together, and that so construed the established practice of the department was maintained. This was the view taken by Judge Shipman in *Stanton* v. *United States*, 37 Fed. Rep. 252, who held that it was not the intention of Congress to authorize payment for such services, "unless prosecutions had been commenced." It was otherwise ruled by Judge Treat, in *In re Account of District Attorney*, 23 Fed. Rep. 26, followed by his successor, Judge Thayer, in this case, 47 Fed. Rep. 40; and a like opinion was expressed by the Solicitor of the Treasury on April 30, 1885.

But, without further remark on this branch of the case, it must be admitted that, even if the rulings of the Department were erroneous and its practice not controlling, upon which we express no opinion, whatever sum was to be paid was left to be determined by the Secretary of the Treasury as he should deem reasonable and just, and this involved the exercise of judgment and discretion on his part. The courts cannot control, though in proper cases they may direct, the exercise of judgment or discretion in an executive officer. In this case, as we have said, the exercise of discretion was not properly invoked, and the party had no right to ask the court to substitute its judgment for the judgment of the Secretary.

The judgment of the Circuit Court of Appeals for the Eighth Circuit is reversed; the judgment of the Circuit Court of the United States for the Eastern District of Missouri is also reversed, and the cause remanded to that court for further proceedings in conformity with this opinion.

Mr. Justice White was not a member of the court when this case was considered, and took no part in its decision.

SCHLESINGER *v.* KANSAS CITY AND SOUTHERN RAILWAY COMPANY.

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

No. 243. Argued and submitted February 1, 1894. — Decided March 5, 1894.

A condition in a grant of land to a railway company that the company shall construct a certain length of road within a given time, and on its failure to do so, that the granted estate shall revert to the grantor, is a condition subsequent, for breach of which the grantor may enter upon the land and repossess himself of it; and, in case of his doing so, the land is not subject to attachment thereafter for debts of the company, contracted while the land was in its possession.

THIS was an appeal from a decree dismissing, for want of equity, a bill brought by the appellants to subject, in satisfaction of their demand against the Kansas City and Southern Construction Company, certain railroad property in the possession of and claimed by the Kansas City and Southern Railway Company.

The facts, so far as it is necessary to state them, were as follows: On the 11th day of January, 1877, the roadbed, masonry, rights of way, and appurtenances of the Kansas City, Memphis and Mobile Railroad Company, a Missouri corporation, were sold at public auction under the order of the District Court of the United States for the Western District of Missouri, sitting in bankruptcy — John D. Bancroft, of Kansas City, becoming the purchaser at the price of $15,025 in cash paid. And a deed was made to the purchaser on the 25th day of April, 1877.

Bancroft, by deed of April 27, 1877, conveyed to Thomas K. Hanna, Benjamin McLean, and himself, as trustees for sundry residents of Kansas City who had contributed the purchase money, and in whose behalf the property was purchased.

By deed executed January 13, 1880, Hanna, McLean, and Bancroft, trustees, in consideration of $19,156.87, cash in hand

paid, conveyed to James I. Brooks all the property and rights so purchased, upon the following terms and conditions:

"Said party of the second part is to build said railroad from Kansas City to Harrisonville or Belton, as said second party may elect, on or before January 1, 1881, so as to be ready for use as a railroad, and also to build said railroad to the coal fields of Bates County to a point south of Butler, on or before July 1, 1881, so as to be ready for like use as aforesaid; and if said second party shall fail to build said railroad to said coal fields as aforesaid, then the property hereby sold as aforesaid shall revert to said first party and reinvest in them the same as they now hold the same: *Provided, however*, That as soon as said second party shall expend the sum of fifty thousand dollars in the construction of a roadbed for said railroad, commencing at Kansas City and running southwardly, then the said provision shall become null and void and of no effect whatever, and upon said expenditure being made in the building of said railroad as aforesaid, by said second party, of said sum of fifty thousand dollars, then said trustees are to execute to said second party or his assigns an instrument in writing acknowledging the waiver and extinguishment of said forfeiture. In the event of a disagreement between the said trustees and said second party as to the expenditure in fact by said second party of said fifty thousand dollars, as aforesaid, as said second party may hereafter claim, said trustees and said second party shall each select an arbitrator, and they, in case of disagreement between them, shall select a third arbitrator, and in case either party refuses to select an arbitrator, then the arbitrator chosen by the other party shall select two additional arbitrators, and the arbitrators selected in any of the above-mentioned modes shall determine whether such expenditure has been made by said second party, and such determination of said arbitrators shall be binding on both parties and may be enforced by judgment as provided by the laws of this State. Said first party covenants and warrants to and with said second party that they, the said trustees, have not in anywise encumbered the said property, and that the same is free from all encumbrances done or suffered by them."

Statement of the Case.

By a declaration in writing, executed February 27, 1880, Brooks acknowledged that the property conveyed to him was held in trust for the benefit of the Kansas City and Southern Construction Company, and covenanted that he would, by a sufficient quit-claim deed, transfer it to that company or their assigns, as they might direct and require. And by deed of April 1, 1880, he conveyed the property by quit-claim deed to the Construction Company.

On the 2d day of March, 1880, the Construction Company made a written contract with the appellants, under the name of Naylor & Co., for the furnishing of steel rails to be used in completing the railroad. But, on the 18th of May, 1880, Naylor & Co. were notified by the Construction Company that it was unable to carry out its contract with them, and they were authorized to sell the rails for account of that company, but without prejudice to any rights or claims of Naylor & Co. for damages.

The Construction Company, by deed of May 24, 1880, conveyed the property to the Kansas City and Southern Railroad Company, the consideration recited being $300,000 of the capital stock of the railroad company, for which certificates were to be issued, and $300,000 of its first mortgage bonds to be secured by mortgage upon the property. But, in fact, there was at that time no such corporation. Brooks, the president of the Construction Company, contemplated the organization of a railroad company to be named the Kansas City and Southern Railroad Company, but he failed to effect such an organization.

By deed of September 18, 1880, the Construction Company conveyed to the Kansas City and Southern Railway Company, a corporation of Missouri, the Kansas City, Memphis and Mobile Railroad, running from Kansas City in the direction of Memphis and Mobile, together with all its rights of way, roadbed, masonry, property, rights of property, and appurtenances, etc. This deed was executed in the name of the grantor company by Henry Ashley, agent, and is attested by its corporate seal, which, the acknowledgment of Ashley states, was affixed thereto by order of the board of directors. The consideration recited was $250,000 cash in hand paid.

Statement of the Case.

Hanna, McLean, and Bancroft as trustees, made, December 15, 1880, a written contract with the Kansas City and Southern Railway Company, as follows: "Whereas the Kansas City, Memphis and Mobile Railroad Company, with all its roadbed, rights of way, and appurtenances and property and rights of property whatsoever connected with the said railroad, with all the franchises of the Kansas City, Memphis and Mobile Railroad Company, were, by deed dated January 13, A.D. 1880, sold and conveyed by the undersigned trustees to one James I. Brooks on certain conditions contained and specified in said deed, and whereas the title to said property subject to the conditions has by sundry mesne conveyances passed to and vested in and is now owned and held by the Kansas City and Southern Railway Company; and whereas said last-named company has not been able to comply with and perform said conditions within the time specified in said first-named deed for their performance, but is now willing to deposit and has deposited with the said trustees the sum of $25,000 as a guaranty by said last-named company of the good faith of its purpose to build a railroad southeasterly from Kansas City, Missouri, through the coal fields of Henry County, Missouri, and the iron fields of St. Clair County, Missouri, the receipt of which sum of twenty-five thousand dollars by said trustees is hereby acknowledged; and whereas, since the making of said deed to said James I. Brooks, various sums of money have been expended for rights of way, for engineering, and other necessary expenses connected with the enterprise of building said railroad, in addition to the purchase price paid to said trustees on the execution of the said first-named deed by them; and whereas the owners of more than two-thirds of the money and shares furnished by the persons and firms in the deed of said property to said trustees, dated April 27, 1877, have directed the undersigned trustees to execute and deliver this instrument to said Kansas City and Southern Railway Company: Now, therefore, in consideration of the premises and the sum of one dollar in hand paid, the receipt of which is hereby acknowledged, it is agreed, stipulated, and covenanted by and between said trustees, for themselves

and their said beneficiaries and said Kansas City and Southern Railway Company, as follows: 1st. The conditions provided and expressed in said deed of said trustees to said James I. Brooks are hereby annulled, extinguished, and the said Kansas City and Southern Railway Company are hereby forever released and discharged from the performance of the same or any part thereof, and in lieu the following conditions are hereby provided, that is to say, said trustees or a majority of them shall, as said railroad from Kansas City, Missouri, southeasterly through the coal fields of Henry County, Missouri, and the coal fields of St. Clair County, Missouri, shall be constructed, pay out said $25,000 on the estimates and orders made and given in the building of said road by the chief engineer of said K. C. and S. R. W. Co., and as soon as said $25,000 is so paid out and the additional sum of fifteen thousand dollars is expended by said last-named company in the building of said road, the last-named company shall hold said property so conveyed free from any and all claims of whatsoever kind on the part of said trustees or their beneficiaries, or any of them. 2d. It is further provided and covenanted that if said last-named company shall not expend the full sum of $25,000 in the building of said railroad before July 1, 1881, then so much of said $25,000 so deposited as shall on the last day aforesaid be unexpended shall be forfeited to and become the money and property of said trustees for the benefit of their beneficiaries. 3d. It is further provided and covenanted that as soon as said $25,000 so deposited shall be paid out, and as soon as the chief engineer of said last-named company shall make the certificate of expenditure by said last-named company of said $15,000 shall be expended before October 1, 1881, then said trustees shall deliver to said last-named company an instrument in writing, duly executed and acknowledged, evincing the full compliance with and performance of all the conditions herein contained by said last-named company, and if the sum of forty thousand (40 M) dollars shall not as above provided be expended by said company before October 1, 1881, then said property shall revert to said trustees as by said deed to said Brooks is provided."

This agreement was executed by the trustees Hanna, McLean, and Bancroft, with the consent in writing of the requisite number of those whom they represented.

On the 11th day of May, 1881, the Construction Company, by James I. Brooks, its president, in consideration of one dollar and other good and valuable considerations, and "by virtue of a vote of the directors of said corporation," conveyed this property to said Brooks, in trust to secure "the payment to him of all indebtedness of whatsoever nature, whether in cash or stock or bonds due said Brooks under the vote whereby the property herein conveyed was deeded by said Brooks to the Kansas City and Southern Construction Company to the date of this conveyance," and after the execution of these trusts to hold the same for the benefit of whom it might concern.

On the 7th day of October, 1881, the present appellants — claiming that the Construction Company was largely indebted to them on the contract of March 2, 1880, for steel rails — instituted an action at law in the Circuit Court of Jackson County, Missouri, against that company, on said alleged liability. Upon affidavit and bond for attachments, writs of attachment and summons issued to the counties of Jackson, Cass, Henry, and St. Clair, Missouri, and were levied by the sheriffs of those counties, respectively, on the 7th, 11th, and 12th days of October, 1881, upon all the right, title, interest, and property of the Construction Company, in the Kansas City, Memphis and Mobile Railroad, in such counties, with its right of way, roadbed, masonry, property, rights of property, and appurtenances — the same property described in the deeds of May 24, 1880, and September 18, 1880 — to the Kansas City and Southern Railway Company. The Construction Company answered, and denied all the material allegations of the petition. In that action, which was removed into the Circuit Court of the United States for the Western District of Missouri in April, 1882, the Kansas City and Southern Railway Company, after such removal, filed their interplea asserting their ownership, prior and subsequent to the attachment suit, of all the property attempted to be levied on as the property of the

Construction Company. In that action, a verdict was returned against the Construction Company for $49,448.11, for which a judgment was rendered October 20, 1885, on which execution was allowed "to be levied on the property and effects attached, and other property of the defendant." Subsequently (a motion for a new trial having been made) the plaintiffs remitted $13,546.72 of the verdict. Thereupon the former judgment was set aside, and it was adjudged, February 1, 1886, that the plaintiffs recover of the Construction Company $35,901.39 and their costs, "and that they have thereof execution, and that the judgment and execution thereon hold not only the property attached heretofore in this case, but the other property of the defendant; but execution shall not issue, without special leave of court, until after final decree in chancery in case No. 401, in the case of *Barthold Schlesinger et al.* v. *The Kansas City and Southern Railway Company et al.*"

The equity case thus referred to was the present suit which was brought, November 10, 1881, by Barthold Schlesinger and Sebastian B. Schlesinger, doing business as Naylor & Co., against the Kansas City and Southern Railway Company, the Kansas City and Southern Construction Company, the Farmers' Loan and Trust Company, and James I. Brooks. The Farmers' Loan and Trust Company was made a defendant because it was the trustee in a mortgage, given by the railway company, January 1, 1883, to secure $6,500,000 of its first mortgage bonds, which mortgage covered all of the property and income of the mortgagor, and warranted the title to the property. The relief sought was a decree adjudging the deeds of May 24, 1880, and September 18, 1880, to the Kansas City and Southern Railway Company, and the deed to the Farmers' Loan and Trust Company, to be voluntary, fraudulent, and void as against the demands of the plaintiffs, and that the property and rights of the Construction Company, attempted to be conveyed by said deeds, and levied upon and attached as aforesaid, be subjected, charged, and sold for those demands and the costs of the attachment proceedings; and that, in the meantime, a receiver be appointed to take charge of the prop-

erty, receiving the profits thereof, and paying all taxes and assessments against it.

Some time after the institution of this suit, and before it was determined in the court below, the appellants sold their claim to one Sargent of Boston for $4000.

Mr. Frank Hagerman, (with whom were *Mr. Jefferson Brumback* and *Mr. Wallace Pratt* on the brief,) for appellants.

Mr. Charles O. Tichenor, for appellee, submitted on his brief.

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

No question is made as to the validity of Bancroft's purchase of the property in dispute at the sale made under the order of the Circuit Court of the United States for the Western District of Missouri, sitting in bankruptcy. Indeed, all parties to the present controversy claim title under him.

We have seen that the title passed from him to Hanna, McLean, and himself, as trustees for those furnishing the money used in the purchase at the bankruptcy sale, and that those trustees conveyed to Brooks, January 13, 1880, upon certain express conditions. One of those conditions was that Brooks should build the railroad from Kansas City to Harrisonville or Bolton, on or before January 1, 1881, and also to the coal fields of Bates County, to a point south of Butler, on or before July 1, 1881. Another condition was that, if Brooks failed to build the railroad to the coal fields mentioned, as stipulated in the deed to him, then the property should revert to the trustees, and reinvest in them, "the same as they now hold the same." This condition of forfeiture was, by the terms of the conveyance to Brooks, to become void and extinguished only in the event Brooks expended $50,000 in the construction of a roadbed for said railroad, commencing at Kansas City and running southwardly.

The Kansas City and Southern Construction Company took the property under the two deeds to it from Brooks, dated, respectively, February 27, 1880, and April 1, 1880. But, of

course, it took subject to the conditions upon which he received the property from the trustees. Neither of those conditions was performed. The road was not built from Kansas City to Harrisonville by the 1st day of January, nor to the coal fields of Bates County by July 1, 1881. Nor was $50,000 or any sum expended by Brooks or by his grantee in the construction of a roadbed for the railroad. Indeed, as early as the 18th of May, 1880, the Construction Company gave formal notice to Naylor & Co. that they were unable to comply with their contract relating to steel rails; and, consequently, the enterprise was abandoned by it.

It results that when the 1st of July, 1881, came, the property had reverted to the trustees under their agreement with Brooks, subject to which agreement the Construction Company took the title. But, on that day, the Kansas City and Southern Railway Company were in possession under the agreement between it and the trustees of December 15, 1880, to say nothing of the deed of the Construction Company to the railway company of September 18, 1880. If it be said that the trustees had no right, under their agreement with Brooks, to treat the property as having reverted to them until after the expiration of the time limited for the building of the railroad to the coal fields, namely, until after July 1, 1881, the answer is: 1, that the Construction Company had by its formal notice to Naylor & Co. of May 18, 1880, indicated that it had no purpose, as the grantee of Brooks, to meet the conditions upon which he was to hold the property; 2, if the provision in the agreement of December 15, 1880, between the trustees and the railway company, annulling and rescinding the conditions imposed by the deed to Brooks, and prescribing other conditions as between the trustees and the railway company, was, at that time, of no effect, in law, as against Brooks or the Construction Company, it became valid and binding after July 1, 1881, when, beyond all question, the trustees were entitled to treat the property as having reverted to them, to do with it as to them seemed best. So that if we disregard altogether the deed of May 24, 1880, from the Construction Company to the Kansas City and Southern Railroad Com-

pany as a nullity, no such corporation or company being in existence, and if we disregard, also, the deed of September 15, 1881, to the railway company, because it was not executed by any officer of the Construction Company, the fact appears that on and after July 1, 1881, the railway company were in actual possession of the property, under their contract with the trustees Hanna, McLean, and Bancroft, who had elected, as they had the clear right to do, to treat it as having reverted to them. This was before Naylor & Co. had instituted their action at law and sued out their attachments against the Construction Company. When that attachment issued the Construction Company had no interest whatever in the property attached. The interest it originally had was acquired subject to certain conditions, upon the non-performance of which the property, at the election of Hanna, McLean, and Bancroft, trustees, reinvested in them.

It was not necessary to the reacquisition of title by the trustees that they should invoke the aid of the courts. In the case of a public grant, the right of the government to repossess itself of the estate granted may be asserted through judicial proceedings, or by some legislative act showing an assertion of ownership on account of the breach of the condition upon which the original grant was made. But judicial proceedings to that end are not absolutely necessary, unless they are prescribed by the grant itself; for where land and franchises are held upon conditions to be subsequently performed, "any public assertion by legislative act of the ownership of the estate after default of the grantee — such as an act resuming control of them and appropriating them to particular uses or granting them to others to carry out the original object — will be equally effectual and operative." *Farnsworth* v. *Minnesota & Pacific Railroad*, 92 U. S. 49, 66, 67; *Pacific Railroad* v. *United States*, 124 U. S. 124, 130. In the case of a private grant, an entry by the grantor, or any act equivalent thereto, showing a purpose to take advantage of the breach of condition subsequent, and to reclaim the estate forfeited by such breach, is all that is required. What was done by the trustees Hanna, McLean, and Bancroft evinced, in the clearest possible manner, their

purpose to reclaim the property and rights granted to Brooks, because of the failure to perform the condition upon which he, or any one claiming under him, was entitled to hold the property.

Under the view we have expressed, it becomes unnecessary to consider other questions discussed by counsel; and it results, and we so adjudge, that the plaintiffs are not entitled to have the property in question or any part thereof sold in satisfaction of their judgment for $35,901.30 against the Kansas City and Southern Construction Company.

The decree below is affirmed.

TENNESSEE *v.* UNION AND PLANTERS' BANK.

TENNESSEE *v.* BANK OF COMMERCE.

TENNESSEE *v.* BANK OF COMMERCE.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

Nos. 1020, 1021, 761. Argued January 12, 15, 1894. — Decided March 19, 1894.

Under the act of August 13, 1888, c. 866, the Circuit Court of the United States has no jurisdiction, either original, or by removal from a state court, of a suit as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim.

THE *first case* was a bill in equity, filed January 26, 1893, in the Circuit Court of the United States for the Western District of Tennessee, by the State of Tennessee, and the county of Shelby in that State, against the Union and Planters' Bank of Memphis, a corporation organized under the laws of Tennessee, and having its place of business at Memphis in Shelby county, and against S. P. Read and W. A. Williamson, citizens of the State of Tennessee, to recover taxes alleged to be due to

the State and county for the years 1887–1891, under the general tax act of the State of 1887, c. 2.

The bill, after alleging that the original charter of the defendant corporation, granted by the State of Tennessee in 1858, provided "that said company shall pay to the State of Tennessee an annual tax of one half of one per cent on each share of stock subscribed, which shall be in lieu of all other taxes;" and stating the provisions of the tax act of 1887, relied on by the plaintiffs, made the following allegations:

"The defendant bank claims that both its capital stock and the shares of stock in the hands of its stockholders are exempt from taxation by virtue of its charter. Complainants, however, are advised and submit that the exemption contained in said charter applies to the shares of stock only and not to the capital stock of said institution, and that the latter in any event is subject to the taxing power of the State."

"It may be, however, that complainants are mistaken in the foregoing construction of the charter, and that the shares of stock are taxable and the capital stock of said institution exempt. The question is one of law, and is submitted to the court for determination."

In view of the latter alternative, the bill alleged that the corporation had each year refused, on demand of the assessing officers of the State, to give them a list of its stockholders; made Williamson, a stockholder, and Read, the cashier of the bank, defendants; and required the latter to disclose on oath the names of the other stockholders and the number of their shares, in order that they might be made defendants and proper relief be had against them.

The bill also set forth the amounts of taxes due from the corporation in one alternative, or from the stockholders in the other, amounting on either view to more than $5000; and concluded as follows:

"Complainants further state and show that the defendant claims that under and by virtue of the terms of its charter both its shares of stock and its capital stock are exempt from taxation, excepting only the one half of one per cent prescribed by the charter; and that the revenue law of the State, under

taking to tax the one or the other, is void, because in violation of the clause of the Constitution of the United States which forbids the State to pass any law impairing the obligation of a contract. It claims immunity from taxation upon that ground, and upon none other. The case is therefore one arising under the Constitution of the United States and within the jurisdiction of this court, this bill being brought to obtain an adjudication of the question of the exemption of the shares of stock, or of the capital stock, or both, of the defendant bank. Complainants aver that by the statute laws of the State of Tennessee they respectively have liens upon the capital stock of said bank, and upon any property in which the same may be invested, for the payment of any sums that may be adjudged due from the defendant bank on account of taxes laid on said capital stock, and liens upon the shares of stock in said bank for any taxes upon said shares that may be adjudged due thereon.

"Premises considered, complainants pray that the parties named as such in the caption be made defendants hereto; that subpœna and copy issue, returnable to the next proper rule day, according to the practice of the court, requiring them to appear and answer the allegations of this bill, the defendant S. P. Read answering under oath and making discovery as asked in the body of the bill; that the court will construe the charter of defendant company, and pass upon the claim of immunity from taxation set up by defendant company and its stockholders, adjudging the liability of the one or the other, or both, to taxation, determining upon which the taxes are laid for the several years mentioned in the bill, rendering judgment accordingly, and enforcing the liens given by the statute laws of the State; and that the court will grant such further relief, general and special, as complainants in equity ought to have."

The defendants filed an answer, admitting most of the facts alleged in the bill, and that the defendant corporation "claims that under and by virtue of the terms of its charter, both its shares of stock and its capital stock are exempt from taxation, excepting only the one half of one per cent prescribed by the charter, and that the revenue law of a State, undertaking to

tax the one or the other, is void, because in violation of that clause of the Constitution of the United States which forbids the State to pass any law impairing the obligation of a contract;" stating that "it does claim immunity from taxation upon that ground, but not, as alleged in the bill, upon none other;" and setting up, as additional grounds of defence, that the exemption of the corporation and its stockholders from taxation, except as provided in its charter, had been adjudicated and established by the decision of this court in *Farrington* v. *Tennessee*, 95 U. S. 679, and by the decision of the Supreme Court of Tennessee in *Memphis* v. *Union & Planter's Bank*, 7 Pickle, 546; and also that they were so exempt from taxation under the constitution and laws of Tennessee; and insisting that the case was not one arising under the Constitution and laws of the United States, nor within the jurisdiction of the Circuit Court of the United States.

The plaintiffs filed a general replication; and the court entered this decree: "This cause came on for final hearing on the pleadings and proofs, and having been argued by counsel and considered by the court, the court is of the opinion as follows, to wit: First, that the objection to the jurisdiction of the court, set up in the answer of the defendants, is not well taken; that the jurisdiction of the court should be sustained, and the cause determined on its merits; second, that by the charter of the defendant bank both the capital stock of the said bank and the shares of stock therein are exempt from taxation; third, that the defence of *res judicata* set up in the answer need not, therefore, be passed upon. It is therefore ordered, adjudged and decreed that the bill of complaint herein be, and is hereby, dismissed at the cost of complainants." The plaintiffs appealed to this court.

The *second case* was a like bill in equity, filed at the same time by the State of Tennessee and the county of Shelby against the Bank of Commerce, a corporation of Tennessee and established at Memphis, and against its cashier, and one of its stockholders, both citizens of Tennessee; and was dismissed on demurrer; and the plaintiffs appealed to this court.

The *third case* was a bill in equity, filed October 22, 1891, in the chancery court of Shelby county, by the State of Tennessee and the city of Memphis against the Bank of Commerce and its cashier; and was substantially similar to the bills in the other cases, except in omitting the last paragraph but one, relating to the Constitution of the United States, the jurisdiction of the Circuit Court of the United States, and the lien of the plaintiffs. The case was removed into the Circuit Court of the United States upon the petition of the defendant corporation, upon the ground that, by reason of the exemption in its charter, the tax act of Tennessee, on which the plaintiffs relied, was repugnant to the provision of the Constitution of the United States that no State shall pass any law impairing the obligation of a contract. In the Circuit Court of the United States, a demurrer to the bill, on the same ground, was filed and sustained, and a final decree entered, dismissing the bill. 53 Fed. Rep. 735. The plaintiffs appealed to this court.

Mr. S. P. Walker, (with whom was *Mr. C. W. Metcalf* on brief,) for all the appellants.

Mr. T. B. Turley, (with whom was *Mr. Henry Craft* on the brief, in No. 1020,) for all the appellees.

Mr. William H. Carroll and *Mr. Julius A. Taylor* for appellees in No. 1021.

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

We find it unnecessary to consider other objections to the maintenance of these three bills, or of any of them, because we are clearly of opinion that each suit is not one arising under the Constitution and laws of the United States, of which the Circuit Court of the United States has jurisdiction, either original, or by removal from a state court, under the act of March 3, 1887, c. 373, as corrected by the act of August 13, 1888, c. 866. 25 Stat. 434.

The Third Article of the Constitution, said Chief Justice Marshall, "enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States." And "when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." But "the right of the plaintiff to sue cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not." *Osborn* v. *Bank of United States*, 9 Wheat. 738, 819, 823, 824. In this last clause, as the context shows, the word "then" (though printed between commas) means "at that time," that is to say, "when the action is brought."

The earliest act of Congress which conferred on the Circuit Courts of the United States general jurisdiction of suits of a civil nature, at common law or in equity, "arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority," was the act of March 3, 1875, c. 137. 18 Stat. 470. Under section 1 of that act, providing that those courts should have original cognizance of such suits when the matter in dispute exceeded the sum or value of $500, their jurisdiction was exercised in cases in which the plaintiff's statement of his cause of action showed that he relied on some right under the Constitution or laws of the United States. *Feibelman* v. *Packard*, 109 U. S. 421; *Kansas Pacific Railroad* v. *Atchison &c. Railroad*, 112 U. S.

414; *New Orleans* v. *Houston*, 119 U. S. 265; *Bachrack* v. *Norton*, 132 U. S. 337; *Cooke* v. *Avery*, 147 U. S. 375. And under section 2 of that act, which provided that any suit of a civil nature, at law or in equity, brought in any state court, "and arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority," might be removed by either party into the Circuit Court of the United States, it was held sufficient to justify a removal by the defendant that the record at the time of the removal showed that either party claimed a right under the Constitution or laws of the United States. *Railroad Co.* v. *Mississippi*, 102 U. S. 135; *Ames* v. *Kansas*, 111 U. S. 449, 462; *Brown* v. *Houston*, 114 U. S. 622; *Provident Savings Society* v. *Ford*, 114 U. S. 635, 642; *Pacific Railroad Removal Cases*, 115 U. S. 1; *Tennessee* v. *Whitworth*, 117 U. S. 129, 139; *Southern Pacific Railroad* v. *California*, 118 U. S. 109; *Bock* v. *Perkins*, 139 U. S. 628.

But, as has been decided under that act, "the suit must be one in which some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution, or a law or treaty of the United States, or sustained by a contrary construction;" *Carson* v. *Dunham*, 121 U. S. 421, 427; "a cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States;" *Gold Washing Co.* v. *Keyes*, 96 U. S. 199, 203; and "the question whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the adverse party." *Central Railroad* v. *Mills*, 113 U. S. 249, 257.

Even under the act of 1875, the jurisdiction of the Circuit Court of the United States could not be sustained over a suit originally brought in that court, upon the ground that the suit was one arising under the Constitution, laws or treaties of the United States, unless that appeared in the plaintiff's statement of his own claim. This was distinctly adjudged, and the reasons clearly stated, in *Metcalf* v. *Watertown*, 128 U. S. 586,

589, in which Mr. Justice Harlan, after pointing out that the cases, in which it had been held sufficient that the Federal question upon which the case depended was first presented by the answer or plea of the defendant, were cases of removal, in which, therefore, the requisite of jurisdiction appeared on the record at the time when the jurisdiction of the Circuit Court of the United States attached, said: "Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determinatiom of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the state court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the Circuit Court. It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind." That view has been affirmed and acted on at the present term in *Colorado Co.* v. *Turck*, 150 U. S. 138, 143.

The same rule applies, more comprehensively, to the acts of 1887 and 1888. In section 1, as thereby amended, the words giving original cognizance to the Circuit Courts of the United States in this class of cases are the same as in the act of 1875, (except that the jurisdictional amount is fixed at $2000,) and it is therefore essential to their jurisdiction that the plaintiff's declaration or bill should show that he asserts a right under the Constitution or laws of the United States. But the corresponding clause in section 2 allows removals from a state court to be made only by defendants, and of suits "of which the Circuit Courts of the United States are given

original jurisdiction by the preceding section," thus limiting the jurisdiction of a Circuit Court of the United States on removal by the defendant, under this section, to such suits as might have been brought in that court by the plaintiff under the first section. 24 Stat. 553; 25 Stat. 434. The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the Circuit Courts of the United States. *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; *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673, 687.

Congress, in making this change, may well have had in mind the reasons which so eminent a judge as Mr. Justice Miller invoked in support of his dissent from the original decision that a defence under the Constitution, laws or treaties of the United States was sufficient to justify a removal by the defendant under the act of 1875. "Looking," said he, "to the reasons which may have influenced Congress, it may well be supposed that while that body intended to allow the removal of a suit where the very foundation and support thereof was a law of the United States, it did not intend to authorize a removal where the cause of action depended solely on the law of the State, and when the act of Congress only came in question incidentally as part (it might be a very small part) of the defendant's plea in avoidance. In support of this view, it may be added, that he in such case is not without remedy in a Federal court; for if he has pleaded and relied on such defence in the state court, and that court has decided against him in regard to it, he can remove the case into this court by writ of error, and have the question he has thus raised decided here." *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 144.

The acts of 1887 and 1888, indeed, contain special provisions as to particular kinds of cases arising under the Constitution or laws of the United States. By section 3, every receiver or manager of property, appointed by a court of the United States, is permitted to be sued without the previous leave of that court, but the suit is subject to its general equity juris-

diction so far as necessary to the ends of justice. By section 5, nothing in this act is to repeal or affect any jurisdiction or right mentioned in sections 641, 642, 643, 722, or title 24 of the Revised Statutes, or the act of March 1, 1875, c. 114, all of which relate to suits concerning civil rights, and section 643 relates also to the removal of suits against officers or other persons acting or claiming under any revenue law of the United States; or in the act of March 3, 1875, c. 137, § 8, which relates to notice to absent defendants in suits to enforce or to remove liens. And section 6 expressly repeals section 640 of the Revised Statutes, which authorized any suit commenced in a state court against any corporation, other than a banking corporation, organized under a law of the United States, to be removed into the Circuit Court of the United States upon the petition of the defendant stating that it had a defence arising under or by virtue of the Constitution, or of any treaty or law of the United States. 24 Stat. 554, 555; 25 Stat. 436. But those provisions have no application to the cases now before us, and contain, to say the least, nothing tending to show that it was intended that such a case as any of these might be removed into the Circuit Court of the United States for trial.

The difference between the act of March 3, 1875, and the later acts is illustrated by the recent case of *Texas & Pacific Railway* v. *Cox*, in which receivers, appointed by a Circuit Court of the United States, of a railroad corporation deriving its corporate powers from acts of Congress, were sued in the same court, without previous leave of the court, after the act of 1887 took effect. This court, speaking by the Chief Justice, after observing that the corporation would have been entitled, under the act of 1875, to remove a suit brought against it in a state court, maintained the jurisdiction of the Circuit Court of the United States of the action against the receivers, under the act of 1887, upon the ground that the right to sue, without the leave of the court which appointed them, receivers appointed by a court of the United States, was conferred by section 6 of that act, and therefore the suit was one arising under the Constitution and laws of the United States. 145 U. S. 593, 601, 603.

Dissenting Opinion: Harlan, Field, JJ.

In each of the three cases now before this court, the only right claimed by the plaintiffs is under the law of Tennessee, and they assert no right whatever under the Constitution and laws of the United States. In the first and second bills, the only reference to the Constitution or laws of the United States is the suggestion that the defendants will contend that the law of the State under which the plaintiffs claim is void, because in contravention of the Constitution of the United States; and by the settled law of this court, as appears from the decisions above cited, a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws. In the third bill, no mention is made of the Constitution or laws of the United States, or of any right claimed under either; and no statement in the petition for removal, or in the demurrer, of the defendant corporation, can supply that want, under the existing act of Congress.

The result is that, in the first and second cases, the decrees must be reversed, at the cost of the plaintiffs, and the cases remanded to the Circuit Court of the United States with directions to dismiss the bills for want of jurisdiction; and that, in the third case, the decree must be reversed, at the cost of the defendants, and the case remanded to the Circuit Court of the United States with directions to remand it to the state court from which it was removed. The costs in each case are to be borne by the party who brought into the Circuit Court of the United States a case not within its jurisdiction. *Torrence* v. *Shedd*, 144 U. S. 527; *Martin* v. *Snyder*, 148 U. S. 663.

Decrees reversed accordingly.

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

I agree that the decrees in the first and second of the above cases must be reversed with directions to dismiss the bills for want of jurisdiction in the Circuit Court.

But I cannot assent to the proposition that the third case, which was originally brought in one of the courts of the State,

was not removable to the Circuit Court of the United States upon the application of the defendant bank. In that case, as the opinion of the court shows, the State sought to enforce a lien for taxes alleged to have been given by a general statute of Tennessee upon the capital stock of the defendant. The bank defended upon the ground that its stock was exempt by the terms of its charter from such taxation, and that the statute under which the State brought its suit was, if applied to the defendant, repugnant to the provision of the Constitution of the United States forbidding the States from passing laws impairing the obligation of contracts.

The opinion of the court proceeds upon the general ground that, while a plaintiff, if his cause of action arises under the Constitution or laws of the United States, or under some treaty with a foreign power, may invoke the original jurisdiction of a Circuit Court of the United States, a *defendant* is not entitled, under the existing statutes, to remove from the state court into the Circuit Court of the United States any suit against him, in respect to which the original jurisdiction of the Federal court could not be invoked by the plaintiff, even where his defence goes to the whole cause of action set forth in the bill, declaration, or complaint, and is grounded *entirely upon the Constitution of the United States, or upon an act of Congress, or upon a treaty between the United States and a foreign power.* Of course the cases excepted by the fifth section of the act of March 3, 1887, c. 373, 24 Stat. 552, 555, to be presently referred to, cannot be brought under this rule.

By the Judiciary Act of 1789, the original jurisdiction of the Circuit Courts of the United States, in suits of a civil nature, at common law or in equity, was restricted to those in which the value of the matter in dispute exceeded, exclusive of costs, the sum or value of five hundred dollars, and in which the United States were plaintiffs or petitioners, or an alien was a party, or the suit was between a citizen of the State in which it was brought and a citizen of another State. And the right of removal was given only to the defendant in a suit commenced in a state court against an alien, or by a citizen of the State in which the suit was brought against a

citizen of another State, and, under certain circumstances, to the party in an action in which the title to land was concerned who relied upon a grant from a State other than that in which the action was pending. Act of September 24, 1789, c. 20, 1 Stat. 73, 78, 79.

The act of 1875 enlarged the original jurisdiction of the Circuit Courts of the United States so as to embrace all suits of a civil nature, at common law or in equity, in which the matter in dispute exceeded, exclusive of costs, the sum or value of five hundred dollars, and "arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects." In respect to each of these cases that act provided that "*either party* may remove said suit into the Circuit Court of the United States for the proper district." Act of March 3, 1875, c. 137, 18 Stat. 470.

The act of March 3, 1887, as amended in 1888, left the original jurisdiction of the Circuit Courts of the United States precisely as it was established by the act of 1875, except that it increased the sum or value of the matter in dispute, necessary to give jurisdiction, to two thousand dollars, exclusive of interest and costs. Act of August 13, 1888, c. 866, 25 Stat. 434.

The act of 1887 further provided as follows:

"SEC. 2. That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district. Any other suits of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which

may hereafter be brought in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district. . . ."

"SEC. 3. That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a state court to the Circuit Court of the United States, he 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 for the removal of such suit into the Circuit Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein."

By the fifth section of that act it was declared that nothing in it should be "held, decreed, or construed to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-one, or in six hundred and forty-two, or in seven hundred and twenty-two, or in Title twenty-four of the Revised Statutes of the United States, or mentioned in section eight of the act of Congress of which this act is an amendment, or in the act of Congress approved March first, eighteen hundred and seventy-five, entitled 'An act to protect all citi-

zens in their civil and legal rights.'" Section 641 of the Revised Statutes relates to civil suits and criminal prosecutions commenced in state courts, and involving the equal civil rights of citizens of the United States. Section 642 prescribes what shall be done when the petitioner who seeks the removal is in the actual custody of the state court. Section 643 gives the right of removal to the defendant in any civil suit or criminal prosecution against an officer, or any person acting under him, for any act done under the authority of a revenue law of the United States. Section 722 relates to proceedings, civil and criminal, in vindication of civil rights. Title 24 of the Revised Statutes relates to civil rights. The eighth section of the act of March 3, 1875, prescribes the mode in which absent defendants, in suits brought to enforce any legal or equitable lien upon or claim to property within the district may be brought before the court. The act of March 1, 1875, has reference to the full and equal enjoyment of the accommodations, advantages, facilities of inns, public conveyances, theatres, and other places of public amusements.

There can be no question as to the import of the words "arising under the Constitution or laws of the United States," to be found in the acts of 1875 and 1887. It has long been settled that a suit was of that class if it necessarily involved a title, right, privilege, or immunity asserted, *by either party*, under the Constitution or laws of the United States. If the defence was based upon the Constitution or laws of the United States, the suit was one arising under that Constitution or those laws, although the *plaintiff* may not have asserted, in *his* pleading, any claim whatever of a Federal nature. *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 140; *Feibelman* v. *Packard*, 109 U. S. 421; *Ames* v. *Kansas*, 111 U. S. 449, 462; *Pacific Railroad Removal Cases*, 115 U. S. 1; *Starin* v. *New York*, 115 U. S. 248, 257; *Bachrack* v. *Norton*, 132 U. S. 337; *Bock* v. *Perkins*, 139 U. S. 628, 630. But the court now holds that the effect of the words in the first clause of section two of the act of 1887, "Of which the Circuit Courts of the United States are given original jurisdiction by the preceding section," is to make the right of the *defendant* in a suit

arising under the Constitution or laws of the United States, or under a treaty, to remove it from the state court, depend upon the inquiry whether the suit was one in respect of which the original jurisdiction of the Circuit Court could be invoked by the plaintiff. In my judgment, this is an erroneous interpretation of the statute. It is too narrow. No such interpretation was suggested at the bar, nor do I think it has ever been before suggested in any case.

The main purpose of the second section of the act of 1887 was to restrict the right of removal to the defendant or defendants in suits of the kind mentioned in the first clause of that section, and to the defendant or defendants, "being non-residents" of the State, in all other suits mentioned in that section. It was not intended to deny to a defendant the right of removal where the suit, by reason of the nature of the defence, was one arising under the Constitution or laws of the United States, or treaties with foreign powers, while allowing the plaintiff, whose bill, declaration, or complaint made a suit of that kind, to invoke the original jurisdiction of the Circuit Court. What possible reason could there have been for denying to a defendant the right, by a removal of the suit, to invoke the jurisdiction of a Circuit Court of the United States for the protection of his rights under the Constitution or laws of the United States, while giving to the plaintiff the right to invoke the jurisdiction of the same court for the protection of similar rights under the Constitution and laws of the United States? One effect of the present decision is — except in the cases mentioned in the sections of the Revised Statutes and in the acts of Congress referred to in the fifth section of the act of 1887 — to prevent an officer of the United States, when sued in a state court on account of some act done by him, from removing the suit into the Federal court, although what he did is alleged to have been done in execution of some act of Congress, or pursuant to an order of a court of the United States.

If it be said that this was the condition of things under the original judiciary act, my answer is that Congress did not, by the act of 1887, evince a purpose to return to the policy indicated by the act of 1789 in respect to the concurrent juris-

diction of the courts of the United States and the state courts. This is shown by the fact that, while under the act of 1789, the Circuit Courts of the United States had no original jurisdiction of suits arising under the Constitution or laws of the United States, or under treaties with foreign powers, or of suits between citizens of the same State, claiming lands under grants of different States, or of controversies between citizens of a State and foreign States, citizens, or subjects, original jurisdiction in all such cases, as conferred by the act of 1875, is preserved to those courts by the act of 1887. It seems to me contrary to the general purpose of the latter act to hold that a suit, which is made by the plaintiff's pleading one arising under the Constitution or laws of the United States or a treaty, can be brought in the proper Circuit Court of the United States, while a suit which is made by the defendant's answer one arising under the Constitution or laws of the United States or a treaty, cannot be removed to the Federal court for hearing or trial. The words in the first clause of the second section of the act of 1887, "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section," have, I think, been construed by the court with too much strictness. They were inserted in the act, in part, for the purpose of indicating that the suits mentioned in the second section as suits "arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority," and which could be removed, were of the same nature as the suits of the same kind described in the same language in section 1, and not for the purpose of limiting the right of removal to those suits arising under the Constitution or laws of the United States, or under treaties, which could be brought by an original action in a Circuit Court of the United States. The court, by its construction, does what the act of Congress does not do, and what it should not be supposed Congress intended to do, namely, it divides suits arising under the Constitution or laws of the United States and suits under treaties with foreign powers into two classes, and excludes one of those classes altogether from the original cognizance of the Circuit Courts

of the United States. It thus — except in the cases saved by the fifth section of the act of 1887 — makes a discrimination against a defendant, whose defence rests entirely upon the Constitution or laws of the United States, or on a treaty, that is not justified either by the policy or the words of the act of 1887.

The Judiciary Acts of 1789 and 1875 restricted the original jurisdiction of the Circuit Courts of the United States to suits, at law or in equity, in which the matter in dispute exceeded the sum or value of *five hundred dollars*, exclusive of costs. The act of 1887 fixed this amount at *two thousand dollars, exclusive of interest* and costs. It may well be held — indeed, the natural and reasonable construction of the act of 1887 is — that the words "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section," were introduced for the purpose of making it clear that no suit, arising under the Constitution or the laws of the United States, or under any treaty, should be removed, unless the matter in dispute exceeded in value the sum of $2000, exclusive of interest and costs. But for the words in the second section of the act of 1887, "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section," *any* suit arising under the Constitution or laws of the United States, or under a treaty, however small the amount in dispute, could have been removed from the state court. Those words being in the second section, no suit of that class could be removed into the Federal court, unless the value of the matter in dispute was such as is prescribed in "the preceding section," namely, $2000, exclusive of interest and costs.

Again, if, instead of suing to enforce the lien given by the statute, the State had levied upon the property of the bank, the officer making the levy could have been enjoined, at the suit of the bank, upon the very ground now set forth in its answer, namely, that the statute under which that officer proceeded was repugnant to the contract clause of the Constitution of the United States. Such a suit would have been one arising under the Constitution, and, therefore, cognizable by

the Circuit Court. *Allen* v. *Baltimore & Ohio Railroad*, 114 U. S. 311; *White* v. *Greenhow*, 114 U. S. 307; *Barry* v. *Edmunds*, 116 U. S. 550. Yet, under the decision just rendered, the bank cannot, by removing the present suit, invoke the jurisdiction of the Circuit Court for the determination of the same question.

Further, it was held in *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593, that, without reference to the citizenship of the plaintiff, a suit for damages can be brought in a Circuit Court of the United States against receivers appointed by a Circuit Court of the United States of a railroad corporation created by an act of Congress, although the case involves no question of a Federal nature; this, upon the ground that the receivers, in executing their duties, were acting under judicial authority derived from the Constitution of the United States. Such a suit, if brought in a state court, could, I take it, be removed under the present decision, upon the ground simply that the plaintiff's suit was within the original cognizance of the Circuit Court. And yet, under the act of 1887, as now interpreted, a suit against a citizen or against a corporation created by a State cannot be removed, even if the defence rests exclusively on the Constitution of the United States. I cannot believe that Congress contemplated any such result.

I am of opinion that, under the act of 1887, a suit, involving the required amount, and "arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority" — whether the suit becomes one of that kind by reason of the allegations in the bill, declaration, or complaint, or by reason of the answer or defence — may be removed, not, as under the act of 1875, by either party, but by the defendant or defendants, of whatever State residents or citizens, in the mode and at the time prescribed by the act of 1887.

Mr. Justice Field authorizes me to say that he concurs in this dissenting opinion.

Mr. Justice White, not having been a member of the court when these cases were argued, took no part in their decision.

McKITTRICK v. ARKANSAS CENTRAL RAILWAY COMPANY.

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

No. 248. Argued February 2, 1894. — Decided March 19, 1894.

The act of the State of Arkansas of July 21, 1868, (Laws of 1868, 148,) "to aid in the construction of railroads," and the act of April 10, 1869, (Laws of 1868–9, 147,) "to provide for paying the interest upon the bonds issued to aid in the construction of railroads," taken together created no lien upon the property of a railroad company for whose benefit the state bonds had been issued, notwithstanding the provisions contained in the act of March 18, 1867, (Laws of 1866–7, 428,) as that act had no force in this respect after the adoption of the state constitution of 1869.

Tompkins v. *Fort Smith Railway Company*, 125 U. S. 109, affirmed and followed.

The sale of the Arkansas Central Railway in the foreclosure proceedings under the mortgage to the Union Trust Company, and the deed made in pursuance thereof, passed the property to the purchaser free from any claims of the creditors of the railway company.

The alleged frauds of the president of that railway company are examined and held not to invalidate that sale.

Neither the State of Arkansas, nor the holders of the bonds of the State issued in aid of the construction of that railway, were necessary parties to that foreclosure suit.

This appeal brought up the final decree of the Circuit Court of the United States for the Eastern District of Arkansas, sustaining a demurrer to a bill filed by the appellant, and dismissing such bill for want of equity.

The appellant, who was the plaintiff below, was a citizen of Great Britain. He sued on behalf of himself and all holders of bonds issued to the Arkansas Central Railway Company by the State of Arkansas, under the provisions of an act of the general assembly of that State, entitled "An act to aid in the construction of railroads," approved July 21, 1868. The defendants were the Arkansas Central Railway Company, a corporation of Arkansas; the Arkansas Midland Railroad Company, a corporation of the same State; and the Union

Trust Company of New York, a corporation of the State of New York.

The bill was of unusual length, and it is difficult to present the case properly without a full statement of its allegations. According to those allegations — which, upon demurrer, must be taken to be true — the case made by the bill was as follows:

By section 6, article 10, of the constitution of Arkansas, in force in 1868, it was provided that "the credit of the State or counties shall never be loaned for any purpose without the consent of the people expressed through the ballot-box." 1 Charters and Constitutions, 148. For the purpose of loaning the credit of the State, and in order to encourage the building of railroads within its limits, the general assembly of Arkansas passed the above act of July 21, 1868, by the first section of which act it was provided: "For the purpose of securing such lines of railroad in this State as the interest of the people may from time [*to time*] require, the faith and credit of the State of Arkansas are hereby irrevocably pledged, and the proper authorities of the State will and shall issue to each railroad company or corporation, which shall become entitled thereto, the bonds of this State, in the sum of one thousand dollars [$1000] each, payable in thirty [30] years from the date thereof, with coupons thereto attached for the payment of interest on the same in the city of New York, semi-annually, at seven per cent per annum, in the sum of fifteen thousand dollars [$15,000] in bonds for each mile of railroad which has not received a railroad land grant from the United States, and ten thousand dollars [$10,000] in bonds for each mile of railroad which has received a land grant from the United States, on account of which such bonds shall be due and issuable as provided." Laws of Arkansas, No. 48, 1868, 148.

At an election held November 3, 1868, under the provisions of this act, the people of the State voted upon the proposition submitted by it, and a majority of the votes cast at such election voted in favor of it, and "For Railroads."

By the second section of the act, it was made the duty of the board of railroad commissioners to receive applications from

railroad companies for the loan of the credit of the State, and to designate the companies entitled to such aid. The fourth section provided that any railroad company having existence under the laws of the State and desiring to receive the aid referred to in the act might signify the same by application to the board of railroad commissioners, signed by its president and attested by the seal of the company, setting forth its character, organization, capital stock, a map of the line or lines of road proposed to be built, the progress made thereon, the financial condition and resources of the company, with such other information as the case required, and if the board of commissioners found such corporation to be organized according to law, with resources adequate to the purpose, and that the construction of the proposed line or lines of road would be of public benefit, and the board consented to approve and to grant such application, then and thereafter the company or corporation should be entitled to and have a right to ask for and receive the bonds of the State in the act mentioned.

The president of the Arkansas Central Railway Company (which had not received a land grant from the United States) applied to the railroad commissioners for a loan of the credit and bonds of the State, as provided in the act of 1868; and on the 25th of April, 1870, the board awarded to that corporation such aid for a distance of 150 miles and at the rate of $15,000 per mile. Of that action notice was given to the railway company.

The railway company was authorized by its charter to construct, maintain, and operate a railroad from Helena, in the county of Phillips, through the counties of Phillips, Monroe, Arkansas, Prairie, and Pulaski to Little Rock, all in the State, the line so located, exclusive of side tracks, being one hundred miles in length, and also a branch road from a point on its main line at or near Aberdeen to Pine Bluff, in the county of Jefferson.

On the date last mentioned, upon proof being duly made and filed in the proper office, the governor of Arkansas, on an award of the loan of the State's credit, caused to be issued and delivered to the Arkansas Central Railway Company 150

bonds of $1000 each, numbered from 1 to 150, both inclusive. Subsequently, from time to time, at different dates between April 25, 1871, and July 12, 1873, inclusive, on similar proof, the board of railroad commissioners caused to be issued and delivered to the railway company other bonds, 1350 in number and of $1000 each.

Each of the bonds thus issued and delivered certified, by the Governor and auditor, and attested by the secretary and treasurer, under the seal of the State, that the State of Arkansas was indebted "unto the Arkansas Central Railway Company or bearer in the sum of one thousand dollars, lawful money of the United States of America, redeemable, at the city of New York, thirty years from the date hereof, with interest at the rate of seven per cent per annum, payable semi-annually, at the city of New York, on the first day of April and October in each year, on the presentation of the proper coupons hereto annexed. The faith and credit of the State are hereby solemnly and irrevocably pledged for the payment of the interest and the redemption of the principal of this bond, issued in pursuance of an act of the general assembly of the State of Arkansas, approved July 21, 1868, entitled 'An act to aid in the construction of railroads,' the said act having been submitted to and duly ratified by the people of the State at the general election held on November 3, 1868."

Each of the bonds at the time of their issue had sixty interest coupons attached thereto, separately numbered, calling for the payment "to the bearer of thirty-five dollars, in the city of New York, on the first day of October, 1871, being semi-annual interest due on bond No. —."

The Arkansas Central Railway Company, on delivery of the bonds to it, caused and authorized its president to endorse officially upon each bond a special guaranty in the words following: "For a valuable consideration the Arkansas Central Railway Company hereby guarantee to the holder of the within bond the payment of the principal thereof when due, and of the interest thereon, as the same accrues, by the State of Arkansas; and on default of said State of Arkansas to pay such principal or interest, or either, as the same shall become

due, the Arkansas Central Railway Company agree to pay the same to said holder upon delivery of the within bond, or of the coupon for the interest thereon, upon which a default of payment shall have been made."

Under the seventh section of the act referred to, it became the duty of the legislature from time to time to impose upon the railroad company, to which its bonds were issued, a tax equal to the amount of the annual interest on such bonds at the time outstanding and unpaid, and after the expiration of five years from the completion of the road to impose an additional special tax of 2½ per cent per annum upon the whole amount of the state aid granted to the company, such taxation to continue until the amount of bonds issued to any company with the interest thereon should be paid by it, in which case the railroad was entitled to be discharged from all claims or liens on the part of the State.

The railway company had not, when this suit was brought, discharged said lien, nor had it been discharged by any one else for or on its behalf.

It was further provided by the eighth section of the act that in case a company should fail to pay the taxes imposed by the seventh section, when the same became due, and for sixty days thereafter, it should be the duty of the treasurer of the State, by a writ of sequestration, to seize and take possession of its income and revenues until the amount of its defaults was fully paid up and satisfied, with costs of sequestration, after which the treasurer was authorized to release any further revenues to its proper officers.

Before the award of the loan of the credit of the State and at the first meeting of the legislature after the election at which the act of 1868 was voted upon and ratified, and before any bonds were issued under it to said railway company, the general assembly of Arkansas passed an act to provide for the prompt payment of the interest upon the bonds which it might thereafter issue to railroad companies. That act is entitled "An act to provide for paying the interest on the bonds issued to aid in the construction of railroads," and was approved April 10, 1869. Laws of Arkansas, No. 73, 1868–1869, 147.

In that act it was provided that the auditor of the State should, on or before the 1st of June in each year, certify to the state treasurer the amount of bonds issued to each company, with the amount of semi-annual interest to accrue thereon, that is to say, the amount of interest the State would have to pay on the 1st of October of that year on the bonds issued to each company, and the amount of tax required from each to pay the same, such tax to be due and payable on the 30th day of June of that year. The auditor was required in like manner, on or before the first day of December in each year, to certify to the treasurer of the State the amount of semi-annual interest the State would have to pay on the bonds on the first day of April in the ensuing year, issued under the act of 1868, and the amount of the tax required from each company to pay the same, such tax to be due and payable December 31 of that year.

It was made the duty of the treasurer, upon receipt of the auditor's certificate, to cause notice to be served upon each railroad company on or before the 20th day of June and December of each year, specifying the amount of tax to be paid, which amount should be the interest on the bonds for that period, and demanding the payment of the same into the treasury upon the 30th day of June and the 31st day of December, respectively, in conformity with the provisions of the acts of July 21, 1868, and April 10, 1869.

If, at the expiration of sixty days after the tax became due and payable, the railroad company should fail to make payment, it became the duty of the treasurer, through the attorney general, to make and file a petition in the Chancery Court of Pulaski County, setting forth the amount due and the fact of default, praying the issue of the writ of sequestration contemplated in the act of 1868, and the appointment of a receiver to take the revenue and income of the company for the purpose specified in that act. The receiver, upon such writ being issued, was required to take possession of the incomes and revenues of the defaulting company, with authority to demand and receive all moneys coming to it from the operation of its road. The officers of the defaulting company were required

to pay over to the receiver all moneys coming into their possession as revenue and income, or from operating the railroad; and they were required to submit all necessary books and papers to the receiver for examination. All moneys received and all moneys coming into the hands of the receiver, after meeting proper operating expenses, were directed by the act to be applied to the payment and discharge of the tax due and unpaid. The receivership was to continue until the amounts in default were paid, with the reasonable costs of sequestration. When such payments had been made, the receiver was to be discharged and to withdraw from the management of the affairs of the company.

After the award to the Arkansas Central Railway Company of the loan of the State's credit, to wit, on the 3d day of July, 1871, that company executed a mortgage or deed of trust to the Union Trust Company of New York, as trustee, to secure the payment of $1,200,000, evidenced by coupon bonds bearing interest at the rate of seven per cent per annum. This mortgage embraced all the property and appurtenances of the railroad company. It was not filed for record or recorded in the county of Pulaski until some time in 1871, nor was it filed for record in the other counties through which that railway was to be constructed, operated, and maintained until after that date. Under that mortgage or deed of trust one thousand bonds of $1000 each, and four hundred of $500 each, were executed and delivered to the trustee. It was provided in the mortgage or trust deed that none of said bonds should be deemed issued under the mortgage or otherwise entitled to the benefit or security thereof, or be in any wise obligatory upon the railway company as an evidence of debt, or otherwise, unless or until there should be endorsed thereon a certificate signed by the Union Trust Company, through its proper officer or its successor in trust, authenticating them as being duly and lawfully issued and secured. Mortgage bonds were signed, certified, and issued by the Union Trust Company to the amount of $720,000.

In April, 1873, the railway company cancelled and caused to be destroyed the remaining bonds unissued, to wit, 480 of

the denomination of $1000 each, and on the same day executed and delivered to the Union Trust Company its second mortgage or deed of trust on the same property and appurtenances to secure the payment of 960 bonds, each for the sum of $500, with interest coupons attached, representing the interest to become due thereon semi-annually at the rate of 7 per cent per annum. It was provided in the latter mortgage that none of the bonds should be deemed issued under it or entitled to the benefit or security thereof, or be in any wise obligatory on the railway company as an evidence of debt or otherwise, unless or until there should be endorsed thereon a certificate signed by the Trust Company through its proper officer, authenticating them as being duly and lawfully issued and secured. The second mortgage bonds issued, signed, and certified amounted to $480,000.

On the 6th of September, 1876, a suit in equity was instituted in the court below under the style of the *Union Trust Company of New York* v. *Arkansas Central Railway Company.* The bill in that case contained, among other things, the following: "Twelfth. Your orator further shows that the State of Arkansas has or pretends to have some claim or lien on said railway and the other property of said Arkansas Central Railway Company so mortgaged to your orator as aforesaid, the particulars and nature of which are unknown to your orator, and therefore your orator cannot more particularly state the same." Its prayer was "that it may be ascertained and adjudged what, if any, estate or interest the State of Arkansas has in the said mortgaged property, and also whether the same is prior and superior to or subsequent and subject to the rights, estates, and interest of your orator under the two said several mortgages herein described."

Neither the State of Arkansas nor any of the holders of the bonds issued by the State to the Arkansas Central Railway Company, nor the holders of the coupons attached thereto, were represented in or were parties to that suit; nor was any decree therein rendered which in any manner determined the priority of said bonds, or whether the lien of the State to and for the use and benefit of the holders of the state aid bonds

was subordinate in point of time or equity to that of the bonds issued under the mortgage as aforesaid. A copy of the decree was attached to the bill in this case. In that suit the railway company, being duly served with process, and neither appearing, answering, nor demurring to the bill of complaint, a decree *pro confesso* was taken and entered January 1, 1877. Subsequently, on March 17, 1877, a final decree was passed against the railway company. It was decreed, among other things, that the whole amount of bonds issued under said mortgage, with the interest thereon, was due; that unless the said defendant paid or caused to be paid to said complainant Trust Company, on or before a day certain named, the sum thereof, being the said principal and interest, with costs of suit, the mortgages should be foreclosed, and the equity of redemption of the railway company thenceforth barred from all equity of redemption under said mortgage, and in default of payment the mortgaged premises mentioned in the bill be sold.

The railway company having failed within the time limited to pay the amount of the decree referred to, the mortgaged property was sold July 26, 1877, by a master commissioner of the court, for the sum of $40,000, to S. H. Horner as trustee. Pending that foreclosure proceeding, a receiver was appointed to take charge of the railway, its property and appurtenances, and he did take such charge. By authority of the court betterments were placed upon the railway and property acquired to the extent of $25,000, or about that sum. At that time the railway was completed, equipped, and in operation for a distance of forty-eight miles, and was worth more than $400,000.

Before the sale, to wit, on the 28th of June, 1877, the Lombard Syndicate, Limited, a corporation of England, by and through which the railway company had sold and negotiated many or all of the state bonds issued to the Arkansas Central Railway Company, and which was then the holder of some of them, filed in court a notice and protest, which was in words as follows:

"We, the undersigned, having by public subscription offered

and allotted the bonds of the State of Arkansas given in aid of the Arkansas Central Railway and issued to this railway under the act of the State of 21st July, 1868, which issue was made on April 1, 1870, therefore prior to the so-called first mortgage, bearing date July 3, 1871, and the above-mentioned bonds being endorsed by the railway as follows: 'Special guarantee endorsed by the railway company on each bond: For a valuable consideration the Arkansas Central Railway Company hereby guarantee to the holder of the within bond the payment of the principal thereof when due and of the interest thereon as the same accrues by the State of Arkansas, and in default of said State of Arkansas to pay such principal or interest, or either, as the same shall become due, the Arkansas Central Railway Company agree to pay the same to said holder upon the delivery of the within bond or of the coupon for the interest thereon upon which a default in payment shall have been made.'

"We, on our own behalf and in behalf of the holders of these bonds, hereby solemnly protest against the sale of this railway, as ordered by the court, except due provisions are made for the priority of the above issue, and hereby give notice to all purchasers or intended purchasers that they will buy the road subject to the above claims. This protest has been executed in triplicate, one of which has been forwarded to the registrar of the court to bring it to the notice of the court, one to the receiver, and the third to Messrs. Tappan and Horner, with a request to read it publicly at the time and place of sale."

This protest and notice came to the hands of the receiver and to said Horner before the foreclosure sale, and was read at and before the sale in the presence and in the hearing of said Horner and his alleged *cestuis que trust.*

By the first section of an act of the general assembly, approved May 29, 1874, it was provided: "That an act entitled 'An act to provide for paying the interest of bonds issued to aid in the construction of railroads, approved April 10, 1869,' be, and the same is hereby, repealed." After the passage of that act the officers, agents, and attorneys of the State neglected

and refused, and, at the commencement of the present suit, still refused, to take any steps towards enforcing the payment of the interest on the bonds issued to the Arkansas Central Railway Company.

The Arkansas Midland Railroad Company was incorporated by an act of the general assembly of Arkansas, approved January 20, 1855, with authority to construct a railroad from Helena to Little Rock. It was empowered by its charter to make a lawful contract for uniting its road with any other road having the same terminus or which might at any intermediate point approach its line. On the 8th of March, 1869, there was filed in the office of the Secretary of State at Little Rock, under the general railroad incorporation law of the State, articles of association incorporating the Little Rock and Helena Railroad Company, the purpose of which was to construct a railroad from the city of Little Rock to Helena. By resolution of the board of directors of the Arkansas Midland Railroad Company, adopted August 31, 1870, that company was consolidated with the Little Rock and Helena Railroad Company under the name of the Arkansas Central Railway Company. This action of the board of directors of the Arkansas Midland Railroad Company, changing the name of its road to that of the Arkansas Central Railway Company, was confirmed at a meeting of the stockholders of the former company. At a meeting of the directors of the Little Rock and Helena Railway Company, held January 20, 1871, a resolution was passed declaring: "That we hereby agree to consolidate with said company under the name and style of the 'Arkansas Central Railway Company,' and do hereby authorize and empower W. H. Rogers, the president of this company, to convey unto said Arkansas Central Railway Company all the rights, privileges, and immunities that we have or may have had or by any means may hereafter become entitled to under or by virtue of said organization, and after said conveyance made this company shall utterly cease to exist."

The conveyance referred to in that resolution was, in fact, made, and the rights, privileges, and immunities of both companies were assumed, possessed, and controlled by the Arkan-

sas Central Railway Company, the president of the Arkansas Midland Railroad Company becoming president of the former company, which, formed and continued as aforesaid, is one of the defendants in this suit.

The bill further alleged that A. H. Johnson was the president of the Arkansas Central Railway Company for a long time, and up to the date of the foreclosure aforesaid; that he "brought about" that foreclosure, and became the receiver of said road in that suit, acting as such for a long time; that he subsequently conspired with one W. W. Bailey and J. J. Horner to secure possession and control of said railroad, of which 48 miles had been completed and were in operation; that to that end he procured Bailey to be appointed receiver in his place and stead, all the while himself drawing the salary of receiver; that in pursuance of that confederation Bailey appointed Johnson superintendent of the railroad, for which the latter was separately paid, giving him certain contracts, whereby Johnson became the holder and owner of receiver's certificates to a large amount, such certificates becoming a charge upon the road superior to any of the mortgage bonds then being foreclosed; that J. J. Horner was, at that time, one of the attorneys of the Union Trust Company in the foreclosure suit and a party to the proceedings in that suit; that S. H. Horner was the brother of J. J. Horner, and pretended to have purchased the railroad at the foreclosure sale, as trustee for Johnson; that afterwards, Johnson and J. J. Horner, pretending to be stockholders of the Arkansas Midland Railroad Company, and claiming that it was never consolidated in the manner stated, and was an independent corporation, met, and with others, whom they pretended to have qualified by issuing to them a few shares of stock in that company, assumed to elect themselves as directors; that as such pretended directors they again met, and by common consent selected from among themselves the officers of the company as follows: Johnson, president and general manager; John J. Horner, vice-president; and S. H. Horner, secretary.

S. H. Horner, who had purchased as aforesaid and then held the said railroad and appurtenances in his capacity as

trustee, thereupon assigned, conveyed, set over, and delivered the same to the Arkansas Midland Railroad Company, the consideration expressed being $600,000, but, in fact, no part of that consideration was ever paid to or received by him as trustee or otherwise, directly or indirectly. A copy of that conveyance was attached to the bill in this case. J. J. Horner, without any consideration whatever, in pursuance of the scheme aforesaid, and as a reward for his services, had conveyed to him a third interest in the railway property, and to S. H. Horner, under like circumstances and for the same consideration, a sixth interest.

By reason of the refusal of the State, its officers, agents, and attorneys, to take any step towards enforcing the payment of the interest on its bonds issued to the Arkansas Central Railway Company, the Arkansas Midland Railroad Company was daily receiving the income and revenue from the operation of the said railroad and was appropriating and had appropriated that income and revenues to its own use and to the use of Johnson and J. J. Horner, and no portion thereof to the payment of the past due interest on the bonds issued by the State to the said railway company.

The plaintiff McKittrick was the owner and holder for value before maturity of coupons attached to five bonds of $1000 each, issued by the State to the Arkansas Central Railway Company, all of which were then due and payable, with interest from the maturity of each coupon until paid. These coupons aggregated more than $5000.

The Arkansas Central Railway Company was hopelessly insolvent, and by the foreclosure and sale heretofore referred to was left entirely without property of any kind from which income or revenue might or could be derived. The corporation was practically dissolved, its directory abandoned, and its property in the hands of the former president and vice-president, who repudiated the liens that had theretofore existed on it.

The bill alleged that under the acts of July 21, 1868, and April 10, 1869, aforesaid, under which said bonds were issued by the State, it was not contemplated by said acts or the said

railway company or the State of Arkansas that the latter should pay the same or the interest thereon out of its own revenues; that as between said State of Arkansas and said railway company said bonds and coupons were accommodation paper, and, in point of fact and in equity, the obligation of said railway company; that the acts of July 21, 1868, and April 10, 1869, aforesaid, were printed and public acts of the State of Arkansas; that the only consideration received by the issuing of said bonds passed to and was received by the said railway company; that the only value the bonds possessed arose out of the fact that the income and revenue of the railway company were pledged for the ultimate redemption of the principal and interest thereof, and that the remedy by sequestration was provided to enforce the prompt payment of the same; and, further, that by virtue of the special guaranty, hereinbefore referred to, endorsed on the several bonds, the Arkansas Central Railway Company equitably appropriated and assigned its income and revenue, as contemplated by said acts, to the payment of the principal and interest thereof, and there then existed in favor of the plaintiff and other holders of said bonds an equitable lien or charge upon said railroad property and its earnings to the extent necessary to discharge the interest due and unpaid, and that such equitable lien or charge continued to attach as the interest matured from time to time until the same, together with the principal amounts of said bonds, have been fully paid; that said special guaranty operated substantially and in effect to raise a trust that bound the railway property and its earnings, and the defendants, who took the same with notice thereof, were in equity obliged to fulfil said trust.

The plaintiff further alleged that Johnson and J. J. Horner, although well advised as officers and stockholders as to the condition and affairs of the Arkansas Central Railway Company, in order to obtain the issue to the company of said railroad aid bonds, made and caused to be made a statement under oath, conformably to the requirements of the act aforesaid, on the 21st day of April, 1871, to the effect that the available resources of the railway company in subscriptions of capital

stock, in moneys, lands, and other means, were sufficient to prepare one hundred consecutive miles of railroad for the iron rails, when, in truth and in fact — as said Johnson and Horner then well knew — the railway company did not possess the available resources aforesaid. He charged that said statement was made with the fraudulent intent to impose on and mislead the state authorities and to secure from the State of Arkansas, without legal right or authority, ostensibly for the railway company but really and in fact for themselves and for their own private gain and profit, the issuing of said railroad aid bonds; that by means of such false and fraudulent statement the bonds were awarded to and obtained by the railway company; that in and by said act it was provided that, after the showing aforesaid as to available resources, the governor of the State should be authorized to issue to the president of the railway company the said aid bonds upon the completion and preparation for the iron rails of each succeeding ten miles or more of road until the entire line should be completed; and, further, the president of said railway company was required to file his official receipt for each issue of bonds, accompanied by the affidavit of himself and at least four directors that the bonds or the avails of them should be disposed of solely for the purpose of providing for the ironing, equipping, building, and completing of said road. And the plaintiff alleged that notwithstanding the said defendants, as officers and stockholders as aforesaid, by means of false and fraudulent statements made and caused to be made by them as to the completion of consecutive sections of railroad ready for the iron rails, whereby the state authorities were deceived, procured, without right or authority, the issuance to said railway company of the whole amount of $1,350,000 of aid bonds as aforesaid, and that no part of said railroad was built or completed ready for the iron rails when the said bonds or any instalments thereof were applied for and issued, and although the said railway company, by and through said defendants, solemnly obligated itself to devote the avails and proceeds thereof as above stated and required by said act, the same were fraudulently diverted from such purpose and appropriated to the use and advantage

of said defendants, with the exception of the first forty-eight miles of road then in operation.

The bill further alleged that said railway company, by putting said state bonds on the market with the recitals therein contained, — that they were issued under and in pursuance of an act of the general assembly of the State of Arkansas approved July 21, 1868, entitled "An act to aid in the construction of railroads, the said act having been submitted to and duly ratified by the people of the State at the general election held November 3, 1868," — and by the guarantee endorsed thereon as aforesaid, solemnly declared to all persons receiving said bonds that the remedies therein mentioned and the liens thereby created existed and could be enforced, and the same estopped it, as well as all persons claiming under them or it whose claims were junior in time, from denying the validity of the acts aforesaid or the bonds issued thereunder; "that the said S. H. Horner, A. H. Johnson, J. J. Horner, and the said Arkansas Midland Railroad Company were well advised of the award of the state aid granted to said railway company by the said board of railroad commissioners, as aforesaid, before they or any of them acquired said railroad and appurtenances at said foreclosure sale, and that said J. J. Horner and A. H. Johnson were officers of said railway company, applied for and received said state aid, and they, and each of them, and said Arkansas Midland Railroad Company, were, in law and in equity, estopped from denying the validity of said acts of July 21, 1868, and April 10, 1869, and the bonds so issued by the State as aforesaid.

"Your orator submits that while it may be held that the act of July 21, 1868, is not sufficient to sustain the issue of the bonds therein described, and that while the same may be held to be unconditional, that the credit of the State being in jeopardy, it was competent for and within the powers of the general assembly of the said State to provide against any and all emergencies, and to create means for the payment of the bonds and the interest thereon, which were then issued or to be issued, and by said act of April 10, 1869, the general assembly did in fact provide by law means to enforce payment of

the principal and interest on the bonds issued or to be issued under said act of July 21, 1868; that said act of April 10, 1869, was and is a public act, enacted before the granting of aid to said Arkansas Central Railway Company, and before the execution of the mortgage to the Union Trust Company aforesaid, and constituted a public and statutory notice of the matters and things therein contained, and of the liens, rights, and remedies therein provided for the enforcement of the payment of the interest and principal of said bonds, and that the said railroad and appurtenances, its income and revenue, were pledged for the payment of said state aid bonds, and was also notice to all persons holding bonds secured by said trust deed to said Union Trust Company of a prior right, lien, and equity to that of persons claiming by, under, or through said mortgage or trust deed. Your orator submits that the attempt made by the general assembly of the State of Arkansas to deprive him of the benefit and provisions of the act of April 10, 1869, aforesaid, by the passage of the act of May 29, 1874, is an attempt to impair the obligation of the contracts of his said bonds and deprive him of a valuable remedy for the enforcement thereof, and the same is therefore unconstitutional and void. Your orator shows that said Arkansas Midland Railroad is not worth exceeding two hundred and fifty thousand dollars, and that the Arkansas Midland Railroad Company has no other property, and by reason of the large issue of said state aid bonds as aforesaid, and of its other obligations, it is hopelessly insolvent, and that it has been and still is misappropriating its income and revenues."

The relief sought was the appointment of a receiver to take possession and custody of the property, income, and revenue of the railroad property and appurtenances in the possession of the Arkansas Midland Railroad Company, and which it acquired by or through the said S. H. Horner, purchaser at the foreclosure sale; and that such receiver continue in possession until he shall have received an amount of income and revenue to pay the costs and expenses of sequestration, and income and revenue sufficient to pay the amount of said coupons due and payable on the bonds issued by the State and deliv-

ered to the Arkansas Central Railway Company, and which may hereafter become due pending such receivership. The bill asked that an account be stated of revenues and incomes received by the defendant railroad company since it went into possession of the property of the Arkansas Central Railway Company down to the filing of the bill, and that the amount so found be directed to be paid to the plaintiff and such other persons, holders of state aid bonds as aforesaid, as might become parties to this suit. In default of such payment by a day named, the bill asked that the amount or so much as might be found due to the plaintiff and other parties to the bill be decreed a lien on the railroad appurtenances and property aforesaid, to be satisfied if necessary by a sale thereof. If it be held that the plaintiff have a lien junior to said mortgages and incumbrances, the relief asked was a decree that the plaintiffs and others holding such bonds might be decreed to have an equity of redemption in and to such railroad, its appurtenances and other property, and that such equity be declared, and the amount to be paid accurately ascertained. The bill also asked for such other relief as might seem meet in the premises and as equity and good conscience require.

Mr. M. M. Cohn, (with whom was *Mr. J. Erb* on the brief,) for appellant.

I. The questions raised in this case were not considered in *Tompkins* v. *Little Rock & Fort Smith Railway Co.*, 125 U. S. 109, and therefore that case is not decisive of this. The acts of 1868 and 1869 are couched in language sufficiently explicit to indicate that the income and revenues of the companies obtaining the state aid were to stand pledged for the payment of the state bonds. In discussing this point the counsel cited: *White Water Valley Canal Co.* v. *Vallette*, 21 How. 414; *Beall* v. *White*, 94 U. S. 382; *Gregory* v. *Morris*, 96 U. S. 619; *Wilson* v. *Boyce*, 92 U. S. 320; *Amoskeag Bank* v. *Ottawa*, 105 U. S. 667; *Leavenworth County* v. *Barnes*, 94 U. S. 70; *South Ottawa* v. *Perkins*, 94 U. S. 260; *Gut* v. *Minnesota*, 9 Wall. 35; *Hamilton Bank* v. *Dudley*, 2 Pet. 492;

East Hartford v. *Hartford Bridge*, 10 How. 511; *Elmwood* v. *Marcy*, 92 U. S. 289; *Walnut* v. *Wade*, 103 U. S. 683; *Brown* v. *Barry*, 3 Dall. 365; *Gardner* v. *Collector*, 6 Wall. 499; *Johnson County* v. *January*, 94 U. S. 202; *Anderson County* v. *Beal*, 113 U. S. 227; *Railroad Companies* v. *Schutte*, 103 U. S. 118; *Ellis* v. *Martin*, 60 Alabama, 394; *Smith* v. *Fields*, 79 Alabama, 335; *Spangler* v. *Jacoby*, 14 Illinois, 297; *English* v. *Oliver*, 28 Arkansas, 317; *Shepardson* v. *Milwaukee & Beloit Railroad*, 6 Wisconsin, 605; *State* v. *Burton*, 11 Wisconsin, 50; *Tims* v. *State*, 26 Alabama, 165; *Sullivan* v. *Adams*, 3 Gray, 476; *Devoy* v. *New York City*, 36 N. Y. 449; *Campar* v. *Detroit*, 14 Michigan, 276; *Childs* v. *Shower*, 18 Iowa, 261; *State* v. *Blend*, 121 Indiana, 514; *Ex parte Davis*, 21 Fed. Rep. 396; *Alexander* v. *State*, 9 Indiana, 337; *United States* v. ———, 1 Brock. 195; *United States* v. *Brown*, Gilpin, 155; *Shunk* v. *Miller*, 5 Penn. St. 250; *Walker* v. *Chapman*, 22 Alabama, 116; *Howie* v. *State*, 1 Alabama, 113; *Hale* v. *Cushing*, 9 Pick. 395; *Harper* v. *Rowe*, 55 California, 132; *Myer* v. *Hart*, 40 Michigan, 517; *Bulloch* v. *Taylor*, 39 Michigan, 137; *Gaar* v. *Louisville Banking Co.*, 11 Bush, 180.

II. There is another feature which distinguishes this case from the *Tompkins case*. Here the primary liability is regarded as in the railroad company. In this respect it resembles the case of *Railroad Companies* v. *Schutte*, 103 U. S. 118.

The right to enforce security, given for the payment of negotiable paper, passes to all holders of the paper, pending maturity, even though the security has not been formally transferred or delivered. *Carpenter* v. *Longan*, 16 Wall. 271; *American File Co.* v. *Garrett*, 110 U. S. 288; *Pierce* v. *Faunce*, 47 Maine, 507; *Taylor* v. *Page*, 6 Allen, 86; *Green* v. *Hart*, 1 Johns. 580; *Jackson* v. *Blodgett*, 5 Cow. 202; *Bloomer* v. *Henderson*, 8 Michigan, 395; *Judge* v. *Vogel*, 38 Michigan, 568; *Croft* v. *Bunster*, 9 Wisconsin, 503.

The recital of an unconstitutional act in the bonds could, of itself, have no effect. *Lippincott* v. *Pana*, 92 Illinois, 24; *School District* v. *Stone*, 106 U. S. 183.

Nor was the State a necessary party to the litigation. The

bill recites a repudiation of the debt by the State and its refusal to proceed further in regard thereto. And the mere fact that the State might choose to assert some interest would not oust the court of jurisdiction. *United States* v. *Peters*, 5 Cranch, 115. The State not being liable, we had a right to proceed against the Railroad Company. *Railroad Companies* v. *Schutte*, 103 U. S. 118; *Railroad Co.* v. *Howard*, 7 Wall. 392.

Inasmuch as the Arkansas Central Railway Company was estopped by its guaranty to question the validity of the bonds, and inasmuch as it agreed, "on default of the State of Arkansas to pay the principal or interest of the bonds, or either, as the same shall become due," . . . "to pay the same to the holder," etc., it cannot say that the bonds and coupons were not valid under the act of 1867, no matter what the recitals of the bonds were — and although they might on their face have referred to an act that never had taken effect. The railway company, by sending out the bonds, with its guaranty, proclaimed that they were duly and properly issued, under a valid law, and that if the State did not pay them, it would do so immediately upon the State's default.

III. The present owners are answerable as trustees. *Drury* v. *Cross*, 7 Wall. 299; *Jackson* v. *Ludeling*, 21 Wall. 616; *McGourkey* v. *Toledo & Ohio Central Railway Co.*, 146 U. S. 536; *Richardson* v. *Green*, 133 U. S. 30; *Railroad Co.* v. *Howard*, 7 Wall. 392.

Mr. John J. Hornor for the Arkansas Midland Railroad Company and the Union Trust Company, appellees.

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

1. The principal question in this case is whether the acts of July 21, 1868, and April 10, 1869, taken together, created any lien upon the property of a railroad company for whose benefit state bonds were issued. That question was determined in *Tompkins* v. *Fort Smith Railway Co.*, 125 U. S. 109, 126, 127.

After observing that if the statutes in question, read in the light of the circumstances attending their passage, disclosed an intention to charge the road of any company to which bonds were issued with liability for the repayment of any loan to it, a court of equity should enforce that charge, Chief Justice Waite, delivering judgment in that case, said: "But after a careful consideration of the statutes, and construing them liberally in favor of the State, we have been unable to find that any such intention did in fact exist. There was a plain and simple way in which such a lien could be created, and that was by providing in express terms for it. That way had been adopted by the State in a statute passed March 18, 1867, and it was the way usually adopted by other States when granting similar aid to their own companies. The wide departure which Arkansas made in this statute from the accustomed form of proceeding, both at home and elsewhere, is strongly indicative of an intention to waive security any further than was embraced in the reserved power of sequestration. The constitution of the State gave authority to issue bonds in aid of such works of internal improvement if assented to by the people. If the people gave their consent, then the bonds when issued became the debt of the State, and there was power in the general assembly, under the constitution of 1868, to levy taxes for their payment, if necessary. This disposes of the cases and renders it unnecessary to consider any of the other questions discussed at the bar or in the briefs. In our opinion, the new companies took the roads free from incumbrance in favor of the State, and neither the State nor its bondholders are entitled to a sequestration of the income and revenue arising therefrom in their hands."

An attempt is made to distinguish this case from *Tompkins* v. *Fort Smith Railway Company*, upon the ground that the act of March 18, 1867, referred to in that case, and entitled "An act loaning the faith and credit of the State in aid of the construction of railroads," was in force when the bonds here in question were issued, and that the plaintiffs and those in whose behalf he sues could avail themselves of the lien given by that act for securing the payment of bonds issued by the

State in aid of the construction of railroads. The section of the act of 1867 giving the lien referred to is in these words: "SEC. 5. That the receipt of any railroad company for the bonds loaned to it by the State shall immediately operate as a lien upon the road, its rights, franchises, and all its property of every description, real and personal; and this lien shall be a mortgage on all the property, rights, and credits of the road, and shall have priority over any and all other debts, contracts, or liabilities of said road; and said mortgage shall continue until the entire amount loaned to the said road by the State shall have been paid off." Laws of Arkansas, 1866–7, No. 166, pp. 428, 430.

The suggestion that the act of 1867 was in force after the passage of that of 1868 is based upon the 12th section of the latter act, which provides: "At the next general election to be holden under the provisions of section three of article fifteen of the constitution of this State, the proper officers having charge of such election shall, upon a poll, as in other cases, take and receive the ballots of the electors qualified to vote for officers at such election for and against this act, in compliance with section six of article ten of the constitution; such ballot to contain the words 'For Railroads' or 'Against Railroads,' and if it appears that a majority so voting have voted 'For Railroads,' this act shall immediately become operative and have full force, and all laws heretofore passed for loaning the credit of this State in aid of railroads shall cease and be void, but if a majority shall be found to have voted 'Against Railroads,' this act shall be void and of no effect." In *Arkansas* v. *Little Rock, Mississippi & Texas Railway*, 31 Arkansas, 701, 721, it was held that the election in 1868 at which the people of Arkansas voted "For Railroads" was a nullity, having been held before the act of 1868 took effect under the constitution of Arkansas, and, consequently, any bonds based upon that election were void. The state court, in its opinion, also suggested reasons why the act of 1868 might be held void as not having been read the requisite number of times, on different days, as required by the state constitution. But it disclaimed any purpose to rest its decision

upon that ground, and placed it upon the one above stated, observing that "the bonds of the State of Arkansas, issued by the governor of the State, her agent, are void, even in the hands of innocent purchasers, because the authority to contract did not exist at the time the bonds were issued."

Upon basis of this decision of the state court it is contended that the act of 1867 was not repealed — the argument being that the laws in force at the date of the act of 1868 authorizing the credit of the State to be loaned in aid of the construction of railroads, were to "cease and be void" only when the act of 1868 became operative and in full force, which, according to the terms of that act, could not, it is claimed, occur until a majority of the qualified electors voting should, at a *valid* election, have voted "For Railroads."

This argument would be entitled to consideration if the act of 1867 was in force after the adoption of the state constitution of 1868, which provided that "the credit of the State or counties shall never be loaned for any purpose without the consent of the people thereof, expressed through the ballot-box." Art. 10, § 6. The state constitution of 1864, in force when the act of 1867 was passed, contained no such restriction upon legislation. As that act authorized the loaning of the credit of the State in aid of the construction of railroads, without first ascertaining by vote the will of the people upon the subject, no bonds could be issued under it, after the adoption of the constitution of 1868, without popular sanction given at a valid election. The express prohibition in that constitution against loaning the credit of the State for any purpose without the previous assent of the people, expressed at the polls, had the effect to withdraw all authority given in previous statutes to lend the credit of the State without first obtaining the consent of the people. *Aspinwall* v. *Daviess County*, 22 How. 364; *Wadsworth* v. *Supervisors*, 102 U. S. 534. In this view, it is unnecessary to consider whether the act of 1868 was void as not having been passed in conformity with the constitutional provision declaring that "every bill and joint resolution shall be read three times, on different days, in each house, before the final passage thereof, unless two-thirds of the house where the

same is pending shall dispense with the rules." Const. Arkansas, 1868, Art. 5, § 21. Even if that act became a law, and if the election of 1868 was valid, still no lien was given by the act of 1868 upon the road of any company receiving bonds from the State. Such was the express decision in the *Tompkins case*, and we again so adjudge upon the authority of that case.

What has been said shows that the plaintiff cannot take anything on account of the act of April 10, 1869, which assumed to make provision for the payment of the interest on the bonds issued under the act of 1868, in case a company receiving bonds failed to meet such interest at maturity. That act authorized the treasurer of the State to obtain a writ of sequestration, and also the appointment of a receiver who should take the income and revenues of the defaulting company and all moneys arising from the operation of its road. Upon this point, it is quite sufficient to say that it was adjudged in the *Tompkins case* that the companies that subsequently took a road under foreclosure proceedings, took it "free from incumbrance in favor of the State, and that neither the State nor its bondholders are entitled to a sequestration of the income and revenues arising therefrom in their hands."

2. Apart from any question of lien upon the road of the defendant, does the bill disclose any ground for the relief asked by the plaintiff? Undoubtedly the Arkansas Central Railway Company, to which the bonds were delivered, became liable under its guaranty, endorsed on each bond, of the payment by the State of the principal and interest as they respectively became due. But that only made each holder of bonds a general creditor of the company, without any lien for their security upon its property or revenues. The existence of this liability did not prevent the company from giving a mortgage upon its property to secure any bonds it might issue. The bill shows that the Arkansas Central Railway Company executed to the Union Trust Company in 1871 a mortgage or deed of trust, covering all of its property, to secure the payment of coupon bonds amounting to $1,200,000, and that that mortgage was foreclosed, and the property sold in 1877 in a suit brought

by the mortgagee against the mortgagor. We find nothing in the bill impeaching the validity of that sale, or that would justify the court in holding that the title to the mortgaged property did not pass to the purchaser, S. H. Horner, trustee, free from any claims upon the part of the company's creditors.

It is true that the bill charges that Johnson was president of the railway company as well when the foreclosure proceedings were instituted as while they were pending, and that he "brought about" the foreclosure. By what means did he bring about such foreclosure? Upon that point the bill is silent. It is not suggested that the railway company was able to meet the interest on the bonds secured by the mortgage to the Union Trust Company, or that it was possible for Johnson, or any one else connected with the railway company, to have prevented a foreclosure and a sale of the mortgaged property. So that the charge that Johnson "brought about" the foreclosure does not necessarily impute to him any fraud of which the general creditors of the railway company could complain, or which would affect the integrity of the purchase at the sale in the foreclosure suit. If, then, the purchase by S. H. Horner, trustee, could not be impeached by the holders of state bonds, the payment of which had been guaranteed by the railway company, it is of no consequence to those holders what the purchaser did with the property, or to whom he sold it. So far as the bill discloses, the purchaser took title free from any claim upon it by any creditor of the railway company.

We attach no consequence to the allegation that S. H. Horner "pretended" to have purchased the road as trustee for Johnson. If the former, in fact, purchased for Johnson, and if that circumstance could have affected the validity of Horner's purchase, as against the creditors of the railway company, the allegation upon this subject should have been more direct and positive. Besides, if the sale of the road was not "brought about" by Johnson in violation of his duty as an officer of the company, his official relations to the company prior to the foreclosure did not prevent him from bidding for the property, or from being interested in its purchase by S. H. Horner trustee. So far as is disclosed by the bill, the sale, under

the decree in the suit brought by the Union Trust Company, was fairly conducted, with full opportunity to all persons to become bidders.

Nor is the fact that Johnson was the holder of receiver's certificates, which became a charge upon the property superior to the mortgage bonds in suit, material in the present inquiry; for it does not appear that, if there had been no such certificates in existence, anything would have been left for the general creditors of the railway company after satisfying the holders of mortgage bonds. There is no suggestion in the bill that any receiver's certificates were issued that ought not to have been issued, or in respect to which the court was not fully informed. The mere fact that Johnson obtained receiver's certificates — even assuming that his ownership of them was inconsistent with the relations he held to the mortgaged property — does not affect the validity or integrity of the foreclosure proceedings and the sale of the property under the decree of the court.

Some stress is placed upon the fact that neither the State nor the holders of its bonds were parties to the suit brought by the Union Trust Company. The State could not have been made a party defendant without its consent. Besides, it had, as we have seen, no lien upon or interest in the property, and was under no liability in respect to the bonds issued under the act of 1868. Clearly, the holders of bonds were not necessary parties. They had no lien upon the property, and, at most, were only creditors of the company in virtue of its guaranty endorsed upon the bonds. The only necessary parties were the mortgagee and mortgagor companies.

In respect to the charge that Johnson and J. J. Horner fraudulently procured the issuing by the State of the bonds in question, we do not perceive how such conduct upon their part can constitute a ground for the relief asked in this case. The wrong charged was a wrong to the State of which it could have complained, if the bonds, so fraudulently procured to be issued, had become valid obligations. But, as we have seen, the bonds were invalid as against the State. The fraud alleged to have been practised in procuring the issuing of

them had no connection, in law, with the mortgage executed by the railway company to the Union Trust Company, under which the property was purchased by S. H. Horner at public sale ordered by the decree of a court that had full jurisdiction of the parties and the subject-matter.

Looking at all the allegations of the bill, we are of opinion that the plaintiffs were not entitled to the relief asked.

Decree affirmed.

Mr. Justice White, not having been a member of the court when this case was argued, took no part in its decision.

MACLAY *v.* EQUITABLE LIFE ASSURANCE SOCIETY.

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

No. 281. Argued and submitted March 14, 1894. — Decided March 26, 1894.

A guardian of a minor, to whom a policy of life insurance on the tontine dividend plan is payable, is authorized, after the completion of the tontine dividend period, and upon receiving its actual surrender value, to discharge the policy, without any order of court; notwithstanding the provisions of the statutes of Mississippi, authorizing him to obtain an order of court for the sale of personal property, or for the sale or compromise of claims.

This was an action, brought February 12, 1889, in the civil district court for the parish of Orleans in the State of Louisiana, by Robert P. Maclay, a citizen of Louisiana, and tutor of Mason Snowden, a minor child and sole issue of Samuel H. Snowden and Mary Louisa, his wife, against the Equitable Life Assurance Society of the United States, a corporation of New York; and removed by the defendant into the Circuit Court of the United States for the Eastern District of Louisiana; to recover the sum of $10,000, with accrued dividends, less any amounts due for premiums, upon a policy, dated July 6, 1870, by which the defendant, in consideration of the sum of $67.70 paid by Mrs. Snowden, and of quarterly

premiums of a like sum to be paid on the fifth days of October, January, April and July in every year during the continuance of the policy, insured "the life of the said Samuel H. Snowden, of New Orleans, in the parish of Orleans, State of Louisiana, for the sole use of the said wife, in the amount of $10,000, for the term of his natural life;" and promised to pay that amount at its office in the city of New York to her, if living, and, if not living, to his children, "or their guardian, for their use," or, if there should be no such children surviving, then to his executors, administrators or assigns, in sixty days after due notice and satisfactory proof of his death during the continuance of the policy, the balance of the year's premium, if any, being first deducted therefrom.

The policy declared that it was "issued and accepted by the assured upon the following special agreements and conditions, relative to tontine dividend policies:

"First. That this policy is issued under the tontine dividend plan, class A.

"Second. That the tontine dividend period for this policy shall be completed on the first day of June in the year eighteen hundred and eighty-six.

"Third. That no dividend shall be allowed or paid upon this policy, unless the person whose life is hereby assured shall survive until the completion of its tontine dividend period, and unless this policy shall be then in force.

"Fourth. That all surplus or profits derived from such policies, in any class on the tontine dividend plan, as shall cease to be in force before the completion of their respective tontine dividend periods, shall be apportioned equitably among such policies of the same class as shall complete their tontine dividend periods.

"Fifth. That the tontine dividend, when made, shall be applied only to the purchase of an annuity to reduce premiums during the whole subsequent continuance of this policy; and that the first payment of such annuity shall be due at the commencement of the assurance year of the policy immediately succeeding the year in which the tontine dividend period of this policy shall be completed; provided, that if in any year

the amount derived from dividends on this policy shall exceed the amount of premiums due thereon, the excess shall be paid in cash to said Samuel H. Snowden or assigns.

"Sixth. That previous to the completion of its tontine dividend period this policy shall have no surrender value in cash or in a paid-up policy."

Mrs. Snowden died August 3, 1883, in the State of Mississippi. Under the laws of Mississippi, Samuel H. Snowden was appointed by the chancery court of Wilkinson county in that State on December 4, 1883, administrator of her personal estate, and gave bond as such, describing himself as of that county and State; and on March 4, 1884, was appointed by the same court, guardian of the person, and of the estate, real and personal, of their child.

On July 19, 1886, the tontine period on the policy having been reached, and the policy having a surrender value, which was proved to have been $3170.40, Samuel H. Snowden, as such guardian, without any application to said chancery court for an order specially authorizing him to do so, requested of the defendant payment of this surrender value, and received the full amount thereof, and gave the defendant a receipt therefor, attaching to his receipt his letters of guardianship.

On March 9, 1888, Samuel H. Snowden died. On April 5, 1888, the plaintiff was appointed and qualified, in Louisiana, tutor of the minor, and afterwards brought this action.

The question in controversy was whether the receipt of the surrender value of the policy by Samuel H. Snowden, as guardian of the minor, was a discharge of the policy.

Upon proof of the foregoing facts, the plaintiff requested the court to instruct the jury "that the receipt of the said amount and discharge of the policy was invalid, and did not bind the ward; and the said guardian, S. H. Snowden, in receiving it and in attempting to discharge the insurance policy, had no authority of the court or of a family meeting or any other authority, excepting that which was vested in him as guardian of the minor under the laws of Mississippi; that the transaction was either a compromise or a sale of a debt,

and therefore was contrary to sections 2065, 2106 and 2110 of the Revised Statutes of Mississippi of 1880," which are copied in the margin.[1]

The court refused to give each of the instructions requested; and instructed the jury "that the transaction on the part of the former guardian, by which he received the surrender value of the policy, was neither a compromise nor a sale of a debt, but, on the other hand, was the collection of a debt which was due in the alternative at the option of the guardian, and that the guardian had authority as a common-law guardian under the laws of Mississippi to make such collection."

The plaintiff excepted to the refusal to give each of the instructions requested, as well as to the instructions given; and, after verdict and judgment for the defendant, tendered a bill of exceptions, and sued out this writ of error.

Mr. Frank L. Richardson, for plaintiff in error, submitted on his brief.

Mr. Charles B. Alexander for defendant in error.

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[1] SEC. 2065. The chancery court may, by decree, authorize any executor or administrator to sell or compromise any claims due the estate, which cannot be readily collected, if the executor or administrator shall petition for that purpose, and shall show that such sale or compromise will promote the interests of the estate. But no such order of sale shall be made until twelve months have elapsed from the grant of the letters. And if a sale be ordered, it shall be made at the court-house door for cash to the highest bidder; but the executor or administrator shall first give twenty days' notice of the time and place of such sale, by advertising the same in a newspaper printed in the county, if there be such, but if not, then in a newspaper published in some convenient county. And the executor or administrator shall make report in writing, of sales and compromises made according to the provisions of this section, to the next succeeding term of the court, which may then be confirmed, unless good cause be shown for setting the same aside.

SEC. 2106. The court may order a sale of personal property of a ward, whenever the interest of such ward will be promoted thereby, which sale shall be made as directed by the court.

SEC. 2110. Guardians may be empowered by the court to sell or compromise claims due their wards, on the same terms prescribed in reference to the sale or compromise of claims due estates of deceased persons.

Opinion of the Court.

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

By the terms of the policy sued on, the amount of the insurance upon the life of Samuel H. Snowden was payable, after notice and proof of his death, to his wife, if living, and if not living, to his children, or their guardian, for their use.

It was proved at the trial that the wife died in Mississippi; that the husband was thereupon appointed, under the laws of Mississippi and by the chancery court of the county of Wilkinson in that State, administrator of her estate, and guardian of the person and property of their only child; and that he described himself, in his administration bond, as of the same county and State. It may be assumed, therefore, that the domicil of himself and his ward at that time was in Mississippi; and it is not suggested that he was not lawfully appointed guardian.

A guardian, unless his powers in this respect are restricted by statute, is authorized, by virtue of his office, and without any order of court, to sell his ward's personal property and reinvest the proceeds, and to collect or compromise and release debts due to the ward, subject to the liability to be called to account in the proper court if he has acted without due regard to the ward's interest. *Lamar* v. *Micou*, 112 U. S. 452, 475; *Field* v. *Schieffelin*, 7 Johns. Ch. 150, 154; *Ellis* v. *Essex Merrimac Bridge*, 2 Pick. 243; *Ordinary* v. *Dean*, 15 Vroom, (44 N. J. Law,) 64, 67; *Pierson* v. *Shore*, West Ch. 711; *S. C.* 1 Atk. 480; *Inwood* v. *Twyne*, Ambler, 417, 419; *S. C.* 2 Eden, 148, 152.

In the case at bar, the validity of the receipt by the father, as such guardian, of the surrender value of the policy, in discharge of all further claim under it, is contested by the plaintiff, (appointed in Louisiana, since the father's death, tutor or guardian of the minor,) upon the ground that it was a compromise or sale of a debt due the ward, unauthorized by the law of Mississippi, because the statutes of that State provide that the chancery court may empower a guardian to sell

personal property of his ward, or to sell or compromise claims due to the ward, as therein directed. Miss. Rev. Stat. of 1880, §§ 2065, 2106, 2110.

But those statutes, limiting the general power of disposition which executors and administrators, as well as guardians, had at common law, have been strictly construed by the Supreme Court of Mississippi. *Bland* v. *Muncaster*, 24 Mississippi, 62, 65. Sales of personal property by executors or administrators have been held by that court to be void, because of other provisions of the statutes, making an order of court essential to the validity of such sales, except in specified cases. See §§ 2032, 2033, 2035, 2038, 2077; Hutchinson's Code, c. 49, § 109; *Cable* v. *Martin*, 1 How. (Miss.) 558, 561; *Worten* v. *Howard*, 2 Sm. & Marsh. 527, 529; *Gelstrop* v. *Moore*, 26 Mississippi, 206, 209. But the statutes relied on, so far as they relate to guardians, would seem to be permissive and not restrictive, and only to provide a mode by which the guardian may obtain in advance a judicial approval of such a sale or compromise, and thereby, in the absence of fraud, establish that it is for the interest of the ward, instead of leaving that fact open to dispute at a future day.

However that may be, the guardian was certainly authorized to collect for the benefit of his ward any amount due under the policy, and had the right and the duty to elect, either to keep it in force by paying the premiums, or to surrender it in consideration of being paid at once its surrender value, whichever appeared to be most beneficial to the ward. *Cocke* v. *Rucks*, 34 Mississippi, 105, 108; *Martin* v. *Tarver*, 43 Mississippi, 517; *Berry* v. *Parkes*, 3 Sm. & Marsh. 625; *Chapman* v. *Tibbits*, 33 N. Y. 289. The amount received was proved to be the surrender value of the policy; and there is nothing to show, or even to raise a suspicion, that the action of the guardian was not for the best interest of the ward, upon the state of facts then existing.

Under the circumstances of this case, therefore, it was rightly held by the court below, that the transaction in question was neither a compromise nor a sale of a debt, but was the collection of a debt due in the alternative at the option of the guar-

dian, and was one which he had authority to make under the laws of Mississippi.

The case is quite different from *Hayes* v. *Massachusetts Life Ins. Co.*, 125 Illinois, 626, cited by the plaintiff, in which, after the death of the man whose life was insured, the guardian of his children gave up the policy in consideration of a payment of about half its amount.

Judgment affirmed.

MANUEL *v.* WULFF.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 214. Submitted January 17, 1894. — Decided March 26, 1894.

A deed of a mining claim by a qualified locator to an alien operates as a transfer of the claim to the grantee, subject to question in regard to his citizenship by the government only.

If, in a contest concerning a mining claim, under Rev. Stat. § 2326, one party, who is an alien at the outset, becomes a citizen during the proceedings and before judgment, his disability under Rev. Stat. § 2319 to take title is thereby removed.

This was an action in the ordinary form of a contest between two claimants of a quartz lode mining claim upon the lands of the United States to determine the right to proceed in the United States land office for patent therefor. Moses Manuel, defendant below, made application in the land office at Helena, Montana, for a patent for the Marshal Ney lode mining claim, which application Iver Wulff, plaintiff below, adversely contested, basing his contest upon his right to the premises by virtue of their location and possession as the Columbia mining claim. This proceeding was thereupon commenced in the District Court for Lewis and Clarke County of the Territory of Montana, in accordance with section 2326 of the Revised Statutes.

The title of plaintiff was put in issue by the pleadings and the defendant filed a counter claim charging that the Columbia

lode location was forfeited by reason of the want of required annual work, and that the ground in controversy was unoccupied public domain at the time of the location of the Marshal Ney. This was denied by plaintiff in his replication.

Upon the trial it appeared that Henry Pflaume, who was a citizen of the United States, located the Columbia lode mining claim, July 1, 1882; that November 1, 1885, he conveyed the claim to Fred. Manuel by deed, and that November 30, 1887, Fred. Manuel conveyed the same property by deed to Iver Wulff, the plaintiff; that one Alfred Manuel, who was a citizen of the United States, located the same mining claim under the name of the "Marshal Ney," (claiming that the Columbia lode location had been abandoned and forfeited for the reason that no work was done thereon during the years 1883 and 1884,) and conveyed to Moses Manuel, the defendant, a one-third interest therein, October 12, 1885, and the remaining two-thirds, October 15, 1887, by deeds duly executed and recorded.

It further appeared that Moses Manuel was born in Canada and came to this country when about eight years old with his father, whom he supposed had been naturalized, and that he was thus a citizen of the United States. But the court held that he was not a citizen, whereupon he was naturalized, pending the trial, under the provisions of section 2167 of the Revised Statutes. The District Court then non-suited defendant upon his counter claim, and did not permit him to proceed with his case, upon the ground that he was not a citizen at the time that Alfred Manuel executed to him the deeds of conveyance of the Marshal Ney lode mining claim and at the time the suit was commenced, holding that the attempt on the part of Alfred Manuel to convey the mining claim operated as an abandonment thereof. Defendant then moved that plaintiff be non-suited, which motion was denied, but the question raised in respect thereof need not be examined here. Judgment was thereupon given in favor of Wulff, and defendant took the case by appeal to the Supreme Court of the State, (which had been admitted into the Union in the meantime,) by which the judgment was affirmed. The opinion of the

court will be found reported in 9 Montana, 279. The case was then brought to this court by writ of error.

Mr. John B. Clayberg, for plaintiff in error, submitted on his brief.

No appearance for defendant in error.

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

The Supreme Court of Montana recognized the settled rule that an alien may take and hold land by purchase until office found, and that, if the alien become a citizen before his alienage has been adjudged, the act of naturalization takes effect by relation; but held that "possessory rights to mining claims on the public domain of the United States," although "endowed with the qualities of real estate to a high degree," did not come within that rule.

The argument was that as by statute mineral lands are not open to exploration, occupation, or purchase by aliens, but only by citizens of the United States and those who have declared their intention to become such, upon compliance with the laws and local mining rules and regulations as to location and possession, title and possessory rights to mining claims thus acquirable solely by virtue of the statute and in the manner prescribed thereby, must be regarded as passing as by operation of law, and not as by grant. Hence that mining claims are controlled by the rule which forbids the alien to take or hold real estate by descent, since it is the rule of law and not the act of the party that vests title in the heir, and it would be an idle thing to vest title by one act of law and then take it away by another. The court was of opinion that upon principle the analogy between an alien heir claiming by descent and an alien miner claiming under the mining laws was complete; and that as Moses Manuel was incapable of taking, the conveyance to him by Alfred Manuel, who was a citizen, amounted to an abandonment by the latter. We are unable to concur in this view. We do not think that the

transfer of a mining claim by a qualified locator to an alien is to be treated as *ipso facto* an abandonment or that the analogy of such a case to the casting of descent upon an alien can be maintained.

Among the cases often referred to upon the general subject and cited by the Montana Supreme Court is *Governeur* v. *Robertson*, 11 Wheat. 332, 350, 354. That was an action of ejectment and the facts these: Plaintiff claimed under one Brantz, who, being an alien, obtained, October 11, 1784, two grants from the Commonwealth of Virginia, of lands lying in Kentucky. He became naturalized in Maryland, November 8, 1784, and his title was confirmed to him and to his heirs and their grantees by the legislature of Kentucky in 1796 and 1799. Defendant claimed under a grant of Virginia made to a citizen in 1785.

This court, speaking by Mr. Justice Johnson, among other things, said:

"On this subject of relation, the authorities are so ancient, so uniform, and universal, that nothing can raise a doubt that it has a material bearing on this cause, but the question whether naturalization in Maryland was equivalent to naturalization in Kentucky. To this the articles of confederation furnish an affirmative answer, and the defendant has not made it a question. Nor, indeed, has he made a question on the subject of relation back; yet it is not easy to see how he could claim the benefit of an affirmative answer on the question he has raised, without first extricating his cause from the effects of the subsequent naturalization, upon the rights derived to Brantz through his patent. The question argued, and intended to be exclusively presented here, is, whether a patent for land to an alien, be not an absolute nullity.

"The argument is, that it was so at common law, and that the Virginia land laws, in some of their provisions, affirm the common law on this subject.

"We think the doctrine of the defendant is not to be sustained on either ground. . . .

"It is clear, therefore, that this doctrine has no sufficient sanction in authority; and it will be found equally unsupported by principle or analogy.

"The general rule is positively against it, for the books, old and new, uniformly represent the King as a competent grantor in all cases in which an individual may grant, and any person *in esse*, and not *civiliter mortuus*, as a competent grantee. Femes covert, infants, aliens, persons attainted of treason or felony, clerks, convicts, and many others, are expressly enumerated as competent grantees. (Perkins, Grant, 47, 48, 51, etc.; Comyn's Dig. Grant, B. 1.) It behooves those, therefore, who would except aliens, when the immediate object of the King's grant, to maintain the exception.

"It is argued that there is an analogy between this case and that of the heir, or the widow, or the husband, alien; no one of whom can take, but the King shall enter upon them without office found. Whereas, an alien may take by purchase and hold until divested by office found. It is argued, that the reason usually assigned for this distinction, to wit, *nil frustra agit lex*, may, with the same correctness, be applied to the case of a grant by the King to an alien, as to one taking by descent, dower, or curtesy: That the alien only takes from the King to return the subject of the grant back again to the King by escheat. But, this reasoning obviously assumes as law the very principle it is introduced to support; since, unless the grant be void, it cannot be predicated of it that it was executed in vain. It is also inconsistent with a known and familiar principle in law, and one lying at the very root of the distinction between taking by purchase and taking by descent. It implies, in fact, a repugnancy in language. Since the very reason of the distinction between aliens taking by purchase, and by descent, is, that one takes by deed, the other by act of law; whereas a grantee, *ex vi termini*, takes by deed, and not by act of law. If there is any view of the subject in which an alien, taking under grant, may be considered as taking by operation of law, it is because the grant issues, and takes effect, under a law of the State. But this is by no means the sense of the rule, since attaching to it this idea would be to declare the legislative power of the State incompetent to vest in an alien even a defeasible estate.

"That an alien can take by deed, and can hold until office

found, must now be regarded as a positive rule of law, so well established, that the reason of the rule is little more than a subject for the antiquary."

The objection here rests, however, on the assumption that Congress has not intended to confer any estate in respect of claims of this character because the right of purchase and the right of possession are indivisible, and the validity of the location is destroyed on the transfer of the claim to a person not authorized to keep the location alive. *Tibbitts* v. *Ah Tong*, 4 Montana, 536. Of course, the same qualification required in those who may purchase is required as to those who may possess, but that, in our judgment, does not render possessory rights any the less property susceptible of distinct ownership, nor involve the consequence that their transfer to unqualified persons would operate a forfeiture *eo instanti* as for a violation of a continuing condition precedent so that the removal of the disqualification would not cure the defect. If it could be properly held that the qualification of his grantee should be regarded as at all a condition annexed to the ownership of the qualified locator, such condition would be a condition subsequent, and governed by the rule laid down in *Schulenberg* v. *Harriman*, 21 Wall. 44.

Section 2319 of the Revised Statutes is as follows: "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

And by section 2322, it is provided that when such qualified persons have made discovery of mineral lands and complied with the law, they shall have the exclusive right to possession and enjoyment of the same. It has, therefore, been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged, and

inherited without infringing the title of the United States, and that when a location is perfected, it has the effect of a grant by the United States of the right of present and exclusive possession. *Forbes* v. *Gracey*, 94 U. S. 762; *Belk* v. *Meagher*, 104 U. S. 279; *Gwillim* v. *Donnellan*, 115 U. S. 45; *Noyes* v. *Mantle*, 127 U. S. 348.

This being so, we are of opinion on this record that, as Alfred Manuel was a citizen, if his location were valid, his claim passed to his grantee, not by operation of law, but by virtue of his conveyance, and that the incapacity of the latter to take and hold by reason of alienage was, under the circumstances, open to question by the government only. Inasmuch as this proceeding was based upon the adverse claim of Wulff to the application of Moses Manuel for a patent, the objection of alienage was properly made, but this was as in right and on behalf of the government, and naturalization removed the infirmity before judgment was rendered.

In the Matter of Krogstad, 4 Land Dec. 564, Mr. Justice Lamar, when Secretary of the Interior, ruled that, an alien having made homestead entry and subsequently filed his intention to become a citizen, the alienage at time of entry, in the absence of an adverse claim, would not defeat the right of purchase. *Jackson* v. *Beach*, 1 Johns. Cas. 399; *Governeur* v. *Robertson*, 11 Wheat. 332; and *Osterman* v. *Baldwin*, 6 Wall. 116, were cited to the point that naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture and a confirmation of title. This seems to have long been the settled rule in the Land Department; *Man* v. *Huk*, 3 Land Dec. 452; *Lord* v. *Perrin*, 8 Land Dec. 536; so that if there had been no adverse claim in the land office, Moses Manuel's application, which appears, in respect of this question, to have been made in good faith, would not have been rejected on the mere ground of alienage when he made it. And as Moses Manuel was the grantee of a qualified locator, and became naturalized before the order, we conclude that there was error in the direction of a nonsuit.

The judgment of the Supreme Court of Montana is reversed, and the cause remanded with a direction to reverse the

judgment of the court below and for further proceedings in conformity with this opinion.

Mr. Justice White, not having been a member of the court when this case was considered, took no part in its decision.

CITY BANK OF FORT WORTH *v.* HUNTER.

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

No. 264. Submitted March 8, 1894. — Decided March 19, 1894.

Compliance with a mandate of this court, which leaves nothing to the judgment or discretion of the court below, may be enforced by mandamus.

This court cannot entertain an appeal from a judgment executing its mandate, if the value of the matter in dispute upon the appeal is less than $5000.

No appeal lies from a decree for costs.

In *City National Bank of Fort Worth* v. *Hunter*, 129 U. S. 557, 579, will be found a full history of the litigation between the parties to the present appeal. The final decree was reversed, with costs, and the case was remanded with directions to proceed in conformity with the opinion of this court. After the mandate and opinion of this court had been filed in the court below, the cause was again heard, and it was, among other things, adjudged: "That said complainants, R. D. Hunter, A. G. Evans, and R. P. Buel, do have and recover of and from the defendants, the City National Bank of Fort Worth, the sum of twelve thousand nine hundred and eighty-four and $\frac{85}{100}$ ($12,984.85) dollars, together with interest thereon from this date at the rate of eight per cent per annum. It is further ordered, adjudged, and decreed that all costs accrued in this cause up to September 30, 1881, be, and the same are hereby, adjudged against said complainants, R. D. Hunter, A. G. Evans, and R. P. Buel, and for which let

execution issue; and as the costs of the Supreme Court have been allowed against said complainants, all other costs incurred herein which have not been otherwise adjudged be, and the same are hereby, adjudged against said defendant, the City National Bank of Fort Worth."

From this decree the present appeal was prosecuted by the bank. The errors assigned are: 1. The court gave interest on the plaintiff's portion of the fund to be divided. 2. Costs were awarded against the defendant bank.

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

Before discussing the merits of the question at issue, it may be well to allude to the matter of appeal here, upon a sum less than the jurisdictional amount in ordinary cases, as some confusion may arise upon this point since the ruling in *In re Washington & Georgetown Railroad*, 140 U. S. 91. In that case affirmance was had, and nothing more, and the cause sent back to the court below for simply an enforcement of that judgment — no order to proceed further, etc. — no room was left for the exercise of discretion. The lower court, however, did proceed further, and exercised its discretion and added interest when this court had been silent as to interest. The court in this case did proceed as it was directed, but it went outside of the opinion of this court, and did, as appellant contends, what the law did not authorize. The distinction, and the difference between the two cases are clear and marked, and this case comes plainly under the ruling in *Perkins* v. *Fourniquet*, 14 How. 328, and reconciles any apparent conflict there may be between the *Washington & Georgetown Railroad case* and the others of long standing — *Humely* v. *Rose*, 5 Cranch, 313; *The Santa Maria*, 10 Wheat. 431; *Boyce* v. *Grundy*, 9 Pet. 275.

To say that, after the court below was commanded to proceed in conformity with the opinion of this court, and it does proceed and puts an additional burden, not claimed or mentioned in the previous proceedings at all, on the bank of nearly or quite $4000, — the bank cannot appeal to see if

this is in conformity with the opinion of this court, would be quite unreasonable, in fact harsh, and in the teeth of *Perkins* v. *Fourniquet*, which this court, in the *Washington & Georgetown Railroad case*, quotes with approbation. And it is most earnestly submitted that, in no case, however small the amount added to a judgment or decree, after the mandate goes down, that may be considered by the party as inconsistent with the opinion of this court containing directions to proceed as here, can a writ of error, or appeal, as the case may be, be denied? This is but one manner, out of several, to get this court to see if the lower court has not misunderstood, or misconstrued, or both, the judgment or decree of this court. While there should be no doubt of the correctness of this view, yet, if there be one, it should be entirely removed, since this is now a controversy with a national bank, and there is no jurisdictional question of amount.

Mr. H. M. Pollard for appellee.

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

1. It is contended that the decree below, so far as it included interest in favor of the appellees, was not in conformity with the opinion of this court, and, for that reason, should be reversed. The claim is that such interest was "nearly or quite $4000." In that view, has this court jurisdiction, upon appeal, to review the last decree?

In support of our jurisdiction, counsel rely upon *Perkins* v. *Fourniquet*, 14 How. 328. In that case, it was claimed that the decree appealed from exceeded what was allowed upon a previous appeal, by a sum larger than was necessary to give this court jurisdiction. And the question arose whether the alleged error could be reached by an appeal from the last decree. Chief Justice Taney, speaking for this court, said: "This objection to the form of proceeding involves nothing more than a question of practice. The mandate from this court left nothing to the judgment and discretion of the Cir-

cuit Court, but directed it to carry into execution the decree of this court, which was recited in the mandate. And if the decree of this court has been misunderstood or misconstrued by the court below, to the injury of either party, we see no valid objection to an appeal to this court in order to have the error corrected. The question is merely as to the form of proceeding which this court should adopt to enforce the execution of its own mandate in the court below. The subject might, without doubt, be brought before us upon motion, and a mandamus issued to compel its execution. But an appeal from the decision of the court below is equally convenient and suitable; and perhaps more so in some cases, as it gives the adverse party notice that the question will be brought before this court, and affords him the opportunity of being prepared to meet it at an early day of the term." This principle was affirmed in *Milwaukee & Minnesota Railroad* v. *Soutter*, 2 Wall. 440, 443, and recognized in *In re Washington & Georgetown Railroad*, 140 U. S. 92, 95.

The case cited would sustain the present appeal as an appropriate mode for raising the question above stated, if the amount now in dispute was sufficient to give this court jurisdiction to review the last decree. Under the statutes regulating the jurisdiction of this court at the date of the decision in *Perkins* v. *Fourniquet*, the amount there in dispute was sufficient for an appeal. But that case does not sustain the broad proposition that, without reference to the value of the matter in dispute, an *appeal* will lie from a decree, simply upon the ground that it is in violation of or a departure from the mandate of this court. While compliance with a mandate of this court, which leaves nothing to the judgment or discretion of the court below, and simply requires the execution of our decree, may be enforced by mandamus, without regard to the value of the matter in dispute, we cannot entertain an appeal, if the value of the matter in dispute upon such appeal is less than $5000. *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 5 U. S. App. 97, 100.

2. If the sum in dispute on this appeal were sufficient to give us jurisdiction, we could consider the question of costs

referred to in the second assignment of error. But as the appeal in respect to interest must be dismissed for want of jurisdiction, the appeal, in respect to costs, must also be dismissed. No appeal lies from a mere decree for costs. *Canter* v. *American Ins. Co.*, 3 Pet. 307, 319; *Wood* v. *Weimar*, 104 U. S. 786; *Paper-Bag Machine Cases*, 105 U. S. 766.

The appeal is dismissed.

SARGENT *v.* COVERT.

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

No. 298. Argued March 19, 1894. — Decided April 2, 1894.

The alleged invention, protected by letters patent No. 161,757, dated April 6, 1875, issued to James C. Covert for "improvement in clasps or thimbles for hitching devices," did not involve such an exercise of the inventive faculty as entitled it to protection.

THIS was a bill filed by James C. Covert against Joseph B. and George H. Sargent in the Circuit Court of the United States for the Southern District of New York for infringement of letters patent No. 161,757, dated April 6, 1875, issued to complainant for "improvement in clasps or thimbles for hitching devices," upon which a final decree was entered adjudging the patent to be good and valid; that the defendants had infringed the same; and that complainant should recover of the defendant Joseph B. Sargent the sum of $750, and of the defendant George H. Sargent, $250; and costs. From this decree an appeal was taken to this court.

Mr. John Kimberly Beach for appellants.

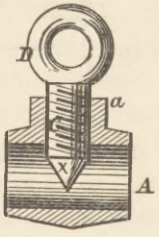
Mr. H. A. Toulmin for appellee.

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

Opinion of the Court.

The patent in suit was issued April 5, 1875, and relates to a device used upon rope halters. That device consists of a tube adapted to slip upon a rope, and having on one of its sides an enlargement with interior screw-threads. A sharp-pointed screw is fitted to pass through the projection at right angles to the bore of the tube so as to enter the rope and hold the tube fast in any given position upon it. This set screw is provided with an eye for the reception of a snap-hook on the end of the hitching rope whereby a loop may be formed to pass around the neck or other part of the animal; the size of the loop being determined by the position of the thimble or tube on the rope.

The specification is accompanied by a drawing, in which Figure 1 was a perspective view, and Figure 2, a longitudinal section, of the alleged invention, Figure 2 being as follows:



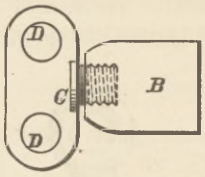
This is thus described in the specification: "A represents a thimble of any suitable dimensions provided on one side with a nut or enlargement, *a*, having a hole through it with female screw-threads. The thimble A is fastened on the rope B at any desired place by means of a sharp-pointed screw, C*x*, which passes through the thimble at the nut *a* and the rope. This screw is provided with a round eye, D, for the reception of a snap-hook."

The claim is: "The combination of the tube A, having the projection *a*, with interior screw-threads cast therewith, and the screw C, having the eye D and the sharp point *x*, for entering into the rope, all constructed as and for the purposes set forth."

The file wrapper and contents showed that the original

claim was: "The combination of the thimble A, rope B, and sharp-pointed screw C, provided with the eye D, substantially as, and for the purposes herein set forth;" but the projection *a* in the claim allowed was not an essential qualification, and complainant insists that the words "cast therewith" do not refer to the "interior screw-threads," and only appear to do so through erroneous punctuation. Defendants' screw-threads were made with a tap in the ordinary way.

In support of the defence of invalidity, defendants introduced a patent issued to John Wiard, June 9, 1868, for an "improvement in cattle tie," in the drawings accompanying which, Figure 2 represented "the adjustable socket of the halter," as follows:



This was described in the specification in these words: "B is a socket, constructed so as to pass freely over the rope, as in Fig. 1, and in one side of which is fitted a thumb screw, C, so that when the said thumb screw is turned hard down upon the rope, the socket will be held firmly in that position, and may be adjusted to different positions on the rope by loosening the screw, and sliding the socket accordingly. The head of the thumb screw C is constructed with a hole, D, at each end, so as to form a means of attachment of the end of the rope thereto."

Comparing these two figures, it will be seen that they are alike except that the end of the screw in the patent sued on is sharpened and the screw has but one eye, whereas the end of the screw in the Wiard patent is blunt and it is provided with two eyes. And these are the particular differences pointed out by complainant's expert, who also testified on cross-examination that if the end of the screw in the Wiard socket were made substantially like the sharpened point *x* of

the Covert patent, that would be, in his opinion, an infringement. According to his view, the most essential advantage of the invention in suit was that which resulted from having the end of the screw sharpened instead of flat, though, he added, "there are advantages in having a single eye to the screw, instead of a double one;" but nevertheless, that he did not "think the use of a double eye instead of a single one would evade the charge of infringement."

The advantages resulting from sharpening the point of the screw were stated by him to be "a sharp-pointed screw will enter the material of which the rope is composed and hold the thimble in a positive manner, and this is true even if the screw becomes slightly slackened; a flat-ended screw simply holds by frictional contact, and if the screw is slightly slackened does not prevent the thimble from being slipped out of place."

It appeared that the Wiard socket as actually made and sold had a convex end; that conical-pointed screws were in common use prior to the patent in suit; that complainant was acquainted with prior devices, including that of Wiard, and sought to improve upon them; and that the sales of his device were large.

Reference was made on the argument to testimony adduced on behalf of complainant tending to show an essential mechanical difference between the two devices in the use of one eye centrally located in the one, and the use of two eyes, each placed one side of the centre, in the other, and it was contended that the former was superior in that the latter was more exposed to being struck and unscrewed, and also exposed to the liability of the attaching hook being snapped "into the wrong eye, especially at night and in the dark, which is constantly the case during the winter months, when much of the caring for stock is done after nightfall."

But be this as it may, the claim of the patent was not limited to the use of a single eye, and it is apparent that the only material difference between the patented thimble and the Wiard socket to be considered is that the screw of the one had a rounded end and the other a sharpened point, while the

difference of operation is manifestly that a sharpened point will enter a material upon which it is directed, further than a rounded point. We cannot perceive in the recognition of the fact that facility of penetration is greater in a sharpened point than in a blunt one, any such evidence of invention as is sufficient to sustain this patent. Moreover, the Wiard screw, which is rounded at its end, is shown to enter the rope when screwed down hard, and in respect of the engagement between the rope and the socket or thimble to operate in the same way as the patented thimble. In other words, it holds by something more than frictional contact. Each of these screws compresses the rope within the socket, but the Covert screw, being sharpened, penetrates further than the other. The change is in degree and not in function.

We think the evidence fails to show that the Wiard socket was not a practicable and successful article, and agree with the remark of Judge Wallace in his opinion overruling the exceptions to the master's report, (38 Fed. Rep. 237, 238,) that: "The patented articles are not so superior to the other fastening devices as to give rise to any cogent presumption that those who purchased them of the defendants would have bought them of the plaintiff in preference to the other devices, and without reference to the difference in price, if they could not have bought them elsewhere."

We are of opinion upon this record that the alleged improvement was such a one as would have occurred to any one practically interested in the subject, and that it did not involve such an exercise of the inventive faculty as entitled it to protection.

The decree is reversed, and the cause remanded with a direction to dismiss the bill.

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

HERRMAN v. ROBERTSON.

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

No. 280. Argued March 14, 1894. — Decided April 2, 1894.

An importation of goods into the port of New York in 1881 being classified under the first clause of Rev. Stat. § 2499 by the customs officers, as bearing a similitude to manufactures composed wholly or in part of the hair of the alpaca, goat, or other like animals, the importer paid the duties demanded under that classification, — 50 cents per pound and 35 per cent ad valorem, — first protesting that the goods were "composed of hair and cotton only, and as such should pay a duty of 35 per cent ad valorem, as a non-enumerated article under the second half of Rev. Stat. § 2499, being the highest rate of duty which any of the component material pays." In an action brought by the importer to recover the alleged excess of duties so demanded and collected, *Held*, that this protest was defective in that it failed to point out or suggest, in any way, the provision which actually controlled, and in effect only raised the question which of two clauses, under one or the other of which it was assumed that the importation came, should govern as being most applicable.

Action to recover duties paid under protest. Trial by jury, and bill of exceptions as follows:

"This action was brought to recover the difference in duty between 35 per cent ad valorem and various higher rates of duty assessed and paid upon certain goods imported by plaintiffs at the port of New York in the year 1881.

"Duties were paid to defendant under protest as follows: Against defendant's liquidation claiming 'The goods in question are liquidated by you as being liable to a duty of 50 cents per pound and 35 per cent ad val.

"'We claim the goods are composed of hair and cotton only, and as such should pay a duty of 35 per cent ad val. as a non-enumerated article under the second half of section 2499, Rev. Stat., being the highest rate of duty which any of the component material pays.'

"Plaintiffs thereafter, in due time, appealed and brought this suit.

"Further to maintain the issues on their part, plaintiffs

introduced samples of the goods in question and evidence tending to show from an analysis their component material to be calf hair and cotton exclusively. Among other evidence on this point a report as to these samples from Prof. Torrey, an expert witness, was verified by him, and on this point was as follows:

"'The sample marked "C 386" by the Republic, August 12, 1887, found to contain 87.4 calf hair and 12.6 cotton by weight.

"'The next sample, "292," Arizona, August 20, 1887, 86.6 calf hair and 13.4 cotton.

"'Sample 760, Alaska, December 1887, 88.5 calf hair and 11.5 cotton.

"'H. T. 2680, 85.6 calf hair and 14.4 cotton.

"'H. T. 2759, 86.1 calf hair and 13.9 cotton.

"'The above samples were all composed of calf hair and cotton, with no admixture of wool that could be detected by the aid of the microscope.

"'(Signed H. G. Torrey, government examiner of textile fabrics.)'

"There was no admixture of wool in the goods.

"It further appeared that the goods in question were a low grade of calf-hair goods. It further appeared that they cost less than forty cents per pound, the foreign value per running yard being from one shilling and ten pence to two pence.

"Plaintiffs having rested, counsel for defendant, without introducing any evidence, moved the court to direct a verdict for the defendant; which motion was granted and the counsel for the plaintiffs then and there duly excepted, and the exception was allowed."

The verdict having been returned as directed and judgment been entered thereon, plaintiffs brought the case to this court on writ of error.

Mr. Edwin B. Smith for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendant in error.

Opinion of the Court.

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

The claim made by the protest was that these goods were dutiable, as non-enumerated, under the last clause of section 2499,[1] at thirty-five per cent ad valorem, as being composed of hair and cotton only, and the cotton chargeable at a higher rate than calf hair. The report of the case, 41 Fed. Rep. 881, shows, and it is so asserted by the government, that the goods were classified under the first clause of that section as bearing a similitude to manufactures composed wholly or in part of "the hair of the alpaca, goat, or other like animals," as provided by the twelfth paragraph of class three of Schedule L, section 2504, Revised Statutes, (2d ed. 471,) and therefore dutiable at twenty, thirty, forty, or fifty cents per pound, according to value, in addition to thirty-five per centum ad valorem. According to the protest, the liquidation was at fifty cents per pound in addition to the thirty-five per cent; according to the bill of exceptions, at "various higher rates" than the thirty-five per cent; and, according to the case as reported, the exaction was at twenty cents per pound and thirty-five per cent ad valorem. What the classification actually was is not shown by the bill of exceptions, but if it were as reported, there is nothing in the record to overcome the presumption in favor of the correctness of the collector's action, and *Arthur* v. *Fox*, 108 U. S. 125, would be in point. But it is admitted that the Circuit Court held that the decis-

[1] "SEC. 2499. There shall be levied, collected, and paid, on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this Title, as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles, on which different rates of duty are chargeable, there shall be levied, collected, and paid, on such non-enumerated article, the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable."

ion in *Arthur* v. *Butterfield*, 125 U. S. 70, applied, and that the goods were manufactures of hair, and as such provided for by the clause in Schedule M, section 2504, Revised Statutes, (2d ed. 476,) under the phrase "and all other manufactures of hair, not otherwise provided for, thirty per centum ad valorem," and therefore, being enumerated, were not within section 2499.

The ruling in *Arthur* v. *Butterfield* was that "goat's-hair goods," composed of eighty per cent of goat's hair and twenty per cent of cotton, came within the clause last above referred to, and that "in the absence of a settled designation of a cloth by merchants and importers, its designation as hair, silk, cotton, or woollen for the purposes of customs revenue depends upon the predominance of such article in its composition, and not upon the absence of any other material." Counsel for plaintiffs in error conceded in argument that that case would be applicable if these fabrics had been eighty per cent of hair in value, but insisted that there was no proof that the hair was the main element of value, and that it did not follow that the relative values accorded with the relative weights. But the bill of exceptions does not exclude the inference that there was evidence of relative value or that counsel assumed that goods consisting by weight of eighty-five and one-half to eighty-eight and one-half per cent of calf's hair to eleven and one-half to fourteen and one-half per cent of cotton were to be taken as containing eighty per cent of hair in value as compared with the value of the cotton.

The case was disposed of below on the question of the sufficiency of the protest, and that is really the only question for consideration here.

The requisition of the statute, Rev. Stat. §§ 2931, 3011; Act of Feb. 27, 1877, c. 69, 19 Stat. 240, 247, as to the notice to be given the collector, in order to recover back an excess of duties paid, is thus expounded by Mr. Justice Clifford in *Davies* v. *Arthur*, 96 U. S. 148, 151.

"Protests of the kind must contain a distinct and clear specification of each substantive ground of objection to the payment of the duties. Technical precision is not required;

but the objections must be so distinct and specific, as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated. *Burgess* v. *Converse*, 2 Curt. 223.

"Two objects, says Judge Curtis, were intended to be accomplished by the provision in the act of Congress requiring such a protest: 1. To apprise the collector of the objections entertained by the importer, before it should be too late to remove them, if capable of being removed. 2. To hold the importer to the objections which he then contemplated, and on which he really acted, and prevent him, or others in his behalf, from seeking out defects in the proceedings, after the business should be closed, by the payment of the money into the Treasury. *Warren* v. *Peaselee*, 2 Curt. 235; *Thomson* v. *Maxwell*, 2 Blatchf. 392."

And this is reiterated in substance by Mr. Justice Blatchford in *Arthur* v. *Morgan*, 112 U. S. 495, 501, where he said for the court: "A protest is not required to be made with technical precision, but is sufficient if it shows fairly that the objection afterwards made at the trial was in the mind of the party and was brought to the knowledge of the collector, so as to secure to the government the practical advantage which the statute was designed to secure." That was the case of the importation of a carriage, claimed in the protest to be "personal effects" used by the owner "over a year" before importation, it being also stated that "personal effects in actual use" were free from duty, whereas the carriage came under the head "household effects in use abroad not less than one year." Personal effects in actual use and household effects if used abroad not less than one year were alike exempt from duty, and as the error was plainly clerical and could not have misled the collector, the protest was held sufficient.

In *Heinze* v. *Arthur's Executors*, 144 U. S. 28, 34, the goods were gloves made on frames and composed of cotton and silk,

in which cotton was the component part of chief value, and were dutiable at thirty-five per cent ad valorem, less ten per cent, as gloves made on frames of whatever material composed. The collector rated them at sixty per cent ad valorem as "ready-made clothing of silk, or of which silk shall be a component material of chief value," or "silk gloves."

The protest specifically stated that the goods were "partly cotton gloves mixed with silk," and "composed of cotton and silk, cotton, chief part, the duty of 60 per cent being only legal where silk is the chief part," and that the gloves were liable to a duty of only thirty-five per cent, less ten per cent. The objection was that the protest did not state that the gloves were made on frames, and this court held, again speaking through Mr. Justice Blatchford, that: "It is entirely immaterial that the protest did not specify that the gloves were made on frames. It was sufficient to state that the gloves were composed of cotton and silk, and that the cotton was the component material or part of chief value, and the silk was not the component material of chief value. The importers were bound only to state, as they did, that the duty of 60 per cent was illegal, and why it was illegal."

In the case at bar, the goods were apparently classified under the similitude clause, but that was not correct because they were to be regarded as "manufactures of hair," and therefore enumerated.

But the importers also insisted that the goods were non-enumerated, and did not assert that they were not within the clause relied on by the collector, save as it was objected that they came under the last clause of section 2499, which was likewise incorrect. The protest failed to point out or suggest in any way the provision which actually controlled, and in effect only raised the question which of two clauses, under one or the other of which it was assumed that the importation came, should govern as being most applicable. We agree with the Circuit Court in holding the protest to have been insufficient. *Judgment affirmed.*

Mr. Justice Jackson was not present when this case was argued, and took no part in its decision.

HUNTLEY *v.* KINGMAN.

ERROR TO THE UNITED STATES COURT FOR INDIAN TERRITORY.

No. 256. Argued March 12, 1894. — Decided April 2, 1894.

An assignment made in Indian Territory on the 29th day of July, 1889, by a debtor in failing circumstances, of a portion of his property to a trustee for the benefit of several persons who had become sureties on notes of the assignor not then due, being made in good faith and for a valuable consideration, was valid as against attaching creditors of the assignor, the common law being at that time in force in the Territory, and not the statutes of Arkansas which were subsequently extended and put in force in the Territory by the act of May 2, 1890, c. 182, 26 Stat. 81.

At common law a debtor in failing circumstances has a right to prefer creditors, though the fund for the payment of other creditors be lessened or absorbed thereby.

This action was originally begun September 28, 1889, by Kingman & Co., a corporation organized under the laws of Illinois, against one Duncan, whose Christian name is not given, and whose surname is sometimes spelled Duncum and sometimes Duncan, a white man, a citizen of the United States, and a resident of the Indian Territory, to recover the sum of $1994.42 with interest and exchange, being the amount of two promissory notes made by Duncan, payable to the order of the plaintiff, but not then due. The complaint contained an allegation that Duncan, the defendant, had disposed of his property, and had suffered it to be sold, with intent to defraud his creditors, and to hinder and delay them in the collection of their debts, and also that he was about to remove his property, or a material part thereof, out of the Indian Territory, with fraudulent intent, etc., and prayed for an attachment and a judgment. On the same day a formal affidavit for an attachment was filed, and a writ issued.

Pursuant to the attachment, the marshal seized a stock of goods as the property of Duncan, and plaintiffs in error filed an interplea, setting up that the interpleaders were sureties for the defendant Duncan, upon certain promissory notes, two

of which were then overdue, and that on July 27, 1889, Duncan, for the purpose of saving his sureties harmless, executed and delivered to one Salters, whose Christian name is not given, as trustee, a deed of trust of his stock of goods. That immediately after the execution of such deed, Salters, at the instance of the beneficiaries, took absolute possession of the property named in the deed of trust, and began the discharge of his duties as trustee, advertised the property for sale, and had procured a buyer for the same at its full cash value, at the time the levy was made which stopped the sale; that, at the time of such levy, the trustee was in actual possession of the property; that the plaintiffs and the officers making the levy were notified of the fact; and that the notes, to secure which the deed of trust was given, were still unpaid and valid claims against Duncan and his sureties; that the deed of trust is a valid lien upon the property; that the property is not worth the amount of the lien, nor more than the sum of $2500; that a sale by the marshal would necessarily be attended with great loss, and that the trustee could sell the property at a much better advantage than the marshal. Wherefore the trustee and sureties prayed for an order restoring the property to the trustee, and for the execution of the trust.

The so-called deed of trust was as follows:

"State of Texas, }
County of Cooke. }

"Know all men by these presents, that I, W. H. Duncan, a resident of the Indian Territory, for and in consideration of the sum of ten dollars paid by J. J. Salters, the receipt of which is hereby acknowledged, have sold, and by these presents do sell, transfer, convey, and confirm, unto the said J. J. Salters and to his successors in this trust the following-described property, to wit: The storehouse now owned and occupied by the said W. H. Duncan, at Beef Creek, in the Indian Territory, the fixtures therein, and all goods, wares, and merchandise contained in said house, and the books, notes, and accounts of said W. H. Duncan in said business, it being

intended hereby to include all stock owned by said W. H. Duncan in his business as a general merchant at Beef Creek, I. T.; also all cattle and horses owned by him at said Beef Creek, together with all and singular the right and appurtenances to the same in any manner belonging or appertaining; to have and hold all and singular the property above described unto the said J. J. Salters or substitute forever. This conveyance is, however, intended as a trust for the better securing of S. M. Huntley, Samuel Paul, S. M. White, and James Rennie against the payment of three promissory notes on which I am principal, and which, as hereafter shown, they signed as sureties; which said notes are as follows."

[Here follow copies of three notes, one by Duncan, White, and Rennie, for $1550, one by Duncan, Paul, and Rennie for $2500, and one by Duncan and Huntley for $5165. The first two were due August 1, 1889, the last June 1, 1890.]

"Upon payment of which said promissory notes according to their face and tenor, being well and truly made, then in such case this conveyance is to become null and void, and shall be released at cost of said W. H. Duncan; but in case of failure or default of payment of said notes when they shall respectively become due, or of either of them, then the other of said notes shall be deemed due and payable; and in such event the said J. J. Salters is, by these presents, fully authorized and empowered, and it is made his special duty upon request of either or all the aforesaid beneficiaries herein at any time made after default as aforesaid, to sell the above described property to the highest bidder for cash in hand — selling at public or private sale, in bulk or retail, with or without advertisement as may seem to said trustee or his substitute best; and after said sale shall make the necessary conveyance of the property so sold, and the proceeds of said sale shall pay to the aforesaid beneficiaries herein, in proportion to the respective amounts for which each may be surety at the time of said sale, as evidenced by the above notes, and the payments that may be made thereon, in which notes all signing are sureties, except W. H. Duncan, and shall pay the expenses of this trust, including a commission of 5% to the trustee acting

Counsel for Plaintiffs in Error.

hereunder, holding the remainder subject to the order of the said W. H. Duncan. It is hereby especially provided that should the trustee named herein from any cause whatever fail or refuse to act or become disqualified from acting as such trustee, then the beneficiaries aforesaid, S. M. Huntley, S. M. White, Samuel Paul, and James Rennie, shall have full power to appoint a substitute, in writing, who shall have the same power as trustee hereinbefore named, and I, by these presents, ratify and confirm any and all acts which said trustee or substitute may do hereunder.

"Witness my hand this 27th of July, 1889.

"W. H. DUNCAN."

Kingman & Co. subsequently filed an answer to this interplea, averring that the notes secured by the deed of trust were void for usury, and for want of consideration; denied that the interpleaders were accommodation endorsers or sureties, or that the trust deed was valid, or gave to the interpleaders any right of property, and alleged that the instrument was made by Duncan for the purpose of placing his property beyond the reach of his creditors, and for the purpose of hindering and delaying them in the collection of their debts; denied that Salters was acting for the beneficiaries named, and averred that he was a clerk of Duncan's and was assisting him in fraudulently disposing of his property, and that he took possession for the purpose of protecting the property from Duncan's creditors.

The case was tried upon the issue joined between Kingman & Co. and the interpleaders. Upon the trial, the court instructed the jury that the deed of trust under which the interpleaders claimed the property was fraudulent on its face; that the same was sufficient for plaintiffs' attachment, and that the jury should return a verdict in its favor, which was accordingly done. The defendants in the proceeding sued out this writ of error.

Mr. John J. Weed for plaintiffs in error.

No appearance for defendants in error.

Opinion of the Court.

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

This case turns upon the validity of the so-called deed of trust executed by Duncan to Salters to indemnify the plaintiffs in error for their signatures upon Duncan's notes.

The property conveyed consisted of a storehouse and its fixtures, together with all the goods, wares, and merchandise contained therein, and the books, notes, and accounts of Duncan in his business as a general merchant, as well as all cattle and horses owned by him at Beef Creek. The testimony indicated that the deed did not include all the property of Duncan, but that he also had a farm near Beef Creek, although the proof was not clear as to its size or value.

No brief was filed by the defendants in error, but in the court below the following clauses appear to have been relied upon as invalidating the deed:

1. The deed was to become null and void upon the payment of the notes secured by it, and there is an inference, though no express provision, that Duncan was to remain in possession until default.

2. Upon default in the payment of either of the notes it was made the duty of the trustee, upon the request of the beneficiaries, or either of them, to sell the property to the highest bidder for cash, either at public or private sale, with or without advertisement.

3. Upon such sale being made, the trustee was to pay to the beneficiaries in proportion to the amounts for which each might be surety at the time of the sale, *holding the remainder subject to Duncan's orders.*

The court instructed the jury that, by the reservation of the surplus, the deed was fraudulent upon its face, and was sufficient ground for the plaintiffs' attachment, and the jury were accordingly instructed to return a verdict for the plaintiffs.

The case must be determined by the application of the general principles of the common law to the questions involved. It is true, that, by act of Congress of May 2, 1890, c. 182, 26 Stat. 81, certain general laws of the State of Arkansas, among

which was a chapter relating to assignments for the benefit of creditors, were extended and put in force in the Indian Territory, until Congress should further provide. But the instrument in question in this case was made July 27, 1889, before this statute was enacted, so that neither the statutes of Arkansas, nor the decisions of the Supreme Court of that State, construing those statutes, constituted at the time a rule of decision of the United States court in the Indian Territory.

There is upon this record but little evidence of actual fraud in the execution of the instrument in question. The notes mentioned, the payment of which it was designed to secure, were given for money borrowed of Stevens & Henning, bankers of Gainesville, for the purchase of grain to feed certain cattle in which Stevens & Henning had an interest. The beneficiaries were joint makers with Duncan of the notes so given to Stevens & Henning. It is entirely well settled, both in England and America, that at common law a debtor in failing circumstances has a right to prefer certain creditors to whom he is under special obligations, though by such preference the fund for the payment of the other creditors be lessened or even absorbed. If, as must be conceded, he has the right to *pay* one creditor in preference to another, even where he is aware of his inability to pay all in full — in other words, where he is insolvent — there is no just reason why, in making provision for all, by way of assignment, he may not make special provision for some. *Marbury* v. *Brooks*, 7 Wheat. 556, 577; *Brashear* v. *West*, 7 Pet. 608; *Clarke* v. *White*, 12 Pet. 178; *Tompkins* v. *Wheeler*, 16 Pet. 106; *Grover* v. *Wakeman*, 11 Wend. 187, 194; *Tillou* v. *Britton*, 4 Halsted, (9 N. J. Law,) 120, 136; *Blakey's Appeal*, 7 Penn. St. 449, 451; Burrill on Assignment, § 160; Jones on Chat. Mtges. § 356.

The tendency of courts in modern times has been, not to hold instruments of this character to be fraudulent and void upon their face, unless they contain provisions plainly inconsistent with an honest purpose, or the instrument indicates with reasonable certainty that it was executed, not to secure *bona fide* creditors, but to enable the debtor to continue to carry on his business under cover of another's name. So early

as 1805, it was held by this court in *United States* v. *Hooe*, 3 Cranch, 73, that the mortgage of a part of his property, made by a collector of revenue to the surety upon his official bond, to indemnify him for his responsibility, and to secure him for endorsements at the bank, was valid against the United States, though it turned out that the mortgagor was unable to pay all his debts at the time the mortgage was given, and the mortgagee also knew at that time that he was largely indebted to the United States. It was contended that the mortgage was fraudulent upon its face, but the case was distinguished from *Twyne's case*, 3 Rep. 81, in the fact that in *Twyne's case* the deed was of *all* the property; was *secret;* was of *chattels*, and purported to be *absolute*, yet the vendor remained in possession and exercised ownership over them; while in the case then under consideration the deed was of a part of the property; was of record; was of lands, and purported to be a conveyance which left the property conveyed in the possession of the grantor. The case was also distinguished from *Hamilton* v. *Russell*, 1 Cranch, 309, in which this court declared an absolute bill of sale of a personal chattel, of which the vendor retained possession, to be a fraud. In *Lukins* v. *Aird*, 6 Wall. 78, an absolute deed of land, with a secret reservation to the grantor to possess and occupy it for a limited time, was held to lack the element of good faith, though made upon a valuable consideration; for, while it purported to be an absolute conveyance on its face, there was a secret agreement between the parties inconsistent with its terms, securing a benefit to the grantor at the expense of those he owed. The deed was held to be void by reason of the trust thus secretly created. So in *Robinson* v. *Elliott*, 22 Wall. 513, 524, a chattel mortgage, which provided that until default was made in the payment of the notes, the mortgagor might remain in possession of the goods, sell the same as theretofore and supply their places with other goods, which should become subjected to the lien of the mortgage, was held to be a fraud upon its face, although the mortgage was recorded according to law. The decision was put upon the ground that both the possession and the right of disposition were to remain with the mortgagors; "they are to

deal with the property as their own; sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit. Instead of the mortgage being directed solely to the *bona fide* security of the debts then existing, and their payment at maturity, it is based on the idea that they may be indefinitely prolonged. . . . It is very clear that the instrument was executed upon the theory that the business could be carried on as formerly by the continued endorsement of Robinson, and that Mrs. Sloan was indifferent about prompt payment." There was no ruling in this case, however, that a mere retention of possession would have avoided the mortgage. Upon the other hand, it was held in *Stewart* v. *Dunham*, 115 U. S. 61, that in the absence of fraud a transfer by a debtor in Mississippi of all his property to one of his creditors in satisfaction of his debt was valid. The case was disposed of as one of general law. And in *Estes* v. *Gunter*, 122 U. S. 450, a deed by an insolvent debtor in Mississippi to secure sureties upon his note, though made in advance of, and in contemplation of, a general assignment for the benefit of creditors, was held to be valid under the laws of that State, though containing a provision that the creditor should remain in possession until the maturity of the note. In this case, also, the common law did not seem to have been affected by any local statute. So, too, in *Smith* v. *Craft*, 123 U. S. 436, a bill of sale of a stock of goods, by way of preference of a *bona fide* creditor, was held not to be fraudulent as matter of law, by reason of a stipulation that the purchaser should employ the debtor at a reasonable salary to wind up the business.

The latest expression of this court upon the subject is contained in the case of *Etheridge* v. *Sperry*, 139 U. S. 266, in which certain creditors of one Hamilton were secured by chattel mortgages upon a stock of goods levied upon by an execution creditor. There was no reservation of interest to the mortgagor, but an express provision that if he defaulted in payment, or attempted to remove from the country any part of the mortgaged property, the mortgagee might take immedi-

ate possession, and before the maturity of the secured notes. The question presented was whether, as matter of law, a mortgage given by a merchant on his stock of goods to secure debts not yet due, which had no imperfections upon its face, contained no reservations for the benefit of the mortgagor, was apparently only for the security of the mortgagee, and gave him full power to take possession upon default of payment, was invalidated by a parol understanding at the time of its execution that the mortgagor might use the proceeds of his sales to support himself, and to keep up the stock by purchase, applying only the surplus to the payment of the mortgage debt; or whether such understanding was simply to be taken into consideration, with the other circumstances, as bearing upon the question of good faith. The cases of *Bank of Leavenworth* v. *Hunt*, 11 Wall. 391; *Robinson* v. *Elliott*, 22 Wall. 513; and *Means* v. *Dowd*, 128 U. S. 273, were all reviewed and distinguished, and it was held that the chattel mortgage was not necessarily invalidated by the parol agreement that the mortgagor was to retain possession with the right to sell the goods at retail, the court placing its opinion largely upon the Iowa cases, which were regarded as resting upon sound principles. See also *People's Savings Bank* v. *Bates*, 120 U. S. 556.

The principal reliance of the court below in this case was placed upon *Means* v. *Dowd*, 128 U. S. 273, 283, which was a conveyance of all the goods and personal property of the assignor to provide for the payment of certain debts, and to indemnify the endorsers upon certain notes. The instrument was variously called a "deed of trust," an "assignment," and a "mortgage." It contained an express provision that the grantors were to remain in possession of the property and continue to sell the goods for cash only, and to collect, under the direction and control of the grantees, the proceeds to be deposited in bank weekly, and applied, under the direction of the grantees, to replenishing the stock by such small bills as might be agreed upon, and to the payment of the debts of the firm in a specified order; and in case of failure to make payments, or if for any other cause the grantees might so elect, it should be lawful for them to take possession and dispose of the same

at public or private sale. This instrument was held to secure to the assignor an interest in, or an unlimited control over the property conveyed, which had the effect of hindering or delaying creditors, and to be void as being a fraud. "In the case before us," said Mr. Justice Miller, "the whole face of the instrument has the obvious purpose of enabling the insolvent debtors who made it to continue in their business unmolested by judicial process, and to withdraw everything they had from the effect of a judgment against them; for it is shown that, except the goods in this place of business transferred by the conveyance, they had nothing of value but one or two pieces of real estate encumbered by mortgage for all they were worth. It specifically provides that the grantors shall remain in possession of the said property and choses in action, with the right to continue to sell the goods and collect the debts under the control and direction of the grantees." The instrument was treated as an artful scheme to enable insolvent debtors to continue in business, in connection with the preferred creditors, at the same time withdrawing their property from the claims of other creditors which might be asserted according to the usual forms of law; and that by the mere expedient of paying interest upon the indebtedness, they had it in their power to continue in business with a large stock of goods on their shelves, and defy the unprotected creditors. The authority to take possession was accompanied by no direction for immediate sale, or winding up the business; but, on the contrary, their discretion as to taking possession and selling seemed to be absolute, and intended to be controlled for their own benefit and that of the debtors, without regard to the unsecured creditors. While the case bears a strong analogy to the one under consideration, we think it is distinguishable in the fact that there was an express provision that the mortgagors should remain in possession and continue business at the will of the mortgagees, who were given such powers as would enable the mortgagors to continue in business for their benefit, and at the same time to bid defiance to the unsecured creditors. In this case there is not only no express reservation of possession to the mortgagor, but even if

there had been, in view of the fact that such possession was immediately surrendered to the mortgagee, it is difficult to see how unsecured creditors could have been deceived or prejudiced by such reservation. In *Means* v. *Dowd*, the mortgage was not recorded, as required by law, for nearly three months after its execution, and the mortgagors were permitted for several months to control the goods and to deal with them as their own. Even when the trustees did in fact take possession, they made no change in the sign nor in the manner of conducting the business, but kept the same books by the same bookkeeper, and also employed the mortgagors to conduct the business upon a salary for them.

There can be no doubt upon this record that the deed of trust in question was made upon a valuable consideration, and for the protection of *bona fide* sureties. The clause most relied upon by the court below is the one which requires that, after payment to the beneficiaries and the expenses of the trust, the remainder should be held subject to the order of Duncan. But if it were not to be paid to Duncan, to whom should it be paid? Clearly the trustee was not entitled to retain any more for himself than was necessary for the payment of the trust and a reasonable compensation for his own services. If he had retained more than this, he might have been compelled by Duncan to account to him for such surplus. Clearly he had no right to pay it to certain of the creditors in preference to others. If he had been a general assignee for the benefit of all the creditors, he would have been obliged to pay them *pro rata;* but he was not. He was a trustee of a part — not necessarily of the whole of Duncan's property — for the benefit of certain creditors, and if any surplus were left after the payment of these creditors, it might properly be paid to the mortgagor for the benefit of the others.

Whatever may be the rule with regard to general assignments for the benefit of creditors, there can be no doubt that, in cases of chattel mortgages, (and the instrument in question, by whatever name it may be called, is in reality a chattel mortgage,) the reservation of a surplus to the mortgagor is only an expression of what the law would imply without a

reservation, and is no evidence of a fraudulent intent. This was the ruling of the Court of Appeals of New York in *Leitch* v. *Hollister*, 4 N. Y. 211, 216, where the assignment was to the creditors themselves for the purpose of securing their demands. "A trust," said the court, "as to the surplus results from the nature of the security, and is not the object, or one of the objects, of the assignment. Whether expressed in the instrument or left to implication, is immaterial. The assignee does not acquire the entire legal and equitable interest in the property conveyed, subject to the trust, but a specific lien upon it. The residuary interest of the assignor may, according to its nature, or that of the property, be reached by execution or by bill in equity." Cases in which reservations for the benefit of the assignor have been held to invalidate the assignment have usually been those where the reservation was either secret, or was upon its face detrimental to the interest of the creditors, and a practical fraud upon them. But if the reservation be only of any surplus which may chance to remain after the debts are paid, it is difficult to see why it should invalidate the instrument, as the creditors obtain all they are entitled to, and the surplus is that which as matter of law properly belongs to the mortgagor. It so rarely happens that a surplus is realized after the payment of all the debts, that courts should not be too technical in holding that the reservation of such surplus invalidates the instrument, unless it appears to have been made with fraudulent intent. If a surplus had been realized in this case, it is difficult to see what could have been done with it, except to return it to the mortgagor, in view of the fact that the trustee was not a general assignee for the benefit of all the creditors. *Dunham* v. *Whitehead*, 21 N. Y. 131; *Curtis* v. *Leavitt*, 15 N. Y. 9, 204; *Beck* v. *Burdett*, 1 Paige, 305; *Camp* v. *Thompson*, 25 Minnesota, 175; *Calloway* v. *People's Bank*, 54 Georgia, 441; *Hoffman* v. *Mackall*, 5 Ohio St. 124.

The judgment of the court below must, therefore, be

Reversed, and the case remanded with directions to set aside the verdict, and grant a new trial.

The Chief Justice concurred in the result.

DEALY v. UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

No. 1035. Argued March 20, 1894. — Decided April 2, 1894.

A *nolle prosequi* as to a count in an indictment works no acquittal, but leaves the prosecution as though no such count had been inserted in the indictment.

A verdict of guilty or not guilty as to the charge in one count of an indictment is not responsive to the charge in any other count.

In charging a conspiracy to defraud the United States of large tracts of land by means of false and fictitious entries under the homestead laws, it is not necessary to specify the tracts by number of section, township, and range.

An entry of lands under the homestead law in popular understanding means not only the preliminary application, but the proceedings as a whole to complete the transfer of title, and in charging a conspiracy to obtain public land by false entries, the word may be used in that sense in the indictment.

A charge that an overt act was done according to and in pursuance of a conspiracy which had been previously recited, is equivalent to charging that it was done to effect the object of the conspiracy.

If an illegal conspiracy be entered into within the limits of the United States and within the jurisdiction of the court, the crime is complete, and the subsequent overt act in pursuance thereof may be done anywhere.

On December 16, 1892, an indictment was returned by the grand jury in the District Court of the United States for the District of North Dakota, charging this plaintiff in error, together with others, with the crime of conspiracy to defraud the United States as denounced in section 5440, Revised Statutes, which reads:

"If two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten

thousand dollars, and to imprisonment not more than two years."

The indictment was in seventeen counts. The first was as follows:

"That on the first day of April, in the year of our Lord one thousand eight hundred and ninety-one, in the county of Rolette, State of North Dakota, and within the jurisdiction of this court, one William W. Allen, one Michael Dealy, one Edward Laberge, one Peter Thibert, and one H. H. Fritz, and others to the grand jury unknown did commit the crime of conspiracy to defraud the United States, committed as follows:

"That at the time and place aforesaid the said William W. Allen, Michael Dealy, Edward Laberge, Peter Thibert, and H. H. Fritz, and others to the grand jury unknown did falsely, unlawfully, and wickedly conspire, combine, confederate, and agree together among themselves to defraud the United States of the title and possession of large tracts of land in said county of great value by means of false, feigned, illegal, and fictitious entries of said lands under the homestead laws of the United States, the said lands being then and there public lands of the United States, open to entry under said homestead laws at the local land office of the United States at Devil's Lake City, in said State, and that according to and in pursuance of said conspiracy, combination, confederacy, and agreement among themselves had as aforesaid the said Allen did persuade and induce one Charles Pattnaude to make filing under said homestead laws and thereafter to make proof and final entry under said laws for the lands known and described as follows: The south half of the northeast quarter and lots one and two of section six, in township one hundred and sixty-three north, of range seventy west, of the fifth principal meridian, said lands lying and being in said county, on which said lands said Pattnaude, as said Allen then and there well knew, had never made settlement, improvement, or residence, contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States."

Counsel for Parties.

In the further counts the conspiracy was charged in substantially the same language, but with it in each a separate overt act, that in the third being stated as follows:

"According to and in pursuance of said conspiracy, combination, confederation, and agreement, the said Allen did fraudulently and unlawfully induce and persuade one Frank Premeau to appear as a witness for one Charles Pattnaude in making final proof under said laws before H. H. Fritz, clerk of the District Court of the State of North Dakota in and for said county, being a court of record of said State, and as such witness before said Fritz to testify and make proof for said Pattnaude in effect that he had resided for more than five years immediately preceding the time of making said proof on the lands known and described as south half of the northeast quarter and lots one and two of section six, township one hundred and sixty-three, range seventy west, of fifth principal meridian, lying and being in said county, public lands of the United States and subject to entry under said laws of said land office, whereas, in fact, said Pattnaude, as said Allen well knew, had never resided on said land at any time within five years prior to making such proof, contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States."

The overt acts stated in the other counts were of a similar character. Prior to the trial a *nolle* was entered as to the second, fourth, fifth, sixth, ninth, and seventeenth counts. The case being tried on the remaining counts, the defendants Allen, Dealy, and Laberge were found guilty on all but the sixteenth. A motion for a new trial and one in arrest of judgment having been overruled, the defendant Dealy was sentenced to imprisonment for the term of one year and one month, and to pay a fine of $1000. To reverse such judgment and sentence he sued out a writ of error from this court.

Mr. A. S. Drake for plaintiff in error.

Mr. Assistant Attorney General Conrad for defendant in error.

Opinion of the Court.

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

The first proposition of counsel for defendant is that the acquittal on certain of the counts works an acquittal as to all. There was in terms no verdict of not guilty as to any count. A *nolle* was entered as to several, but a *nolle* works no acquittal, and leaves the prosecution just as though no such count had ever been inserted in the indictment. Of those remaining, one, the sixteenth count, was not referred to in the verdict. It may have been simply overlooked by the jury. Be that as it may, the discharge of the jury under the circumstances was doubtless equivalent to a verdict of not guilty as to that count. Upon this, defendant's counsel say that the only offence charged is conspiracy, that "the indictment amounts to but one count, and one charge of conspiracy, with seventeen different overt acts," and that an acquittal on one count acquits him of the single offence charged in all the counts. But this is obviously a mistake. It is familiar law that separate counts are united in one indictment, either because entirely separate and distinct offences are intended to be charged, or because the pleader, having in mind but a single offence, varies the statement in the several counts as to the manner or means of its commission in order to avoid at the trial an acquittal by reason of any unforeseen lack of harmony between the allegations and the proofs. 1 Bishop on Criminal Procedure, § 422. Yet, whatever the purpose may be, each count is in form a distinct charge of a separate offence, and hence a verdict of guilty or not guilty as to it is not responsive to the charge in any other count. Take the case of an indictment for murder. Suppose in one count the homicide is charged to have been committed by means of a blow from a pick-axe, and in another by a shot from a pistol. While from the name of the deceased and the time and place of the killing it may be inferred that the same homicide is in the mind of the pleader, yet such inference is not, as a matter of fact, conclusive, and, as a matter of law, is overthrown by the dissimilarity in the means of the homicide, and it certainly

would be a novelty in criminal practice to have a verdict returned upon such indictment, finding the defendant guilty under the one count and not guilty under the other, adjudged a verdict of not guilty as to both.

In the case at bar the section of the statute under which this indictment was found requires not merely a conspiracy, but some act to carry into effect its object. This act is only one of the means by which the conspiracy is sought to be carried into effect, just as in the illustration given, the blow of the pick-axe and the shot from the pistol are means for the accomplishment of the homicide, and a verdict of not guilty as to any one of the counts in this indictment is not necessarily a finding against any conspiracy, but only that the conspiracy and the overt act therein stated did not both exist, while a verdict of guilty upon any other count finds both the conspiracy and the overt act named therein. There is no conflict between the findings, and no force to this objection.

Neither the testimony nor the instructions having been preserved in the record, the only other matter to which our consideration is directed is as to the sufficiency of the indictment. It is objected, in the first place, that there is no specification of the particular tract or tracts of which the defendants conspired to defraud the United States. There is nothing more definite than this, large tracts of land in the county of Rolette, State of North Dakota, such lands being public lands of the United States, open to entry under the homestead laws at the local land office of the United States at Devil's Lake City in said State. It is true, no tract is named by number of section, township, and range, and the language is broad enough to include any or all the public lands of the United States situate within that county, and subject to homestead entry at that land office. But manifestly the description in the indictment does not need to be any more definite and precise than the proof of the crime. In other words, if certain facts make out the crime, it is sufficient to charge those facts, and it is obviously unnecessary to state that which is not essential. Can it be doubted that if these defendants entered into a conspiracy to defraud the United States of public lands,

subject to homestead entry, at the given office in the named county, the crime of conspiracy was complete even if no particular tract or tracts were selected by the conspirators? It is enough that their purpose and their conspiracy had in view the acquiring of some of those lands, and it is not essential to the crime that in the minds of the conspirators the precise lands had already been identified.

In Dickinson's Guide to the Quarter Sessions, p. 355, is given the form of an indictment for a like conspiracy which, as appears, was twice before the King's Bench. *Rex* v. *Cooke*, 2 B. & C. 618; 5 B. & C. 538. In that indictment the conspiracy is charged in these words: "Did conspire, combine, confederate, and agree together unlawfully and unjustly to disturb, molest, and disquiet Sir George Jerningham, Bart., in the peaceable and quiet possession, occupation, and enjoyment of certain manors, messuages, lands, and hereditaments and premises, situate and being in the said county of S., of which he, the said Sir George Jerningham, then was, and for a long time had been, peaceably and quietly possessed." In describing the overt act it is stated that defendant did "break and enter a certain messuage, called Stafford Castle, situate in the county aforesaid, whereof the said Sir George Jerningham had long been, and then was, in the peaceable and quiet possession." In other words, there as here the description in the conspiracy part of the indictment is broad enough to include any lands within the county belonging to and in the possession of the party against whom the conspiracy was formed, but when the overt act of the conspirators is stated, then the particular tract in respect to which the act was committed is described.

It is further objected that the indictment is defective in its statement of the means by which the conspiracy was to be carried into effect. The language is by means of "false, feigned, illegal, and fictitious entries under the homestead laws of the United States." It is insisted that the word "entry" in homestead cases has a settled technical meaning, and refers simply to the initiation of the proceedings, and the language of Mr. Justice Lamar, speaking for this court in *Hastings & Dakota Railroad* v. *Whitney*, 132 U. S. 357, 363,

is cited: "Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made — the land is entered."

The argument is that the word "entry," having a technical meaning, must be taken with that meaning in this indictment; that, as thus understood, an entry in a homestead case being but a preliminary act, does not operate to divest the title of the government, and, as is said in the brief: "The charge that defendants conspired to defraud the government by means of false entries to lands under the homestead laws will thus be seen to be a charge of an innocent act."

But the popular understanding of the word is not thus limited. It is common to speak of an entry of land under the homestead law, meaning thereby not a mere preliminary application, but the proceedings as a whole, the complete transfer of title. Counsel concede that in cash purchase and preëmption cases it is even technically used to describe the final proof or final purchase, but seek to draw a distinction between its use in those cases and under the homestead law. Even if it were conceded that such a distinction is recognized in the statutes and authorities, it would not change the significance of the popular use. Clearly, it is used in this indictment in its popular sense, for, when we turn to the description of the overt acts, we find matters subsequent to the original entry. Thus, in the first count, one of the defendants is charged to have induced "Charles Pattnaude to make filing under said homestead laws, and thereafter to make proof and final entry under said laws for the lands known," etc. Something of equal significance is found in each of the subsequent counts upon which conviction was had. It is one purpose of an indictment to inform the defendant of the crime of which he is charged, and there can be no doubt that this defendant understood the exact sense in which the word "entry" was

used in this indictment, and was not misled into the belief that the only crime charged against him was of a conspiracy to acquire lands of the United States by means of wrongful preliminary proof.

It is also said that the indictment does not charge that the overt act was done "to effect the object of the conspiracy," as the statute expresses it, but is charged to have been done simply "according to and in pursuance of said conspiracy." But this is too great a refinement of construction. Something more is intended by the use of the words "according to and in pursuance of" than that the overt act was done after the formation of the conspiracy, or even that it was simply a result of the conspiracy. It implies that the act was one contemplated by the conspiracy, "according to," and was done in carrying it out, "in pursuance of," something which the conspiracy provided should be done, something which when done should tend to accomplish the purpose of the conspiracy.

Again, it is objected that the time at which the overt act was done is not specifically stated, but the date of the conspiracy is alleged, and that the overt act was "according to and in pursuance of." Necessarily, therefore, it was subsequent to the conspiracy.

Still, again, it is urged that the overt acts, the inducing and persuading, are not charged to have been done within the limits of the United States. The conspiracy is charged to have been entered into in the State of North Dakota, and the proof necessary to make final entry at the land office named would have to be used in that State. While it is true there is no specific allegation that the act of inducing and persuading was done within the jurisdiction of the court, and while it may be possible, as counsel suggest, that so far as this record discloses all the solicitation and persuasion exercised by the defendant was done within the limits of Canada, and outside the jurisdiction of the trial court, yet the solicitation was to do a wrongful act within the State of North Dakota, *In re Palliser*, 136 U. S. 257, 265, and that solicitation was not a part of the conspiracy, but subsequent to and in

furtherance of it. The gist of the offence is the conspiracy. As said by Mr. Justice Woods, speaking for this court, in *United States* v. *Britton*, 108 U. S. 199, 204: "This offence does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiæ*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute." Hence, if the conspiracy was entered into within the limits of the United States and the jurisdiction of the court, the crime was then complete, and the subsequent overt act in pursuance thereof may have been done anywhere.

These are all the questions which we consider of importance. Several other matters are suggested by counsel. We have examined all of them, and deem it unnecessary to prolong this opinion by noticing them in detail. We see no error in the record, and the judgment is

Affirmed.

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

HARDT *v.* HEIDWEYER.

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

No. 268. Submitted March 13, 1894. — Decided April 2, 1894.

Whether a debtor in Illinois in failing circumstances has or has not the right by transfers of property to prefer certain creditors in the disposition of his assets, it is clear that he has not the right to transfer to such creditors property largely in excess of their claims to the injury of other general creditors.

A bill in that State by other creditors of the debtor filed several years after

Statement of the Case.

such transfers were made, which attacks them and prays to have them decreed to be invalid and to have the assigned property distributed *pro rata* among the general creditors, and which alleges that the plaintiffs were ignorant of the matters complained of, but now have knowledge acquired within a month prior to the filing of the bill, but which does not show how knowledge of the wrongs complained of was obtained, nor why they had not had earlier the same means of ascertaining the facts, may be dismissed, on demurrer, for laches on the part of the complainants.

On April 23, 1889, the appellants as plaintiffs, citizens of the State of New York, filed their bill in the Circuit Court of the United States for the Northern District of Illinois, making as defendants the following persons, citizens of the State of Illinois: Sigismund Heidweyer, Norbert Stieglitz, the National Bank of Illinois, Siegmund Florsheim, Philip Florsheim, and Simon Florsheim. On January 15, 1890, they filed an amendment to their bill. To the bill, with its amendment, the defendants demurred on the several grounds of a want of equity in the bill, the laches of plaintiffs, a lack of jurisdiction, and a defect of parties. On May 5, 1890, this demurrer was sustained, and the bill dismissed. From the decree of dismissal the plaintiffs appealed to this court.

The facts as stated in this bill and its amendment are as follows: The plaintiffs were judgment creditors of the defendants Heidweyer & Stieglitz, a firm doing business in Chicago from July, 1875, to October 15, 1884. As early as January 1, 1884, the latter were hopelessly insolvent, their liabilities exceeding even their nominal assets, as they well knew. By the assistance of friends, however, they were enabled to keep up the appearance of doing business until October. Early in September they ascertained and determined definitely that they must fail, make a general disposition of their property among their creditors, and go out of business. At that time their indebtedness amounted to about $240,000, their assets to about $150,000, of which $125,000 was the value of their merchandise, and $25,000 that of their bills receivable and open accounts. Among other creditors were the following parties to whom Heidweyer & Stieglitz claimed was due at the time the sums set opposite to their names:

Statement of the Case.

"National Bank of Illinois..... $12,000 00
Siegmund Florsheim..... 2,628 00
Julius Heimann..... 5,000 00
Julius Heimann, administrator..... 5,000 00
Florsheim Brothers..... 5,000 00
Philip Florsheim..... 9,000 00
Simon Florsheim..... 5,000 00
Herman Hahlo..... 2,500 00
Hahlo, Stieglitz & Co..... 2,086 56"

In fact, the true amount due to such parties was much less than the sums so named. In addition to this, the defendant Siegmund Florsheim was liable, as they pretended, as endorser on their commercial paper for the sum of $22,925.

It was their duty — so the bill avers — in view of their financial condition, under the policy of the assignment law of Illinois, to make in due form a general assignment to some person of all their property for the benefit of their creditors, and without any preferences; but instead of doing this they consulted with counsel as to the best means to prefer the creditors above named. On September 16, by the advice of such counsel, they executed certain judgment notes, payable on demand to the parties, and for amounts as follows:

"National Bank of Illinois..... $12,000 00
Siegmund Florsheim..... 41,553 50
Florsheim Brothers..... 5,000 00
Philip Florsheim..... 9,000 00"

On the note in favor of Siegmund Florsheim, $16,000 was subsequently credited as paid. On October 13 they executed further judgment notes, payable on demand, as follows:

"Julius Heimann, two notes, each..... $5,000 00
Simon Florsheim..... 5,000 00
H. Hahlo & Co..... 2,500 00
Hahlo, Stieglitz & Co..... 2,086 56"

On October 15 the counsel above referred to, acting for both

the creditors and the debtors, caused judgments to be entered upon said notes in the Superior Court of Cook County, Illinois, in favor of the creditors for the amounts of principal and interest and attorneys' fees, the attorneys' fees amounting in all the cases to the sum of $3564.04. Immediately after the entry of such judgments executions were issued thereon to the sheriff of Cook County, who levied upon the stock of merchandise of said firm of Heidweyer & Stieglitz, being all the tangible property of which they were possessed, and of the value of $125,000. Of this merchandise about $8500 was replevied from the sheriff before the sale, and the remainder sold at great sacrifice, producing only $65,537.38, which sum was applied upon the executions, leaving a small balance due upon most of them. The only property of value which the said Heidweyer & Stieglitz, on October 15, possessed other than the stock of merchandise, were certain bills receivable, of the value of about $18,000, and certain accounts receivable, of the value of about $6000. It is charged "that as a part of the same scheme of preference said Heidweyer & Stieglitz assigned and delivered said bills and accounts receivable to the defendant Simon Florsheim in trust to collect the same for the benefit of said judgment creditors as to the amounts remaining unpaid on their aforesaid judgments, and for the benefit of himself as to a claim of thirteen hundred dollars due to him by said Norbert Stieglitz individually, the surplus, if any, to be returned to said Heidweyer & Stieglitz; so that, out of said accounts and bills receivable so assigned and out of said replevied goods subsequently surrendered or paid for, said defendant's judgment creditors as aforesaid have received the amounts of their judgments and interest and said attorneys' fees in full. Said defendant, Simon Florsheim, has received payment in full of his claim against the defendant Norbert Stieglitz, as aforesaid, and the entire scheme originally devised by and between said Heidweyer & Stieglitz and said judgment creditors has been successfully accomplished, and all the property of said defendants, Heidweyer & Stieglitz, has been appropriated to prefer said creditors to the exclusion of all others." And that all these "judgment notes,

judgments entered thereon, executions issued, levies and sales thereunder, transfers, assignments, and other dispositions of all their property, . . . are in effect but one instrument and one transaction, and, taken together, constitute a general assignment for the benefit of creditors," and " were all entered into and consummated in pursuance of a conspiracy between the parties thereto to defraud the other creditors of said Heidweyer & Stieglitz."

It is further charged " that while it is true that all the transactions aforesaid constitute an assignment for the benefit of creditors, yet said assignment is fraudulent and void as to creditors, in this, that said judgment notes were purposely given for sums greater than was due the payees thereof respectively at the time they were so given; that the sum provided in said judgment notes for attorneys' fees, being thirty-five hundred and sixty-four $\frac{4}{100}$ dollars, and which was included in said judgments confessed and thereafter collected thereon, was so inserted in said instruments with actual intent to hinder, delay, and defraud the creditors of said Heidweyer & Stieglitz, and actually has defrauded them, whereby said notes, judgments, and everything that was done under them became wholly fraudulent and void as to the creditors of said Heidweyer & Stieglitz, and in that all of said transactions constituting such assignment were conceived and executed from beginning to end with the sole and only purpose of defrauding the law and defrauding all the creditors not intended to be protected thereby, including your orators."

The amendment was intended to cover the objection of laches, and its allegations in respect thereto are as follows:

" And your orators further represent that at the time of the several transactions hereinbefore mentioned they were and ever since have been residents of the city of New York, and that the judgment creditors aforesaid, who were defendants to this bill, were and now are residents of the city of Chicago; that immediately after the entry of the judgments aforesaid, your orators caused an investigation to be made as to the genuineness of the indebtedness represented by said judgments and the good faith of the judgment creditors in having them

entered and enforced in the manner set forth herein; that it was upon such investigation given out, represented, and stated to your orators by each of said judgment creditors, defendants herein, that their said judgments were for full value and were entered aggressively by them for the sole purpose of realizing the moneys due them respectively, and that they did so without the knowledge, privity, or procurement of the debtors themselves, and said debtors then stated that they had still a large amount of property remaining in their hands in the form of book accounts and bills receivable, applicable to the payment of their other debts, and that they proposed to convert the same and apply the proceeds thereof to such payment as soon as possible.

"Relying upon which statements and believing the same to be true, your orators refrained for a considerable time to take legal measures to collect the large indebtedness due them in the belief also that the transactions as to said judgments were *bona fide* and having no knowledge or information of any fact tending to show that they constituted, constructively, an assignment for the equal benefit of all creditors.

"A long time afterwards and within, to wit, less than one month from the time of bringing this suit, your orators for the first time learned not only that said judgments covered and took all the tangible property of said Heidweyer & Stieglitz, but that the entry thereof was procured by them for the express purpose of preferring said judgment creditors, and that at the same time they transferred all their remaining property to a trustee for the benefit of creditors, as heretofore in this bill alleged, thereby creating an assignment, as herein alleged."

The relief sought for was as follows: "That the several judgment notes, judgments confessed theron, executions, levies, and sales thereunder, transfer of bills and accounts receivable, and all other transactions had and done by and between said Heidweyer & Stieglitz and said preferred creditors and hereinbefore referred to be adjudged to constitute a voluntary assignment for the benefit of the creditors of said Heidweyer & Stieglitz with preferences; that the preferences be declared void; that said preferred creditors be held chargeable and be

charged and decreed to account jointly and severally as assignees and trustees for all the property which has come to their hands or possession or to the hands or possession of any of them by virtue of any of the transactions related herein; that said assignees and trustee be removed and a receiver appointed, to whom they shall be decreed to account for the same at its true market value and not for the amount they may have realized out of it; that the fund so to be realized, if it shall appear to the court that said assignment is not altogether void, shall be distributed ratably among your orators and all the creditors of said debtors under the direction of the court, excluding from the distribution, however, and postponing the creditors guilty of the frauds aforesaid until all others are fully paid; but if it shall appear to the court, by reason of the frauds alleged, that said assignment is altogether fraudulent and void as to creditors, then that said fund be paid in satisfaction of the judgment or your orators and of all other creditors who may be entitled, and that the complainants may have such other and further relief as may be just."

Mr. Daniel K. Tenney, *Mr. Edward O. Brown*, and *Mr. Charles E. Pope* for appellants. *Mr. Sydney Richmond Taber* for Schnabel Brothers, appellants.

I. None of the objections raised by the special demurrers warranted the dismissal of the bill.

a. Appellants were not guilty of laches. *Kilbourn* v. *Sunderland*, 130 U. S. 505; *Meader* v. *Norton*, 11 Wall. 442; *Michoud* v. *Girod*, 4 How. 503; *Sheldon* v. *Keokuk Packet Co.*, 8 Fed. Rep. 769; *Le Gendre* v. *Byrnes*, 44 N. J. Eq. 372; *Radcliff* v. *Rowley*, 2 Barb. Ch. 23; *Waterman* v. *Sprague Mfg. Co.*, 55 Connecticut, 554.

b. The Circuit Court had jurisdiction. *Gorrell* v. *Dickson*, 26 Fed. Rep. 454; *Putnam* v. *New Albany*, 4 Bissell, 365; *Ogilvie* v. *Knox Insurance Co.*, 22 How. 380; 2 Black, 539; *Buck* v. *Colbath*, 3 Wall. 334; *Shields* v. *Thomas*, 18 How. 253; *Barber* v. *Barber*, 21 How. 582.

c. There was no defect of parties. *Ogilvie* v. *Knox Ins. Co.*,

22 How. 380; *Horn* v. *Lockhart*, 17 Wall. 570; *Hotel Co.* v. *Wade*, 97 U. S. 13.

II. The bill was improperly dismissed under the general clause of the demurrer.

a. The bill shows fraud sufficient to invoke and compel equitable relief. *Pickett* v. *Pipkin*, 64 Alabama, 520; *Thomas* v. *Beck*, 39 Connecticut, 241; *Preston* v. *Spaulding*, 120 Illinois, 208; *Farwell* v. *Nilsson*, 133 Illinois, 45; *Hulse* v. *Mershon*, 125 Illinois, 52.

b. The several instruments and transactions described in the bill constitute in effect a general assignment with preferences, which is consequently void, as being in contravention of the Illinois statute relating to voluntary assignments. *White* v. *Cotzhausen*, 129 U. S. 329, 337, 338, 341, 342.

III. The construction of that statute by the Supreme Court of Illinois, in *Farwell* v. *Nilsson*, *supra*, is not conclusive, because that case is distinguishable from the suit at bar. *Farwell* v. *Cohen*, 138 Illinois, 216; *Weber* v. *Mick*, 131 Illinois, 520; *Hanchett* v. *Waterbury*, 115 Illinois, 220; *Preston* v. *Spaulding*, 120 Illinois, 208; *Home Natl. Bank* v. *Sanchez*, 131 Illinois, 330; *Hanford Oil Co.* v. *First Natl. Bank*, 126 Illinois, 584; *Hide and Leather Natl. Bank* v. *Rehm*, 126 Illinois, 461; *Hanford* v. *Prouty*, 133 Illinois, 339.

IV. The construction now placed upon that statute by the Supreme Court of Illinois is not the established law of that State. *Farwell* v. *Nilsson*, 133 Illinois, 45; *Bucher* v. *Cheshire Railroad*, 125 U. S. 555; *Scipio* v. *Wright*, 101 U. S. 665; *Louisville & Nashville Railroad* v. *Palmes*, 109 U. S. 244; *Preston* v. *Spaulding*, 120 Illinois, 208; *Hide and Leather National Bank* v. *Rehm*, 126 Illinois, 461; *Gelpcke* v. *City of Dubuque*, 1 Wall. 175; *Pease* v. *Peck*, 18 How. 595; *Farwell* v. *Cohen*, 138 Illinois, 216.

Even if this court feel bound to adopt the general construction by the Illinois Supreme Court of the Illinois statute applied to instruments of assignment, they are under no obligation to accept the inference that the Illinois court draws as to whether the particular instruments before this court are or are not such "instruments of assignment." *Schroeder* v. *Walsh*,

120 Illinois, 403; *Farwell* v. *Nilsson*, 133 Illinois, 45; *Pana* v. *Bowler*, 107 U. S. 529; *Swift* v. *Tyson*, 16 Pet. 1; *Myrick* v. *Michigan Central Railroad*, 107 U. S. 102.

V. If there may be an obligation on the part of this court to follow the construction by a state court of a statute of that State in an action at law, there is no such obligation in a suit in equity. *Bucher* v. *Cheshire Railroad*, 125 U. S. 555; *Leffingwell* v. *Warren*, 2 Black, 599; *Luther* v. *Borden*, 7 How. 1; *Johnston* v. *Western Union Telegraph Co.*, 33 Fed. Rep. 362; *United States* v. *Reid*, 12 How. 361; *Neves* v. *Scott*, 13 How. 268.

VI. Construction of state statutes by state courts may not be invoked in the United States courts to determine rights that have arisen before the state court's decision. *East Alabama Railway* v. *Doe*, 114 U. S. 340; *Farwell* v. *Cohen*, 138 Illinois, 216; *Buncome County Commissioners* v. *Tommey*, 115 U. S. 122; *Rollins* v. *Lake County*, 34 Fed. Rep. 845; *Anderson* v. *Santa Anna*, 116 U. S. 356; *Bolles* v. *Brimfield*, 120 U. S. 759; *Barnum* v. *Okolana*, 148 U. S. 393; *Knox County* v. *Ninth National Bank*, 147 U. S. 91; *Clark* v. *Bever*, 139 U. S. 96; *Union Trust Company* v. *Trumbull*, 137 Illinois, 146.

VII. Weight of authority, as well as principle, is in favor of this court's adopting its own construction of a state statute, notwithstanding a contrary construction by the highest court of that State. This the court has done:

(*a*) Where there has been no decision by a Federal court before that of the state court; *Butz* v. *Muscatine*, 8 Wall. 575; *Pine Grove* v. *Talcott*, 19 Wall. 666; *Pana* v. *Bowler*, 107 U. S. 529; *Lane* v. *Vick*, 3 How. 464. (*b*) Where there has been a decision by one of the United States Circuit Courts before that by the state court. *Burgess* v. *Seligman*, 107 U. S. 20, 33. (*c*) Where there has been a decision by this court before that of the state court. *Rowan* v. *Runnels*, 5 How. 134; *Pease* v. *Peck*, 18 How. 595; *Carroll County* v. *Smith*, 111 U. S. 556.

As citizens of foreign States appellants are entitled to the independent judgment of the United States Supreme Court.

Watson v. *Tarpley*, 18 How. 517; *Burgess* v. *Seligman*, 107 U. S. 20; *Pease* v. *Peck*, 18 How. 595; *New Orleans Water Works Co.* v. *Southern Brewing Co.*, 36 Fed. Rep. 833; *Carroll County* v. *Smith*, 111 U. S. 556.

Mr. Curtis H. Remy for appellees.

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

It will be perceived that nowhere in the bill is it alleged that the failing debtors Heidweyer & Stieglitz ever executed any formal written assignment for the benefit of creditors. It is charged that they gave to certain creditors judgment notes, and assigned and delivered their bills and accounts to one of the creditors in trust; that these judgment notes, with the proceedings had thereon, and the assignments of bills receivable and accounts, were in effect but one instrument and one transaction, and constituted a general assignment for the benefit of creditors; and this, as plaintiffs insist, brought the case within the ruling in *White* v. *Cotzhausen*, 129 U. S. 329, 342, in which this court, by Mr. Justice Harlan, said, "that when an insolvent debtor recognizes the fact that he can no longer go on in business, and determines to yield the dominion of his entire estate, and in execution of that purpose, or with an intent to evade the statute, transfers all, or substantially all, his property to a part of his creditors, in order to provide for them in preference to other creditors, the instrument or instruments by which such transfers are made and that result is reached, whatever their form, will be held to operate as an assignment, the benefits of which may be claimed by any creditor not so preferred, who will take appropriate steps in a court of equity to enforce the equality contemplated by the statute. Such, we think, is the necessary result of the decisions in the highest court of the State."

On the other hand, it is contended that the Supreme Court of the State has since that decision reached a different conclusion, and in support thereof reference is made to the opinion in *Young* v. *Clapp*, 147 Illinois, 176, 184, where this language

is found: "The thirteenth section of the assignment act does not prohibit preferences generally, but only preferences which are contained in written deeds of assignment voluntarily executed for the benefit of creditors. The language of the section is, that 'every provision in any assignment hereafter made in this State for the payment of one debt or liability in preference to another shall be void.' A preference, given by a debtor after he has made up his mind to execute a general assignment for the benefit of his creditors, has been held to be void upon the theory that such a preference must be regarded as a part of the assignment. There is no such thing as a constructive assignment contemplated by the assignment act. That act does not take away the common law right of a debtor to prefer one or more of his creditors. A preference may be given by the execution of a judgment note resulting in the entry thereon of a judgment." See also *Schroeder* v. *Walsh*, 120 Illinois, 403, 412; *Weber* v. *Mick*, 131 Illinois, 520, 533; *National Bank* v. *North Wisconsin Lumber Co.*, 41 Illinois App. 383; and *American Cutlery Co.* v. *Joseph*, 44 Illinois App. 194; *Ross* v. *Walker*, decided November 27, 1893, by the Appellate Court of Illinois, and reported in 26 Chicago Legal News, 133.

It is insisted that this construction of the statute should be accepted by this court as controlling, and the case of *Union Bank of Chicago* v. *Kansas City Bank*, 136 U. S. 223, 235, is cited, in which this court said:

"The question of the construction and effect of a statute of a State, regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the State, establishing a rule of property, are of controlling authority in the courts of the United States."

But we deem it unnecessary to enter into any consideration of this question, or to determine whether there is any substantial difference between the views of the Supreme Court of Illinois and those of this court, or whether in case such difference be found to exist it becomes the duty of this court to defer to the opinions expressed by that, for there are questions nearer to the surface and controlling. Even if it be conceded

that there is not disclosed by this bill that which is equivalent to a voluntary assignment within the scope of the statute, and that in the absence of restrictive statutes a failing debtor has the right to prefer certain creditors, even to the entire exclusion of others, — *Jewell* v. *Knight*, 123 U. S. 426, 434, and cases cited; *Smith* v. *Craft*, 123 U. S. 436, — yet such debtor cannot, under pretence of preferring certain creditors, pay to them sums largely in excess of their demands, and thus prevent his other creditors from receiving any payment. Here the charge distinctly is, that while Heidweyer & Stieglitz claimed to owe the preferred creditors certain sums for which they gave judgment notes, and which judgment notes were afterwards satisfied in full, yet the amounts in fact due to such creditors were much less than those so named and paid; and that is a wrong of which the creditors who receive no payment can justly complain. It is unnecessary, therefore, to inquire whether the transaction between Heidweyer & Stieglitz and these creditors was within the inhibition of the statute or not.

While this is so, we are constrained to hold that the plaintiffs have not shown due promptness in asserting their rights. It is said by counsel for defendants that it was the decision in *White* v. *Cotzhausen* which enabled the plaintiffs to perceive that they had been defrauded, and our attention is called to the fact that the opinion in that case was announced January 28, 1889, and this suit was commenced April 23, 1889. *Post hoc, propter hoc*, is not, however, sufficient, and the rule of causation implies some other sequence than that of time. Nevertheless, the plaintiffs waited nearly five years before commencing any proceedings to charge the preferred creditors, and no satisfactory excuse for the delay is shown. It is well settled that a party who seeks to avoid the consequences of an apparently unreasonable delay in the assertion of his rights on the ground of ignorance must allege and prove, not merely the fact of ignorance, but also when and how knowledge was obtained, in order that the court may determine whether reasonable effort was made by him to ascertain the facts. Thus, in *Stearns* v. *Page*, 1 Story, 204, 215, 217, Mr. Justice Story observed:

Opinion of the Court.

"General allegations, that there has been fraud, or mistake, or concealment, or misrepresentation, are too loose for purposes of this sort. The charges must be reasonable, definite, and certain as to time, and occasion, and subject-matter. And especially must there be distinct averments of the time when the fraud, mistake, concealment, or misrepresentation was discovered, and how discovered, and what the discovery is; so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made. For, if by such diligence the discovery might have been before made, the bill has no foundation on which it can stand in equity, on account of the laches. . . . But the bill does not state what particular discoveries have been obtained, or when they were obtained, or by what inquiries, or in what manner, or at what time."

On appeal this decision was affirmed, *Stearns* v. *Page*, 7 How. 819, 829, and in delivering the opinion of this court Mr. Justice Grier laid down the rule in this language: "And especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made."

Similar declarations may be found in several subsequent cases; *Badger* v. *Badger*, 2 Wall. 87, 95, in which is found this quotation:

"The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill."

Godden v. *Kimmell*, 99 U. S. 201, 211; *Wood* v. *Carpenter*, 101 U. S. 135, 140, in which this court said:

"A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not

made sooner." See also *Lansdale* v. *Smith*, 106 U. S. 391, 394; *Hammond* v. *Hopkins*, 143 U. S. 224, 251; *Felix* v. *Patrick*, 145 U. S. 317, 332; *Foster* v. *Mansfield, Coldwater &c. Railroad*, 146 U. S. 88; *Fisher* v. *Boody*, 1 Curtis, 206; *Carr* v. *Hilton*, 1 Curtis, 390; *Moore* v. *Greene*, 2 Curtis, 202.

Tested by this rule, it is apparent that this bill must be held deficient in not showing how knowledge of the wrongs complained of was obtained by the plaintiffs. It is alleged that they were ignorant, and now have knowledge; and that they acquired such knowledge within a month prior to bringing the suit; but how they acquired it, and why they did not have the same means of ascertaining the facts before, is not disclosed.

What were the wrongs complained of? So far as the mere preference is concerned, that was obvious. If the attorneys' fees were improper, *Young* v. *Clapp*, *ubi supra*; *Hulse* v. *Mershon*, 125 Illinois, 52, the fact that such attorneys' fees were specified in the notes and included in the judgments was a matter of record. That the stock of goods sold at sheriff's sale for less than its value does not, of itself, show wrong on the part of the parties thereto, plaintiffs or defendants. No act is shown tending to prevent a fair sale, and the result, that of realizing less than the value, is a common experience of such sales, and of itself proves nothing amiss. If these plaintiffs failed to attend such sales, they cannot complain of the result; and if they did attend, they should have seen to it that the property brought its value. At any rate, there is no pretence of a want of knowledge on the part of these plaintiffs. There remain, therefore, as the concealed wrongs, only these matters: First, that the judgment notes were in excess of the real demands; second, that Heidweyer & Stieglitz transferred their bills and accounts receivable in trust to Florsheim, and that that trust included an individual debt of one of the partners. That the plaintiffs knew of the existence of these bills and accounts is shown, and their alleged ignorance is only of the fact of their transfer in trust.

Now, it is a matter of common experience that when there

is so pronounced a failure on the part of a firm carrying such a large stock, there is made by the creditors a thorough examination of the situation. That such an examination, if made, would disclose any substantial difference between the true indebtedness to these preferred creditors and the amount of the notes given to them seems reasonably certain, and if no such examination was made, it indicated indifference on the part of the other creditors. If the plaintiffs relied on the mere statements of these defendants, why did they cease to rely upon such statements, and how did they become advised of their untruth? So, with reference to the bills and accounts receivable; knowing what they were, they could easily have ascertained whether they were collected, and if so, by whom. If collected by other than their debtors, that fact certainly should have provoked inquiry. If collected by the debtors, why were the moneys received not appropriated in payment of other than the preferred claims?

These are matters in respect to which the bill fails to enlighten us. Indeed, so far as disclosed, it would seem that when the debtors failing, and failing for so large a sum, appropriated all their tangible property to the payment of a few of their creditors, the others, including these plaintiffs, accepted the situation, and made no inquiry or challenge of the integrity of the transaction for nearly five years. Such indifference and inattention must be adjudged laches. Upon this ground alone, and without reference to any other questions discussed by counsel in the briefs, the decree of the Circuit Court is

Affirmed.

SEABURY *v.* AM ENDE.

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

No. 285. Argued March 14, 15, 1894. — Decided April 2, 1894.

The invention patented to Charles G. Am Ende by letters patent No. 181,024, dated August 15, 1876, which "had for its object to combine the

Argument for Appellant.

various advantages of cotton-fibre with those possessed by boracic acid and glycerine for preserving animal and vegetable matter from decay," was useful, novel, and patentable, and was described in the application and specification in sufficiently full, clear, and exact terms to enable an intelligent chemist reading that description of it, to construct and use it.

In estimating the profits derived from the unlawful manufacture and sale of a patented invention, the infringer should not be allowed interest on the capital invested in his plant, unless it appears that the plant was used solely for the manufacture or sale of the patented article, or the evidence be such as to enable the master to satisfactorily apportion the interest between the several kinds of business.

If the infringer be a corporation, salaries of its officers should not be allowed in estimating such profits, where it does not appear that they have been actually paid.

Charles G. Am Ende, a citizen of the State of New Jersey, filed a bill of complaint in the Circuit Court of the United States for the Southern District of New York, against Seabury & Johnson, a corporation of the State of New York, in which he alleged that he was the patentee and owner of letters patent of the United States, dated August 15, 1876, and numbered 181,024, for an improvement in borated cotton, and that the defendant corporation, in disregard of his rights, was engaged in making and vending borated cotton made in accordance with the method described in said letters patent. The defendant corporation, by its answer, raised the issues of novelty and patentability, which were determined in favor of the complainant, and the case resulted in a decree, restraining the defendant from further infringement, and awarding the complainant the sum of $2349.15 with costs; from which decree this appeal was taken.

Mr. Edwin H. Brown and *Mr. Norman T. M. Melliss*, for appellant, as to the points considered in the opinion of the court, said:

The specification shows nothing new in the manner of producing a solution of boracic acid, and gives no information as to the strength of solution which shall be used. It states nothing definite about the quantity of glycerine, but contains only the very vague and indefinite information that a *small*

proportion is to be used. The manufacturer therefore is left to follow his own preferences with regard to the relative proportions of the boracic acid and glycerine which he shall employ, or to experiment in order to ascertain what may be required.

The specification being, therefore, a mere suggestion and not a specification conforming to legal requirements of the use of cotton, boracic acid and glycerine for preserving animal tissue must, we submit, be held insufficient to constitute a consideration for the contract involved in the granting of a patent. On this general ground, aside from specific provisions of the statutes concerning the necessary characteristics of a specification, is not the patent invalid? *Tyler* v. *Boston*, 7 Wall. 327.

Appellee's patent admits that there was nothing novel in the solution of boracic acid, by omitting information about it except that it was to be prepared in the usual manner. It also admits that boracic acid was the substance relied upon as a preservative agent.

Exhibit A, extract from Druggists' Circular and Chemical Gazette, June, 1875, (p. 64,) states that Dr. J. Edmunds, in a complicated case of amputation of the thigh, "had employed dressing of lint steeped in a hot saturated solution of boracic acid with most satisfactory results in preventing putrefactive discharge. The bandage could remain for thirty-six or forty-eight hours without the slightest putrefactive odor."

There is absolutely nothing in the record or in appellee's patent to show that a dressing consisting simply of cotton and boracic acid solution would, so long as the water of the solution remained unevaporated, be less efficacious than appellee's dressing. In other words, there is nothing in this case to show, nor has there been any contention, that a dressing consisting of cotton and a boracic acid solution would possess increased antiseptic properties, because of the addition of glycerine.

Under the doctrine in *Hollister* v. *Benedict Mfg. Co.*, 113 U. S. 59, the addition of glycerine did not amount to a patentable invention. Its hygroscopic property was the only one

which rendered its use desirable, and that was well known. See also *Union Edge Setter Co.* v. *Keith*, 139 U. S. 530; *Adams* v. *Bellaire Stamping Co.*, 141 U. S. 539, 542; *Leggett* v. *Standard Oil Co.*, 149 U. S. 287.

The appellant is entitled, in case the patent is sustained, to be allowed, in computing the profits on sales, the interest on the plant and capital invested.

The master threw out these items because of his reading of the rule laid down in *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 804. But it is submitted that interest on capital should be allowed, and also interest on machinery, under the rules laid down in the *Troy Iron and Nail Factory* v. *Corning*, 6 Blatchford, 328, 354, and in the *Steam Stone Cutter Co.* v. *Windsor Mfg. Co.*, 17 Blatchford, 24, 28; for it must be admitted that the reasoning of these Circuit Court decisions is more convincing on this point than that of the Supreme Court case, and that the latter decision seems hardly consistent with itself, for it is difficult and perhaps impossible to see why interest should be allowed on borrowed capital and not on capital owned by the infringer. Indeed, the principle of the case of *Rubber Co.* v. *Goodyear* on this point seems to have been overruled by the Supreme Court in the case of the *Manufacturing Co.* v. *Cowing*, 105 U. S. 253, 257. In that case the court criticised and modified the master's report because it did not allow for use of tools, machinery, power and other facilities employed in the manufacture of the infringing article. See also Walker on Patents, § 718, Sub.-Div. 4.

The tools, etc., were the tangible things in which the defendant's capital was invested, and to allow for their use was really to allow interest or its equivalent on that capital.

Mr. Arthur v. Briesen for appellee.

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

The specification and claim of the patentee were in the following terms:

"This invention has for its objects to combine the various

advantages of cotton-fibre with those possessed by boracic acid and glycerine for preserving animal and vegetable matter from decay.

"Heretofore boracic acid has been used as a preservative agent in a fluid state, and also as a powder. In use, the matter to be preserved had to be immersed in the solution of boracic acid, or completely covered with the powder. In either case, a very large quantity of boracic acid was used.

"My present invention, which consists in saturating cotton-fibre with boracic acid and glycerine in a manner hereinafter described, enables me to apply a very small proportion of boracic acid and glycerine to the cotton-fibre with fully as good an effect as though the matter to be preserved were entirely embedded in large quantities of the solution or powder. It enables me, at the same time, to utilize the germ-filtering properties of the cotton, and its elasticity as a superior material for packing or covering delicate tissue.

"I produce my improved borated cotton as follows: I first prepare a solution of boracic acid in the usual manner, and add thereto a small proportion of glycerine. For the preservation of tender substances, such as veal, I may also add from ten to forty per cent of soda or potash, never sufficient, however, to reach neutrality. The cotton, either in bulk or wadding, is next immersed in the solution until well impregnated therewith, and then pressed, to discharge all surplus solution, or so much thereof as may be required. The cotton is then dried and ready for use.

"When applied to the material to be preserved, either as a covering or as a wrapping or packing, the cotton will constitute a filter for keeping germs of putrefaction from passing through, and the boracic acid absorbed by the cotton will, at the same time, preserve the surfaces from decay, and counteract all injurious influences of germs, or other elements of destruction, already in contact with such surfaces.

"The glycerine is added to increase the preserving power of the borated cotton. It renders the cotton slightly hygroscopic, thus aiding in the diffusion of the acid and in the preservative effect of the prepared cotton.

"I have found that the impregnated fibre shows, even under a good microscope, no difference from a fibre not impregnated with boracic acid, and that, therefore, although a very thin film of acid may adhere to the exterior surface of the fibre, the main proportion of the acid is absorbed by and diffused within the fibres. In consequence, the acid can, in use, be but gradually released from the fiber, and will thus produce a constant and lasting effect.

"I claim —

"The borated cotton, being cotton-fibre which is saturated with boracic acid and glycerine, substantially as herein shown and described."

The first ground of defence relied on is that the patentee has failed to describe his invention in such full, clear, and exact terms as to enable persons reading the description of the invention to construct and use it; and it is contended that the strength of the boracic acid solution is not prescribed, nor the precise proportion of glycerine. In considering this objection it must be remembered that the description is addressed to persons skilled in the art to which it relates. The solution of boracic acid is referred to, not as anything new, but as an article well known to druggists and physicians, and when the patentee says that he "prepares a solution of boracic acid in the usual manner," he means as it has formerly and customarily been prepared. When he directs that a small proportion of glycerine shall be added, it is obvious that the quantity of the glycerine is to vary with the amount of cotton and boracic acid used, but that the merits of the invention will not depend on whether, in a given case, a little more or less glycerine is used. Such general directions are common in the arts, as appears in some of the very publications introduced by the defendant to show anticipation. Thus in the Druggists' Circular and Chemical Gazette it is stated that Dr. Edmunds had used "a solution of boracic acid;" and in the Journal de Pharmacie it is said that, in making his dressing, Professor Gubler saturated his wadding with "a certain quantity of glycerine," and his formula is thus given: "It is only necessary to pour a small quantity of glycerine over the square sheet," etc.

We, therefore, agree with the court below in thinking that "an intelligent chemist, setting out properly to combine the enumerated ingredients into which the cotton is to be immersed, and with which it is to be impregnated, could hardly go astray." It is also to be observed that neither the defendant, in making the infringing article, nor the several witnesses of eminence in the medical profession, who testified to the practical value of the patented dressing, seem to have had any difficulty in understanding and applying the description contained in the patent.

In *Loom Co.* v. *Higgins*, 105 U. S. 580, where the sufficiency of a description was in question, it was held that a specification in letters patent is sufficiently clear and descriptive when expressed in terms intelligible to a person skilled in the art to which it relates.

The next contention is, that as the plaintiffs' patented dressing was composed of materials whose specific virtues and modes of operation were well known, there was no invention shown in combining them in the manner described. It is, indeed, true that the patentee did not claim to have been the first to suggest the use of cotton fibre as a means of excluding germs from wounds or from the article to be protected. Nor did he claim to have first discovered the antiseptic qualities of boracic acid or the hygroscopic property of glycerine. But the patentee was the first to perceive that by combining these articles, in the manner he pointed out, there would be formed a convenient and permanent dressing with the desirable qualities of the several constituents. The complainant's evidence satisfactorily shows that, in such a dressing, the cotton acts as a screen to exclude germs and as a vehicle to hold the other ingredients; that the boracic acid possesses marked antiseptic qualities, but is liable, if used alone, to dry on the cotton and to form crystals, which impair the antiseptic qualities of the acid, and which mechanically scratch or irritate the sensitive surface of a wound; and that the glycerine, owing to its property of absorbing moisture from the atmosphere, keeps the boracic acid from hardening or crystallizing, and besides adds somewhat to the healing and preservative power of the dressing.

The merits of the complainant's invention received immediate and widespread recognition, and the article came into use, not only to protect animal substances for alimentary purposes, but, and chiefly, to protect wounds from infection and suppuration. It was introduced into hospitals and into the private practice of physicians, and, in fact, has become a staple article for medicinal purposes.

But it is further contended that there was no novelty in complainant's invention, because it had been anticipated by others. To sustain this contention the defendant put in evidence an article published in the American Journal of Pharmacy for November, 1871, at page 516, where it is stated that Professor Gubler, at a recent meeting of the Academy of Medicine, had exhibited some specimens of wadding prepared by saturating it with a certain quantity of glycerine, which he had found to render it permeable to all medicinal liquids, without causing it to lose any of its suppleness and lightness. Also, an article in the same journal, for March, 1867, at page 149, wherein Dr. Adolphus stated that, "applied to suppurating surfaces which are painful and produce an ichorous pus, glycerine dressings change the abnormal condition by arresting the degenerating process, through its antiseptic and astringent properties." The defendant likewise put in evidence a copy of The Druggists' Circular and Chemical Gazette, for June, 1875, wherein there is an account of treatment by Dr. Edmunds, in the case of an amputated thigh, by a dressing of lint steeped in a hot solution of boracic acid, with most satisfactory results in preventing putrefactive discharge.

Undoubtedly this evidence shows that the specific qualities of glycerine and of boracic acid were known, and that those articles had been successfully used in the instances narrated. But we agree with the court below in thinking that "this evidence does not disclose that any one prior to Am Ende accomplished what he has described and claimed; that the fact that others had done something quite similar, and had used separately or in different combinations, the ingredients of his claim, should not affect his patent. All that is described in the prior publications the defendant may use with perfect

immunity. They may use 'lint steeped in a hot saturated solution of boracic acid,' or 'wadding saturated with a certain quantity of glycerine,' or boracic acid dissolved in glycerine; but they should not be permitted to use cotton combined with a solution of boracic acid and glycerine in the manner described in the specification, for that belongs to Am Ende."

Errors are complained of in the action of the court below in overruling defendant's exceptions to the master's report. So far as those exceptions are based on the computations and findings of the master, under the evidence before him, as to the profits made by the defendant, we see no reason to differ with the court below in overruling them. The claim that the appellants should be allowed, as part of the cost of the borated cotton during the period covered by the accounting, interest on plant, and capital invested, calls for more particular notice.

A similar claim was disallowed in the case of *Rubber Co.* v. *Goodyear*, 9 Wall. 804, but it is claimed that in *Manufacturing Co.* v. *Cowing*, 105 U. S. 257, such an item was allowed. In the latter case, which this court styled an "exceptional one," it was said that, in charging the defendant with profits, he should be allowed for "the use of tools, machinery, power, and other facilities employed in the manufacture." It may be, as was observed by the court below in the present case, that it did not appear, in *Manufacturing Co.* v. *Cowing*, but that the use of the tools, machinery, and power was a hired use. At any rate, in that case, the infringement consisted in making and selling a pump, which was the only one that could successfully compete with that controlled by the patent, and the machinery was used for no other purpose. In the present case, the defendant's plant and real estate were used for several other and wholly different kinds of manufacture than the patented article, and the evidence offered to distinguish between the profits derived from the use of the plant and real estate for making the borated cotton and those attributable to the other sources of profit, was not sufficient to enable the master to make a satisfactory apportionment or allowance for interest on the investment.

We do not wish to be understood as holding that in no case

where the plaintiff's damages are measured by the defendant's profits, ought there to be an allowance, in the latter's favor, of interest on the money invested in the plant. Nor do we say that such an allowance may not be properly made, even where the use of the plant is not wholly restricted to making the infringing article. But the evidence, in such a case, should enable the master to satisfactorily apportion the interest between the several kinds of business.

The appellant further complains of the action of the master in disallowing the sum of $15,000 per annum for salary of the president of the defendant company. The defendant introduced evidence tending to show what would be reasonable compensation for such services as were performed by the president, but did not show what sum, or that any sum was actually paid him. To have allowed salaries, which had never been paid, would have been, as was said in *Rubber Co.* v. *Goodyear*, to permit a dividend of profits under the guise of salaries.

Other exceptions that were taken to the master's report were satisfactorily disposed of by the court below, and do not call for further discussion.

The decree of the Circuit Court is accordingly

Affirmed.

SARLLS *v.* UNITED STATES.

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

No. 872. Submitted November 15, 1893. — Decided April 9, 1894.

Lager beer is not "spirituous liquors" nor "wine" within the meaning of those terms as used in Rev. Stat. § 2139.

THE case is stated in the opinion.

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

Mr. Assistant Attorney General Conrad for defendants in error.

Opinion of the Court.

Mr. Justice Shiras delivered the opinion of the court.

At the May term, 1892, in the District Court of the United States for the Western District of Arkansas, the plaintiff in error was indicted and convicted of introducing, at the Choctaw Nation, in the Indian country, ten gallons of lager beer, which the indictment averred were "spirituous liquors," and the introduction of which into the Indian country was made an offence, punishable by fine and imprisonment, by section 2139, Revised Statutes of the United States.

That section is in the following terms:

"No ardent spirits shall be introduced under any pretence into the Indian country. Every person (except an Indian in the Indian country) who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars. But it shall be a sufficient defence to any charge of introducing or attempting to introduce liquor into the Indian country, that the acts charged were done by order of or under authority from the War Department, or any officer duly authorized thereunto by the War Department."

It appears that such a provision was originally enacted on the 9th of July, 1832, c. 74, § 4, 4 Stat. 564; was amended by acts of 15th of March, 1864, c. 33, 13 Stat. 29, and 27th of February, 1877, c. 69, 19 Stat. 244; and was included in the Revised Statutes as said section 2139.

It was contended, on behalf of the defendant, in the court below that lager beer is not "spirituous liquor or wine," within the meaning of those terms in the statute, and that, therefore, the defendant was wrongly convicted. The court below refused, on request, to so instruct the jury, and to this refusal, and to the judgment of the court sentencing the defendant to pay a fine of two hundred and fifty dollars, and to be imprisoned for a term of three months, error is assigned.

It thus appears that the sole question presented for our con-

sideration by this record is whether "lager beer" is a "spirituous liquor or wine." The only evidence on this subject, disclosed by the record, was to the effect that lager beer is a malt liquor, and is intoxicating. To enable us to solve the question we must look to the popular signification of the terms used, and also to the phraseology of other statutes of the United States in which like terms appear. We are likewise entitled to any light that may be thrown on the subject by the decisions of respectable courts which have had to construe similar terms in penal statutes.

The Century Dictionary defines *spirituous liquors* as "containing much alcohol; distilled, whether pure or compounded, *as distinguished from fermented;* ardent: applied to a liquor for drinking." *Malt liquor* is defined by the same authority as "a general term for an alcoholic beverage produced merely by the fermentation of malt, as opposed to those obtained by distillation of malt or mash."

Webster defines the word "spirituous" as rum, whiskey, brandy, and other distilled liquors, as distinguished from wine and malt liquors. Worcester says that "ardent spirits" is a term applied to liquors obtained by distillation, such as rum, whiskey, brandy, and gin.

So far, therefore, as popular usage goes, according to the leading authorities, "lager beer," as a malt liquor made by fermentation, is not included in the term "spirituous liquor," the result of distillation.

Looking to other statutes of the United States, we find that the terms "spirituous liquors" or "distilled spirits," and "malt liquors," are not used as synonymous. On the contrary, they are treated as different substances, and in the system of revenue restrictions, in providing for their manufacture and sale, they are regarded as distinct. Thus, in section 3244, Revised Statutes, it is provided, "Wholesale dealers in malt liquors shall pay fifty dollars. Every person who sells or offers for sale malt liquors in larger quantities than five gallons at one time, but who does not deal in *spirituous liquors*, shall be regarded as a wholesale dealer in malt liquors." And in the same section it is enacted that "every person who

manufactures fermented liquors of any name or description for sale, from malt, wholly or in part, or from any substitute therefor, shall be deemed a brewer," and "shall pay one hundred dollars;" and "rectifiers of distilled spirits shall pay two hundred dollars;" "wholesale liquor dealers shall pay one hundred dollars," and "wholesale dealers in malt liquors shall pay fifty dollars."

Such provisions seem to plainly distinguish "malt liquors," the product of fermentation, from "spirituous liquors," the result of distillation.

Most of the decisions to which our attention has been directed are to the same effect.

A New Hampshire statute in terms declared that the words "spirituous liquors" shall be taken to include intoxicating liquors and all mixed liquors, any part of which is spirituous or intoxicating. But the Supreme Court, in *State* v. *Adams*, 51 N. H. 568, 569, held that ale, porter, and cider were not within the statute; that the indictment charged the sale of "spirituous liquors" only; that fermented liquors are not, in common parlance, spirituous liquors, and that the fact that ale contains from four to ten per cent of alcohol which can be separated from it by distillation does not bring it within the class of liquors called spirituous.

In *Commonwealth* v. *Grey*, 2 Gray, 501, 502, Metcalf, J., said: "All spirituous liquor is intoxicating, yet all intoxicating liquor is not spirituous. In common parlance, spirituous liquor means distilled liquor. Fermented liquor, though intoxicating, is not spirituous."

In *Tuker* v. *State*, (Alabama,) 8 South. Rep. 855, it was said: "Malt liquors have neither vinous nor spirituous liquors as an ingredient. Spirituous liquors, vinous liquors, and malt liquors are not synonymous terms, but each refers to a liquor separate and distinct from each other. Lager beer is a malt liquor, and the courts take judicial notice of the fact. The statute having prohibited the sale of spirituous and vinous liquors only, malt liquors are not included. It was error, therefore, to charge the jury that a sale of lager beer was in violation of the statute."

There are other cases in which the terms were similarly construed by state courts, but which it is unnecessary here to cite.

In the District Court of the United States for the District of Montana, *In re McDonough*, 49 Fed. Rep. 360, it was held that beer is not a spirituous liquor, within the meaning of the statute before us; and we have been referred to a case to the same effect in the District Court of the United States for the Eastern District of Texas, but which case is not reported.

In *Hollender* v. *Magone*, 149 U. S. 586, this court reversed the Circuit Court of the United States for the Southern District of New York, for construing, in section 2927, Revised Statutes, the word "liquors," as including beer, and it was said that "it may be laid down as a general proposition that where the term 'liquor' is used in a special sense, spirituous and distilled beverages are intended, in contradistinction to fermented ones."

To the contrary of these definitions and decisions, the principal case is that of *State* v. *Giersch*, 4 S. E. Rep. 193, the reasoning and conclusion wherein were adopted by the court below. That was a case where a statute of North Carolina (Code, §§ 3110, 3116) prohibited the introduction and sale of spirituous liquors, and the court held those terms to be generic, and to include all intoxicating liquors containing alcohol, whether distilled, fermented, or vinous.

The reasoning on which such a conclusion is reached excludes the common and popular signification of the words, and finds the meaning of the statute in the fact, true in a scientific sense, that alcohol is found in fermented, as well as in distilled, liquors, and that the purpose of the statute is to prevent the mischief occasioned by the use of intoxicating drinks.

We cannot agree with this method of reading a penal statute. The purpose of such a statute is to notify the public of the legislative intent, not to furnish scientific definitions. That intent is, in most cases, to be found by giving to the words the meaning in which they are used in ordinary speech.

Nor can courts, in construing penal statutes, safely disregard the popular signification of the terms employed, in order to bring acts, otherwise lawful, within the effect of such statutes, because of a supposed public policy or purpose. The danger of substituting for the meaning of a penal statute, according to the popular and received sense, the conjecture of judges as to a supposed mischief to be corrected, is pointed out by Chief Justice Marshall, when, in the case of *United States* v. *Wiltberger*, 5 Wheat. 76, 96, he said: "To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of a kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."

There is a difference, overlooked by the court below, between the language of the North Carolina statute and of section 2139, in that the former uses only the words "spirituous liquors," but in the latter the words are "spirituous liquors or wines."

That by the term "spirituous liquors," used alone in a statute, it may with some plausibility be contended the legislature meant to signify all intoxicating drinks. But the case is quite different when "wines" are added to the articles prohibited. In that case it is evident that the legislature did not think that all intoxicating drinks were included in the term "spirituous liquors," or they would not have named "wines." Under the construction put by the court below on the words "spirituous liquors," as including all liquors that are intoxicating, and hence as including lager beer, the word "wines" is useless in the statute.

If, then, lager beer is not reasonably within the terms of the statute as a "spirituous liquor," can it be said to be included in the term "wines?"

Tacitus does, indeed, in his account of the customs of the ancient Germans, speak of their using a liquor made from barley — "*corruptus in quendam similitudinem vini*," "fermented into a kind of resemblance to wine." This passage is one of the earliest references we have to malt liquor. That it was potent, we learn from the same author, who tells us that the German warriors would deliberate upon and form their designs when sober, and then get drunk, presumably on this barley wine, and carry their projects into effect.

But if beer is *like* wine, in its appearance and effects, it is plainly not wine, either in its popular or technical meaning.

In *State* v. *Moore*, 5 Blackford, 118, it was said: "This was an indictment for retailing port wine by small measure without license. . . . The prosecution is founded on that part of the act relative to crime and punishment which forbids the sale of spirituous liquors by a less quantity than a quart at a time without license. (R. C. 1831, p. 192.) That is a penal statute, and must receive a strict construction. We are not at liberty to extend its meaning beyond its exact literal sense. Spirit is the name of an inflammable liquor produced by distillation. Wine is the fermented juice of the grape, produced by fermentation. We cannot so far confound the signification of these general terms as to call wine a spirituous liquor. We think port wine is not within the purview of the statute. If its omission is an evil, the courts have no power to remedy it."

The Supreme Court of Tennessee, in *Caswell* v. *The State*, 2 Humphrey, 402, 403, said: "The question for consideration is, whether wine is a spirituous liquor, within the meaning of the statute passed in the year 1837, c. 120. We think it is not. Wine is a fermented liquor. Spirits are distilled liquors. This distinction exists, not only in common parlance, but is recognized by chemists and physiologists. . . . We therefore think that the words 'spirituous liquors' embrace those which are produced by distillation, but not those produced by fermentation."

Since this cause was tried, an amendatory act has been passed by Congress, approved July 23, 1892, c. 234, 27 Stat.

260, providing that the section shall read as follows: "No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretence, into the Indian country. Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquors of any kind into the Indian country, shall be punished by imprisonment for not more than two years, and by fine of not more than three hundred dollars for each offence."

This would seem to show that Congress regarded the act, as it previously stood, as not including ale and beer in its terms. At any rate, the temptation to the courts to stretch the law to cover an acknowledged evil is now removed.

The judgment of the court below is

Reversed, and the cause remanded with directions to quash the indictment and discharge the defendant.

PRESSON v. RUSSELL.

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

No. 315. Submitted March 22, 1894. — Decided April 9, 1894.

Dry salted codfish, never pickled, imported January 19, 1888, in dry flour or sugar barrels, incapable of containing liquids, were subject to a duty of 25 per cent ad valorem, under the act of March 3, 1883, c. 121, 22 Stat. 488, 504, as other fish not specially enumerated or provided for; but, as the importer's protest was not sufficient to notify the collector of his claim, the judgment below is reversed, and a judgment ordered for defendant.

This was an action to recover duties alleged to have been unlawfully assessed, and was tried by the Circuit Court, without a jury, upon the following agreed statement of facts:

Statement of the Case.

"The plaintiffs, on the nineteenth day of January, 1888, imported from Montreal, Canada, into the port of St. Albans, Vermont, one hundred barrels of dry salted codfish consigned to John S. Story, to be by him entered at the custom-house at St. Albans, and thence to be immediately transported in bond to the port of Gloucester, Massachusetts, consigned to the plaintiffs. The goods were entered at the custom-house at St. Albans on the nineteenth day of January, 1888, by Story, as 'one hundred barrels pickled cod,' and were immediately transported in bond to Gloucester and entered by the plaintiffs at the custom-house in Gloucester. The fish were imported in dry flour or sugar barrels, incapable of containing liquids, and had never been pickled, but had been cured with dry salt, and were not at the time of their importation what is known as 'pickled fish,' but were dry salted fish; each barrel contained two hundred and thirty-eight pounds of fish. The defendant, then collector of customs for said port of Gloucester, demanded and collected upon each pound of said fish a duty of one cent, amounting in the whole to the sum of two hundred and thirty-eight dollars, a sum which the plaintiffs claimed was not due and payable as duties, and exacted payment of the same from the plaintiffs, who made payment thereof to the said defendant under protest and in order to obtain possession of said merchandise.

"The plaintiffs, being dissatisfied with the decision of the collector assessing the said duty upon the said fish, gave to him due and seasonable notice thereof in writing, setting forth therein distinctly and specifically the grounds of their objection thereto, and duly and seasonably appealed to the Secretary of the Treasury, who affirmed the said decision of the said collector, and the plaintiffs seasonably brought this suit to recover the said sum of one hundred and nineteen dollars, so exacted and paid to the said defendant for customs duty upon said fish.

"The writ and pleadings may be referred to, also annexed copy of protest, and copy of invoice also annexed.

"Upon the foregoing facts it is agreed that the court may enter such judgment as the law requires."

Opinion of the Court.

The protest read thus: "We understand that you have assessed duties at the rate of one cent per lb. as 'pickled fish,' whereas they are 'dry fish,' and the duty should be but one-half cent per lb. We hereby protest against your assessment of one cent per lb.," etc.

The invoice stated the actual cost of the fish at $523.60.

The Circuit Court held that salt fish in barrels were not subject to duty under the tariff act of 1883, and gave judgment for the plaintiff in the sum of $238, to review which this writ of error was brought.

Mr. Assistant Attorney General Whitney for plaintiff in error.

Mr. Frederic Cunningham for defendant in error.

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

Schedule G of the act of March 3, 1883, c. 121, 22 Stat. 488, 503, 504, contained, under the heading "Fish," these paragraphs:

"Salmon, pickled, one cent per pound; other fish, pickled, in barrels, one cent per pound.

"Foreign caught fish, imported otherwise than in barrels or half barrels, whether fresh, smoked, dried, salted, or pickled, not specially enumerated or provided for in this act, fifty cents per hundred pounds."

"Salmon, and all other fish, prepared or preserved, and prepared meats of all kinds, not specially enumerated or provided for in this act, twenty-five per centum ad valorem."

These fish were entered as "pickled cod," and were in barrels, and the collector assessed them under the first of the above three paragraphs, but as it was admitted on the trial that the fish had never been pickled but had been cured with dry salt, this must be treated as erroneous; and, being in barrels, they were not within the second paragraph, which

applied only to fish "imported otherwise than in barrels or half barrels."

As, however, the fish were preserved by being dry salted, we are of opinion that they came within the third paragraph, and were subject to the ad valorem duty there specified.

But the action cannot be maintained if the statutory requirements in respect of notice were not complied with. Rev. Stat. §§ 2931, 3011. While such protest need not be technically precise, it must "definitely and specifically" set forth the grounds of the importer's objections, to the end that the collector may have seasonable opportunity to remove them, and that the importer may not raise other objections than those on which he acted, after the business is closed and the money paid into the Treasury. *Herrman* v. *Robertson*, *ante*, 521.

This involves the designation in substance, though exact accuracy is not required, of the provision under which the importer insists the goods are dutiable, so as to comprehensively indicate the grounds of alleged error and afford the means of rectification. The importers assumed to do this here, and objected that the fish were not "pickled fish" liable to a duty of one cent per pound, but were "dry fish" dutiable at one-half cent per pound; or, in other words, the inference from the duty specified was that the collector should have assessed them under the second paragraph above quoted and not under the first. The collector, who had classified the fish in accordance with the entry, was thus notified that he should have classified them under a clause which was in terms inapplicable. It was only from the connection of the words "dry fish" with the rate named, that the collector could have inferred that the importers meant that the fish were cured by being dried; but the clause did not apply, and he was left to conjecture as to whether the fish might not have been originally pickled and become subsequently dry. We do not say that the protest need necessarily have stated that the fish had never been pickled, but it was essential to its sufficiency that it should amount to a notification that the importers claimed that the fish were cured by being dried or salted, and not by being pickled. Had the second paragraph applied, the protest

might be treated as definite enough; but, as the case stands, it must be held to have been insufficient.

The judgment is reversed and the cause remanded with a direction to enter judgment for the defendant.

Mr. Justice Jackson did not hear the argument, and took no part in the consideration and decision of the case.

SEEBERGER *v.* SCHLESINGER.

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

No. 274. Argued and submitted March 13, 1894. — Decided April 9, 1894.

Chinese goat skins, tanned with the hair on, so that the skin is soft and pliant, should not be classified for the assessment of customs duties as "rugs," under the act of March 3, 1883, c. 121, 22 Stat. 488.

The commercial designation of an imported article is not a matter of which courts can take judicial notice, but is a fact to be proved by evidence.

When the court below makes special findings, no exception is necessary to raise the question whether the facts support the judgment.

Shell-covered opera glasses, composed of shell, metal, and glass, imported under the tariff act of March 3, 1883, c. 121, were subject to be classed as manufactures composed in part of metal, under Schedule C, and were dutiable at 45 per cent.

This was an action by the firm of Schlesinger & Mayer against the collector of the port of Chicago to recover duties paid upon certain importations of Chinese goat skins and pearl opera glasses, entered for consumption at the custom-house at Chicago.

The case was tried by the court, without a jury. The court made a special finding of facts, and awarded the plaintiff judgment for $113.60 for excess duties upon the goat skins, and $6.60 upon the opera glasses.

Defendant sued out a writ of error from this court.

Mr. Assistant Attorney General Whitney for plaintiff in error.

Mr. Percy L. Shuman and *Mr. W. Wickham Smith* for defendants in error submitted on their brief.

Mr. Justice Brown delivered the opinion of the court.

This case involves the proper classification for duties under the act of March 3, 1883, c. 121, 22 Stat. 488, of Chinese goat skins and pearl opera glasses.

1. In reference to the goat skins, the court found that the plaintiffs imported and entered at the custom-house in the port and district of Chicago certain Chinese goat skins, dressed and finished, upon which the plaintiffs paid a duty of 40 per cent ad valorem, as "rugs" not otherwise provided for, classified and assessed by the defendant collector, under Schedule K, act of March 3, 1883, namely: "Carpets and carpetings of wool, flax, or cotton . . . not otherwise herein specified, forty per centum ad valorem; and mats, rugs . . . shall be subjected to the rate of duty herein imposed on carpets." Plaintiffs paid these duties under protest, and appealed to the Secretary of the Treasury, claiming that such merchandise should be assessed at a duty of 20 per cent ad valorem under Schedule N, "Sundries," as "skins dressed and finished, of all kinds, not specially enumerated." The court further found "that the goods in question were described in the invoice as 'Chinese goat skins;' that they are tanned with the hair on so that the skin is soft and pliant; that none of the skins are whole or entire, but that the articles imported are made of pieces of skins tanned as aforesaid, loosely sewed together so as to make large parallelogram-shaped pieces about 18 inches wide by 36 to 48 inches long; that they are advertised and sold to some extent for floor rugs, and are sometimes lined and trimmed for sleigh and carriage robes; that they are not always used in the shape imported, but are sometimes cut apart at the seams, or cut into strips and dyed, and used for trimming lap robes, overcoats," etc.

Opinion of the Court.

We agree with the court below in holding that the skins in question were improperly classified as "rugs." Schedule K of the act of March 3, 1883, (22 Stat. page 508,) is entitled "Wool and Woollens," and, until the clause in question is reached, provides for duties upon various classes of wools, woollen goods, clothing, carpets, including, as an analogous material, the hair of the alpaca, goat, and other like animals, with fabrics made of such hair, or mixtures of the same with wool. The schedule then imposes a duty of six cents per yard upon "hemp or jute carpeting," and then provides that "carpets and carpetings of wool, flax, or cotton, or parts of either or other material, not otherwise herein specified, forty per centum ad valorem; and mats, rugs, screens, covers, hassocks, bedsides, and other portions of carpets or carpetings, shall be subjected to the rate of duty herein imposed on carpets or carpetings of like character or description; and the duty on all other mats not exclusively of vegetable material, screens, hassocks, and rugs, shall be forty per centum ad valorem." There is no mention here of skins, or of hair attached to the skin; and while, if the articles in question were used exclusively or principally as rugs, they might be included within that designation, the fact that they were of the size of small rugs, and were advertised and sold to some extent for that purpose, would not be sufficient, if a more specific designation could be found. It not only appears that they were sometimes lined and trimmed for sleigh and carriage robes, but that they were not always used in the shapes imported, and were sometimes cut apart at the seams, and cut into strips and dyed and used for trimming garments. In fact, their uses were so various that they afford a very unsatisfactory criterion for their classification.

The plaintiffs took the ground in their protest, and in this they were sustained by the court below, that they should be classified under Schedule N, "Sundries.— Skins dressed and finished." The clause relied upon is one providing for the assessment of leathers, and reads as follows (page 513):

"Leather, bend or belting leather, and Spanish or other sole leather, and leather not specially enumerated or provided for in this act, fifteen per centum ad valorem.

"Calfskins, tanned, or tanned and dressed, and dressed upper leather of all other kinds, and skins dressed and finished, of all kinds, not specially enumerated or provided for in this act, and skins of morocco, finished, twenty per centum ad valorem.

"Skins for morocco, tanned, but unfinished, ten per centum ad valorem.

"All manufactures and articles of leather, or of which leather shall be a component part, not specially enumerated or provided for in this act, thirty per centum ad valorem."

It is insisted, however, that the item of "skins dressed and finished," read in connection with the residue of the clause, and particularly with "skins for morocco, tanned, but unfinished," indicates that, by "skins dressed and finished" were meant skins dressed and finished in the similitude of leather; that is, by having the hair removed; and that a reference to the corresponding clause of the Revised Statutes, section 2504, page 477, shows still more clearly that the clause in question was not intended to include skins with the hair on:

"Leather. — Bend or belting-leather, and Spanish or other sole leather: fifteen per centum ad valorem; calfskins, tanned, or tanned and dressed: twenty-five per centum ad valorem; upper leather of all other kinds, and skins dressed and finished of all kinds, not otherwise provided for: twenty per centum ad valorem; skins for morocco, tanned, but unfinished: ten per centum ad valorem; manufactures and articles of leather, or of which leather shall be a component part, not otherwise provided for, thirty-five per centum ad valorem.

"Leather and skins japanned, patent, or enameled: thirty-five per centum ad valorem.

"All leather and skins, tanned, not otherwise provided for: twenty-five per centum ad valorem."

In this court, it is further claimed by the collector that while none of the clauses referred to include skins of animals with the hair on *eo nomine*, the goat skins in question fall either directly or under the similitude clause within the description of "dressed furs on the skin," page 513, and were dutiable at twenty per centum ad valorem; that although goat skins are

not ordinarily classified as furs — a term usually reserved for the short, fine hair of certain animals, whose skins are largely used for clothing; yet in a commercial sense furs have been regarded as including other skins, perhaps more properly designated by the term "peltry;" and that within their commercial designation is included the covering of all animals whose skin is used either for warmth or ornament, with the hair on. In this connection we are cited to the case of *Astor* v. *Union Insurance Co.*, 7 Cowen, 202, in which an "Invoice of furs" was described as consisting of bear and raccoon skins, opossum, deer, fine fisher, cross fox, marten, white raccoon, wild cat, wolf, wolverine, panther, and cub skins. In this case evidence was held to be properly admitted showing that, by the usage of the trade, skins valuable chiefly on account of the fur were called *fur*, while *skins* was a term appropriated to those which were valuable chiefly for the *skin*, by which we understand the skin with the hair removed. Our attention is also called to the Encyclopædia Britannica, which, in treating of the subject of fur, includes within that designation the skins of the bear, buffalo, lamb, lion, tiger, and wolf, although perhaps none of these would fall within the popular definition of furs.

The commercial designation of an article, however, is not a matter of which courts can take judicial notice, but is a fact to be proved like any other — by evidence. In this case there is no finding as to the commercial meaning of the word "furs," and no testimony whatever upon the subject, for clearly neither the opinion in the *Astor case* nor the extract from the encyclopedia can be considered as legitimate testimony. In short, the case was tried wholly upon the theory that the goat skins in controversy were either "rugs" or "skins dressed and finished." The collector, therefore, is in no position, as the case is now presented, to ask for a reversal upon this ground; but as the case must be reversed upon another ground, both parties will be at liberty upon a new trial to introduce testimony upon the question of commercial usage.

2. With reference to the opera glasses, the court found that the plaintiffs had imported certain shell-covered opera

glasses, composed of shell, metal, and glass, upon which said merchandise the plaintiffs paid a duty of 45 per cent ad valorem, assessed by the defendant collector as "manufactured articles, composed in part of metal," under Schedule C, act of March 3, 1883; that plaintiffs protested and appealed to the Secretary of the Treasury, claiming that these opera glasses should be assessed a duty of 25 per cent ad valorem under Schedule N, "Sundries," as "shells, whole or parts of, manufactured, of every description," and under section 2499, as "articles composed of shell, metal, and glass in which the shell is the component of chief value."

The court further found from the proofs that the "said opera glasses are composed of silver or nickel-plated metal tubes, fitted to slide within each other, and held together by a metal framework or connections, said tubes containing glass lenses properly fitted therein, and that said tubes are enclosed in a cover of polished mother-of-pearl; that the shell, when manufactured, or brought to the proper shape for such cover and properly polished, costs more than the glass lenses and metal tubes and frame when finished and ready to be combined with said pearl to make a complete opera glass."

In this connection, our attention is called to the fact that, while an exception was taken to the ruling of the court with respect to goat skins, none was taken to its rulings with respect to the opera glasses. This, however, is immaterial, no exception being necessary, in case of special findings by the court, to raise the question whether the facts found support the judgment. *St. Louis* v. *Ferry Co.*, 11 Wall. 423, 428; *Tyng* v. *Grinnell*, 92 U. S. 467, 469; *Insurance Co.* v. *Boon*, 95 U. S. 117, 125; *Allen* v. *St. Louis Bank*, 120 U. S. 20, 30.

The court below was of opinion that, taking the designation of "shells, whole or parts of, manufactured," found in Schedule N, page 514, in connection with the last clause of Rev. Stat. § 2499, that "on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value be chargeable, these opera glasses should have been classified as manufactured shells, inasmuch as it appeared that the shell, when manu-

factured or brought to the proper shape for such covering and properly polished, costs more than the glass lenses and metal tubes and framework, when finished ready to be combined with said material to make a complete opera glass." We held this method of computation to be correct in *Seeberger* v. *Hardy*, 150 U. S. 420, but the question of the proper classification of the opera glasses was not considered in that case.

We think the court was in error in holding that the articles in question were shells, whole or parts of, manufactured, as this clause was obviously intended to apply to articles made entirely, or nearly so, of shell, such as combs, bracelets, chains, and lorgnons, and not to articles of which shell was a mere component, though perhaps, as in this case, the most valuable part. Nor are we satisfied that they should be classed as "articles manufactured from two or more materials," in which case, by Rev. Stat. § 2499, as amended by the act of 1883, (22 Stat. 491,) duty should be assessed at the highest rate at which the component material of chief value may be chargeable. In view of the more specific designation in Schedule C, page 501, of "manufactures, articles, or wares not specially enumerated or provided for in this act, composed wholly or in part of . . . metal," and in view of the fact that, while the metal is not the component of chief value, it is a substantial part of the finished glass, and the framework upon which the lenses and shell are mounted, we think these articles should be classed as manufactures of metal. We do not wish to be understood as holding that, if the metal be a mere incident or an immaterial part of the completed article, as, for instance, the screws or knobs upon an article of household furniture, or the buttons upon an article of clothing, such articles should be classified as manufactures in part of metal; but where, as in this case, they form a necessary and substantial part of the article, we think this clause should determine their classification. Particularly is this so in view of the fact that opera glasses are frequently made of glass and metal alone, or with an outer covering of leather, which would form an inconsiderable part of the total expense. It would be obviously unjust that these cheaper glasses should pay a

duty of forty-five per cent while the more expensive glasses with shell coverings are dutiable only as manufactures of shell at twenty-five per cent.

Practically the same question was before this court in *Solomon* v. *Arthur*, 102 U. S. 208, in which the question arose as to the proper classification of goods composed of silk and cotton. The collector laid a duty upon them as "manufactures of silk or of which silk is the component part of chief value, not otherwise provided for;" and the question was whether they were "otherwise provided for" as "manufactures composed of mixed materials, in part of cotton, silk, wool or worsted, or flax." The goods in question were confessedly embraced in both descriptions; but as "manufactures made of mixed materials, in part of cotton, silk," etc., was more general than that of "manufactures in which silk is the component part of chief value," the two phrases were interpreted to read as follows: "Goods made of mixed materials, cotton, silk, etc., shall pay a duty of thirty-five per cent; *but if* silk is the component part of chief value, they shall pay a duty of fifty per cent." So by analogy we may read the two clauses in question in this case as follows: "On all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable, provided that if such articles are composed wholly or in part of metal, they shall be dutiable at forty-five per cent." So in *Hartranft* v. *Meyer*, 135 U. S. 237, the question was whether cloth composed partly of silk, partly of cotton, and partly of wool, silk being the component material of chief value, should be classified as "manufactures of wool of every description, made wholly or in part of wool, not specially enumerated or provided for in this act," or as "goods, wares, and merchandise, not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value." It was held that, as the latter clause was narrower and more limited than the other, they should be classified as silk goods. In the case of *Liebenroth* v. *Robertson*, 144 U. S. 35, photographic albums made of paper, leather, metal clasps and plated

clasps, the paper being worth more than all the rest of the materials put together, were held not to be liable to duty as "manufactures and articles of leather, or of which leather shall be a component part," but as manufactures of paper, or of which paper was the component material of chief value not specially enumerated or provided for. The case was held to be determined by Revised Statutes, section 2499, as amended by the act of March 3, 1883, that "on all articles manufactured from two or more materials the duty shall be assessed at the highest rates of which the component material of chief value may be chargeable." As the evidence distinctly showed that the paper was the component material of chief value, the albums were held to be assessable as manufactures of paper. In this case the two clauses were practically the same, one being of "manufactures and articles of leather, or of which leather shall be a component part, not specially enumerated;" and the other "paper; manufactures of, or of which paper is a component material, not specially enumerated." As the articles were made both of leather and paper, and were assessable with equal propriety under the one clause or the other, the court called to its aid section 2499, and held the article to be assessable at the highest rates at which the component material of chief value, to wit, the paper, was chargeable. If there had been in the statute such a provision with regard to articles manufactured wholly or in part of shell as there is with regard to articles manufactured wholly or in part of metal, this case would be decisive, but there is no necessity of relying upon section 2499 to aid us in the interpretation of the clauses in question here.

The views of the courts of the different circuits have not been uniform with respect to the classification of these glasses, but we agree with the district judge in the case of *Aloe* v. *Churchill*, 44 Fed. Rep. 50, that they should be classed as manufactures composed in part of metal under Schedule C, and, therefore, dutiable at forty-five per cent.

The judgment of the court below is, therefore,

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

DAVIS *v.* MERCANTILE TRUST COMPANY.

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

No. 320. Argued March 22, 26, 1894. — Decided April 9, 1894.

On an appeal from a decision of a Circuit Court, all parties to the record who appear to have an interest in the decision challenged, must be given an opportunity to be heard.

The successful bidder at a foreclosure sale becomes thereby a party to the proceedings, and is entitled to be heard on questions subsequently arising affecting his bid, not foreclosed by the terms of the decree of sale.

In a decree for the foreclosure of a mortgage, the two parties principally interested are the mortgagor and the mortgagee, and third parties should not be given an opportunity to disturb the decree without first giving the principal parties an opportunity to be heard.

On February 18, 1889, the Mercantile Trust Company of New York filed in the Circuit Court of the United States for the Southern District of Ohio its bill against the Kanawha and Ohio Railway Company. The bill alleged that on May 1, 1886, the defendant, the Kanawha and Ohio Railway Company, issued a series of bonds, and on the same day executed to the Mercantile Trust Company its mortgage or deed of trust to secure the payment of the principal and interest of such bonds. It alleged a default in the payment of interest due on January 1, 1889, as well as the existence of a large floating debt, and prayed the appointment of a receiver, and a decree of foreclosure and sale. On February 19 the defendant entered its appearance, and on the same day a receiver was appointed, who qualified and took possession of the mortgaged property. Subsequently, and on July 24, an amended bill was filed making the Toledo and Ohio Central Railway Company and the Shawnee and Muskingum River Railway Company additional parties defendant. On October 26 a decree *pro confesso* was entered against the latter company. On October 30, Erwin Davis, the present appellant, filed a petition alleging that he was the owner of more than $100,000 of the bonds secured by the mortgage or deed of

trust sought to be foreclosed in this suit, and also the owner of more than $500,000, par value, of each class of stock of the defendant, the Kanawha and Ohio Railway Company, to wit, first and second preferred, and common, and asking for the removal of the receiver on the ground of his incompetency, and the appointment of some capable and disinterested person as such receiver. On the same day a decree *pro confesso* was entered against the Kanawha and Ohio Railway Company. On November 13 the petition of Davis, for the removal of the receiver and the appointment of another in his stead, was denied, and at the same time this order was made: "It is further ordered that said Erwin Davis be, and is permitted to intervene herein, and that he have liberty to be heard upon any and all proceedings herein for the protection of his interests as bondholder and stockholder of the Kanawha and Ohio Railway Company."

On November 29 the Toledo and Ohio Central Railway Company filed its consent to the entry of a decree, according to the prayer of the amended bill of complaint, and that the "cause proceed in like manner as if an order *pro confesso* had been duly entered against it more than thirty days prior" thereto. On December 5 Davis filed a second petition, reciting his interest as before, and in addition alleging the existence of certain prior mortgage liens upon the property described in the plaintiff's bill, or part of it; that in the bill there was claimed that the Kanawha and Ohio Railway Company had a floating debt of about $330,000; that since the filing of the bill that company had confessed judgment in favor of the Kanawha Improvement Company in a court of West Virginia for the sum of $285,232.20; and that, as a bondholder and stockholder of the Kanawha and Ohio Railway Company, on behalf of himself and all other stockholders and creditors, he had filed a bill in the Circuit Court of the United States for the District of West Virginia, attacking such judgment so confessed, on the ground of fraud, and praying that it be cancelled, set aside, and held for naught. He attached a copy of this bill, and closed the petition in these words:

"Your petitioner respectfully represents that he is advised that no decree of sale of the property included in said mortgage should be decreed until a reference is had to ascertain the liens which shall have been first ascertained thereon, the amounts thereof, and the order of their priorities; that a sale should not be decreed until the validity of the judgment referred to shall have been first adjudicated.

"Petitioner therefore prays that this his petition be read and considered at the hearing; that your honors will not at said hearing enter a decree of foreclosure as prayed for in said bill until the matters of this petition have been fully heard and a proper reference to a master be made to ascertain all liens upon said railroad and the order of their priorities, and that petitioner have full relief in the premises, and, as in duty bound, he will ever pray," etc.

On the same day, to wit, December 5, 1889, a decree of foreclosure and sale was entered; that decree found a default in the payment of interest and decreed a sale unless such interest should be paid within thirty days. At the close of the decree was this entry: "Thereupon came the intervening petitioner, Erwin Davis, and prayed the court for the allowance of an appeal, with supersedeas, from the foregoing decree, and the court thereupon refused the appeal."

Subsequently, an application was made to Mr. Justice Harlan of this court for an appeal, and on February 11, 1890, it was allowed. The only security given on this appeal was a cost bond, in the sum of five hundred dollars, executed by Davis and his surety to the appellee, the Mercantile Trust Company, alone. This bond was approved February 27, 1890, and a citation was then signed by Mr. Justice Harlan, the citation running to the Mercantile Trust Company, the Kanawha and Ohio Railway Company, the Toledo and Ohio Central Railway Company, and the Shawnee and Muskingum River Railway Company. This was served on the Mercantile Trust Company, the Toledo and Ohio Central Railway Company, and the Shawnee and Muskingum River Railway Company, but not on the Kanawha and Ohio Railway Company, the mortgagor. No supersedeas bond having been executed,

a sale was had under the decree on March 4, 1890, and the property struck off to Nelson Robinson and William B. Post, for the sum of $505,000. On April 7, 1890, this sale was confirmed and a deed ordered; from such order of confirmation Davis prayed an appeal, which was allowed. On such appeal also a cost bond to the Mercantile Trust Company alone was given, and a citation issued running only to the Mercantile Trust Company.

Mr. Walter S. Logan, (with whom was *Mr. Charles M. Demond* on the brief), for appellant.

Mr. Thomas Thacher for appellee.

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

As a preliminary matter the standing of the appellant in this court is challenged. In the court below he was not a party to the record, either plaintiff or defendant; was never substituted for either; filed no bill, cross-bill, or answer; but was simply permitted to intervene, with liberty to be heard upon any and all proceedings for the protection of his interests as bondholder and stockholder. Assuming, under the authority of *Williams* v. *Morgan*, 111 U. S. 684, 698, that this gave him a right of appeal from any decision of the Circuit Court affecting his interests, it did not change the ordinary rules respecting appeals, one of which is that all the parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal. The rule and the reasons therefor are fully stated in *Masterson* v. *Herndon*, 10 Wall. 416, and restated in *Hardee* v. *Wilson*, 146 U. S. 179, 181, and need not, therefore, be again repeated. See also *Inglehart* v. *Stansbury*, 151 U. S. 68.

In this case the appellant has taken two appeals, one from the decree and the other from the order confirming the sale. These appeals being taken separately, each must stand or fall on its own merits. Noticing first the appeal from the order

of confirmation, it will be seen that the sale confirmed was of the mortgaged property to Robinson and Post for the sum of $505,000, of which sum $50,000 had been paid in cash by the purchasers, and the balance secured by a deposit of $1,069,000, first mortgage bonds of the Kanawha and Ohio Railway Company, the bonds in suit. Who is more vitally interested in the question whether such sale and confirmation shall stand than these purchasers? If the sale be set aside, they lose the purchased premises and all the profit which might result from their purchase, and assume all the risks and delay in recovering that which they have paid into court. In *Kneeland* v. *American Loan Co.*, 136 U. S. 89, 95, this court said that, "supported by sound reasons, are the following propositions: First, a party bidding at a foreclosure sale makes himself thereby a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase; and with a right to be heard on all questions thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree."

Again, not only is the purchaser interested, but also the mortgagor. He may be satisfied with the sale which was made, may believe that at no other sale would it be possible to realize so much in satisfaction of his indebtedness. At any rate, the setting aside of one sale and the ordering of another may affect prejudicially or beneficially his interests, and because of that he has a right to be heard upon the question of setting it aside. Now, the only party respondent to this appeal is the trustee. It is the only party named as obligee in the cost bond. The citation in terms runs to it only, and there is no pretence that the mortgagor or the other defendants, or the purchasers at the sale, have ever been brought into this court to respond to this appeal. Manifestly, it would be the grossest injustice to attempt to determine the question of the validity of this sale in the absence of these so vitally interested parties.

Neither does the appeal from the decree stand in any better condition. In a decree for the foreclosure of a mortgage the two parties principally and primarily interested are the mortgagee and the mortgagor. No third party should be permitted

to disturb such a decree unless and until both mortgagee and mortgagor are given an opportunity to be heard. The mortgagor may be unwilling that the decree should be set aside notwithstanding irregularities in prior proceedings, for fear that on a subsequent hearing a larger sum may be decreed against him. It is not necessary in any given case to determine that his interests would or would not be promoted by the setting aside of the decree; it is enough that in that matter he has a direct interest, and because of this interest common justice requires that no change shall be made in the terms of that decree, nor shall it be set aside, without giving him a chance to be heard in its defence. Ordinarily it may be presumed that all the parties to the record are interested, and so it is often said that all such parties must be joined as appellants or appellees, plaintiffs in error or defendants in error; but it is unnecessary to rest this case upon the mere fact that the mortgagor in this case was a party to the record — the only defendant in the first instance. It was not only such a party, but is also one directly and vitally interested in the question whether the decree of foreclosure and sale shall stand, and yet it is not before us. The trustee is the only obligee named in the appeal bond, and while the citation on its face runs to all the parties to the record, it was not served on the mortgagor, the Kanawha and Ohio Railway Company, and that company has never been brought into this court, and never entered an appearance here. This is fatal to the appeal. The appellant seems to have assumed that he was authorized to represent the corporation mortgagor and all the stockholders, but this is obviously a mistake. He was not by order of court substituted for the defendant mortgagor, nor was he allowed to represent the mortgagor or to carry on its defence. The only authority given to him was to intervene for the protection of his personal interests as bondholder and stockholder. The corporation mortgagor still represented all the other stockholders, as did the trustee all the other bondholders; and while the appellant appears to have had a considerable interest, both as stockholder and bondholder, it was only a minor fraction. Out of 1160 bonds 1069 (all but 91) were

tendered by the purchasers upon application for confirmation of sale, and while he claims to be the owner of $1,500,000 of the stock, it appears that the total amount thereof was $12,200,000; so that in fact he was the owner of less than one-eleventh of the bonds and one-eighth of the stock. No authority from these other bondholders or stockholders to him to act for them is shown, so that neither in fact nor in law was he representing the corporation mortgagor in this litigation; and as that mortgagor was interested in and affected by the decree of foreclosure and sale, it should have been made a party to this appeal and brought into this court, and because of the failure so to do, the appeal cannot be maintained.

For the reasons above given both appeals are

Dismissed.

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

NORTH CHICAGO ROLLING MILL COMPANY *v.* ST. LOUIS ORE AND STEEL COMPANY.

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

No. 197. Argued January 11, 1894. — Decided April 9, 1894.

A garnishee, who occupies the double position of debtor to the principal defendant in a definite or ascertained amount, and also that of a creditor of such principal debtor by way of unliquidated damages arising out of the breach of a contract in existence when the garnishment proceedings were instituted, can, after an order at law subjecting the defined indebtedness to the payment of the garnishor, invoke the aid of a court of equity to restrain the garnisheeing creditor from enforcing the payment of the amount due until the unliquidated damages can be ascertained, and set off against such indebtedness, on the ground that the principal debtor is insolvent and a non-resident of the State in which the garnishee resides, and in which the garnishment proceedings are had.

Equity will entertain jurisdiction and afford relief against the collection of

Statement of the Case.

a judgment where there is a meritorious, equitable defence thereto, which could not have been set up at law, or which the party was, without fault or negligence, prevented from interposing.

The adjustment of demands by counter-claim or set-off rather than by independent suit is favored and encouraged by the law, to avoid circuity of action and injustice.

The insolvency of the party against whom a set-off is claimed is a sufficient ground for equitable interference; and in Illinois and some other States the non-residence of the party against whom the set-off is asserted, is also held to be sufficient ground therefor.

It is settled in England, where the law differs in no material respect from that of Illinois, that a garnishee order does not effect a transfer of the debt to the garnishor, or create the relation of creditor and debtor between him and the garnishee.

It is a recognized principle that the rights of the garnishor do not rise above or extend beyond those of his debtor; that the garnishee shall not, by operation of the proceedings against him, be placed in any worse condition than he would have been in had the principal debtor's claim been enforced against him directly; that the liability, legal and equitable, of the garnishee to the principal debtor is a measure of his liability to the attaching creditor, who takes the shoes of the principal debtor and can assert only the rights of the latter.

THE court stated the case as follows:

The principal question presented by the record in this case is whether a garnishee, who occupies the double position of debtor to the principal defendant in a definite or ascertained amount, and also that of a creditor of such principal debtor by way of unliquidated damages arising out of the breach of contract in existence when the garnishment proceedings were instituted, can, after an order at law subjecting the defined indebtedness to the payment of the garnishor, invoke the aid of a court of equity to restrain the garnisheeing creditor from enforcing the payment of the amount due until the unliquidated damages can be ascertained, and set off against such indebtedness, on the ground that the principal debtor is insolvent and a non-resident of the State in which the garnishee resides, and in which the garnishment proceedings are had? In other words, is the insolvency and non-residence of the principal debtor, to whom the garnishee is indebted in a certain, definite amount, and against whom he has a valid

claim for unliquidated damages growing out of a breach of contract between them — in existence at the commencement of the garnishment proceedings — a good ground for the exercise of equitable jurisdiction after an order, or judgment at law, declaring the sum due the principal debtor applicable to the payment of the garnishor, to stay the enforcement of such order or judgment until the unliquidated damages due the garnishee can be ascertained and set off against the amount certain owing by him to the principal debtor?

The material facts and proceedings out of which this question arises are as follows: In November, 1883, the St. Louis Ore and Steel Company, of St. Louis, Missouri, (hereafter styled the St. Louis Company,) and the North Chicago Rolling Mill Company, of Chicago, Illinois, (hereafter called the Chicago Company,) were each engaged in the manufacture of steel rails for railroads. The St. Louis Company was also a miner of iron ore and the maker of pig metal. On November 6, 1883, the St. Louis Company entered into a contract with the Missouri Pacific Railroad Company for the sale and delivery to the railroad company of 24,000 tons of steel rails, in quantities of 2000 tons per month from January to December, 1884, inclusive, for which the railroad company agreed to pay for each monthly delivery of rails on receipt of bills of lading and invoice, at the rate of $18 a ton cash, and one ton of old rails for each ton delivered.

On November 19, 1883, the St. Louis Company entered into another contract with the Missouri Pacific Railroad Company, by which it agreed to sell to the railroad company the further quantity of 18,000 tons of steel rails to be delivered at the rate of about 1500 tons per month, commencing January 1 and ending in December, 1884, for which the purchaser was to pay for each delivery of 1500 tons at the rate of $37.50 a ton in cash, on the twentieth day of the month succeeding the delivery.

Having these engagements on its hands, the St. Louis Company on December 1, 1883, entered into a written contract with the Chicago Company, by which the latter agreed to furnish the former company 18,000 tons of No. 1, Bessemer

steel rails, to be delivered free on board the cars at Chicago in about equal amounts, (1500 tons,) during each month of the year 1884, at the rate of $35 per gross ton, (2240 pounds,) to be paid by the St. Louis Company on the tenth day of each month for all rails delivered during the previous month. The contract specified that the rails to be furnished by the Chicago Company should weigh 52, 56, 59, or 63 pounds per lineal yard, as per templet to be furnished by the St. Louis Company, and were to be drilled for bolts at certain distances from the ends of the rails according to their weight.

The rails were to be consigned as directed by the St. Louis Company, which was to furnish the cars for the prompt shipment thereof from Chicago, "and in the absence of the furnishing of cars upon which to load said rails, enabling the said first party (the Chicago Company) to make their deliveries as herein specified, then the said second party (the St. Louis Company) shall make their settlements and pay for said rails on the tenth day of the month, the same as though said rails had been delivered, and the non-delivery of cars shall in no way relieve the said second party from the prompt payment for the rails on the tenth day of the month as specified herein." The rails, so far as delivered, were manufactured in varying weights, upon orders given by the St. Louis Company.

On December 22, 1883, the Chicago Company entered into a contract with R. M. Cherrie & Company, of Chicago, for the purchase of 50,000 tons of iron ore, to be mined and shipped, during the year 1884, from the Pilot Knob Mine in the State of Missouri, owned and operated by the St. Louis Company. This ore was to be delivered at the Chicago Company's works in quantities of from one to seven thousand tons per month, as required by the Chicago Company, and payment therefor was to be made on the fifteenth day of each month for ore delivered during the previous month. This contract, if not made by Cherrie & Company, as agents of the St. Louis Company, was guaranteed by the latter so far as the quality of the ore and its delivery were concerned.

Cherrie & Company became financially involved, and on July 3, 1884, made an assignment to one Jenkins for the ben-

efit of their creditors, of whom the St. Louis Company was a large one. Upon the failure of Cherrie & Company the St. Louis Company assumed the former's ore contract with the Chicago Company, and thereafter, between the 4th and 21st days of July, 1884, delivered to the Chicago Company iron ore and pig metal to the amount or value of $44,916.82, for which payment was to be made by the Chicago Company on August 15, 1884.

On July 10, 1884, the St. Louis Company, being indebted to the Chicago Company in the sum of $21,536.56 for steel rails delivered during the previous month, (June,) made default in paying the same, and the next day (July 11, 1884) informed the Chicago Company by letter of its inability to pay for the June delivery of rails, and asked as a special favor to let the matter rest for a little while, as the Chicago Company had in its possession funds arising from the sale of ore and pig metal which were being delivered during the month of July. To this request no reply appears to have been made.

On July 12, 1884, the St. Louis Company again wrote the Chicago Company, expressing a doubt as to its ability to pay its debts promptly, and suggesting an arrangement by which the receivers of the Wabash Railroad Company should take certain rails and settle directly with the Chicago Company. This arrangement was not, however, consummated.

The St. Louis Company being embarrassed, and having made default in paying the interest on its several issues of bonds, secured by mortgages, was, on July 21, 1884, placed in the hands of a receiver, upon a bill filed against it in the United States Circuit Court for the Eastern District of Missouri by Robert M. Olyphant, as trustee, a citizen of New York, for the foreclosure of a second mortgage upon its property. The bill alleged the insolvency of the St. Louis Company, and upon the day of its filing, E. A. Hitchcock, the president of the company, was appointed provisional receiver of its property and assets, with instructions "to carry out and perform the contracts of the company for the purchase and sale of steel rails, and to preserve and protect all its property." This receivership was made permanent on August 7, 1884,

and the provisional instructions were renewed. Hitchcock promptly qualified both as provisional and permanent receiver.

The receiver subsequently, on August 25, 1884, made a report to the court, in which, after referring to the several contracts of the St. Louis Company with the Missouri Pacific Railroad Company for the sale of steel rails, and with the Chicago Company and others for the purchase of such rails, together with what had been done thereunder, stated that on July 30, 1884, he had received from the railroad company an order for 2045 tons of rails to be delivered in August; that he thereupon had placed with the Chicago Company an order for 1500 tons of the rails required, the price of which, under the contract between the St. Louis Company and the Chicago Company, would amount to about the sum of $52,000, and if the rails were delivered in August, that sum would have to be paid on September 10, 1884; that he had not in hand, and was not likely to have, any funds with which to meet such payment; that he had, after negotiations, failed to induce the railroad company to agree to make payment for the rails on September 10, 1884; that the railroad company had, furthermore, notified him that it was ready to carry out its contract with the St. Louis Company according to the terms thereof, but would no longer accept steel rails from other makers in the performance of that contract; that he had without success made overtures to be released from the contract of the St. Louis Company for the sale and purchase of steel rails, on the basis of the difference between the then market price of such rails, estimated at $31 per ton, and the contract prices, which terms he regarded as just to all parties, but that these overtures were not accepted. The receiver further reported that the Chicago Company had notified him by letter under date of August 6, 1884, that it was ready and willing to carry out its contract of December 1, 1883, for the manufacture and delivery of steel rails upon the terms of payment therein mentioned, and that for the failure of the St. Louis Company to carry out the said contract it would claim damages; that the Chicago Company requested an explicit statement from him,

as receiver, whether he would be prepared to pay in cash on the tenth of each month following the delivery of rails ordered by him under said contract, to which he had replied that he was not in possession of money sufficient to pay cash for such rails, but that the court under whose orders he was acting had power to make provision therefor; that to this the Chicago Company had replied that it was ready and willing to furnish the rails as ordered upon being notified that he was prepared to pay therefor on the tenth of the month following delivery.

The correspondence fully established the facts thus reported by the receiver. It is further shown in the correspondence between the receiver and the Chicago Company that the receiver proposed to pay for the rails which might be ordered and delivered under the contract with the St. Louis Company in receiver's certificates, which the Chicago Company declined to receive. The receiver admitting that he could not pay for the 1500 tons ordered for the next month, those rails were, for that reason, not manufactured by the Chicago Company.

The Chicago Company received no orders for rails from the St. Louis Company, or its receiver, for the month of July, or for any subsequent month during the year 1884. Nor did the receiver ever notify the Chicago Company that he was prepared to pay for the rails according to the terms of the contract between the two companies.

On the day of the receiver's appointment, (July 21, 1884,) the Joliet Steel Company, an Illinois corporation, commenced two attachment suits in the Superior Court of Cook County, Illinois, against the St. Louis Company, one for $7777.07, the other for $10,051.78, and on the same day and in the same court the Iron Mountain Company, a Missouri corporation, commenced an attachment suit against the St. Louis Company upon a claim for $19,782.60. No property of the St. Louis Company was attached under the writs issued in these suits, which were thereupon, and in conformity with the statutes of Illinois, served upon the Chicago Company, and R. E. Jenkins, as assignee of R. M. Cherrie & Company, as garnishees, and interrogatories were filed for each of them to answer, touching

their indebtedness to the St. Louis Company. The two suits of the Joliet Company were removed in September, 1884, to the law side of the United States Circuit Court for the Northern District of Illinois. The Chicago Company made answer in November, 1884, and a supplemental and amended answer on February 25, 1885, setting forth the transactions and matters of account between itself and the St. Louis Company, admitting an indebtedness to the latter for ore and pig iron amounting to $44,916.82, and setting up counter-claims to the amount of $56,807.50, which included the sum of $28,390.16 as damages for the failure of the St. Louis Company to carry out the steel rail contract by receiving and paying for the rails in compliance with the terms of that contract.

To this answer replication was made, and, upon the issues formed, the cause was tried before a jury. The Chicago Company introduced proof tending to establish its claim for the $28,390.16, as damages; but upon motion of the plaintiff this evidence was stricken out, and the claim for damages was disallowed by the court on the ground that, being unliquidated, it could not properly be set off at law. The disallowance of the claim for damages left a balance of $16,473.28 due by the Chicago Company to the St. Louis Company. A verdict was directed for the plaintiff for that amount, and judgment was rendered against the Chicago Company, January 13, 1886, for the sum of $16,473.28.

This garnishment proceeding was, under the Illinois statutes, in the name of the St. Louis Company, and judgment was rendered in its favor against the Chicago Company for the amount of the verdict for the use of the Joliet Company and others entitled to share therein.

In the garnishment proceedings under the attachment suit of the Iron Mountain Company in the Superior Court of Cook County a similar judgment was rendered against the Chicago Company as garnishee. By the laws of Illinois the sum adjudged against the Chicago Company as garnishee was a *quasi* trust fund for the use of both attaching creditors — the Joliet Company and the Iron Mountain Company.

Pending the garnishment proceedings, on September 26,

1884, Robert M. Olyphant, as trustee, filed what is called an ancillary bill in the United States Circuit Court for the Northern District of Illinois against the St. Louis Company, for the purpose of reaching the assets of the company in that jurisdiction. This bill recited the proceedings had, and the orders made, in the original suit, and asked the court to administer the assets of the company in that jurisdiction.

The Chicago Company having secured a stay of proceedings in both of the garnishment cases, thereupon filed its bill, or petition, on January 18, 1886, against the St. Louis Company, the Joliet Company, and the Iron Mountain Company, on the equity side of the United States Circuit Court for the Northern District of Illinois, in the ancillary suit of *Olyphant* v. *St. Louis Company*. This bill or petition of the Chicago Company, after setting out the rail and ore contracts, the default of the St. Louis Company in failing to perform the rail contract, and the resulting damages to the Chicago Company, the garnishment proceedings at law in the state and Federal courts, and the denial of its right therein to set off its claim for damages against the St. Louis Company, alleged that the St. Louis Company was insolvent, and that, being both insolvent and a non-resident, the Chicago Company was entitled to relief in equity by having its damages liquidated, and then set off against the judgments in the attachment suits. The prayer was for an injunction and relief by way of equitable set-off, and for judgment over for any balance due it by the St. Louis Company.

The Iron Mountain Company filed its answer in March, 1887, admitting that the claim on which its attachment suit was brought against the St. Louis Company had been settled, and disclaimed any further interest in the proceedings.

The answer of the other defendants, while admitting most of the allegations of the bill, denied that the St. Louis Company had violated or failed to perform the rail contract, or that the complainant had any valid claim for damages against it; that if there had been any breach of the rail contract, the claim for unliquidated damages could not be the subject of set-off in equity any more than in law; that if the claim were

valid, it arose out of transactions distinct from the subject-matter of the suit in which such set-off was claimed; that it did not exist on July 21, 1884, when the garnishment process was served; that from that date the garnishor acquired a lien upon and a right to the fund, due from the garnishee, in the nature of an equitable assignment, which could not be disturbed or affected by any subsequent breach of the rail contract by the St. Louis Company. A general replication was filed by the Chicago Company.

While this suit of the Chicago Company for equitable relief was pending, the St. Louis Company effected a compromise with its bond creditors by issuing new mortgage securities in lieu of the old bonds, and thereupon the Olyphant suits against the St. Louis Company in the United States Circuit Courts for the Eastern District of Missouri and for the Northern District of Illinois were dismissed. The decree of dismissal of the Illinois suit provided, however, that the petition of the Chicago Company should stand and be proceeded in as an original bill.

On April 9, 1887, the Joliet Steel Company assigned and transferred its two judgments for $9101.85 and for $10,760.41, respectively, against the St. Louis Company to David K. Ferguson, who, as such assignee, thereafter, in May, 1888, applied to be made, and was made, a party to the suit of the Chicago Company.

The cause came on for hearing in May, 1889, upon evidence as to the breach of the rail contract by the St. Louis Company, and the damages thence resulting to the Chicago Company, which was substantially the same as that introduced at law in the garnishment proceedings. The Circuit Court held that the equitable set-off sought by the bill could not be allowed for the reasons that the judgment against the Chicago Company as garnishee was for money due for pig iron and ore bought from the St. Louis Company, while the claim for unliquidated damages grew out of the failure of the St. Louis Company to receive rails under the contract of December, 1883, which had no connection with the one upon which the Chicago Company was held as garnishee; that when the

Chicago Company was served as garnishee no part of the claim urged as a set-off had accrued; that the Chicago Company then had no right of action for the recovery of that claim; that it was then uncertain whether that company would make or lose money by the further performance of the rail contract. The opinion of the court concluded by saying: "Without ruling upon other questions discussed by counsel, it is sufficient to say that the claim for unliquidated damages growing out of the failure of the St. Louis Company to receive rails under the rail contract after the failure of that company and after the commencement of the suit in attachment and the service of the writ of garnishment upon the Chicago Company was properly rejected by the court in the trial of the action at law, and cannot now be set off against the judgment rendered against the garnishee. The intervening petition is dismissed without prejudice to the right of the Chicago Company to prosecute an action against the St. Louis Company." 39 Fed. Rep. 308.

Mr. E. Parmalee Prentice, (with whom was *Mr. Charles S. Holt* on the brief,) for appellant.

Mr. Henry Hitchcock for appellees.

I. The Circuit Court, at law, properly refused to allow appellant, as garnishee, to set off its claim for unliquidated damages.

It is not necessary to argue this proposition. The correctness of that ruling depended altogether upon the proper construction of the Illinois statute; and the cases cited under this head are conclusive on the point. The rail contract, for alleged breach of which said damages are claimed, being wholly independent of the verbal agreements under which appellant purchased and was indebted for ore and pig metal, and the damages claimed for breach of the former being unliquidated, the case fell directly within the ruling in *De Forrest* v. *Oder*, 42 Illinois, 500; *Robison* v. *Hibbs*, 48 Illinois, 408; *Hawks* v. *Sands*, 3 Gilman, 227; *Clause* v.

Bullock Printing Press Co., 118 Illinois, 612; *Capes* v. *Burgess*, 135 Illinois, 61; *Evans* v. *Hughey*, 76 Illinois, 115; *Sargeant* v. *Kellogg*, 5 Gilman, 273; *Ellis* v. *Cothran*, 117 Illinois, 458; *Ryan* v. *Barger*, 16 Illinois, 28, 30; *Ayres* v. *McConnel*, 15 Illinois, 230; *Kelly* v. *Garrett*, 1 Gilman, 649; *Martin* v. *Kunzmuller*, 37 N. Y. 396; *Myers* v. *Davis*, 22 N. Y. 489; *Duncan* v. *Lyon*, 3 Johns. Ch. 351; *S. C.* 8 Am. Dec. 513; *Mohawk Bank* v. *Burrows*, 6 Johns. Ch. 317.

II. Courts of law and of equity follow the same general doctrine on the subject of set-off. A set-off will be allowed in equity only on some special equitable ground: the mere existence of cross demands is not sufficient. No set-off will be allowed in equity in respect of a demand not mutual, or to arise in future, nor in respect of mutual unconnected debts in the absence of an agreement for mutual credit, nor in respect of a demand for uncertain damages arising on a breach of contract.

It will probably be conceded, certainly it will be assumed, for the purpose of this argument, that the claim for damages made by appellant for alleged non-performance by the Ore and Steel Company of the rail contract, is a claim for uncertain and unliquidated damages.

In the important case of *Duncan* v. *Lyon*, 3 Johns. Ch. 351, *S. C.* 8 Am. Dec. 513, plaintiff sought an injunction to stay proceedings at law to enforce an award made by referees under an order of the Supreme Court, and for an accounting in respect of certain partnership dealings, for a decree for his share of the proceeds of lumber sold, and to have that share set off against the damages found by the referees. On this bill a temporary injunction was allowed, which the defendant sought to have dissolved. Chancellor Kent sustained that motion, on the express ground that equity would not allow such a claim to be set off, nor would enjoin proceedings at law for that purpose pending the taking of the account.

In *Mohawk Bank* v. *Burrows*, 6 Johns. Ch. 317, there came before the same chancellor a petition for leave to set off certain claims against a judgment upon which an attorney had a lien. The defendant was insolvent, and the claim

sought to be set off was a claim for contribution, which was quite unsettled. The petition was denied, the chancellor affirming the decision in *Duncan* v. *Lyon* and repeating the statement that "there is no case to warrant the delay of satisfaction of a judgment debt on one side until an unsettled demand on the other is reduced to certainty and in a condition to be set off."

In *Hackett* v. *Connett*, 2 Edwards Ch. 73, decided by Vice-Chancellor McCoun, it was said that there is no such thing as an inherent quality or right of set-off in the creation or origin of a debt or demand. It can only arise or attach where there is a mutuality of debts of such a certain and ascertained character as to be capable of set-off or of being applied in compensation of each other. Hence, there was no equity of this sort to which the assignment in question could be subjected. The whole doctrine of set-off was critically examined by Judge Story in *Greene* v. *Darling*, 5 Mason, 202.

Eight years later, the doctrine of equitable set-off was again thoroughly considered by Mr. Justice Story in *Howe* v. *Sheppard*, 2 Sumner, 409. It was held, affirming *Greene* v. *Darling*, and citing approvingly Chancellor Kent's decisions in *Duncan* v. *Lyon*, 3 Johns. Ch. 358, and *Dale* v. *Cooke*, 4 Johns. Ch. 11, that the known rule in courts of equity is that they follow the law in regard to matters of set-off, unless there is some intervening natural equity going beyond the statutes of set-off which constitutes the general basis of set-off at law — but the only case of natural equity mentioned is that of mutual credits given or agreed for.

In this case also the fact of insolvency was urged as a ground of relief. The equitable set-off prayed for was denied on other grounds, but the court plainly intimated that insolvency would not have sufficed, referring to the case of *Simson* v. *Hart*, 14 Johns. 63. See also *Scammon* v. *Kimball*, 92 U. S. 362; *Wade* v. *Wade*, 12 Illinois, 89; *Buckmaster* v. *Grundy*, 3 Gilman, 626; *Raleigh* v. *Raleigh*, 35 Illinois, 512; *Gay* v. *Gay*, 10 Paige, 369.

III. Appellant's contention as to insolvency and non-residence is not valid under the facts in proof in this case.

Argument for Appellees.

The sole ground upon which it is now sought to reverse the decree below is that the St. Louis Ore and Steel Company was insolvent and a non-resident; and that since this made it impossible for appellant to recover the damages claimed by it unless by means of the equitable set-off prayed for, that is a sufficient ground of equity for such relief.

The case of *Schuler* v. *Israel*, 120 U. S. 506, 510, seems to be the authority most relied on for appellant. But the passage quoted from Mr. Justice Miller's opinion is admitted to have been merely "incidental to the point decided in that court," —that is, as the opinion shows, simply a *dictum*, couched in the most general terms. Giving to that general statement all weight to which it may be entitled, it is inapplicable on its face to any case in which the complainant should fail to allege and prove, not merely that the demand sought to be set off was at some former time in danger of being lost, but that it had become and continued to be in fact irrecoverable unless the set-off were allowed, because the judgment creditor was in fact insolvent at the time when the relief prayed for was to be made effectual.

A fortiori must this be true, when a court of equity must, if the set-off be allowed, thereby deprive the opposing claimant of all benefit from a judgment recovered by him in the exercise of superior diligence. In such case *Zogbaum* v. *Parker*, 55 N. Y. 120, is directly in point.

IV. Appellant's claim for unliquidated damages cannot be set off against the judgment recovered by the Joliet Steel Company against appellant as garnishee. Said claim is based upon alleged violations by the St. Louis Company of the rail contract of December 1, 1883, which occurred, if at all, after July 21, 1884, on which day appellant was summoned as garnishee. At that date no right of action for damages for breach of said rail contract existed in favor of appellant. No such claim or right of action arising after that date can be set off by appellant against said judgment, the lien of which relates back to July 21, 1884, the date of said attachment, and is prior and superior to any supposed equity here alleged in favor of appellant.

The question whether, at the date of the attachment, July 21, 1884, appellant's claim for unliquidated damages for breach of the rail contract, was an existing right of action, lies at the very threshold of this controversy. Our contention is:

1. That on July 21, 1884, when appellant was summoned as garnishee of the St. Louis Company in the attachment suit brought by the Joliet Steel Company, a lien upon its then existing and admitted indebtedness to the St. Louis Company was created, which became complete and was merged in the judgment rendered against said garnishee in favor of the Joliet Steel Company on January 13, 1886.

2. That said judgment, when rendered, related back to the date of the attachment, the lien of which became consummated as of that date in favor of the Joliet Steel Company, not only as against the defendant in attachment, but as against all third persons not having valid prior claims to the fund attached.

3. That, except in failing to pay, on July 10, 1884, for the rails delivered in June, the St. Louis Company had not, on or before July 21, 1884, in any respect failed to comply with its rail contract of December 1, 1883.

4. That if such non-payment on July 10, 1884, was a violation of said contract, appellant could recover no damages therefor except by way of interest at six per cent per annum on the amount due and unpaid; and that such interest, if recoverable at all, should have been claimed, and if claimed would have been allowed to the garnishee, in the garnishment suit, and not having been claimed therein, cannot now be claimed by way of equitable set-off against said judgment.

5. That, without conceding that any cause of action for damages for breach of said rail contract arose in favor of appellant and against the St. Louis Company after July 21, 1884, certainly no such cause of action existed in appellant's favor at that date, under the facts in proof.

6. That the judgment in favor of the Joliet Steel Company against appellant as garnishee, rendered on January 13, 1886, for an admitted debt arising from transactions wholly distinct from the rail contract, is a valid and meritorious claim, the right to enforce which, by execution against the garnishee,

relates back to the date of the attachment and is prior and superior to any right of action or supposed equity subsequently arising, if any, as between the garnishee and the defendant in attachment.

7. That, even if a valid claim for unliquidated damages in favor of appellant against the St. Louis Company, for breach of the rail contract, were conceded to have arisen after July 21, 1884, under circumstances such that equity would permit appellant to set off such claim against a judgment previously recovered against appellant by the St. Louis Company for its own benefit, yet, under the facts above stated equity will not allow such claim for damages to be set off against this judgment, because the right of the Joliet Steel Company and its assignee to enforce such judgment was, and is, a prior and superior equity to any which, on the facts in proof, could arise in favor of appellant after that date. See Drake on Attachment, §§ 223, 224, 453, 542, 615 *a*; *Hall* v. *Kimball*, 77 Illinois, 161; *Chicago, Danville &c. Railroad* v. *Field*, 86 Illinois, 270; *Reeve* v. *Smith*, 113 Illinois, 47; *Bank of America* v. *Indiana Banking Co.*, 114 Illinois, 483.

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

From the decree dismissing this bill the present appeal is prosecuted, and the errors assigned by the appellant may be embraced in the general proposition that the court below erred in declining to adjudicate and determine the amount of the damages sustained by the Chicago Company from the breach of the rail contract and set off the same against the judgment at law, and in dismissing the bill, even though such dismissal was without prejudice to the right of the Chicago Company to bring suit for the recovery of such damages.

In addition to the reasons on which the court below denied relief and dismissed the bill, it is urged by the appellee that the equitable ground for relief, viz., the insolvency of the St. Louis Company, ceased to exist before the final decree was rendered. It is urged that its solvency was shown by the

settlement of its debts and the dismissal of the foreclosure suits against it and the discharge of the receiver. There are several answers to this suggestion. *First*, the fact relied upon to establish such restored solvency, viz., the compromise of the company's bonded indebtedness by issuing new obligations secured by mortgage on all its tangible property, fails to show any actual improved financial condition, such as would be available to the Chicago Company in enforcing its claim for damages; *Second*, as appears in the record, there were other claims against the St. Louis Company which were not settled by the compromise which terminated the foreclosure suits; *Third*, the alleged restored solvency of the St. Louis Company was not set up by supplemental pleading of any kind in this suit, although there was ample time and opportunity to do so between March, 1887, and May, 1889, when this cause was finally heard; as a matter of defence, arising after the case was at issue, the restored solvency of the St. Louis Company must have been set up by supplemental answer or other appropriate pleadings, (Story's Equity Pleading, § 393;) *Fourth*, equitable jurisdiction having once rightfully attached, cannot be defeated by matter subsequently arising which does not go to the merits of the complainant's case. The state of facts existing when the bill was filed must be looked to in determining the question of equitable jurisdiction, which in this case is rested on the ground of insolvency and non-residence. The latter fact is not questioned; as to the former, the Joliet Steel Company, by its petition, filed May 1, 1886, in the Olyphant foreclosure suit in the Northern District of Illinois, asking that the receiver be required to give bond as such in the sum of $50,000, to account for the assets received in that jurisdiction, distinctly alleged that the St. Louis Company was an insolvent, non-resident corporation, and on the strength of its petition the receiver gave bond to cover the assets within the jurisdiction of the Circuit Court of the United States for the Northern District of Illinois, and the receiver thereafter, with the consent of the Joliet Company, compromised the claim of the St. Louis Company against Cherrie & Company, and obtained securities and assets thereunder, which

were allowed to be removed from the jurisdiction of the court, or applied otherwise than to the debt of the Joliet Company.

It is not shown by the record that the St. Louis Company was restored to a state of solvency before the final decree; but if that fact had been properly shown, it was not set up as a defence in the present suit, and it cannot now be invoked on behalf of the Joliet Company or its assignee.

It admits of no question that the St. Louis Company made default in the performance of the rail contract. It failed in the payment of the sum of $21,536.56 on July 10, 1884, for steel rails delivered in June. This default continued throughout the year 1884. Neither the St. Louis Company nor its receiver gave any order or orders for the manufacture of rails for July delivery. On the order for 1500 tons of rails, given for August delivery, the receiver was confessedly not prepared to pay, nor was any provision made by which the Chicago Company could reasonably expect payment therefor on September 10, 1884. The receiver had made every possible effort to raise funds by the sale of receiver's certificates, and had failed. He had nothing to pay with except "certificates," and the Chicago Company had declined to take them. It was certainly not bound to proceed with the manufacture and delivery of rails under the August order, after being notified in advance that the receiver was not prepared, and did not expect to be in funds to pay for the same unless certificates were accepted. For the reason that he had nothing to pay with, except "certificates," the receiver considered, as he stated to the president of the Chicago Company, in a letter dated September 26, 1884, that it would have been wrong to have asked the Chicago Company to make and forward rails without immediate or prospective means of paying for the same. So no further orders were given for rails, although the Chicago Company repeatedly, during August, September, and October, expressed its readiness and ability to fill all orders when the receiver was prepared to pay therefor according to the terms of the contract. The Chicago Company, early in October, indicated its willingness to reduce the price of the undelivered rails to $30 per ton, upon prompt

settlement in cash, according to the contract, but this proposition was not accepted.

Under these circumstances there was a clear breach of the rail contract on the part of the St. Louis Company. The first default occurred on July 10, 1884, in failing to pay the amount then due the Chicago Company. It was further in default in not giving an order to manufacture rails for July, which was continued during the succeeding months of the year 1884; so that at the close of December, 1884, when the time for the final performance of the contract expired, there were about 10,618 tons of rails that the St. Louis Company had failed to order, receive, and pay for at the contract price of $35 per ton. Steel rails continued to decline from July, 1884, to January, 1885, the price running down to $29.50 a ton between those dates.

It is claimed for the appellee that as the Chicago Company had not rescinded and terminated the rail contract for the July breaches thereof — if entitled so to do — it was not in a position to bring suit for damages when the garnishor's right became fixed. This, however, does not affect the merits of this case. The Chicago Company was not bound to treat the contract as at an end upon the first breach thereof by the St. Louis Company. It had a right to await the expiration of the time for its final performance, and then make its claim for the entire breach. In the view we take of the question it is not material to determine at what precise date there was such a breach as would entitle the Chicago Company to damages upon the entire contract. The material thing is that the contract (for the breach of which the claim for damages arises) was in existence when the garnishment process was served. It had then been broken in one particular, if not in more, and from the situation and embarrassed condition of the St. Louis Company there was almost a certainty that it would fail to perform the contract in the future. The Chicago Company gave repeated notices to the receiver of its readiness and willingness to fulfil the contract on its part. It could only manufacture rails as they were ordered, and their weights specified. It notified the receiver time and again that it

would claim damages. That it sustained damages to the extent of the difference between the contract and the market price of steel rails is clear beyond all controversy. The liability of the St. Louis Company for these damages is equally clear, but the amount thereof being unliquidated could not properly be set off in the attachment proceeding at law. Under these circumstances and conditions, has the Chicago Company any right to relief in equity by way of equitable set-off? Would it be just and equitable to compel the garnishee to pay its indebtedness to the St. Louis Company for the benefit of a stranger, and then be left to either lose its valid claim for damages, or follow its non-resident insolvent debtor into another jurisdiction in the effort, more or less experimental and expensive, to collect such claim? If the St. Louis Company was the beneficial plaintiff in the judgment at law, or the case stood alone between it and the Chicago Company, there could be little or no doubt that a court of equity would, under the facts stated, afford the latter relief by way of equitable set-off.

Cross-demands and counter-claims, whether arising out of the same or wholly disconnected transactions, and whether liquidated or unliquidated, may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice.

Again, it is well established that equity will entertain jurisdiction and afford relief against the collection of a judgment where in justice and good conscience it ought not to be enforced, as where there is a meritorious, equitable defence thereto, which could not have been set up at law, or which the party was, without fault or negligence, prevented from interposing. Illustrations of these general principles are found in the cases of *Leeds* v. *Marine Ins. Co.*, 6 Wheat. 565; *Scammon* v. *Kimball*, 92 U. S. 362; *Crim* v. *Handley*, 94 U. S. 652; *Embry* v. *Palmer*, 107 U. S. 3; *Knox County* v. *Harshman*, 133 U. S. 152; *Marshall* v. *Holmes*, 141 U. S. 589.

The adjustment of demands by counter-claim or set-off rather than by independent suit is favored and encouraged by

the law, to avoid circuity of action and injustice. *Railway Co.* v. *Smith*, 21 Wall. 255.

By the decided weight of authority it is settled that the insolvency of the party against whom the set-off is claimed is a sufficient ground for equitable interference. *Leeds* v. *Marine Ins. Co.*, 6 Wheat. 565; *Lindsay* v. *Jackson*, 2 Paige, 581; *Gay* v. *Gay*, 10 Paige, 369; *Pond* v. *Smith*, 4 Connecticut, 297, 302; *Robbins* v. *Holley*, 1 T. B. Mon. 194; *Hinrichsen* v. *Reinback*, 27 Illinois, 295; *Raleigh* v. *Raleigh*, 35 Illinois, 512; *Hall* v. *Kimball*, 77 Illinois, 161; *Chicago, Danville &c. Railroad* v. *Field*, 86 Illinois, 270; *Doane* v. *Walker*, 101 Illinois, 628; *Davis* v. *Milburn*, 3 Iowa, 163; *Tuscumbia &c. Railroad* v. *Rhodes*, 8 Alabama, 206; *Wray* v. *Furniss*, 27 Alabama, 471; *Keightley* v. *Walls*, 27 Indiana, 384; *Wulschner* v. *Sells*, 87 Indiana, 71; *Laybourn* v. *Seymour*, (Minn.,) 54 N. W. Rep. 941; *Rothschild* v. *Mack*, 115 N. Y. 1; *Richards* v. *La Tourette*, 119 N. Y. 54; *Schuler* v. *Israel*, 120 U. S. 506.

In *Schuler* v. *Israel*, 120 U. S. 506, 510, it was said by Mr. Justice Miller, speaking for the court, that, "While it may be true that in a suit brought by Israel against the bank it could in an ordinary action at law only make plea of set-off of so much of Israel's debt to the bank as was then due, it could, by filing a bill in chancery in such case, alleging Israel's insolvency, and that, if it was compelled to pay its own debt to Israel, the debt which Israel owed it but which was not due would be lost, be relieved by a proper decree in equity; and as a garnishee is only compelled to be responsible for that which, both in law and equity, ought to have gone to pay the principal defendant in the main suit, he can set up all the defences in this proceeding which he would have in either a court of law or a court of equity."

It is suggested by the appellee that this was merely "incidental to the point decided in that case," but the proposition it announces is supported by sound principle and authority, and the Illinois decisions are in full accord therewith.

In addition to insolvency, it is held by many well-considered

decisions, including those of Illinois, that the non-residence of the party against whom the set-off is asserted is good ground for equitable relief. *Quick* v. *Lemon*, 105 Illinois, 578; *Taylor* v. *Stowell*, 4 Met. (Ky.) 175; *Forbes* v. *Cooper*, 88 Kentucky, 285; *Robbins* v. *Hawley*, 1 T. B. Mon. 18; *Edminson* v. *Baxter*, 4 Hayw. (Tenn.) 112; *Davis* v. *Milburn*, 3 Iowa, 163.

It is not deemed necessary to review these cases and make quotations from them. They fully establish the principles for which they are cited. There is nothing in the Illinois statutes on the subject of attachment and garnishment inconsistent with the doctrine of the foregoing decisions. Applying the principle they announce to the present case, it admits of no doubt that the Chicago Company is entitled to the relief it seeks as against the St. Louis Company. The question then remains whether the attachment proceedings, or the garnishment process thereunder, resulting in the order or judgment at law declaring the Chicago Company's ascertained indebtedness liable to the payment of the Joliet Company's judgment against the St. Louis Company, in any way changes or defeats the equity or right of the Chicago Company to the same relief?

The court below seems to have entertained the theory that while the St. Louis Company may have failed to perform the rail contract, the Chicago Company's right to claim damages for the entire breach thereof had not accrued July 21, 1884, when the garnishment process was served and the garnishor's rights attached, and, furthermore, that such claim, however meritorious as against the St. Louis Company, could not form the subject of an equitable set-off, especially as against a demand arising out of a disconnected transaction. This proceeds upon the assumption, as appellees here contend, that the garnishor by the service of the garnishment acquired such a lien upon or equitable right to the funds due from the garnishee which could not be disturbed or affected by any right or equity subsequently accruing to the latter as against the principal debtor. The service of garnishment neither changed nor interrupted the contractual relations existing between the

Chicago Company and the St. Louis Company. The rights and equities existing, and to arise out of those contractual relations, were in no way terminated or defeated by that service. The legal operation and the effect of the garnishment proceedings and of the final order therein made was only to impound what was legally and equitably due from the garnishee after the adjustment of the claims between the latter and the principal debtor, and place it beyond the control of the debtor and subject to collection for the benefit of the attaching creditor. The claim made by the appellee that the garnishment service operated as an equitable assignment to the garnishor of the due indebtedness from the garnishee cannot be sustained either upon reason or authority. The final order in that proceeding does not have the legal effect and operation of transferring the Chicago Company's due indebtedness to the St. Louis Company, and from the latter to the Joliet Company. The Illinois statutes in relation to garnishment are substantially the same as the generality of statutes on that subject, and contain no provision sustaining the proposition that either the service of the writ or the order made in the proceedings operates to transfer the debt, but only binds it and prevents the principal debtor from receiving it.

The English law upon the subject of garnishment and its effect differs in no material respect from that of Illinois, and in *Chatterton* v. *Watney*, 17 Ch. D. 259, it was held that a garnishee order did not have the effect of transferring the debt from the garnishee.

In the case of *Ex parte Chinery*, 12 Q. B. D. 342, it was held by Lord Justice Cotton that a garnishee order absolute was not a final judgment against the garnishee, and did not make the garnishor a creditor of the garnishee. In the subsequent case of *In re Combined Weighing and Advertising Machine Co.*, 43 Ch. D. 99, 104, 105, 106, the effect of a garnishee order was again under consideration, and it was held that the garnishee order did not effect any transfer, legal or equitable, of the debt owing by the garnishee, or create the relation of creditor and debtor as between the garnishor and the garnishee.

Opinion of the Court.

Cotton, L. J., said: "A garnishee order attaching the debt and enabling the person who has obtained the order to give a good discharge, does not come within the principle of equitable assignment," so as to make the garnishor a creditor of the garnishee. Bowen, L. J., said: "I cannot see that this statutory relation, which was created originally by the *Common Law Procedure Act* of 1854, and was perpetuated in the rules under the *Judicature Act*, is really a relation involving the creation of a fresh debt. There cannot be said to be any equitable debt. There is no assignment in equity, and I cannot see that there is any legal debt. There is an order of a court of common law that a sum equal to the original debt shall be paid by the garnishee to the judgment creditor, or as an alternative that execution may issue; but I think that the relation which is created by that section, and the order made under it, does not create a debt at all." Fry, L. J., said: "It is plain to my mind that there is no transfer of the debt. It is equally plain to my mind that the garnishee order, therefore, does not make the garnishor a creditor of the garnishee. What the order does is this, it gives the garnishor certain statutory rights; it enables the garnishor to say to the garnishee, 'You shall not pay to your creditor the money which you owe him.' It enables him to give a valid receipt and discharge for the money. It enables him in the event of the money not being paid to obtain execution. He has all those rights, but there is no transfer of the debt, and he is not created a creditor."

The proposition here laid down is in harmony with the generally recognized principle that the rights of the garnishor do not rise above or extend beyond those of his debtor; that the garnishee shall not, by operation of the proceedings against him, be placed in any worse condition than he would have been in had the principal debtor's claim been enforced against him directly; that the liability, legal and equitable, of the garnishee to the principal debtor is a measure of his liability to the attaching creditor, who takes the shoes of the principal debtor and can assert only the rights of the latter. *Towner* v. *George*, 53 Illinois, 168; *Richardson* v. *Lester*, 83 Illinois, 55; *Henry*

v. *Wilson*, (Iowa,) 51 N. W. Rep. 1157; *Huntington* v. *Risdon*, 43 Iowa, 517.

From these propositions and authorities it follows that the Chicago Company is entitled to assert against the Joliet Company the equitable set-off it could enforce against the St. Louis Company in respect to its claim for damages.

It is hardly necessary to observe that the appellee Ferguson, having taken an assignment from the Joliet Company *pendente lite*, occupies the same position as his assignor, and is subject to the same equity. It is sought to defeat this right of the Chicago Company by invoking in favor of the Joliet Company and its assignee, Ferguson, the doctrine of relation so as to antedate the claim for damages. This cannot be done for two reasons: first, because the breach of contract, on which the claim for damages is based, had in fact commenced before the garnishment writ was served; second, if that had not been the case, the contract, for the non-performance of which the right for damages arises, was in existence when the garnishment proceedings were instituted.

This unquestioned fact is very material, if not controlling of the case. The court below did not give the fact that the claim for damages arose under and by virtue of a contract in existence prior to the date of the attachment its due weight and importance, as will be seen by a brief reference to the authorities bearing upon the question. Thus in *Boston Type Co.* v. *Mortimer*, 7 Pick. 166, 167, the garnishee, when summoned, was indebted to the defendant, but was at the same time liable as accommodation endorser of a note of the defendant for a large amount which became due after the garnishment, and was protested for non-payment and paid by the garnishee before he made his answer. The court held that the garnishee could set off against his indebtedness to the principal defendant the amount of the notes so paid, and in giving its decision observed: "Under these circumstances we think he cannot be held as trustee, for it would be against justice that he should be held to pay a creditor of his debtor the only money by which he can partially indemnify himself."

In the recent case of *Lannan* v. *Walter*, 149 Mass. 14, 15,

the court said: "The answer of the trustee on which it was discharged is, in effect, that at the time of the service of process it had in its deposits, to the credit of the defendants, $927.10, and that at the same time it held three promissory notes, which it had discounted for the benefit of the defendants, and on which they were endorsers; that since said service these notes have all matured; that the liability of the endorsers has been made absolute by due demand and notice. The makers and endorsers have all become insolvent, and the notes remain in its hands wholly unpaid, except that a small sum has been received on one of them. The amount due on each note is considerably more than $927.10. The counsel for the trustee contends that it has the right to set off the sum of money due from the defendants on any one of these notes against the deposit. We regard it as settled that 'if before final answer the debtor becomes indebted to the' trustee 'on any contract entered into before the service of the writ, the latter shall have a right of set-off, and be chargeable only with the final balance, if one should be due.' *Boston Type Co.* v. *Mortimer*, 7 Pick. 166; *Smith* v. *Stearns*, 19 Pick. 20; *Nickerson* v. *Chase*, 122 Mass. 296; *Eddy* v. *O'Hara*, 132 Mass. 56, 61; Pub. Stat. c. 183, § 27."

So in *Farmers' and Merchants' Bank* v. *Franklin Bank*, 31 Maryland, 404, 412, the court, allowing a set-off which matured after action brought, said: "There is nothing in the attachment law of this State to justify the conclusion that it was designed, by allowing garnishment to be made, to place the garnishee in a worse position in reference to the rights and credits attached than if he had been sued by the defendant. The attaching creditor seeks to have himself substituted to the rights of his debtor as against the garnishee, and by levying his attachment he acquires no superior right to that of his debtor. The right of condemnation must, therefore, be subject to any such right of set-off or discharge existing at the time of garnishment, as would be available to the garnishee if he were sued by the defendant. Any other rule would in many cases work gross injustice and might be subject to great abuse. . . . This right of set-off or discharge, and

as against the attaching creditor, should not, however, extend to any matter originating by the action of the garnishee subsequent to garnishment, as otherwise it would be in the power of the garnishee to defeat the right of condemnation, which should not by any means be allowed."

In the first of the above cited cases the liability of the garnishee was conditional and undeterminate at the time of the service of the garnishment process, and his right to claim against the principal debtor did not become fixed until long after the service of process, so that the garnishee had no cause of action against the principal debtor when the attachment writ was served. Also in each of the other cases the set-off allowed matured after the service of garnishment, but arose under a contract entered into before the service of the writ. In other words, the principle established by these cases is that, whatever rights the garnishee may have under existing contracts with the principal debtor, he is entitled to have the benefit thereof as against the attaching creditor.

The latter clause of the quotation from the case of *Farmers' and Merchants' Bank* v. *Franklin Bank*, *supra*, lays down the correct rule to be applied in cases of this character, and that rule is, that, while the garnishee may not, after service of the writ, by his own action acquire set-offs or counterclaims against the principal debtor to the prejudice of the attaching creditor, he may properly avail himself of all claims fairly arising out of contracts with the principal debtor which were in existence when the attachment was commenced, and under or out of which his claim against the principal debtor arises.

From the foregoing considerations we think the court below should have ascertained the damages growing out of the failure to perform the rail contract on the part of the St. Louis Company, and having ascertained the amount of such damages the same should have been allowed the complainant as a set-off against the sum of $16,473.28, found to be due from it to the St. Louis Company, and for which the garnishee order or judgment was rendered; and if that adjustment left

any balance due the complainant from the St. Louis Company, a personal decree should have been rendered therefor.

The judgment of the court below is accordingly reversed, and the cause remanded, with directions to proceed therein in conformity with this opinion.

Mr. Chief Justice Fuller having been of counsel, and Mr. Justice White not having been a member of the court when the case was argued, took no part in its consideration and decision.

BOGLE *v.* MAGONE.

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

No. 291. Argued March 15, 1894. — Decided April 9, 1894.

Anchovy paste and bloater paste, made of anchovies or bloaters ground up fine and spiced, used as food or as an appetizer, in sandwiches or with a cracker, and not used as a condiment, nor known in trade and commerce as sauces, may be found by a jury to come within the description of "fish prepared or preserved," and not within the description of "sauces of all kinds," in the tariff act of 1883.

This was an action, brought May 23, 1888, against the collector of the port of New York, after due protest and appeal, to recover back an excess of duties exacted and paid upon goods imported and invoiced by the plaintiffs in 1886 and 1887 as "fish pastes," and which they contended should have been assessed as "fish, prepared or preserved," twenty-five per cent ad valorem, but which the defendant assessed as "sauces," thirty-five per cent ad valorem, under the tariff act of March 3, 1883, c. 121, Schedule G of which imposes the following rates of duty:

"Anchovies and sardines, packed in oil or otherwise," in small tin boxes, certain rates varying from ten to two and a half cents per box, according to its size; "when imported in any other form, forty per centum ad valorem.

"Fish preserved in oil, except anchovies and sardines, thirty per centum ad valorem.

"Salmon, and all other fish, prepared or preserved, and prepared meats of all kinds, not specially enumerated or provided for in this act, twenty-five per centum ad valorem.

"Pickles and sauces, of all kinds, not otherwise specially enumerated or provided for in this act, thirty-five per centum ad valorem." 22 Stat. 503, 504.

At the trial, one of the plaintiffs, who were importers of fancy groceries at New York, testified that the goods in question (samples of which were produced in court) were imported as "anchovy paste" and "bloater paste." The definition in Webster's Unabridged Dictionary of "sauce," as "a mixture or composition to be eaten with food for improving its relish; a relishing condiment; appetizing addition to the principal material of a dish;" being read to him, he testified that the word had a significance in the wholesale commerce of this country in 1883 and theretofore, differing from the definition read; that the commercial meaning of a sauce was a liquid, and that was the only particular in which it varied from the definition read; and that anchovy paste or bloater paste, such as represented by the samples, was not recognized in trade and commerce in 1883 and prior thereto as a sauce. On cross-examination, he testified that he understood the sense of the dictionary definition of sauce to be "anything used as a relish, either liquid or solid, as an addition to the food;" that these articles were used as food, principally in sandwiches, or like potted meats or devilled meats; that "anchovy paste" was manufactured out of anchovies, and "bloater paste" out of bloaters; that these were the only names by which they were known in trade and commerce in and before 1883, as well as since; that they had a fish taste; and that no part of each fish could be distinguished, but all was ground up fine, and spiced.

Three other importers and sellers of fancy groceries at New York, called as witnesses for the plaintiffs, testified that the term "sauces," as used in trade in and before 1883, had reference to liquids only, and did not include solids; and that the goods in question were not commonly known as sauces. One of them testified that each of these pastes was used as a direct

article of food, and not as an addition to anything to give zest to it, and was used only in a distinct form, as in a sandwich or the like; and on cross-examination testified that "he had often eaten the same articles as those in suit with a cracker or cake, eating the paste alone first and the cracker afterwards — probably within thirty seconds after — as soon as he was able to swallow." The two other witnesses testified that it had a spicy flavor, and would induce hunger and thirst, and was used as an appetizer before a meal. The witnesses also testified that they dealt in the article known as "anchovy sauce" or "essence of anchovies," which was a liquid, and altogether different from these pastes, and never eaten alone or as an addition to bread, but as a condiment.

At the close of the plaintiffs' evidence, the court, upon motion of the defendant, directed a verdict for him, upon the grounds that "the plaintiffs had not proved facts sufficient to entitle them to recover;" that "the term 'sauces of all kinds,' in the tariff act, was a descriptive term of ordinary use, to be taken in its ordinary meaning, and not in any restrictive or trade meaning," and that "the ordinary use of the term 'sauces' included the articles in suit." 40 Fed. Rep. 226.

A verdict was returned accordingly, and judgment entered thereon; and the plaintiffs tendered a bill of exceptions, and sued out this writ of error.

Mr. Everit Brown for plaintiffs in error.

Mr. Assistant Attorney General Whitney for defendant in error.

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

The word "sauce," as commonly used, designates a condiment, generally but not always of liquid form, eaten as an addition to and together with a dish of food, to give it flavor and make it more palatable; and is not applied to anything which is eaten, alone or with a bit of bread, either for its own

sake only, or to stimulate the appetite for other food to be eaten afterwards. For instance, cheese eaten with bread, or ham or chicken eaten in a sandwich, or anchovies or herrings, caviare or shreds of salt fish, eaten, whether with or without bread, as an appetizer before a meal, would hardly be called a sauce.

In the dictionary of Webster, referred to at the trial, the primary definition of "sauce" is accordingly given as "A mixture or composition to be eaten with food for improving its relish; a relishing condiment; appetizing addition to the principal material of a dish." In a later edition, there is given, by way of additional definition, "Stewed or preserved fruit, eaten with other food as a relish; as apple sauce, cranberry sauce, etc."

In the tariff act of 1883, the clause relating to "sauces of all kinds," (unless affected by other clauses in the act, or by commercial usage,) may well be held to include all substances, whether solid or liquid, fairly coming within either of these two definitions. But the second definition has no application to the present case.

The three clauses, mentioned in argument as possibly applicable to the goods in question, are arranged in the act in a natural order, beginning with the most specific and restrictive, and ending with the most general; first, "anchovies," "imported in any other form" than "packed in oil or otherwise" in small tin boxes, forty per cent ad valorem; then, "all other fish, prepared or preserved," "not specially enumerated or provided for in this act," twenty-five per cent ad valorem; and lastly, "sauces, of all kinds, not otherwise specially enumerated or provided for in this act," thirty-five per cent ad valorem. 22 Stat. 503, 504. Any article which comes within two or more of these descriptions must therefore be assigned to the earlier one. *Homer* v. *The Collector*, 1 Wall. 486; *Reiche* v. *Smythe*, 13 Wall. 162; *Seeberger* v. *Cahn*, 137 U. S. 95; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468.

At the trial, the plaintiffs introduced evidence that the goods in question were manufactured out of anchovies or

bloaters, ground up and spiced; were used as food, in a distinct form, or as an appetizer, principally in a sandwich, or sometimes with a cracker, and not as a condiment; and were specifically known as "anchovy paste" and "bloater paste;" and that, in trade and commerce in 1883 and previously, the word "sauces" was applied to liquids only, and not to these pastes.

The Circuit Court, in directing a verdict for the defendant, ruled, in substance, that as matter of law, and without regard to commercial usage, these articles came within the words "sauces of all kinds" in the tariff act. We are unable to concur in that view; or to say, either of our judicial knowledge, or in view of the evidence introduced, that these articles are necessarily "sauces" of any kind; still less, that this is so clear as to exclude the usual test of commercial designation. *Cadwalader* v. *Zeh*, 151 U. S. 171, 176.

On the contrary, we are of opinion that the evidence of the nature and the use of these articles, and of their commercial designation, would have warranted a jury in finding that they were not "sauces," and were "fish, preserved or prepared." If that fact were proved, it would follow that, as such, the bloater paste, at least, was subject to the duty of only twenty-five per cent ad valorem; but a question might arise, which does not appear to have been considered at the trial, whether the anchovy paste was not subject to a duty of forty per cent ad valorem, under the earlier and more specific clause of the act, as "anchovies" "imported in any other form" than packed, in oil or otherwise, in small tin boxes.

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

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

SALTONSTALL *v.* RUSSELL.

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

No. 314. Submitted March 22, 1894. — Decided April 9, 1894.

By the submission of a case to the judgment of the Circuit Court upon an agreed statement of facts, all questions of pleading are waived; and no finding of facts by the court is necessary.

By sections 2931 and 3011 of the Revised Statutes, as amended by the act of February 27, 1877, c. 69, if at the first port of entry, not being one of the ports at which the statutes authorize goods to be imported and shipped through without appraisement, goods imported by sea are entered for warehousing and immediate transportation by the same vessel to another port and are transported accordingly, and the duties thereon are assessed by the collector at the first port, and again by the collector at the second port and paid by the importers to the second collector to obtain possession of the goods, no part of the duties can be recovered back in an action by them against him, unless due protest is made within ten days after the decision of the first collector as to the rate and amount of duties.

THIS was an action, brought May 15, 1888, against the collector of customs for the port of Boston and Charlestown, to recover back duties exacted by him, and paid under protest, upon blueberries imported by the plaintiffs from New Brunswick. No answer was filed. But the case was submitted to the decision of the Circuit Court upon a statement of facts, in which it was agreed that the regulations of the Treasury Department might be referred to, and that the court might enter judgment as the law required upon the facts stated, which were in substance as follows:

On October 22, 1887, the plaintiffs imported from New Castle in the Province of New Brunswick, into the port of Eastport in the State of Maine, upon the steamship Cumberland, running regularly between St. John in New Brunswick, Eastport, and Boston in the State of Massachusetts, five hundred cases of canned blueberries, consigned to John Thompson, the master of the steamship, to be by him entered at the custom-house at Eastport, and thence to be immediately transported

in bond to the port of Boston, consigned to the plaintiffs; and the goods were duly entered by him, as agent of the plaintiffs, at the custom-house at Eastport, for warehouse and immediate transportation, without being removed from the steamship. On the same day, the duties were assessed by the collector at Eastport, and the amount of duty fixed at $144, being twenty per cent of $720, the value of the blueberries, cases, cans, and cost of packing, added together, that being the amount of the entered value, as stated in the invoice. The value of the blueberries was $315, the value of the coverings was $330, and the cost of packing them $75. The cases were made of wood; each case contained twenty-four cans, made of tin; and each can contained one and a half pounds of blueberries. Both the cases and the cans were the usual and necessary coverings of such goods, and were not of any material or form designed to evade duties thereon, nor designed for use otherwise than in the *bona fide* transportation of the goods to the United States.

The goods were immediately transported by the same steamship to Boston. Upon examination of the goods by the United States appraisers in Boston, they reported to the defendant that the dutiable value of the same was $315, being the cost of the blueberries, without including the value of the coverings, or the cost of packing them; and the defendant wrote to the collector at Eastport, calling his attention to the fact that he had included the value of the coverings in his assessment; but he refused to correct it. Thereupon the defendant reported the case to the Secretary of the Treasury, informed the collector at Eastport of the fact, and meantime suspended the entry. On November 11, 1887, the Secretary of the Treasury wrote a letter to the collector at Eastport, instructing him to make the correction.

On November 18, 1887, the plaintiffs entered the goods at the custom-house in Boston for rewarehousing and withdrawal; and the defendant assessed the duties thereon, for the same amount and made up of the same items as the collector at Eastport, and exacted payment of the same from the plaintiffs. They contended that the merchandise was subject to a duty of

twenty per cent of the value of the blueberries, not including the value of the boxes and cans, or the cost of packing; and paid the assessed duties to the defendant under protest; and, being dissatisfied with his decision, on the same day gave to him, and mailed to the collector at Eastport, notices thereof in writing, setting forth distinctly and specifically the grounds of their objection; and appealed to the Secretary of the Treasury, who declined to entertain the appeal, on the ground that the protests had not been seasonably filed, but affirmed the assessment by the collector at Eastport; and the plaintiffs seasonably brought this suit to recover the sum of $81, exacted and paid upon the coverings and cost of packing.

Upon the agreed statement of facts, the Circuit Court gave judgment for the plaintiffs; and the defendant sued out this writ of error.

Mr. Assistant Attorney General Whitney for plaintiff in error.

Mr. Frederic Cunningham for defendants in error.

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

The case having been submitted to the Circuit Court upon a statement of facts agreed by the parties, or case stated, upon which the court was to render such judgment as the law required, all questions of the sufficiency of the pleadings were waived, and the want of an answer was immaterial; and no finding of facts by the court was necessary. *Willard* v. *Wood*, 135 U. S. 309, 314; *Bond* v. *Dustin*, 112 U. S. 604, 607.

It is conceded that the duties complained of were illegal, in view of the decision of this court in *Oberteuffer* v. *Robertson*, 116 U. S. 499; and that the only question in the case is whether protest should have been made, under sections 2931 and 3011 of the Revised Statutes, within ten days after the liquidation of the duties at Eastport.

Opinion of the Court.

By the customs acts of the United States, except as otherwise expressly provided, duties on imported goods are to be assessed and paid at the first port of entry. *United States* v. *Vowell*, 5 Cranch, 368; *Meredith* v. *United States*, 13 Pet. 486, 494; *Hartranft* v. *Oliver*, 125 U. S. 525. For the purpose of encouraging and facilitating commerce, by exempting the importer from the payment of duties until he is ready to bring his goods into market, provision has been made by which the goods may be entered for warehousing and deposited in a bonded warehouse in the district of entry, and may be transported to a bonded warehouse in any other collection district, and the payment of duties postponed until the goods are withdrawn; and they may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which they may be subject by law at the time of such withdrawal, or after that time and within three years from such date on payment of the duties assessed on the original entry and charges, and ten per cent additional. Rev. Stat. §§ 2962, 2970, 3000, 3001; *Tremlett* v. *Adams*, 13 How. 295, 303; *Fabbri* v. *Murphy*, 95 U. S. 191; *Westray* v. *United States*, 18 Wall. 322. For the same purpose, provision has been made by which merchandise imported at certain ports, appearing to be consigned to one of the ports afterwards named in the statute, may be entered for warehouse and immediate transportation, and examined and the duties estimated at the port of first arrival, but the appraisement and liquidation of duties made at the port of destination. Rev. Stat. §§ 2990–2997; Acts of June 10, 1880, c. 190; 21 Stat. 174; February 23, 1887, cc. 215, 218; 24 Stat. 411, 414. But the goods in question were not deposited in or withdrawn from a bonded warehouse; nor is Eastport one of the ports at which goods can be imported and shipped through without appraisement. It follows that articles 721–725, 740 and 743 of the Treasury Regulations of 1884, cited by the importers, have no application to the case; and that the assessment at Eastport was the final ascertainment and liquidation of the duties upon these goods. That such was the opinion of the Treasury Department appears from its

having addressed its letter of instructions for the correction of the assessment, not to the defendant, but to the Eastport collector, as well as from the reasons which it gave for disallowing the appeal of the importers. And we have been referred to no act of Congress, Treasury regulation or judicial decision, which warranted a new assessment of the duties upon these goods by the defendant at Boston. See *Spring* v. *Russell*, 1 Lowell, 258.

But this suit of the importers against him clearly comes within section 3011 of the Revised Statutes, as amended by the act of February 27, 1877, c. 69, which provides that "any person who shall have made payment, under protest, and in order to obtain possession of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law," may maintain an action "to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid;" but that "no recovery shall be allowed in such action, unless a protest and appeal shall have been taken as prescribed in section 2931." 19 Stat. 247.

By section 2931, here referred to, "the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid" on merchandise and the dutiable costs and charges thereon, "shall be final and conclusive against all persons interested therein," unless the importer "shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury."

By virtue of this section, Eastport being "the port of importation and entry" of these goods, the decision of the collector at that port, as to the rate and amount of duties to be

paid, was "the ascertainment and liquidation of the duties by the proper officers of the customs;" and the plaintiffs, not having given notice in writing of their objection to that decision within ten days thereafter, cannot maintain an action to recover back the whole or any part of the duties paid.

This conclusion, which appears to be required by the terms of the statutes, is the only one consistent with the decision of this court in *Merritt* v. *Cameron*, 137 U. S. 542.

It was suggested, in the brief in behalf of the importers, "that the collector had no jurisdiction or power to assess a duty upon the coverings: the liquidation was void, just as if the collector undertook to assess a duty upon domestic goods: the appraisement was void; and in such a case section 2931 of the Revised Statutes does not apply, and no protest is necessary, because there has been no valid liquidation." In support of this suggestion were cited *Oberteuffer* v. *Robertson*, 116 U. S. 499; *Badger* v. *Cusimano*, 130 U. S. 39; *Robertson* v. *Frank Brothers Co.*, 132 U. S. 17, 24; *United States* v. *Thurber*, 28 Fed. Rep. 56.

But *United States* v. *Thurber* was an action by the United States to recover duties, and not an action against the collector to recover them back; in *Badger* v. *Cusimano*, and in *Robertson* v. *Frank Brothers Co.*, protests had been made in due form; in *Oberteuffer* v. *Robertson*, it was distinctly recognized that the proper remedy of the importer was by protest and appeal; and the statutes, as has already been seen, make such protest and appeal essential prerequisites to recovery in an action brought to ascertain the validity of the demand and payment of duties, and to recover back any excess so paid. See also *Lawrence* v. *Caswell*, 13 How. 488, 496; *Nichols* v. *United States*, 7 Wall. 122; *Arnson* v. *Murphy*, 109 U. S. 238, and 115 U. S. 579.

Judgment reversed, and case remanded to the Circuit Court with directions to render judgment upon the agreed statement of facts for the defendant.

Syllabus.

BURCK *v.* TAYLOR.

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

No. 170. Argued December 15, 1893. — Decided April 9, 1894.

S. contracted with the State of Texas, in writing, January 18, 1882, to build a new capitol building for it for an agreed compensation, and not to assign the contract without the consent of the State. On the 31st of January, 1882, S., with the consent of the State, assigned an undivided three-fourths interest in the contract to F., G., and T., who were partners. On the same day, without the consent or knowledge of the State, S. assigned to B., C., and D., each one-fourth of the one-fourth interest remaining in him. On the 9th of May, 1882, S. conveyed to F., G., and T. all the right and interest which he had in and under the contract, and the State gave its assent to this transfer on the 10th of May. It did not appear that the assignees in the last conveyance knew of the transfer to B., C., and D. On the 20th of June, 1882, F. and G. transferred, with the consent of the State, all their interest in the contract to T., who then performed the work to the satisfaction of the State, and received the agreed compensation therefor. On the 1st of April, 1883, D. transferred to E. the interest in the contract which had been transferred to him, January 31, 1882, and on the 27th of May, 1884, he transferred the same interest to T. Most of these conveyances were filed and recorded in the office of the county clerk for Travis County, Texas, and some were filed in the office of the comptroller of public accounts of the State. In a suit brought by E. against T. to recover what he claimed to be his share of the profits under the contract, *Held*,

(1) That it was not competent for S., by his own act, and without the consent of the State, to transfer any interest in the contract;

(2) That all that could have been acquired by an assignment by S. without the consent of the State was a right to maintain an action against S. for the share of the profits which he had attempted to transfer;

(3) That when the contract was transferred to T., who was accepted by the State in lieu of the original contractor, T. entered upon its performance free from any disposition of the profits made by the original contract;

(4) That the filing of an instrument for record in a public office of the State, for the record of which the statutes of the State made no provision, carried with it no notice to other parties.

Statement of the Case.

On December 8, 1888, appellant filed his petition in the District Court of Travis County, Texas, to recover of defendant the sum of $231,417, alleged to be his share of the profits of the contract made with the State of Texas for the building of its capitol. The suit thus commenced was thereafter removed to the United States Circuit Court for the Western District of Texas, and on October 7, 1889, upon leave obtained, the plaintiff filed an amended bill. To this bill, on November 4, defendant demurred. On March 4, 1890, the demurrer was sustained, and the plaintiff electing to stand upon his bill and declining to amend it, a decree was entered dismissing the same with costs. From such decree of dismissal the plaintiff appealed to this court. The matters set forth in the bill are as follows: On January 18, 1882, the State of Texas, by Joseph Lee and N. L. Norton, capitol commissioners, with the approval of O. M. Roberts, governor, made and executed a contract with Matthias Schnell for the erection of the capitol building, according to certain plans and specifications; Schnell to furnish all the material and do all the work, and the State, as the consideration therefor, to convey 3,000,000 acres of land. The twenty-sixth clause of the contract is as follows:

"It is further agreed, covenanted, and stipulated by the party of the second part that this contract shall not be assigned, in whole or in part, by the party of the second part without the consent, in writing, of the party of the first part, signed by the governor of Texas and the capitol building commissioners, with the advice and consent of the heads of departments."

On January 31, 1882, Matthias Schnell, Charles B. Farwell, John V. Farwell, Amos C. Babcock, and the defendant, Abner Taylor, entered into a contract by which Schnell assigned and set over to the other parties an undivided three-fourths interest in said contract. The material portions of this contract are as follows:

"It is hereby agreed by and between the parties hereto that the said Matthias Schnell shall assign and set over, and by these presents does assign and set over, to the parties of the second part an undivided three-fourths ($\frac{3}{4}$) interest in said

contract for the purpose that the said parties of the second part may share in any and all the profits that may arise from same, the same as the party of the first part, as their interests may appear, which is hereby agreed to be equal.

"And it is understood and agreed by and between the parties hereto that the parties of the second part are to furnish whatever money may be needed or necessary for the proper construction of said state-house or for the execution of the said contract as the same may be required from time to time.

"It is further agreed and understood by and between the parties hereto that the said Matthias Schnell shall have the management and superintendence of the building and construction of said state-house from the commencement to its completion, subject to the direction and control of the majority in interest herein, at a salary of five thousand ($5000) dollars per annum, payable monthly.

* * * * *

"And it is further agreed that the said superintendent shall be personally responsible to the parties of the second part for any loss or damages caused or sustained by reason of his neglect or mistakes in prosecution of his duties as such superintendent, wilfully done.

"And it is hereby understood and agreed that this agreement shall be binding and operative from the date of its approval by the governor of Texas and the heads of departments."

In accordance with clause 26 of the original contract, the following consent to the assignment was endorsed on the back:

"State of Texas,
County of Travis.

"We hereby consent to the within assignment of an interest in the contract referred to this the eleventh day of February, 1882.

"(Signed) Joseph Lee,
N. L. Norton,
Capitol Building Commissioners.
O. M. Roberts, *Governor.*

Statement of the Case.

"We advise and consent to the above consent given by the capitol building commissioners and governor this eleventh February, 1882.

"(Signed) F. R. Lubbock, *Treasurer.*
J. H. McLeary,
Attorney General.
W. C. Walsh,
Commissioner General Land Office.
W. M. Brown, *Comptroller.*"

On January 31, 1882, Schnell made an agreement with James M. Beardsley, James S. Drake, and A. A. Burck, which, after referring to the prior contracts, purported to be an assignment and transfer to each of the three of an undivided one-fourth of the one-fourth interest in the contract remaining in Schnell. This contract, although signed and acknowledged by all four of the parties, was without the consent in writing of the State of Texas. Afterwards, and on May 9, 1892, Schnell executed in writing a further assignment in the following language:

"The State of Texas, }
County of Travis. }

"Know all men by these presents that I, Matthias Schnell, a citizen of Rock Island, in the State of Illinois, for and in consideration of the sum of fifteen thousand five hundred dollars to me now paid, the receipt whereof I do now acknowledge, have transferred, released, and conveyed to Charles B. Farwell, John V. Farwell, Abner Taylor, and Amos C. Babcock, who compose the firm of Taylor, Babcock & Co., all the rights and interest which I have in and under a certain contract made by me with Joseph Lee and N. L. Norton, capitol commissioners, for the construction of a new state-house for the State of Texas.

"And I do also, for the consideration hereinbefore expressed, transfer, assign, and release to said parties above named all interests, rights, or claims which I may now or might hereafter assert by virtue of any contract made by me with said

parties regarding the construction of said state-house or the superintendency thereof and all interest accruing to me from any contract regarding the building of said state-house for the State of Texas.

"In testimony whereof I have hereunto set my hand this the 9th day of May, A.D. 1882.

"(Signed) MATTHIAS SCHNELL;"

which assignment was duly acknowledged, the assignment accepted in writing, and a written consent endorsed upon it as follows:

"This certifies that we, the governor of Texas and the capitol building commissioners, with the advice and consent of the heads of departments, consent to the assignment in the foregoing instrument, made to take effect on the filing of the formal adoption of the contract referred to, and the execution and approval of the bond to carry out the same this tenth day of May, A.D. 1882.

O. M. ROBERTS, *Governor.*
JOSEPH LEE,
N. L. NORTON,
Capitol Building Commissioners.
F. R. LUBBOCK, *Treasurer.*
W. M. BROWN, *Comptroller.*
W. C. WALSH,
Com'r Gen'l Land Office.
J. H. MCLEARY,
Attorney General."

On June 20, 1882, the firm of Taylor, Babcock & Co. assigned and transferred the entire contract to Abner Taylor, the language of the transfer being as follows:

" . . . do hereby transfer and assign, and have transferred and assigned, to Abner Taylor, the said contract to construct, build, erect, complete, and deliver to the State of Texas a capitol building and appurtenances thereto according to the plans and specifications therein referred to and made a part thereof, and each and every, all and singular, the rights, profits, and benefits thereunder, the same to be by him carried

out in the same manner as provided for in the original contract between the State of Texas and Matthias Schnell as aforesaid;"

which assignment was accepted in writing by Abner Taylor, whose acceptance contained this covenant on his part:

"Now, therefore, in consideration of the fact that, by virtue of the transfers and assignments herein set out, I, the said Abner Taylor, have become the contractor with the State of Texas for the building of the capitol aforesaid, and in consideration of the fact that the capitol building commissioners, together with the governor of Texas and the several heads of departments, have consented to the several transfers and assignments aforesaid, and in further consideration of the stipulations, covenants, and agreements set forth in the original contract between the State of Texas and Matthias Schnell, to the profits, rights, and benefits of which I have succeeded by virtue of the said contract and the several transfers and assignments aforesaid, I, the said Abner Taylor, have agreed, covenanted, and bound myself, and do by these presents agree, covenant, and bind myself, unto the State of Texas, through its capitol building commissioners, that I will in every particular carry out, finish, and perform the contract made and entered into by and between the State of Texas and Matthias Schnell, a printed copy of which is hereto attached as aforesaid, in the same manner, style, and method and according to the said terms, tenor, and effect that the said Matthias Schnell was originally bound to do, and I hereby adopt the said contract as my own, and assume each and every, all and singular, the obligations therein imposed on the party of the second part as my own as fully and completely as if they had originally been assumed, incurred, and undertaken by me in person, the said contract, of which the printed copy is hereto attached, being hereby incorporated into this contract and made a part thereof.

"And I, the said Abner Taylor, do hereby bind myself, my heirs, executors, and administrators, to keep and perform this covenant, agreement, and contract according to its full intent

and meaning in each and every, all and singular, of its parts and stipulations, in every particular whatsoever.

"In testimony whereof I hereto set my signature this the twentieth day of June, A.D. 1882, (one thousand eight hundred and eighty-two.)

"[SEAL.] (Signed) ABNER TAYLOR;"

and this assignment and acceptance, both being duly acknowledged, were also assented to in writing, endorsed on the back, the consent being in these words:

"STATE OF TEXAS, }
COUNTY OF TRAVIS. }

"In accordance with the provisions of section 26 of the original contract between the State of Texas and Matthias Schnell for building a new capitol, dated eighteenth of January, 1882, we, O. M. Roberts, governor of Texas, and Joseph Lee and N. L. Norton, capitol building commissioners, acting by and with the advice and consent of the heads of departments, do hereby consent in writing to the assignment made by Matthias Schnell of his contract to Taylor, Babcock & Co., and to the further assignment made by Taylor, Babcock & Co. of the said contract to Abner Taylor; and we, the said governor, capitol building commissioners, and heads of departments do hereby recognize Abner Taylor as the contractor, bound in all respects to carry out the contract with the State of Texas in like manner as the original contractor, Matthias Schnell, was bound; and in testimony of our advice and consent having been so given we hereunto subscribe our names officially this the twelfth day of July, 1882.

'(Signed) JOSEPH LEE.
N. L. NORTON.

"Approved by and with the advice and consent of the heads of the departments.

"(Signed) O. M. ROBERTS, *Governor.*"

On April 14, 1883, A. A. Burck executed to plaintiff the following conveyance:

"The State of Texas, }
County of Travis. }

"Know all men by these presents that I, A. A. Burck, of the county of Milam and State of Texas, in consideration of the sum of ten thousand dollars to me in hand, paid by S. B. Burck, of the county of Galveston and State of Texas, the receipt of which is hereby acknowledged, have granted, bargained, sold, conveyed, and released, and by these presents do grant, bargain, sell, convey, and release, unto the said S. B. Burck, heirs and assigns, the following-described property, to wit: One undivided one-half interest in one-sixteenth interest in the capitol contract which was awarded to M. Schnell by the Texas state capitol commissioners, Joseph Lee and N. L. Norton, and transferred to me by said Schnell, together with all and singular the rights, members, improvements, hereditaments, and appurtenances to the same belonging or in anywise incident or appertaining:

"To have and to hold all and singular the premises above mentioned unto the said S. B. Burck, heirs and assigns forever; and I do hereby bind myself, heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said S. B. Burck, heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

"Witness my hand, at Austin, this 14th day of April, A.D. 1883.

"A. A. Burck. [seal.];"

which conveyance was duly acknowledged. On May 27, 1884, A. A. Burck made an assignment to Taylor and Babcock in these words:

"Austin, Texas, *May* 27, 1884.

"For and in consideration of one dollar, in hand paid, and other valuable considerations I hereby sell, assign, and transfer to Abner Taylor, of the county of Cook, State of Illinois, and A. C. Babcock, of the county of Fulton, said State, all my rights, interest, and claim in and to the contract or contracts from the State of Texas to build or erect a state-house or

capitol building in the city of Austin and last-mentioned State derived from a contract or agreement made with Matthias Schnell in Chicago, Cook County, Illinois, bearing date January 31st, 1882, or any interest I may have for building or erecting a state-house or capitol building in the city of Austin, Texas, derived from said Schnell at any time or from any other source, hereby relinquishing to said Taylor and Babcock all right or claim of any character to any and all contracts or agreements that I may have heretofore had or now possess pertaining to building, erecting, or constructing a state-house or capitol building in the city of Austin, State of Texas.

"Witness my hand and seal this 27th day of May, A.D. 1884.

"A. A. BURCK. [SEAL.];"

which was also duly acknowledged.

It further appears that the instrument dated January 31, by which Schnell transferred a three-fourths interest in the contract to the two Farwells, Babcock, and Taylor, was filed for registration on February 13, in the office of the clerk of the county court of the county of Travis, that being the county in which the capitol building was situated, and thereafter recorded in the records of said county; that the instrument executed between Schnell, Drake, Beardsley, and Burck was also filed and recorded in the same office on February 14, 1882; likewise the assignment of May 9, 1882, from Schnell to Taylor, Babcock & Co. on May 10, 1882, and the deed from A. A. Burck to S. B. Burck, of date April 14, 1883, on April 20, 1883; also the conveyance from Burck to Taylor and Babcock, of date May 27, 1884, on May 27, 1884. It also appears from the certificate of the comptroller of public accounts of the State of Texas that the original contract of the State with Schnell, together with the assignment from Schnell to the two Farwells, Babcock, and Taylor, of date January 31, the assignment, of date May 9, from Schnell to Taylor, Babcock & Co., and the assignment from Taylor, Babcock & Co. to Abner Taylor, were all on file in his office, though when so filed is not stated. With reference to the

effect of the filing in the office of the clerk of Travis County, the bill avers as follows:

"And your orator further says that the account between your orator and defendant as to this matter is still open and unsettled, and that for reason why your orator should not have an account or relief against him the defendant pretends that he had no notice that the said A. A. Burck assigned or transferred to your orator a one-half interest in his, the said A. A. Burck's, one-sixteenth interest in the profits that might arise from the building of said capitol contract, and that the defendant in good faith and without notice purchased from said A. A. Burck for a valuable consideration the said Burck's one-sixteenth interest in said profits after the said A. A. Burck had sold one-half of his said interest to your orator, and therefore refuses to account with plaintiff; whereas the truth is that the said transfer by A. A. Burck to your orator, which has been hereinbefore stated and made a part of this bill as an exhibit, was duly authenticated for registration in the office of the county clerk, and was duly recorded in the records of deeds of Travis County, Texas, on the 14th day of April, A.D. 1883, and said Abner Taylor then had notice of the same; whereas the said A. A. Burck did not sell or transfer any of his said interest in said profits to said Abner Taylor until the 27th day of May, 1884.

"That the said Abner Taylor ought not to be heard to aver that said registration was not notice to him of the said assignment by A. A. Burck to your orator, for that the formation of the copartnership between Matthias Schnell, Abner Taylor, Amos C. Babcock, Charles B. Farwell, and John V. Farwell, as hereinbefore alleged, wherein it was stipulated that the profits arising from building the capitol should be divided between said parties or with the assignees of either party, the said copartnership caused said contract of copartnership, which contained an assignment by said Schnell of three-fourths of his interest in said capitol contract, to be recorded in the register of deeds of Travis County, whereupon the said A. A. Burck, J. M. Beardsley, and James S. Drake, acting on this means of giving notice of assignments adopted by said part-

nership, caused their said assignment to be recorded in the office of the clerk of the county court of Travis County in the records of deeds; and afterwards, when the said Schnell assigned his remaining interest in said contract and in the profits that might arise from the fulfilment of the same to the other members of said firm styled Taylor, Babcock & Co., the said firm caused said last-mentioned assignment to be also recorded in the said register of deeds as a means of giving notice thereof; that when the said firm of Taylor, Babcock & Co. and the individual members thereof assigned their interests in said contract to Abner Taylor, the defendant herein, they and said Taylor in their contract of assignment referred to the several mesne assignments of interests in said contract as being of record in the office of the clerk of the county court of Travis County, and referred to said records for full particulars as to said mesne assignments, whereby the said parties concerned in said contract for building said capitol building agreed and established a custom among themselves to give notice of assignments of interests in said capitol contract or in the profits that might arise from the fulfilment of the same by recording such assignments in the records of deeds of Travis County, Texas, and by their conduct in so recording such assignments, and referring to said records and not otherwise giving notice of such assignments led your orator to believe and justified him in believing that said partnership and its assigns would take notice of the assignment by said A. A. Burck to your orator when your orator placed the same on record in the records of deeds of Travis County, duly authenticated for record; that your orator, fully believing that such record would be accepted as notice of the said assignment to your orator, caused his said assignment to be promptly recorded in the records of deeds of Travis County on the 14th day of April, 1883, which was more than a year before the said Abner Taylor purchased any interest from the said A. A. Burck."

And with regard to the rights acquired by defendant, through the conveyance of May 27, 1884, from A. A. Burck to him, it avers as follows:

"And your orator further says that said assignment by A. A. Burck to Abner Taylor did not purport on its face to sell or assign to said Taylor the interests in the profits of said capitol contract which the said A. A. Burck had assigned to your orator, but only purported to assign to said Taylor whatever interest the said A. A. Burck had at the time of the said assignment to Abner Taylor, or might thereafter have; wherefore the said Abner Taylor, defendant, was placed upon notice and inquiry as to whether A. A. Burck had parted with any of his interest before the assignment of his remaining interest to the said Abner Taylor, but the said Abner Taylor made no inquiry of said A. A. Burck as to whether he had parted with any of his, the said Burck's interest, nor did the said Taylor examine or cause to be examined the records of deeds of Travis County for any record of an assignment by said A. A. Burck, notwithstanding the said custom and practice of all the parties concerned in assignments affecting said capitol contract or interest in the profits thereof to record all such assignments and the agreement thereby affected to that [as their?] method of giving notice of assignments."

The bill further alleges the performance of the contract by Taylor, large profits as the result thereof, and prays an accounting.

Mr. F. Charles Hume, (with whom was *Mr. F. G. Morris* on the brief,) for appellant.

Mr. George E. Hamilton for appellee.

Mr. Justice Brewer delivered the opinion of the court.

That which arrests the attention is that, though the defendant furnished all the means and did all the work of building the capitol, and although the authorities of the State expressly recognized him as the contractor, bound in all respects to carry out the contract with the State in the same manner as the original contractor, and though he had no knowledge of any claim of plaintiff, the court is asked to recognize the latter as the owner of one thirty-second of the profits of the con-

tract, and to compel the defendant to pay him that amount. While only one thirty-second of the profits is asked for, the rule would be the same if thirty one thirty-seconds were sued for, and the first and principal question which arises is, whether these transactions between Schnell and A. A. Burck and between A. A. Burck and plaintiff, had without the knowledge of the defendant, operated to create in the plaintiff a valid claim to a share of the profits. The contract in its twenty-sixth clause stipulated that there should be no assignment in whole or in part by the contractor without the consent in writing of the state authorities. No such consent was given to the assignment by Schnell to Burck, nor does it appear that the State ever in any form recognized the plaintiff, or his immediate grantor, as having any interest in, or control of, the contract, or any part thereof. He was to both the State and the defendant, who did the work, an unknown party until after the full completion of the contract, when for the first time he appears claiming an interest in the profits by virtue of an assignment and transfer, made before the work was done and in disregard of the terms of the contract.

It is earnestly insisted by counsel that this provision forbidding an assignment without the written consent of the state authorities was solely for the benefit and protection of the State; that it did not restrict or interfere with the right of the contractor to dispose, in any way he saw fit, of an interest in the contract, or the profits thereof, so long as the party to whom such transfer was made attempted no interference with the actual work, and presented no claim against the State. The contract in the possession of the contractor was his property, and the profits arising therefrom, and any interest therein, were as much the subject of disposal as any other property, and the only limitation was one for the benefit of the State and could not be claimed by any subsequent assignee from the contractor. The case of *Hobbs* v. *McLean*, 117 U. S. 567, 576, is relied upon as authority for this contention. In that case one Peck having, in response to an advertisement from the proper authorities, put in a bid for furnishing wood and hay to the government, and expecting that the contract

would be awarded to him, entered into a partnership with McLean and Harmon, by which Peck was to furnish one-half of the capital necessary to carry on the partnership business, and McLean and Harmon each one-fourth, the profits and losses of the partnership to be divided in like proportion. The partnership was for the purpose of carrying out this expected contract. Subsequently, the contract with the government was obtained, and after it had been performed and the money therefor paid to an assignee in bankruptcy of Peck, the other partners, McLean and Harmon, filed their bill to recover their proportionate share of the profits, as fixed by the terms of this partnership. Among the defences was that the partnership was invalid by reason of section 3737, Revised Statutes, which reads as follows:

"No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States."

But this defence was overruled, the court, by Mr. Justice Woods, observing in respect thereto:

"Interpreting the articles in the light of the statute, as it is the duty of the court to do, they were not intended to transfer, and do not transfer, to the plaintiffs any claim or demand, legal or equitable, against the United States, or any right to exact payment from the government by suit or otherwise. They may be fairly construed to be the personal contract of Peck, by which, in consideration of money to be advanced and services to be performed by the plaintiffs, he agreed to divide with them a fund which he expected to receive from the United States, on a contract which he had not yet entered into. This is the plainly expressed meaning of the partnership contract, and it is only by a strained and forced construction that it can be held to effect a transfer of Peck's contract with the United States, and to be a violation of the statute.

"We are of opinion that the partnership contract was not opposed to the policy of the statute. The sections under consideration were passed for the protection of the government. *Goodman* v. *Niblack*, 102 U. S. 556. They were passed in order that the government might not be harassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and a settlement made. Their purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed."

It is insisted that, tested by the rule thus laid down, this stipulation of clause 26 was one solely for the benefit of the State, and worked no restriction on the right of the contractor to dispose, in advance of the completion of the contract, of the profits which should enure therefrom.

We cannot concur in these views. By the section quoted not only was a transfer of the contract prohibited, but also the result of such a forbidden transfer declared. In terms it was said that any "such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned." *Expressio unius est exclusio alterius.* The express declaration that so far as the United States are concerned a transfer shall work an annulment of the contract, carries, by clear implication, the declaration that it shall have no such effect as between the contractor and his transferee. In other words, as to them, the transfer is like any other transfer of property, and controlled by the same rules. Its invalidity is only so far as the government is concerned, and it alone can raise any question of the violation of the statute. The government in effect, by this section, said to every contractor, You may deal with your contract as you please, and as you may deal with any other property belonging to you, but so far as we are concerned you, and you only, will be recognized either in the execution of the contract or in the payment of the consideration.

It is familiar law that not every contract in contravention of the terms of a statute is void, and the courts will search

the language of the statute to see whether it was the intent of the makers that a contract in contravention of it should be void or not. *Harris* v. *Runnels*, 12 How. 79; *Miller* v. *Ammon*, 145 U. S. 421; *Pangborn* v. *Westlake*, 36 Iowa, 546.

It was in pursuance of this line of thought that the court, in *Hobbs* v. *McLean*, ruled as it did as to the effect of a transfer by a contractor with the United States of an interest in his contract to a third party. But it has never been doubted that, as a general rule, a contract made in contravention of a statute is void and cannot be enforced, and the only exception arises when, from an examination of the statute, the courts are able to discern a different or a limited purpose on the part of the law makers.

It is true that, in the case at bar, we have no construction of a statute, but only of the terms of a contract. That contract, however, was as binding on the one party as the other. The contractor assented to its terms precisely as did the State, and his promise was not to assign the contract in whole or in part without the consent in writing of the state authorities. It was a promise which entered into and became one of the terms of the contract, and one which was binding, not only upon the parties, but upon all others who sought to acquire rights in it. It may be conceded that, primarily, it was a provision intended, although not expressed, for the benefit of the State, and to protect it from interference by other parties in the performance of the contract, to secure the constant and sole service of a contractor with whom the State was willing to deal, and to relieve itself from the annoyance of claims springing up during or after the completion of the contract in favor of parties of whose interests in the contract it had no previous knowledge, and to the acquisition of whose interests it had not consented. Concede all this, and yet it remains true that it was a stipulation which was one of the terms of the contract and binding upon the contractor, and equally binding upon all who dealt with him. It is unnecessary to hold that the contractor might not be personally bound upon his promise made before the performance of the contract to

transfer a portion of his profits to any third party. Whatever liabilities he might assume by such a promise, it would be an independent promise on his part, and would not let the promisee into an interest in the contract. It would give him no right to take part in the work, no right to receive anything from the State, and all that it would give him would be an independent right of action against the contractor for the failure to pay that which he had promised to pay; the contract remaining all the time the property of the contractor, subject to disposal by and with the consent of the State. To him alone the State would remain under obligations, and with him alone would the State be required to deal. In no way, by garnishment, injunction, or otherwise, could the promisee prevent the State from carrying out the entire contract with the contractor, paying to him the whole consideration, and receiving from him a full release. By the three instruments of January 31, May 9, and June 20, 1882, this contract was wholly transferred to and accepted by the defendant. This was while the contract was executory and before the work was done, and these transfers were with the written consent and approval of the state authorities, and by them the State in terms recognized "Abner Taylor as the contractor, bound in all respects to carry out the contract with the State of Texas in like manner as the original contractor, Matthias Schnell, was bound." In other words, by the consent of parties, and in accordance with the express provisions of the contract, before the work was done Abner Taylor, the defendant, was substituted for Schnell as the contractor. It was precisely the same as though the contract with Schnell had been surrendered and a new one made with Taylor. The contract was still executory; nothing had been earned by Schnell, and nothing was due to him. He steps out of the contract and Taylor steps in; Taylor is accepted as the contractor and proceeds with the work. Would it not be strange if, after having thus completed the contract, some person could, on the strength of an unknown transfer of the entire profits of the contract made before the transfer to Taylor, compel the latter to pay to him such entire profits? And yet if one thirty-

second of the entire profits can be so obtained, all the profits could, in like manner, have been obtained.

It will be borne in mind that the instrument of date January 31, 1882, by which Schnell transferred to Taylor, Babcock & Co. a three-fourths interest in the contract, did not operate to make Schnell a mere beneficiary of profits. He and they became thereby joint contractors with the State. He was under the same obligation of performance as they, and for any failure in respect thereto the State could hold him responsible equally with them. The mere fact that there was a division between themselves as to duties in no manner abridged the fact that he was a joint contractor with them. They, it is true, were to furnish the money, but he was to have the management and superintendence. He was to take his part in the performance of the contract. Not only that, but, as seen, he was to be personally responsible to them for any loss or damage caused or sustained by reason of his neglect or mistakes. So, that if he had gone on jointly with them in the performance of the contract as provided for, out of the profits earned in the performance of the contract, they would have had a right to deduct from the amount coming to him all the loss and damages which they had sustained by reason of his neglect and mistakes.

We have thus far rested the non-assignability of this contract, or any interest therein, to plaintiff's grantor upon the express stipulation of clause 26; but even in the absence of such a clause, it was not competent for Schnell, by his own act, and without the consent of the State, the other contracting party, to transfer any interest in this contract. It is a contract of that nature which is not susceptible of assignment without the consent of the other party. *Arkansas Valley Smelting Co.* v. *Belden Mining Co.*, 127 U. S. 379; *Delaware County* v. *Diebold Safe & Lock Co.*, 133 U. S. 473, 488. In the latter case it was said by this court:

"A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But when

rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract."

So that even if clause 26 had been omitted from the contract, Schnell, the contractor, could never have transferred an interest in it to the grantor of plaintiff so as to vest in him a right to take part in the work, or a subsequent right to recover from the State on the completion of the work. All that could ever have been acquired by an assignment or transfer by Schnell, without the consent of the State, was a right to maintain an independent action against him for whatever share of the profits he had attempted to transfer. But that obligation would be personal to Schnell, and was not assumed by the defendant, or Taylor, Babcock & Co. when they took an assignment of the entire contract from Schnell. Assuming to the State the performance of Schnell's contract carried with it no assumption of Schnell's unauthorized assignments or of his promises to pay over certain portions of the profits he would have received had he performed the contract. In other words, stepping into the place of Schnell in this contract with the State, they did not assume his personal liabilities to third parties. They assumed his obligations to the State, and they took with those obligations a right to receive the entire consideration promised by the State, and they did not agree to become liable for all or any independent promises he had made in reference to the contract.

It is true that in that assignment it was stipulated that the profits were "to be divided as the interests of the parties appear under the contract, or to their heirs or assigns." If Schnell, with Taylor, Babcock & Co., had under that assignment performed the contract with the State and had made profits thereby, it may be that this plaintiff after giving notice could have enforced both against Schnell and this defendant a one-thirty-second of such profits, resting upon this stipulation

for division among the parties or their assigns, but as Schnell never earned any share in the profits there is nothing upon which that stipulation can take effect. The profits which would have resulted if Schnell, with Taylor, Babcock & Co., had performed the contract might have been very different from that which did result from the performance of the contract by Taylor alone. It is a mistake to suppose that the profits to be derived from the performance of a contract, as yet unexecuted, are something separable from the performance — as a coupon is detachable from a bond — and can be sent floating through the channels of commerce as a separate obligation. The profits are tied up in the contract to such an extent that the promise in respect to them becomes of value only when he who makes the promise shall have earned the profits through the performance of the contract. And when the contract, being wholly executory, is transferred to a third party who is accepted by the promisor in lieu of the original contractor, such third party enters upon the performance of the contract free from any disposition of the profits made by the original contract or before the substitution.

We have thus far considered this case on the assumption that the defendant proceeded with the completion of his contract in ignorance of any transfer to plaintiff, and that such was the case is, we think, a fair inference from the allegations of the bill. The pleader has evidently sought to charge constructive notice from the fact of record in the office of the clerk of the county in which the work was done, but in which none of the land promised and deeded was situated. It is not pretended that there was any statute providing for such record, or making the record notice to subsequent assignees or purchasers, Rev. Stat. Texas, 1879, art. 4331; *Burnham* v. *Chandler*, 15 Texas, 441; *Wright* v. *Lancaster*, 48 Texas, 250; but it is alleged that the assignments and transfers under which the defendant claims were recorded in that office. The argument seems to be that the defendant and his assignors selected filing and record in that office as a means of giving notice to other parties of their rights, and that having made such selection was equivalent to an admission

that they would accept a like filing and record as notice to them; but that argument cannot be sustained. The defendant and his assignors may have desired to give as much publicity as possible to the fact of the transfers to themselves, and in seeking to give such publicity may have selected the filing and record in one of the principal offices of the county as a means thereto, but they did not thereby create a new law in respect to notice. They never in terms declared, and their own acts of filing for record carried, no implied declaration of their willingness to accept a similar record as notice to themselves. They had a right to rely upon the law of the State, as enacted by its legislature, and were not bound by any constructive notice other than those laws provided. If notice was essential to charge them, actual notice should have been given, at least in the absence of a statute providing some means for constructive notice. Indeed, it is a mere and not very reasonable inference from the fact that they placed these instruments on record that their purpose was thereby to give notice. As well might it be assumed that they simply sought to have preserved for their own use a recorded copy of their assignments rather than rest upon their own possession of the original papers. It is true in this part of the bill there is a statement that "said Abner Taylor then had notice of the same." This language standing by itself is open to a construction that actual notice was charged, but that no such construction should be given to it is evident from the paragraph immediately following, in which the pleader alleges that notice was given by filing and record, and states the reasons why such filing and record should be accepted as constructive notice. Indeed, we do not understand from counsel's brief or argument that there is a claim that there was actual notice given of these transfers.

Finally, it is claimed that the defendant was chargeable with notice because the assignment which he took from A. A. Burck, on May 27, 1884, was really nothing but a quitclaim; that a party taking under a quitclaim deed cannot be a *bona fide* purchaser, but takes with notice of all limitations of his grantor's rights, and in respect thereto several authorities are

cited from the State of Texas and elsewhere as to the rights of one taking under such a deed.

We do not care to enter into the consideration of this question; for, while the instrument is open to two constructions, yet, conceding that it in terms only quitclaimed, it took nothing away from Taylor's rights; it was not executed until two years and over after Schnell had parted with all his interest in the contract to Taylor, Babcock & Co., and it could not possibly have the retroactive effect of vesting in the plaintiff a right as against Taylor, which he did not theretofore have. All that can be inferred from that instrument is that more than two years after Schnell had parted with his entire interest in the contract to defendant and his associates, and they had assumed full responsibility to the State, and nearly two years after defendant had accepted the sole responsibility of the contract, and after he had partially performed its obligations, he ascertained in some way the existence of an outstanding claim in favor of A. A. Burck and, rather than litigate with him the validity of that claim, purchased it. It was not an admission that A. A. Burck had a valid claim to the extent of the attempted assignment from Schnell to him, and the fact that it was in the mere language of a quit claim as likely resulted from the unwillingness of A. A. Burck to assume the obligations of a covenant or warranty as from any other reason.

In conclusion, we hold that by the nature of the contract as well as its express stipulation Schnell was incapacitated from transferring an interest therein without the consent of the State; that the attempted transfers from him to A. A. Burck and from A. A. Burck to S. B. Burck created simply a personal obligation which could be enforced against him alone; that the assignments and transfers with the consent of the State vested the absolute and sole interest in the contract in the defendant, Abner Taylor; that the latter took without notice of the plaintiff's claim; and that by his performance of the contract he acquired the right to the entire consideration promised by the State, and assumed no liability to Schnell, and no obligation to perform any promise which Schnell made

to plaintiff, or plaintiff's assignor. The judgment of the Circuit Court is

Affirmed.

MR. JUSTICE JACKSON, with whom concurred MR. JUSTICE SHIRAS, dissenting.

I am unable to concur in the opinion and judgment of the court in this case, and will briefly state the grounds of my dissent.

The case stands upon the bill, original and amended, and demurrer thereto. From the nature of the building contract between the State of Texas and Schnell, as well as the covenant contained in the twenty-sixth clause thereof, providing that the contract should not be assigned in whole or in part by the contractor without the consent, in writing, of the designated state officials, "with the advice and consent of the heads of departments," the conclusion is reached by the court that "Schnell was incapacitated from transferring an interest therein without the consent of the State; that the admitted transfers from him to A. A. Burck, and from A. A. Burck to S. B. Burck, (complainant,) created simply a personal obligation, which could be enforced against him alone; that the assignments and transfers, with the consent of the State, vested the absolute and sole interest in the contract in the defendant, Abner Taylor; that the latter took without notice of the plaintiff's claim; that by his performance of the contract he acquired the right to the entire consideration promised by the State, and assumed no liability to Schnell and no obligation to perform any promise which Schnell made to plaintiff or plaintiff's assignor."

I find nothing in the allegations of the bill or in the exhibits, made a part thereof, which sustains the statement that Taylor "took without notice of the plaintiff's claim." The bill certainly does not admit that Taylor took the transfer to himself and Babcock from A. A. Burck without notice of the previous transfer to S. B. Burck. The other conclusions involve legal and equitable propositions, which, as applied to

the admitted facts of this case, are not, in my opinion, correct.

There are important allegations in the bill, and provisions in some of the contracts, made exhibits thereto and parts thereof, which are admitted by the demurrer, but which are not noticed or considered in the opinion. By the contract of January 31, 1882, (Exhibit "L,") Schnell assigned and set over to Charles B. Farwell, John V. Farwell, Amos C. Babcock, and Abner Taylor, "an undivided three-fourths interest in said (state) contract, for the purpose that the said parties of the second part may share in any and all the profits that may arise from same, the same as the party of the first part, (Schnell,) as their interests may appear, which is hereby agreed to be equal;" that is, the assignees collectively were interested in the three-fourths interest transferred to them. This contract further provided that the assignees were "to furnish whatever money may be needed or necessary for the proper construction of said state-house or for the execution of the said contract as the same may be required from time to time." The sum of $13,000, which the parties acknowledged to be then due Schnell, was to be paid with interest "whenever the sum of $50,000 shall have been realized by the sale of lands named in said (state) contract." After the payment of that sum the contract provides "that the said parties of the second part are to have all the remaining profits until all the money advanced as above stipulated shall be paid, with six per cent interest thereon per annum from the time said money is advanced, and all the other profits are to be divided as the interests of the parties appear under the contract or to their heirs or assigns. It is further agreed by and between the parties hereto that Amos C. Babcock, one of the parties of the second part, shall be the trustee for the parties herein named of each part, to act as and be the trustee to receive the title to be conveyed in pursuance of the contract between the State of Texas and the said Matthias Schnell and receipt for same to the proper officers of said State, and do all other things required of the said Schnell pertaining to the conveyance of the lands under said contract with the State of Texas or

capitol building commissioners, and to hold the same and to make such conveyances or sales of said lands or any portion thereof from time to time as the parties hereto may direct."

The State of Texas, by its proper officials, gave its written consent to this contract of assignment, which operated to substitute Schnell and his assignees, composing a partnership under the style of Taylor, Babcock & Company, as the contractors with the State in place of the original contractor. In thus becoming the substituted contractors with the State, instead of Schnell, the members of the partnership in no way abrogated or terminated the provisions of their private contract *inter sese* as above set forth. It admits of no question that by the terms of this partnership contract Schnell was not required to make any advances or incur any expenditures in executing the state contract and completing the capitol building, as the four assignees of an undivided three-fourths interest in the state contract were to advance all the funds required for that purpose, and obtain their reimbursement from the sales of the lands to be received from the State in settlement for the work. It is equally clear that Schnell retained a one-fourth share of the profits that might be realized on the contract after refunding advances made by his copartners in completing the capitol building. Now, the State of Texas certainly had no concern with these private matters and agreements between the new contractors. It was not interested in, or in any way affected by, the relative or respective shares of the contractors in the profits which might be made. Neither had the State any interest in the question as to how, or amongst whom, such profits, if any, should be divided. These were matters to be settled among the copartners or associate contractors, and they were settled by them in the provision of their private contract which provided that, after repaying the amount expended in constructing the state capitol, "all the other profits are to be divided as the interests of the parties appear under the contract, or to their heirs or assigns." It can hardly be doubted that this language permitted and provided for the assignment by either or all of the partners of his or their share in the profits, and that such

assignee could equitably assert a right thereto against any person into whose hands such profits might come, or be found, except a *bona fide* purchaser thereof for value without notice of the assignee's rights. Such an assignee of a share in the profits of the enterprise would have nothing to do with the execution of the state contract out of which profits might arise. Nor would he touch the State at any point, or in any way affect its rights, interest, or convenience. The contractor's covenant not to assign the building contract without the consent, in writing, of designated state officials, did not extend to or cover an assignment by the contractor of a share or interest in the profits which it was expected would arise from the execution of the contract. The State had notice of the provisions of the private partnership contract which included "assigns" among those entitled to share in the division of the profits, and in consenting to the arrangements made by that contract it may be fairly assumed to have assented to such provisions. The right to assign a share or interest in the profits was one of the terms of the copartnership, which the State accepted as contractor in the place of Schnell. In thus accepting the firm as contractor, with notice that its members had provided for their "assigns" to share in the profits of the building contract, the State itself could not thereafter have objected to Schnell's assignment of his interest, wholly or partially, in the profits that the firm might make out of the contract, whether such assignment was made before the completion of the work, or after.

Suppose the firm of Taylor, Babcock & Company, having the same copartnership articles and agreements as to how the members should share in the profits of the business, had been the original, instead of the substituted, contractors? Could or would it be held that the contract with the State, or the twenty-sixth clause thereof, would operate or have the effect to prevent any member of the firm from assigning a part of his interest in the profits that might be realized in completing the state building? Such a proposition as this could not be maintained. It would be too clear for argument that the state contract with the partnership could not control the

articles of copartnership as between the partners and third parties in respect to what might be realized by the firm out of the contract with the State. Each partner of a firm has an undoubted right to make a valid assignment, either absolutely or as security, in the profits of a partnership. No partner owns absolutely any part of the partnership property. He cannot assign any particular part of such property, or any specific amount of the profits of the concern. But the assignment of his share, or any part thereof, in such profits will pass such part of the profits as may remain after payment of the firm's debts, and settlement of the partnership accounts. The right conferred by the assignment is an intangible thing and can only be reduced to possession by a demand for account, and no notice of such an assignment need be given other than a demand for an account of such profits. This is the rule laid down in *Wallace's Appeal*, 104 Penn. St. 559, where it was held "that a purchaser of a partner's interest, whether at private or judicial sale, acquires merely the right to demand an account from the other partners and receive a certain share of the balance remaining after the payment of the partners' debts and the adjustment of the partnership equities. This right is an intangible thing, and can only be reduced to possession by a demand for an account." In that case it was further held that the assignee of a partners' interest was superior to the claim of general creditors, and all others claiming under the partnership, except the purchasers for value without notice.

The right of the partners, under the articles of copartnership, as well as under the general law, to make a transfer or assignment of their interest in the profits of the firm, should not be confounded with the right of the firm to make an assignment of the contract, so far as the State is concerned. In accepting the copartnership as its contractor the State did not undertake to control the ordinary rights of partners, nor abrogate their private agreement. The opinion of the court asserts the proposition and reaches the conclusion that, notwithstanding the terms of the partnership agreement, which provided that the "assigns" of any member of the firm should

be included amongst those who were to share in the profits of the enterprise, as their interest might appear, still such an assignee could acquire no right or title to the profits as against the firm, or members thereof, into whose hands such profits might come, without the consent of the State to such assignment; and as the result of this startling proposition, holds that the appellee, Taylor, who was a member of the firm and a party to that agreement, is relieved from liability to account for profits which belong to the appellant, as the assignee of Schnell. I know of no principle or authority upon which this can be sustained.

Having retained a one-fourth interest in the profits of the building contract, Schnell, on January 31, 1882, by written contract, after reciting the contracts with the State, and with Taylor, Babcock, and the Farwells, transferred and assigned to A. A. Burck and two others, separately and severally, an undivided one-fourth part "of all and whatever share, interest, or advantage, whether in money, lands, or otherwise, which he (said Schnell) may be entitled to have or receive under or by virtue of the contracts herein mentioned and referred to," excepting only the $5000 to be paid for his services as superintendent, and $13,000 coming to him out of the first $50,000 proceeds of land sales. This assignment contained the provision "that this contract shall be binding upon and inure to the executors, administrators, heirs, and assigns of the several parties hereto respectively, and that the same shall be recognized by the parties and trustee named in the contracts herein referred to."

This assignment to A. A. Burck was witnessed by A. C. Babcock, of the firm of Taylor, Babcock & Company, and trustee of the parties to receive and sell the lands to be acquired under the building contract. He not only witnessed the contract, but appeared before the proper officers and proved its execution for registration. The firm of Taylor, Babcock & Company thus had notice through one member thereof of the assignment. In addition to this it is distinctly alleged in the amended bill that this transfer was executed by Schnell "with the knowledge and assent of said partner-

ship," meaning Taylor, Babcock & Company. It is further alleged "that the said Matthias Schnell, having assigned to the said A. A. Burck a right to one-sixteenth interest in the profits that might arise from the construction of said capitol under said contract with the State of Texas, and having made such assignment to said Burck at the time said partnership was existing, as hereinbefore alleged, with the knowledge and assent of said firm as it then existed, the right of the said A. A. Burck to have one-sixteenth of the profits that might arise from the carrying out of said contract and to have an accounting therefor became binding upon said firm and its assignees."

On May 9, 1882, Schnell by written contract transferred his remaining interest in the contracts (consisting of his claim of $13,000, and an undivided one-sixteenth interest or share in the profits that might be realized) to Charles B. and John V. Farwell, Abner Taylor, and A. C. Babcock, "who composed the firm of Taylor, Babcock & Company." In respect to this assignment, which the State approved, the original petition charges "that the said Taylor, Babcock & Company received said assignment from Matthias Schnell of all his interest in said contract to complete said state capitol with full notice of the interest of said A. A. Burck, as hereinbefore alleged, an undivided one-half of which interest A. A. Burck subsequently transferred to plaintiff, S. B. Burck, as aforesaid, and that the said Abner Taylor had full notice of the interest of the said A. A. Burck at the time of the said transfer of Taylor, Babcock & Company to him, the said Abner Taylor, and with full notice that by the terms of the agreement and assignment executed by and between said Matthias Schnell, of the first part, and J. M. Beardsley, James S. Drake, and A. A. Burck, of the second part, that the same should be binding on, and inure to, the executors, administrators, heirs, or assigns of the several parties to the said contract."

Now, after this transfer by Schnell of his interest to the firm of Taylor, Babcock & Company, what was the situation in respect to the profits that might be realized from the building contract? It was clearly this: Taylor, Babcock & Company

thereafter held and owned the three-fourths interest acquired under the partnership contract of January 31, 1882, and one-sixteenth interest derived from the assignment of May 9, 1882, aggregating thirteen-sixteenths interest in the profits, leaving the outstanding three-sixteenths assigned to A. A. Burck and others by Schnell on January 31, 1882. The stipulations of the partnership contract were in no way changed or affected by Schnell's assignment of his remaining interest to the firm of Taylor, Babcock & Company. The obligation of Taylor and his associates, Babcock and the Farwells, to furnish the money required to complete the contract was not altered or abrogated in any way, and if the contract had been completed by Taylor, Babcock & Company, the profits realized from the sales of the lands, after refunding the expenditures made in completing the contract, would have been distributable between the parties in the proportion of thirteen-sixteenths to Taylor, Babcock & Company, one-sixteenth to A. A. Burck, and two-sixteenths to the other two assignees of Schnell.

On June 20, 1882, the firm of Taylor, Babcock & Company transferred the building contract to Abner Taylor, which was assented to by the State, and Taylor thereby became the contractor. But in so doing he did not cease to be bound by the terms of the partnership contract under which Schnell retained his one-fourth interest in the profits, and a right to assign it, as he did. In other words, Taylor, in acquiring the shares of the members of the firm of Taylor, Babcock & Company, in no way either terminated or affected the interest of the parties holding the outstanding interests in the profits assigned by Schnell to A. A. Burck, with the knowledge and consent of both Taylor and the firm of Taylor, Babcock & Company. Nor did the transfer to Taylor by Babcock and the Farwells, as members of the firm of Taylor, Babcock & Company, in any way relieve Taylor from the provisions of the contract of January 31, 1882, which required himself and associates, other than Schnell, to furnish all the money needed to complete the building. The only effect of that transfer was simply to place Taylor in the shoes of Taylor, Babcock & Company, subjecting him to all the obligations resting upon himself and assignors,

and affected by all the rights and equities which were binding upon the firm, not only in respect to the State, but as to all others interested in the result of the enterprise.

It is held, in the opinion of the court, that this assignment by the members of the firm of Taylor, Babcock & Company to the appellee, Taylor, with the consent of the State, vested in him the absolute and sole interest in the contract, and profits arising therefrom, and that by his completion of the contract he acquired the right to the entire consideration promised by the State, and assumed no liability to either Schnell or to others claiming under Schnell. Schnell's assignee, holding the outstanding one-sixteenth interest in the profits, was no party to that arrangement. His rights were fixed by the partnership articles, and how and upon what principle can it be maintained that Taylor's acquisition of the interest of Babcock and the Farwells in the contract, and the profits thence to arise, can cut off this outstanding interest held by Burck? By taking the assignment from his copartners, Taylor was in no way released from the obligation to furnish money and complete the contract which rested upon the firm of Taylor, Babcock & Company; and how is it then that, by acquiring the interest of his copartners, he can terminate or extinguish the right of Schnell's assignee, previously acquired with the knowledge and consent of the firm of Taylor, Babcock & Company? Can rights acquired with Taylor's knowledge and consent be cut off and extinguished by the private dealings between himself and partners, even though it be with the consent of the State? No such proposition can be sustained either upon principle or authority.

By the transfer of April 14, 1883, from A. A. Burck to the complainant S. B. Burck, (Exhibit "O,") the latter acquired an undivided one-half interest in the one-sixteenth interest held by the former, and thereby became entitled to one-thirty-secondth part of the profits that might arise upon the completion of the contract, and the sales of the land to be received therefor. This transfer left A. A. Burck the holder of one-thirty-secondth interest in the profits, and, thereafter, on May 27, 1884, he assigned to Abner Taylor and A. C.

Dissenting Opinion: Jackson, Shiras, JJ.

Babcock all his right, interest, and claim in and to the contract with the State of Texas derived from Schnell, or any interest he might have in the erection of the capitol building.

These two assignments by A. A. Burck are not, upon their faces, in conflict. They may well stand together. That to S. B. Burck was of a specific interest; that to Taylor and Babcock may be fairly construed to cover A. A. Burck's remaining interest of one-thirty-secondth share of the profits. This last transfer does not purport to convey the one-thirty-secondth interest previously transferred to S. B. Burck, and there is no allegation in the bill to give color to the idea that Taylor and Babcock, in taking the assignment of May 27, 1884, from A. A. Burck, supposed that they were getting a one-sixteenth interest instead of a one-thirty-secondth interest. When that assignment was made to them, Taylor and Babcock both knew that A. A. Burck had acquired from Schnell a one-sixteenth interest in the profits, and it is somewhat significant that they accepted an assignment from him, general in its character, without specification as to the interest conveyed. It is alleged that this transfer from A. A. Burck to Taylor and Babcock did not, upon its face, purport to convey the interest previously conveyed to S. B. Burck. Upon demurrer this statement of the bill with respect to the purport of that transfer must be taken as true. In *Campbell* v. *Mackay*, 1 Myl. & Cr. 603, Lord Chancellor Cottenham laid down the rule "that the court upon demurrer must assume the statement of the bill, with respect to the purport of a deed, to be true, and the demurring party is not at liberty to read the instrument itself for the purpose of disproving the statement, notwithstanding that for greater certainty as to its contents, the bill expressly refers to it as being in the demurring party's possession."

When this assignment of May 27, 1884, was made to Taylor and Babcock, the latter had ceased to be a cocontractor for the erection of the building.

The State never assented to either of these assignments by A. A. Burck. The want of that assent is held to violate the transfer to S. B. Burck, while it does not affect that made to

Taylor and Babcock. In reference to these A. A. Burck assignments the bill charges "that for reason why your orator should not have an account or relief against him the defendant pretends that he had no notice that the said A. A. Burck assigned or transferred to your orator a one-half interest in his, the said A. A. Burck's one-sixteenth interest in the profits that might arise from the building of said capitol contract, and that the defendant in good faith and without notice purchased from said A. A. Burck for valuable consideration the said Burck's one-sixteenth in said profits after the said A. A. Burck had sold one-half of his said interest to your orator, and therefore refuses to account with plaintiff; whereas the truth is that the said transfer by A. A. Burck to your orator, which has been hereinbefore stated and made a part of this bill as an exhibit, was duly authenticated for registration in the office of the county clerk, and was duly recorded in the records of deeds of Travis County, Texas, on the 14th day of April, A.D. 1883, and said Abner Taylor then had notice of the same; whereas the said A. A. Burck did not sell or transfer any of his said interest in said profits to said Abner Taylor until the 27th day of May, 1884."

Suppose, as suggested in the opinion of the court, that this does not amount to anything more than an averment of constructive notice arising from the registration of the transfer? It was certainly not an admission that Taylor had no notice of that assignment. But considering the subject-matter of the interest transferred by Schnell to A. A. Burck, and by him to S. B. Burck, and the situation of the parties, the question arises whether want of a definite allegation that Taylor and Babcock had notice of the complainant's interest when they took their assignment from A. A. Burck, can in any way affect or defeat the complainant's rights according to the allegations of the bill?

The interest involved was to arise out of the sales of lands then being, and thereafter to be acquired, without expense to Schnell or his assignees. To whom was an assignee of an interest in the profits under duty and obligation to give notice? The ordinary rule applicable to the transfer of debts or choses

in action has no application to the case, as shown in *Wallace's Appeal*, 104 Penn. St. 603. The principle which would govern and control the question and the conflicting rights of complainant and Taylor and Babcock, if there is any real conflict between them, is the equitable doctrine of a *bona fide* purchaser for value without notice. This is a matter of defence on the part of such purchaser. There is certainly nothing on the face of either the bill or the contracts, made exhibits thereto, to indicate that Taylor, or Taylor and Babcock, have or can assert any such defence, and yet the court's opinion and conclusion gives Taylor the full benefit of that position as effectually as though he had set it up by answer and established it by proof.

There is a clear distinction between choses in action and chattel or freehold interests. This distinction is pointed out in *Wiltshire* v. *Rabbits*, 14 Sim. 76, 77, in which it was held that the person who took the first assignment of an annuity charged on leaseholds was entitled to priority over the person who took the second, notwithstanding the latter may have been beforehand with the former in giving the trustee notice of his security. The same general principle is asserted in *McCreight* v. *Foster*, 5 Ch. App. 604, 610. And in *Wilmot* v. *Pike*, 5 Hare, 14, it was distinctly held that the doctrine of notice applicable in determining the priority of charges on choses in action does not prevail as to equitable estates in land. In that case several mortgages were held to take effect with regard to interests arising out of real estate, according to the order of time at which they were respectively created, and that their priorities were not affected by the giving or failing to give notice to the party in whom the legal estate was vested.

But even treating the interest here involved as an ordinary chose in action, no proposition is better settled than that an assignee of such a right can take only such interest as his assignor has to transfer, and will be bound by all equities binding on the latter, unless it affirmatively appears that the subsequent assignee took without notice. *Davies* v. *Austen*, 1 Ves. Jr. 247; *Brashear* v. *West*, 7 Pet. 608; *Livingston* v. *Hubbs*, 2 Johns. Ch. 312; *McKinnie* v. *Rutherford*, 1 Dev. &

Bat. (Eq.) 14; *Webster* v. *Wise*, 1 Paige, 319; *Gay* v. *Gay*, 10 Paige, 369.

There is no allegation in the bill which can be tortured into an admission that Taylor occupies the position of a *bona fide* purchaser, for value without notice, of the interest of A. A. Burck previously conveyed to S. B. Burck. The opinion of the court goes far beyond giving Taylor the benefit of such position. It, in principle and effect, gives to the covenant against transferring the state contract a greater effect than a law or a statute could have had. How can the rule laid down by the court that the covenant against transferring the state contract has the effect to defeat the rights of an assignee from a member of the firm of contractors be reconciled with the principle announced in *Blair* v. *Gibbes*, 17 How. 232, 239; *Brooks* v. *Martin*, 2 Wall. 70, 87; *Railroad Co.* v. *Durant*, 95 U. S. 576, and also in *Sharp* v. *Taylor*, 2 Phillips, 801, 818? In these cases it was held that there was a distinction between enforcing an illegal or prohibited contract, and the assertion of a title to funds that had been realized out of such transactions. Here the contract with the State has been completed. The State is not objecting to the assignment made by Schnell to A. A. Burck, and by A. A. Burck to S. B. Burck, and certainly Taylor, who not only had knowledge of Schnell's assignment to A. A. Burck, but is charged with having assented thereto, is not in a position to interpose an objection which even the State could not urge in order to withhold funds that do not belong to him. What Lord Chancellor Cottenham said in *Sharp* v. *Taylor*, *supra*, is directly in point here: "As between these two, can this supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? In this particular suit can the one tenant in common dispute the title common to both? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision in some act of Parliament has been violated or neglected? Can one of two partners in any import trade defeat the other by showing that there was some irregularity in passing the goods through the custom-house? The answer

to this, as to the former case, will be that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do, as between the parties. Do the authorities negative this view of the case? The difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken in *Tenant* v. *Elliot*, 1 Bos. & Pull. 3; and *Farmer* v. *Russell*, 1 Bos. & Pull. 296, and recognized and approved by Sir William Grant in *Thomson* v. *Thomson*, 7 Ves. 473."

The same principle is laid down in the recent case of *Kingsbury* v. *Burrill et al.*, 151 Mass. 199, where it was held that an assignment of a fractional part of a claim is good in equity where the person who is to pay raises no objection, following *James* v. *Newton*, 142 Mass. 366.

The present case cannot be distinguished in principle from the rule announced in *Hobbs* v. *McLean*, 117 U. S. 567, in which A, having contracted with the United States to furnish supplies of wood and hay to troops in Montana, entered into partnership with B and C for the purpose of executing the contract. A was to furnish half the capital, B and C one-fourth each, and profits and losses were to be divided on that basis; but, in fact, the capital was furnished by B and C. A delivered the wood according to the contract, but failed to deliver the hay, and, payment being refused, he brought suit in his own name in the Court of Claims against the United States to recover the contract price of the wood. In this suit B and C each was a witness on behalf of A, and each testified that he had no "interest, direct or indirect, in the claim," except as a creditor of A, holding his note. Pending the suit, A became bankrupt, and then died. His administratrix was admitted to prosecute the suit, but before entry of final judgment his assignee in bankruptcy was substituted in her place. Final judgment was then rendered in favor of the assignee, and the amount of the judgment was paid him. B and C, as surviving partners, then filed a bill in equity against the assignee and the attorneys and counsel, to recover their shares in the partnership property, and the court sustained their right to recover.

Dissenting Opinion: Jackson, Shiras, JJ.

The attempt to draw distinctions between decisions which involve no substantial differences in principle is not only unwise, but is attended inevitably with embarrassment in the administration of the law. The cases of *Arkansas Valley Smelting Co.* v. *Belden Mining Co.*, 127 U. S. 379, and *Delaware County* v. *Diebold Safe and Lock Co.*, 133 U. S. 488, cited in the opinion of the court, fall far short of asserting the proposition that a member of the firm of Taylor, Babcock & Company (the substituted contractors with the State) could not transfer an interest in the profits to arise out of the building contract without the consent of the State. There is a class of cases where the services to be rendered are of such a personal character that they cannot be assigned; but where is the authority that holds that where a firm is a contractor to do certain work a member of such firm cannot assign or transfer his share of the profits to arise therefrom? I have looked in vain for such an authority.

The real question before the court upon the bill, and the demurrer thereto, is not whether Schnell could have assigned to A. A. Burck the right to take part in or assert any control over the construction of the state capitol, or to have recovered from the State the compensation it had promised to pay therefor? But the question is, can Taylor retain a share of the profits which belong to Schnell by the partnership agreement, made with himself and his associates upon full consideration, a portion of which profits Schnell, "with his knowledge and consent," transferred to A. A. Burck, who assigned a part thereof to the complainant? Under and by what provision of the contract, described in the record, did Taylor become entitled to hold that share for his own benefit?

The bill shows that the building cost about $3,700,000; that the lands received from the State as compensation for the work, and since sold, were worth from ten to eleven millions of dollars, and the profits made on the transaction were between seven and eight millions of dollars. By the terms of the partnership contract, all the expenditures connected with the completion of the building were to be refunded with interest, and the remaining profits were to be divided "as the interest of the

Counsel for Defendant in Error.

parties or their assigns might appear." The complainant as an "assign" holds title to one-thirty-secondth interest of those profits. The bill clearly discloses his right thereto, and I fail to see upon what principle Taylor can dispute his claim or deny the account which he seeks. To allow him to do so, under the allegations in this bill, and upon the ground on which it is rested, that the State did not assent to the complainant's acquisition of the interest he holds, is not only a perversion of right and justice, but finds no sanction or support in either principle or authority.

Mr. Justice Shiras concurs in this dissent.

Mr. Justice White was not a member of the court when this case was argued, and took no part in its decision.

NORTHERN PACIFIC RAILROAD COMPANY *v.* BOOTH.

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

No. 327. Submitted March 28, 1894. — Decided April 9, 1894.

The verdict and judgment in the court below having been for $5000, and that judgment having been a few days later amended on the motion — apparently *ex parte* — of the defendant, by adding to it the sum of $116.73, interest, this court, as the defendant made the motion with the sole object of obtaining a writ of error not otherwise allowable, declines to permit what was done to be efficacious in the accomplishment of the purpose designed, and dismisses the writ of error.

The case is stated in the opinion.

Mr. James McNaught, *Mr. A. H. Garland*, and *Mr. H. J. May* for plaintiff in error.

Mr. C. D. O'Brien for defendant in error.

Opinion of the Court.

THE CHIEF JUSTICE: This was an action to recover damages for the death of Fred. D. Booth, alleged to have been occasioned by the wrongful act or omission of the defendant, brought under the statute of the State of Minnesota in that behalf, which limited the recovery to not exceeding five thousand dollars. The case being tried to a jury resulted in a verdict in plaintiff's favor, January 10, 1890, for five thousand dollars, and, after motions for a new trial and in arrest had been overruled, judgment was rendered for that amount on May 12, 1890. On the following nineteenth of May the Circuit Court, on motion of the defendant's counsel, apparently made *ex parte*, ordered the judgment to be amended so as to read that the plaintiff recover the sum of five thousand dollars, "the amount found to be due by the jury, together with the sum of one hundred and sixteen and $\frac{73}{100}$ dollars, ($116.73,) the amount of interest thereon from the rendition of the verdict to date."

These proceedings were had at December term, 1889. On July 3, 1890, one of the days of the succeeding June term, plaintiff moved the court to vacate the amendatory order of May 19, which motion was overruled. Defendant thereafter sued out this writ of error. But the writ cannot be maintained unless it appear that the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars, and in this case the judgment would be the measure of the jurisdiction. As originally rendered this did not exceed that sum, and we are of opinion that it could not be amended on motion of the defendant by the addition of an amount not claimed by plaintiff, so as to bring the case within our jurisdiction. Since the defendant confessedly made its motion with the sole object of obtaining a writ of error not otherwise allowable, and, in doing so, conceded that the amount sought to be added was not in dispute, we decline to permit what was done to be efficacious in the accomplishment of the purpose designed.

Writ of error dismissed.

ROBERTSON *v.* CHAPMAN.

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

No. 255. Argued March 9, 12, 1894. — Decided April 2, 1894.

The evidence does not bring this case within the operation of the following principles of law, laid down by the court in its opinion, namely:

(1) That an agent is precluded from taking advantage of his principal, or from dealing with the property committed to his care in any other capacity than as an agent, who is bound to subordinate his own interests to those of his principal;

(2) That an agent cannot directly or indirectly become the purchaser of property of his principal, entrusted to him to sell, and cannot maintain a title thus acquired as against his principal; for, in so purchasing, his duty and his interest would come in conflict;

(3) That if an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and, at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a *bona fide* purchaser, to account not only for its real value, but for any profit realized by him on such resale; and this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it;

(4) That the law will not, in such case, impose upon the principal the burden of proving that he was, in fact, injured, and will only inquire whether the agent has been unfaithful in the discharge of his duty; for, while the agency continues he must act, in the matter of such agency, solely with reference to the interests of his principal; and the law will not permit him, without the knowledge or assent of his principal, to occupy a position in which he will be tempted not to do the best he may for the principal.

THE case is stated in the opinion.

Mr. Alexander H. Robertson and *Mr. William A. Fisher* for appellant.

Mr. George E. Hamilton for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

This appeal brings up for review a decree dismissing a bill brought by the appellant for the purpose, among others, of obtaining a decree setting aside and cancelling of record certain deeds and mortgages alleged to have been made in fraud of his rights.

The principal question in the case is whether the real estate, covered by those deeds and mortgages, was acquired by the appellee Polk in violation of his duty to the appellant.

Ella V. Davis, a citizen of Maryland, died in 1881, leaving a will, by which Augustine C. Dalrymple was appointed a trustee with power to sell and convey such estate of the testatrix as did not yield an income, and could not be leased to advantage.

Dalrymple renounced the trusteeship, and on the 3d of June, 1881, by an order of the proper court of Maryland, William A. Stewart was appointed in his place as trustee. Stewart, subsequently, on the 6th day of April, 1885, resigned that position, and the present appellant was substituted in his place.

The testatrix, at her death, was the owner of numerous lots in Plattsmouth, Cass County, Nebraska. In the fall of 1885 the appellant Robertson visited that city for the purpose of effecting a sale of them, if, upon investigation, it was deemed best to do so. He employed the appellees Samuel M. Chapman and Milton D. Polk, partners in the practice of the law as Chapman & Polk, to attend to the probating of the will in Cass County, and to obtain a judgment of the proper court construing the will and authorizing a sale of the lots. While in Plattsmouth, after conferring with real estate agents and others to whom he was introduced by Chapman, and who were familiar with the value of property in that city, he fully determined to sell these lots; the only question, he testified, "was to find a purchaser at $4000."

After returning to Baltimore, the place of his residence, Robertson received a letter from Chapman, dated October 22, 1885, in which the latter said: "We have been canvassing the sale of the realty belonging to the Davis estate and $4000 is the best offer we can get — $1000 down and the balance

when a deed is made and confirmed by court. I have prepared petition to sell and will take first order next week. If a sale of this property is consummated, it should be done before winter sets in, as you cannot then, in all probability, get a fair offer before matters open up next spring. Looking this property over, I am, as you well know, very firmly convinced that you should sell it now, as a long, hard winter will, in the condition it now is, unquestionably reduce it in value."

Under date of November 14, 1885, Polk, in the name of his firm, wrote to Robertson: "A man here by the name of O'Donohoe says he will give $4000 for that property — $1000 cash, balance in three equal annual payments, at 7 per cent, secured by mortgage on that, together with mortgage on other property, so that the security will be ample. Not long ago he offered $4000 cash, but times are dull here now, and he says the time-payment offer is the best he will do. If the above is satisfactory to you, you can advise us, and we will arrange the matter to close up the trade with him as soon as possible, as money matters are getting close here, with no flattering prospect of better times soon. We are yours to command. The above is the best we have been able to do thus far, but if not satisfactory let us hear from you at your convenience."

To this letter Robertson replied, under date of November 17, 1885, as follows: "Yours of the 14th is before me. I am decidedly of opinion that the property in your city should be sold, and that, too, at once. I think the offer a fair one, and you are authorized to accept the same. Please send me the mortgage and notes as soon as consummated."

On account of the absence from Plattsmouth of both Chapman and Polk, some delay occurred in the preparation of the deed, mortgage, and notes. But, on the 12th of December, 1885, the papers were mailed to Robertson — Polk, in the name of his firm, writing: "Enclosed please find blank deed, mortgage, and notes of O'Donohoe. He did not like giving his notes before he got his deed, but finally he signed everything up in proper shape. Now, there are some taxes due and payable against the property, and I agreed with him that when

he paid the $1000 (on the receipt of his deed) we would accept tax receipts for those taxes in lieu of the amount of taxes in currency. Court is in session, and we expected to have had a decree before this, but have not; no doubt will have by time deed reaches us. Money matters are very close here. . . . You can send us deed and we will collect and remit to you, or if you do not know us well enough to be satisfied and do not care to inquire of any bank in this city, you can send deed to First National Bank with full instructions." To this letter was this postscript: "O'Donohoe claimed he might want to pay off those notes next fall, and would not sign unless they were made so he could pay them if he chose to do so. I did not think it would make any difference with you."

Under date of December 17, 1885, Robertson returned the deed, notes, and mortgage to Chapman & Polk, with directions to record the mortgage, returning the original to him, and to deliver the deed when a decree for the sale of the property was passed. In this letter Robertson said: "Please see that a decree is passed by your court authorizing sale before you deliver deed; under our arrangement fee of $400 was to be charged and divided between us." Polk, in the name of his firm, replied, December 22, 1885: "Yours of recent date at hand, with deed duly executed and mortgage which I forgot to seal in my hurry to get it off in the mail. I have sealed the same and will place on record as soon as we get decree and O'Donohoe pays in the money."

On the 22d of January, 1886, Polk enclosed to Robertson a draft for $449.15, as the balance in cash due on the first payment for the property bought by O'Donohoe. In that letter, Polk said: "I reserved our fee of $200 out of the $1000 together with the taxes. . . . I will send complete statement in a day or two with duplicate tax receipts, together with what money is in bank here belonging to you." Under date of January 26, 1886, he enclosed a statement to Robertson, indicating that he had received the cash payment of $1000, and accounting for it as follows: "Paid fee, $200; paid taxes, $319.50; remitted, $449.15." This left a balance of $31.35. In a postscript to this last letter, Polk said: "Now shall I

remit you the balance due or shall I apply it on taxes? The balance on taxes will have to stand until note is due and be deducted from that, I suppose. I think from the way things have been running that a sale at $3000 would have been profitable for the estate."

On the 28th day of January, 1886, the mortgage given by O'Donohoe and wife to the appellant, as trustee, to secure the notes executed by O'Donohoe, was filed in the proper office for record.

On the 3d of April, 1886, Polk wrote to Robertson: "If you would like the money on the note which falls due first, send it to Citizens' Bank at Plattsmouth for payment at an early date."

Under date of May 1, 1886, Polk wrote to Robertson: "Your favor of recent date at hand. The note you speak of was duly received by the bank, and is in their hands for payment. I traded O'Donohoe out of the property and had a note of $800, which was due several days ago, that I expected to put right on that note, as I have assumed the payment of them; but the party did not pay promptly, as I expected. He says, however, he will get me the money as soon as he can, which will not be long. If nothing happens I want to pay the other two notes in August." This letter is without date, but Polk fixes May 1, 1886, as the date, while Robertson fixes the month of February, 1886, as the time when he was first informed by Polk that he bought the property from O'Donohoe. It should be stated in this connection that Chapman had, upon examination, reached the conclusion that a decree to sell the property was unnecessary, and that the trustee had authority under the will to make a sale.

The record contains many letters that passed between Polk and Robertson in 1886, 1887, and 1888, which upon their face show that the latter, after receiving the letter of May 1, 1886, treated the former as the owner of the property by purchase from O'Donohoe.

Prior to the institution of the present suit, Polk had fully paid the first of the notes given by O'Donohoe and a portion of the second note. And Polk and wife sold and conveyed some of the lots and mortgaged others.

On the 21st of August, 1888, O'Donohoe wrote the following letter to Robertson:

"M. O'Donohoe, attorney and solicitor.

"PLATTSMOUTH, NEB., *August* 21, 1888.

"A. H. Robertson, Baltimore.

"SIR: I am not the real and '*bona fide*' purchaser of the property in this city of which you are the trustee. Milton D. Polk, Mr. Chapman's partner, is the purchaser. He was the agent, and as such could not become the purchaser. He agreed with me to purchase it and that he would pay me. He has failed to pay me, and if you employ me I can set aside the sale and the property falls again into your hands. I deeded the property to Polk on the same day on which I bought from you, and next day Polk sold ½, half, lot on Main St. to V. V. Leonard for $1600. It was worth $2000. In fact, the 2 half lots on Main St. were worth the $4000 in ready cash. The whole property is worth now $20,000 and even more. You have received $2000, and you can have five times the amount if — agree with me. The deed can be readily set aside.

"Polk managed and controlled the whole deception by which the sale was effected. If you give me power of attorney to act I will set the deed aside without any expense to you.

"Yours sincerely, M. O'DONOHOE."

The present suit was brought January 26, 1889, to obtain a decree setting aside the above-mentioned conveyances and mortgages as having been made in fraud of the rights of Robertson. So far as Polk and Chapman are concerned, the bill charges that they fraudulently represented to the plaintiff that the property was in fact worth only $4000, when they knew or ought to have known that it was worth much more than that sum; and that the original purchase in the name of O'Donohoe was a mere device upon the part of Polk, in violation of his duty as the plaintiff's attorney and agent, to get the property at less than its value, concealing from the plain-

tiff, all the while before the conveyance to O'Donohoe, the fact that he, Polk, bought in the name of O'Donohoe. In respect to the grantees and mortgagees, holding under Polk, the charge is, that they knew or should have known that the conveyances and mortgages in question were in fraud of plaintiff's rights. The relief asked was that all the conveyances and mortgages be cancelled, and if that could not be done, that plaintiff have personal judgment against O'Donohoe, Polk, and Chapman, for the full value of the property. The plaintiff offered to pay into court the money he had received through the alleged sale to O'Donohoe for the use of such persons as were entitled to it, in case the conveyances and mortgages referred to were cancelled of record.

Notwithstanding the positive statement in his letter of August 21, 1888, to the effect that Polk was the real purchaser of the property, and had practised a deception upon the plaintiff, O'Donohoe, in an answer verified by his oath, alleged the fact to be "that said Chapman & Polk, at the request of this answering defendant, notified complainant that he (this answering defendant) wished to purchase said real estate at said price; that after some correspondence this answering defendant did purchase said property in good faith, intending to keep the same for his own use; that soon afterwards this answering defendant became satisfied it would be impossible for him to pay the balance due on said property, namely, $3000, without great inconvenience to him; that thereupon this answering defendant, for a good and valuable consideration, sold and conveyed said property to Milton D. Polk, one of the codefendants herein; that each of said sales were *bona fide* and without any collusion between this defendant and his codefendants; that each of said transactions was complete and entire in itself, and also that at the time of said transaction the full value thereof was paid in each instance, and there was no intention on the part of this defendant to defraud in any manner the estate of said deceased; . . . that there was no understanding by this answering defendant that said sale should in fact be a sale to said Polk, and that said deed from complainant to this answering defendant was not re-

corded sooner than it was for the reason that this answering defendant experienced difficulty in raising the first $1000 in cash which he was compelled to pay before said Chapman & Polk would deliver said deed to him."

The answers of Chapman and Polk met all the material allegations of the bill with full and explicit denials.

The record before us discloses nothing upon which to found a charge of fraud or want of good faith upon the part of the defendant Chapman. His partner and himself were employed to attend to the probating of the will of plaintiff's testatrix, and to obtain a decree construing it and authorizing a sale of the property in Plattsmouth belonging to the Davis estate. The fee which, by agreement with the plaintiff, was authorized to be charged had reference entirely to legal services to be rendered by his firm. He did not assume any responsibility in connection with the property in question, except such as would arise from services of that kind. He did not undertake, for compensation, to negotiate a sale of it for the plaintiff.

When the plaintiff visited Plattsmouth in the fall of 1885 for the purpose of ascertaining the condition of the Davis estate in that city, and of determining what was his duty as trustee in respect to it, he invited an expression of opinion by Chapman as to what the property was worth. The latter informed him that his judgment upon such a subject was of little value, but that he would put him in communication with persons whose opinions were entitled to consideration. This was done, and, upon full information as to the then value of real estate in Plattsmouth, the plaintiff determined before leaving that city to sell, if he could get an offer of $4000. And, after his return to Baltimore, he received a letter from Chapman, stating that he and Polk had canvassed the subject, and that $4000 was the best price that could be obtained. Chapman advised the acceptance of the offer, as is shown by his letter of October 22, 1885. But this advice, and Chapman's expression of willingness to assist in finding a purchaser, were not in execution of his duties as an attorney, although, perhaps, superinduced by the relations es-

tablished between his firm and the plaintiff in respect to legal services to be rendered.

The only evidence tending to show that the firm of Chapman & Polk undertook to act as agents for the sale of this property is furnished by certain letters written by Polk in the name of his firm to the plaintiff. But those letters were written without the knowledge or direction of Chapman, and Polk was without authority, in virtue of his partnership with Chapman in the practice of the law, to accept for his firm an agency for the mere sale of real estate. Whatever he did, in respect to the sale made to O'Donohoe, was upon his own responsibility, and imposed no liability upon the defendant Chapman.

What is the case as to the defendant Polk? It is not to be doubted that the relations between himself and the plaintiff in respect to the sale of this property, were those of agent and principal. He was precluded by the position voluntarily assumed by him from taking advantage of his principal, or from dealing with the property committed to his care in any other capacity than as an agent, who was bound to subordinate his own interests to those of his principal. He could not, directly or indirectly, become the purchaser and maintain any title thus acquired as against his principal; for, in so purchasing, his duty and his interest would come in conflict. If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and, at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a *bona fide* purchaser, to account not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it. The law will not, in such case, impose upon the principal the burden of proving that he was, in fact, injured, and will only inquire whether the agent has been unfaithful in the discharge of his duty. While his agency continues, he must act, in the matter of such agency,

solely with reference to the interests of his principal. The law will not permit him, without the knowledge or assent of his principal, to occupy a position in which he will be tempted not to do the best he may for the principal.

It is earnestly contended that the evidence brings the present case within the operation of these principles. In this view of the facts we do not concur. The charge against Polk of dereliction of duty is not sustained. While there is some evidence tending to show that he desired, from the outset, to acquire an interest in this property, it does not appear that he intended to practise any deception upon the plaintiff. At any rate, he was not, in fact, interested in the offer made by O'Donohoe. The latter purchased on his own account exclusively, and without any understanding that Polk was to become interested with him, or should take his place in the purchase. Polk had no expectation, when O'Donohoe's offer was accepted, of becoming the owner of the property.

The only circumstance in the case indicating a want of frankness, on the part of Polk in his letters to the plaintiff, was a statement in the letter of January 22, 1886, implying that he had actually collected the cash payment of $1000. His explanation of this statement is that he had not been as diligent as he should have been in concluding the business, and he did not suppose it was of any consequence to the plaintiff whether the $1000 came from him or from O'Donohoe. It would have been more consistent with the truth if he had then stated that he had agreed, or would agree, with O'Donohoe to take the property, and, therefore, as between himself and O'Donohoe, he was bound to make good the latter's obligations to the plaintiff. But the failure of Polk to notify the plaintiff of his agreement with O'Donohoe immediately upon its being made, cannot affect any right acquired by him under that agreement. The sale to O'Donohoe was so far consummated that neither party was at liberty to undo what had been done. O'Donohoe executed his notes for the deferred payments, and, his wife uniting with him, gave a mortgage to secure them. The notes and mortgage were delivered to and accepted by the plaintiff, who executed a deed to O'Donohoe,

and placed it in the hands of Polk, to be delivered to O'Donohoe, whenever a decree for the sale of the property was obtained, and upon the payment of the $1000 stipulated to be paid in cash. So that at the time Polk took the property from O'Donohoe, it was not in the power either of the plaintiff or of O'Donohoe to rescind the contract between themselves, and Polk's agency for the sale of the property had, in every material sense, terminated. Nothing then stood in the way either of O'Donohoe's agreeing that Polk should take the property, or of Polk's becoming a purchaser from him. If the sale to O'Donohoe was an actual sale, in good faith, so far as Polk had any agency in effecting it — if the contract between the plaintiff and O'Donohoe had been so far executed at the time Polk took O'Donohoe's place in the purchase, that it could not be rescinded by either party to it — then Polk's agency in selling the property did not prevent him from purchasing from O'Donohoe. And his failure to give notice of his purchase immediately upon its being made cannot be regarded as a fraud upon the rights of the plaintiff. A real *bona fide* sale of the property, through the agency of Polk, and upon the terms prescribed by the plaintiff, and which sale was substantially completed between vendor and vendee, intervened between Polk's acceptance of the position of agent and his purchase of the property from the plaintiff's vendee. Upon this ground, the decree below can be sustained, without impairing, in any degree, the rule that an agent will not be permitted to become the purchaser, without the knowledge or consent of his principal, of property committed to him for sale. That the defendant Polk did not intend to conceal the fact of his purchase, is made clear by his letter of May 1, 1886, in which he informed the plaintiff that he had "traded O'Donohoe out of the property." The plaintiff's recollection was that this information was received by him from Polk some time in February, 1886. He never complained, at the time, or afterwards, that Polk took O'Donohoe's place in the purchase. But his present complaint, based upon O'Donohoe's letter of August 21, 1888, is that Polk, his agent to sell, while pretending to have sold to O'Donohoe, had, without his knowledge or assent, taken the

property for himself, in the name of O'Donohoe, and that he did not become aware of that fact until August, 1888. If this complaint were well founded, the plaintiff, according to the principles to which we have referred, and which are deeply rooted in the law, would be entitled to a decree that would deprive Polk of the fruits of his infidelity. But, as already suggested, the evidence does not justify the conclusion that O'Donohoe's purchase was, in fact, for the benefit of Polk.

It is proper to say that in our decision of this case, no controlling weight has been attached to the statements made by O'Donohoe. *Decree affirmed.*

Mr. Justice Jackson and Mr. Justice White did not hear the argument, and took no part in the decision of the case.

UNION PACIFIC RAILWAY COMPANY *v.* DANIELS.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 165. Argued and submitted March 13, 1894. — Decided April 16, 1894.

When a defendant, after the close of the plaintiff's evidence, moves to dismiss, and, the motion being denied, excepts thereto, and then proceeds with his case, and puts in evidence on his part, he thereby waives the exception, and the overruling of the motion to dismiss cannot be assigned for error.

A railroad company is bound to see to it, at the proper inspecting station, that the wheels of the cars in a freight train about to be drawn out upon the road are in a safe and proper condition; and if the servants to whom it delegates this duty perform it so negligently as to permit a car to go into service on the train, one of the wheels of which has an old crack in it some twelve inches long, filled with grease, rust, and dirt, but which could have been detected without difficulty, and in consequence of that wheel's giving way while the train is in motion an accident takes place by which another servant of the company is injured, the company is liable therefor.

This was an action brought by William Daniels against the Union Pacific Railway Company, in the District Court for

Statement of the Case.

the Third Judicial District of the Territory of Utah, to recover damages for personal injuries alleged to have been sustained because of defendant's negligence. During the pendency of the writ of error in this court, Daniels died and his administrator was substituted.

The complaint alleged that plaintiff was an employé of the defendant company as brakeman on a freight train; that the company by its negligence and carelessness allowed a wheel of one of its freight cars to become defective through a large open crack in it, which rendered the car unsafe; that the crack was an old one, and could have been easily discovered by a proper inspection of the wheels; that it was the duty of the defendant to inspect the wheels of all cars used by it and running on its road, at stations at short intervals along the line of the road; that an inspecting station was established at Green River, Wyoming, at which point the defect would have been discovered had the company's inspection service at that point been suitable and sufficient; that the company negligently and wrongfully employed incompetent agents in that service; that they did not employ sufficient in number; that those employed negligently inspected; that the defect by which the accident and ensuing injuries were caused was not discovered by reason of the company's negligence; and that plaintiff, without fault or negligence on his part, was injured by the breaking of the defective wheel and the train being thereby thrown from the track.

The answer denied the essential averments of the complaint. Plaintiff recovered a verdict and defendant moved for a new trial, which was overruled, and judgment rendered, from which an appeal was prosecuted to the Supreme Court of Utah Territory, where it was affirmed. The opinion is reported 6 Utah, 357. To review that judgment this writ of error was sued out.

The errors assigned and relied on at the bar were that the court erred in overruling defendant's motion for a non-suit made at the close of plaintiff's testimony; that the court erred in giving each of the following instructions:

"8th. In this case, if you find that the plaintiff was injured

in consequence of the wreck of the train caused by a crack and break in one of the wheels of the car on a train operated by the plaintiff, if you find that by the exercise of proper care and caution in inspecting the wheels the crack was of such a nature that it might have been discovered by the agents or servants of the defendant employed for that purpose, then such neglect to discover the crack was negligence on the part of the defendant and for which it may be held liable in this action.

"9th. If you find that there was a want of care and diligence on the part of the persons engaged in inspecting the wheels of the cars of defendant, and that the accident was caused thereby, it is not a defence for the defendant to show that it used proper diligence and care alone and only in the selecting of such agents, but the defendant is responsible for the acts of his employés in repairing and inspecting machinery to the same extent as if he were himself present doing the act;" and that the court erred in refusing to give each of the following instructions requested by the defendant:

"Fourth. The plaintiff by his contract of hiring was held to assume the risks of injury from the ordinary dangers of the particular employment and the nature of the business engaged in, and if you find from the evidence that the accident causing the injury in question was one of the perils incident to the employment, your verdict should be for the defendant.

"Fifth. The presumption of the law in this case is that the defendant exercised proper care and diligence in employing a competent and sufficient number of servants to safely carry on its several departments of labor and in furnishing safe machinery and appliances with which the plaintiff was to do his work, and the burden of proof to show the contrary is on the plaintiff.

"You are further instructed that as between employer and servant, as in this case, negligence on the part of the former is not proven nor to be inferred from the existence of a defect which caused the injury.

"Sixth. Although the inspector of the defendant at Green River station, whose duty it was to inspect the said broken wheel, was guilty of negligence in making the inspection, and

that negligence resulted in the wrecking of the train on which the plaintiff was, and the injury of which he complains, still he cannot recover in this action unless it appears from the evidence that the defendant was guilty of negligence either in the appointment of such inspector or retaining him in his position, and to establish such negligence on the part of the defendant not only the incompetence of such inspector must be shown, but it must also be shown that defendant failed to exercise ordinary care to ascertain his fitness for that service prior to his appointment, or failed to remove him after his incompetency had come to the notice of the defendant or to some officer or agent of defendant having power to remove him, or after such incompetency could have been ascertained by the exercise of ordinary care on the part of the defendant or such agent or officer.

"Seventh. To render the negligence of the inspector whose duty it was to inspect the said broken wheel the negligence of the defendant, or to render the defendant liable therefor, it is incumbent on the plaintiff to prove that the said inspector was appointed to or retained in his said position with knowledge on the part of the defendant, or some officer or agent of it having the power of appointment and removal, that he was incompetent, or that such knowledge might have been obtained by the use of reasonable and ordinary care and diligence on the part of the defendant or of such officer or agent."

Mr. Artemas H. Holmes, (with whom was *Mr. John F. Dillon* on the brief,) for plaintiff in error.

Mr. Arthur Brown, for defendant in error, submitted on his brief.

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

1. At the close of the plaintiff's evidence, the defendant moved to dismiss the complaint, which motion was denied, and defendant excepted. Thereupon the defendant proceeded

with its case and adduced evidence on its part. This waived the exception, and the action of the court in overruling the motion to dismiss cannot be assigned for error. *Columbia & Puget Sound Railroad* v. *Hawthorne*, 144 U. S. 202; *Brown* v. *Southern Pacific Co.*, 7 Utah, 288, 291.

2. The evidence tended to show that Daniels was a brakeman in the employment of the company, and in the discharge of his duties as such, April 3, 1887, on a freight train made up at Green River, and running thence westward; that he was ordered on top of the train to set the brakes at different points going down a long hill, and was so engaged when the train was suddenly wrecked, and he was severely injured; that a wheel on one of the cars of the train had an old crack in it, some twelve inches long, which rendered it unsafe; that the wheel gave way by reason of the fracture and thus the disaster occurred; and that, although the crack, being old, was filled with greasy dirt and rust, it could have been detected without difficulty if the wheel had been properly examined at Green River, which was an inspecting station, at which trains were made up.

Upon the inferences properly deducible from such evidence, the rule applied, which requires of the master the exercise of reasonable care in furnishing suitable machinery and appliances for carrying on the business for which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections, tests, and examinations at the proper intervals. As observed in *Hough* v. *Railway Co.*, 100 U. S. 213, 218, the duty of a railroad company "in that respect to its employés is discharged when, but only when, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employés;" and the company "cannot in respect of such matters interpose between it and the servant, who has been injured, without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation." *Hough* v. *Railway Co.*, and *Northern Pacific*

Railroad v. *Herbert*, 116 U. S. 642, to the same effect, were cited in *Balt. & Ohio Railroad* v. *Baugh*, 149 U. S. 368, 386, and it was said: "A master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employé in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employé by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employé, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employés to each other." And see *Fuller* v. *Jewett*, 80 N. Y. 46; *Rogers* v. *Ludlow Mfg. Co.*, 144 Mass. 198; *Spicer* v. *South Boston Iron Co.*, 138 Mass. 426.

There can be no doubt that under the circumstances of the case at bar the duty rested upon the company to see to it, at this inspecting station, that the wheels of the cars in this freight train, which was about to be drawn out upon the road, were in safe and proper condition, and this duty could not be delegated so as to exonerate the company from liability to its servants for injuries resulting from the omission to perform that duty or through its negligent performance.

The rulings of the court in giving the eighth and ninth instructions for plaintiff, and in refusing to give the sixth and seventh instructions requested on the part of defendant, were not, therefore, open to the exceptions taken. The sufficiency of the number of inspectors and their competency furnished no defence, nor the contrary, the ground of recovery, though some of the averments of the complaint may have indicated that cause of action.

The trial court charged the jury, among other things, that the defendant was required to "use a reasonable care, consistent with the nature and extent of the business, and provide proper machinery; but it is not responsible for hidden defects, which could not have been discovered by a careful inspection;" that "the burden of proof is in this case, as in all other cases like it, upon the plaintiff, to make out his case to your satisfaction. The law is well settled, both here and in England, our mother country, that the employer should adopt such suitable implements and means to carry on the business as are proper for that purpose; and where there are injuries to its servants, or its workmen, and they happen by reason of improper or defective machinery or appliances in the prosecution or carrying on the work which they are employed to render, the employer is liable, provided he knew, or might have known, by the exercise of reasonable skill, that the apparatus was unsafe and defective. If, by reasonable and ordinary care and prudence, the master may know of the defect in the machinery which he operates, it is his duty to keep advised of its condition, and not needlessly expose his servants to peril or danger;" that "in employing the plaintiff, the corporation defendant did not become an insurer of his life or his safety. The servant takes the ordinary risks of his employment. The duty of the defendant towards him was the exercise of reasonable care in furnishing and keeping its machinery and appliances, about which he is required to perform his work, in a reasonably safe condition. It was the defendant's duty also to use like ordinary care in selecting competent fellow-servants, and in a sufficient number, to insure that the work would be safely done; and this duty was discharged by the defendant

Counsel for Defendant in Error.

if the care disclosed by it in these several matters accorded with that reasonable skill and prudence and care which careful, prudent men, engaged in the same kind of business, ordinarily exercise."

And that, "as between employer and employé, between master and servant, as in this case, negligence on the part of the former is not proven, or to be inferred, simply from the existence or occurrence of the accident which caused the injury complained of."

The defendant had no reason to complain because the fourth and fifth instructions, which it asked, were not otherwise given than as contained in the views thus expressed by the court. *Judgment affirmed.*

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

SCHOENFELD *v.* HENDRICKS.

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

No. 1067. Submitted March 5, 1894. — Decided April 16, 1894.

An action cannot be maintained against a collector of customs, either at common law or under the statutes of the United States, to recover duties alleged to have been illegally exacted, in 1892, upon an importation of merchandise, appraised according to law, no reappraisement being asked for, and the duties being assessed upon the valuation so arrived at.

A Circuit Court of the United States is without jurisdiction to hear and determine a suit against a collector raising such issues.

The case is stated in the opinion.

Mr. W. Wickham Smith for plaintiffs in error.

Mr. Solicitor General for defendant in error.

Opinion of the Court.

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

This was an action brought by Max Schoenfeld, David Schoenfeld, Lewis Loeb, and Ferdinand E. Loeb against Francis Hendricks, collector of the port of New York, in the Circuit Court of the United States for the Southern District of New York, to recover duties alleged to have been unlawfully assessed.

The defendant demurred to the complaint for want of jurisdiction. The Circuit Court held that it had no jurisdiction, sustained the demurrer, rendered judgment for defendant, and certified the question of jurisdiction to this court.

The complaint alleged that, upon entry made at the port of New York, the invoice was transmitted by the collector to the appraiser for appraisement of the merchandise therein described; that the appraisement was not conducted according to law by the appraiser and resulted in an illegal addition to the value of the merchandise; and that thereafter the collector assessed the duties upon the valuation so arrived at, which liquidation, therefore, plaintiffs alleged "to be wholly illegal, null, and void."

Under section 13 of the act of Congress "to simplify the laws in relation to the collection of the revenues," approved June 10, 1890, c. 407, 26 Stat. 131, it was provided that if the importer, owner, agent, or consignee of merchandise imported should be dissatisfied with the appraisement thereof, he might, by giving notice to the collector in writing of such dissatisfaction, obtain a reappraisement by one of the general appraisers, and that the decision of the general appraiser in such cases should govern as to the dutiable value, unless the importer, owner, consignee, or agent should still be dissatisfied and carry the matter, as provided, before the board of three general appraisers on duty at the port, the decision of which board should be final and conclusive.

In the case at bar the importers did not avail themselves of the means pointed out for the correction of the alleged error, and it follows that the exaction by the collector on the

value according to the appraisement cannot be held to be illegal, since if the appraisement remained unquestioned, the collector was bound to proceed thereon.

It was decided by this court in *Arnson* v. *Murphy*, 109 U. S. 238, that the common law right of action against a collector to recover duties illegally collected was taken away by act of Congress, and a statutory remedy given, which was exclusive. *Arnson* v. *Murphy*, 115 U. S. 579; *Cheatam* v. *United States*, 92 U. S. 85. While the common law right was outstanding, the collector withheld, as an indemnity, the sum in dispute, but Congress provided that he must pay into the Treasury all moneys received officially, and that the Secretary of the Treasury should refund erroneous and illegal exactions. A suit to recover back an excess of duty necessarily could only be maintained as affirmatively specified in the statute. Rev. Stat. (2d ed.) §§ 2931, 3010, 3011, 3012, 3012½, 3013; act of February 27, 1877, c. 69, 19 Stat. 240, 247; *Hager* v. *Swayne*, 149 U. S. 242, 244.

Section 3011 of the Revised Statutes, which authorized an action against a collector to recover money paid as duties "when such amount of duties was not, or was not wholly, authorized by law," was repealed by section 29 of the act of June 10, 1890, as were also sections 2931, 3012, 3012½, 3013; and the remedies substituted which these importers did not see fit to pursue. Moreover, section 25 of that act provided: "That from and after the taking effect of this act no collector, or other officer of the customs shall be in any way liable to any owner, importer, consignee, or agent of any merchandise, or any other person, for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise, or any other matter or thing as to which said owner, importer, consignee, or agent of such merchandise might, under this act, be entitled to appeal from the decision of said collector or other officer, or from any board of appraisers provided for in this act."

This section exempted the collector from suit in respect of any rulings or decisions as to the classification of merchan-

dise; the duties charged thereon; the collection of any dues, charges, or duties on or on account of said merchandise, or any other matter or thing as to which the importer might under the act be entitled to appeal from the decision of the collector or other officer, or from any board of appraisers provided for in the act; and its operation is not confined to rulings and decisions of the collector from which an appeal lies ultimately to the Circuit Court.

We held in *Passavant* v. *United States*, 148 U. S. 214, that the act of June 10, 1890, conferred no jurisdiction upon Circuit Courts of the United States, on the application of dissatisfied importers, to review and reverse a decision of a board of general appraisers ascertaining and fixing the dutiable value of imported goods, when such board has acted in pursuance of law, and without fraud or other misconduct from which bad faith could be implied; but it does not result from that conclusion that in such cases the collector is still subject to suit.

In *In re Fassett, Petitioner*, 142 U. S. 479, the question arose as to whether a British-built steam pleasure yacht, purchased in England by a citizen of the United States, and duly entered at the port of New York, was liable to duty as an imported article; and it was held that, as the owner, in order to have the benefit of proceedings under the act of June 10, 1890, would have been obliged to concede that the vessel was imported merchandise and to make entry of her as such, which was the very question in contention, he had pursued the proper remedy by filing his libel in the District Court of the United States for the Southern District of New York, which had jurisdiction of the vessel, under the circumstances disclosed, by virtue of section 934 of the Revised Statutes.

In *Robertson* v. *Frank Brothers Company*, 132 U. S. 17; *Oelbermann* v. *Merritt*, 123 U. S. 356; and other cases cited for plaintiffs in error, it was decided that while the general rule that the valuation of merchandise made by the appraiser, and unappealed from, is conclusive, the appraisement was subject to be impeached on grounds therein indicated, but these cases were adjudicated while section 3011 of the Revised

Statutes was still in force, and in view of the provision therein made for suits against the collector.

We are of opinion that this action would not lie at common law, the money being required by section 3010 to be paid into the Treasury; that it was not authorized by statute; and that the question of jurisdiction certified was properly answered by the Circuit Court in the negative.

Judgment affirmed.

Mr. Justice Jackson was absent when this case was submitted, and took no part in its decision.

WORTHINGTON *v.* BOSTON.

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

No. 312. Argued March 20, 21, 1894. — Decided April 9, 1894.

The Mayor and City Council of Boston had authority, in 1885, to authorize the City Water Board, without previous advertisement, to contract for the exchange of such pumping engines and machinery as were inadequate or of insufficient capacity for those of the capacity required by plans and estimates for a high-service extension previously made, and to direct that the expense of such exchange should be charged to the appropriation for high-service extension; and the contract made by the Water Board, in pursuance of such authority, and without previous advertising, is binding on the city.

The plaintiffs in error, as surviving partners of a firm doing business under the name of Henry R. Worthington, brought this action upon a written agreement concluded, May 19, 1885, between that firm and the Boston Water Board — the latter assuming to act on behalf of the city of Boston.

This agreement involved the expenditure of a large sum of money for pumping engines and machinery in connection with the "high-service" extension of the water works of the city, and was made without an advertisement for proposals by bidders.

Statement of the Case.

The court below tried the case without a jury pursuant to a written stipulation of the parties, and, being of opinion that without such advertisement the Water Board had no authority to make the agreement, gave judgment in favor of the city. 41 Fed. Rep. 23. Whether the Water Board had such authority depends upon certain facts set forth in an agreed statement of the parties. These facts are as follows:

The city of Boston previous to, and ever since, the year 1875 was authorized to take water from Lake Cochituate, Sudbury River, and Mystic Lake, to build and maintain aqueducts, dams, reservoirs, and to lay pipes, establish hydrants, and supply its inhabitants with water in such manner and by such agents, officers, and servants as the city council should from time to time direct; and previous to 1875 it had established the Cochituate Water Board and the Mystic Water Board to exercise those powers, subject to the ordinances and orders of the city.

By chapter 80 of the statutes of Massachusetts of 1875, it was provided: "The city council of the city of Boston may establish by ordinance a water board to be known as the Boston Water Board, consisting of three able and discreet persons to be appointed by the mayor, with the advice and consent of the city council, and to receive such compensation as the city council may from time to time determine. The said board may be empowered by said city council to exercise all or any of the powers conferred by the statutes of the Commonwealth upon the city of Boston, with reference to supplying said city with water, or of the Cochituate and Mystic Water Boards, and also to act as the agent of the city of Boston in doing any and all things which the city is now authorized to do in relation to the taking of lands, water rights, and other property, and the establishment and maintenance of works and appliances for supplying the city of Boston or other cities and towns with pure water, and the said Boston Water Board shall, so far as the city council of said city may by ordinance prescribe, succeed to all the powers and duties formerly vested in the Cochituate Water Board and Mystic Water Board."

Statement of the Case.

On the 22d day of March, 1876, the city council of Boston, with the approval of the mayor, passed an ordinance that was in force when the agreement in question was made, and which, among other things, provided: "There shall be a board to be known as the Boston Water Board and to consist of three members. Said board shall have and exercise all the powers so far as such powers can be legally delegated by the city council, which were granted to the city by or are held by the city under chapter one hundred and sixty-seven of the statutes of the Commonwealth of the year eighteen hundred and forty-six, chapter one hundred and seventy-seven of the said statutes of the year eighteen hundred and seventy-two, and by or under any and all statutes in addition to either of the before-mentioned chapters, subject, however, to the authority of the city council from time to time, by ordinances, orders, or resolutions, to instruct said board, and to change and limit their powers. Said board may, subject to the approval of the mayor, sell or lease such of the property connected with the water works as they deem expedient, and all necessary deeds and leases shall be executed by the mayor and countersigned by the chairman of said board. No contract or purchase which is estimated to involve an expenditure of more than ten thousand dollars, except a contract for the laying of pipe, shall be made by the said board until they have advertised, as hereinafter provided, for sealed proposals thereof. . . . All proposals shall be publicly opened at the time and place designated in the advertisement, and the said board may reject any or all bids which are offered, and it shall be their duty to reject the bids of all irresponsible parties."

For several years prior to 1884 the question of extending the high-service works of the Cochituate Water Department, which comprised a part of the city water works, was before the city council.

In 1881, the Water Board submitted to the council the following estimate of the cost of such extension: "For engine buildings, wells, engine foundations, etc., $149,000; one engine, capacity 10,000,000 gallons, $75,000; one relief engine, capac-

ity 5,000,000 gallons, (based on using one of Mystic pumping engines,) $18,000; lands and reservoir, (No. 1,) capacity 15,000,000 gallons, $169,000; land damages for reservoir (No. 3) and pipe lines, $28,000; pipe mains, force, and supply, $237,000; add 10 per cent for superintendence, engineering, and contingencies, $67,600; total, $743,600."

The Water Board, November 17, 1884, submitted to the council another estimate of the cost of such extension, as follows: "For engine buildings, wells, engine foundation, connection chamber, $142,000; one engine, capacity 10,000,000 gallons, $60,000; one relief engine, capacity 5,000,000 gallons, $25,000; land and reservoir, capacity 15,000,000 gallons, including gate chamber, $210,000; land damages for reservoir No. 3, $28,000; pipe mains, force and supply, $231,000; add 10 per cent, engineering and contingencies, $69,600; total, $765,600."

On December 23, 1884, an order was duly passed by the city council, and approved by the mayor, to this effect: "*Ordered*, That the city treasurer be authorized to borrow, under the direction of the committee on finance, and at such a rate of interest as they shall determine, the sum of $766,000, which sum is hereby appropriated, and the Boston Water Board is authorized to expend the same for the extension of the high-service works of the Cochituate Water Department."

On December 31, 1884, the City Engineer, Henry M. Wightman, addressed to the Water Board a letter, in which he said: "The board should determine the pumping engine it will use, as such determination is necessary before a plan of the pumping station can be made. I am of the opinion that the improved Worthington engine will prove the most advantageous for the city, and as a three-million-gallon engine of this type is running at the Worthington pump works in New York, it would be advisable for the board to examine this engine before any decision is made."

The Water Board adopted plans and specifications for the proposed extension, requiring, among other things, two engines of the daily capacity of five million and ten million gallons, respectively, estimated by the board to cost from $85,000 to $93,000, and the discontinuance of the pumping station on

Elmwood Street, at the Highlands, and the engines and machinery therein. And on the third day of April, 1885, it sent this communication to the city council: "The plans for the extension of high service, as detailed by ex-City Engineer, Jos. P. Davis, and the late City Engineer, Henry M. Wightman, require the establishment of a new pumping station at Chestnut Hill of larger capacity than the present one at the Highlands, and the discontinuance of the latter. Mr. Wightman, after a careful examination of the matter, concluded that it would be advantageous for the city to exchange if possible the small engines now in use for the larger ones required in the extension of the high service, and so recommended to the board. We therefore ask 'That the Water Board be authorized to exchange such pumping engines and machinery as are inadequate or of insufficient capacity for those of the capacity required by the plans and estimates of the new high-service extension.'"

On April 20, 1885, the following order, prepared by the chairman of the Water Board, and which had duly passed both branches of the city council, was approved by the mayor: "*Ordered*, That the Water Board be authorized to exchange such pumping engines and machinery as are inadequate or of insufficient capacity for those of the capacity required by the plans and estimates of the new high-service extension, the expense of such exchange to be charged to the appropriation for high-service extension."

On April 21, 1885, the Water Board visited New York and examined the improved or high-duty Worthington engine, and other engines in New York, Philadelphia, and Brooklyn, all of which they had done several times before subsequently to January 1, 1885, and on the previous visits had been accompanied by the City Engineer; and on April 24, 1885, received from the firm of Henry R. Worthington the following proposal, sent at the suggestion of the chairman of the Water Board in accordance with the recommendation of the City Engineer as above set forth: "We beg leave to submit the following proposal: For $106,575, will furnish and erect the pumps, etc., ready for continuous service. Whole to the satis-

faction of the City Engineer, and under such specifications as to details as may hereafter be agreed upon. Above price on assumption that we are to receive other engines and boilers on Elmwood Street. Boilers according to specifications accompanying — also feeding apparatus. We guarantee 100,000,000 foot pounds with 100 pounds of coal. Also materials and labor shall be first-class and equal to any other work furnished by us. We agree to complete work in eight months from date of signing contract." On the same day the Water Board returned the following answer: "Your proposal of April 24, 1885, to furnish high-service pumping plant for the city of Boston for the sum of one hundred and six thousand five hundred and seventy-five dollars ($106,575) is hereby accepted under the conditions that the detailed specifications and terms of the contract for the above-mentioned work shall be satisfactory to both parties concerned in the said proposal; it being understood that the present pumping plant at the Elmwood Station is to be exchanged, as per the terms of your proposition."

The "other engines and boilers" and "pumping plant" above referred to were the engines and machinery of the pumping station on Elmwood Street at the Highlands, that were to be discontinued, and consisted of one small low-duty Worthington engine, made in 1878, and of the daily capacity of 3,000,000 gallons, and one engine and two boilers made by the Boston Machine Company, said engine being made in 1870, and of the daily capacity of 1,800,000 gallons — all of the aggregate value of $3500.

The distinguishing feature of the improved or high-duty Worthington engine was a "high-duty" attachment, the patent for which was owned and used exclusively by the plaintiffs. This device, so far as the parties to this suit knew, was the only one beside a fly-wheel that secured high economy of steam and fuel by enabling the steam to be cut off from the cylinder at an early point in the stroke of the piston without causing a loss of speed; the effect of plaintiff's device and of the fly-wheel, together with the expansion of the steam left in the cylinder, being to carry the piston through the re-

mainder of its stroke without loss of speed. It avoided the vibration on the water column incident to the use of a crank and fly-wheel, and could be used on the duplex low-duty Worthington engine the motion of which was such that a fly-wheel could not be used with it. The duplex high-duty or low-duty Worthington engine was the only form of engine that secured an absolutely steady and regular flow of water, and whose steadiness and regularity of flow was in no way dependent on speed, and the low-duty duplex engine was, January 1, 1885, and ever since has been, manufactured by other parties besides the plaintiffs.

The plaintiffs had knowledge of the above ordinance requiring advertisement for proposals, but were informed by the chairman of the Water Board that the order of April 20, 1885, avoided any necessity of advertising in this instance; and on May 19, 1885, the Board, in the name of and claiming to act for the defendant, and whose whole authority in the premises, if any it had, was derived from the orders, ordinances, and statutes referred to, and the plaintiffs' firm, without any advertisement for proposals, entered into a contract the material portions of which were that Worthington should make and erect at Chestnut Hill reservoir two high-duty Worthington pumping engines, one of ten million and one of five million gallons daily capacity, and the boilers and appurtenances for the same; that the defendant should pay the plaintiffs therefor the sum of $106,575, and the pumping machinery, boilers, and all their appurtenances then located in the Highland pumping station, and valued at $3500, were to become the property of the contractors.

That agreement provided for payments to the contractors as follows: Twenty per cent of the contract price to be paid when the steam cylinders of the engines were cast; fifteen per cent, when the water cylinders were cast; fifteen per cent, when the steam cylinders of the engines were bored and planed; fifteen per cent, when both engines were erected; and fifteen per cent, when the boilers and engines were delivered at the pumping station at Chestnut Hill reservoir in Boston; such payments not to be made nor demanded unless the work

was progressing faithfully and to the satisfaction of the city engineer. The balance of the money due the contractor was to be paid, and the pumping machinery at the Highland pumping station was to become the contractor's property, upon the completion of the entire work according to the terms of the agreement, and "its connection to the high-service system of the city of Boston, all to the satisfaction of the said engineer."

On the date of the execution of the agreement a bond in the sum of $25,000, with sureties, running to the city of Boston, was delivered to the Water Board to secure the faithful performance of the contract. This bond was accepted for the city by the Board and attached to the contract, and, when this action was brought, was in possession of the City Auditor.

The pumping engines and machinery called for by the contract were of a capacity required by the plans and specifications for the new high-service extension, and were capable of doing the work contemplated by the orders of December 23, 1884, and April 20, 1885. The expenditure for piping was less than the estimate therefor, and the entire amount expended and agreed to be expended for the new high-service extension by the Water Board did not exceed the whole sum appropriated for that purpose.

The plaintiffs, before the commencement of this action, had performed so much of the work described in the contract as entitled them to receive 65 per cent of the contract price, and notified the defendant that they were ready and willing to deliver the engines and boilers and perform the remainder of the work described in the contract; but the defendant had refused to receive the same, or to pay any of the instalments named in the contract, although requested so to do, and notified the plaintiffs that it would not allow said engines and boilers to be delivered, and would not pay for the same.

In the year 1877 the Water Board and Henry R. Worthington contracted for an engine, at a cost of $20,000, without advertising therefor, and the price stipulated therein was paid by the city.

Mr. George F. Edmunds for plaintiff in error.

Mr. Andrew J. Bailey for defendant in error.

I. The ordinances cited provide that the Boston Water Board shall not make any contract estimated to involve more than ten thousand dollars until it has advertised for proposals therefor, and all persons having to do with the city must take notice of the ordinance. *Heland* v. *Lowell*, 3 Allen, 407; *S. C.* 81 Am. Dec. 670; *Taylor* v. *Lambertville*, 10 Atl. Rep. 809.

II. The Boston Water Board not having complied with this ordinance, the contract made by it was not the contract of the city, and is not binding upon it. *Brady* v. *Mayor of New York*, 30 N. Y. 312; *Nicholson Pavement Co.* v. *Painter*, 35 California, 699; *Zottman* v. *San Francisco*, 20 California, 96; *S. C.* 81 Am. Dec. 96; *Dean* v. *Charlton*, 23 Wisconsin, 590; *S. C.* 99 Am. Dec. 205; *The Floyd Acceptances*, 7 Wall. 666; *Petition of Laura E. Eager*, 46 N. Y. 100; *Lowell Savings Bank* v. *Winchester*, 8 Allen, 109; *Palmer* v. *Haverhill*, 98 Mass. 487; *Baltimore* v. *Eschbach*, 18 Maryland, 286; *Moran* v. *Miami County*, 2 Black, 722; *Agawam Nat. Bank* v. *South Hadley*, 128 Mass. 503; *Horton* v. *Thompson*, 71 N. Y. 513.

III. The fact stated in the sixteenth clause of the statement of facts has no bearing on this case. *Butler* v. *Charlestown*, 7 Gray, 12; *Sikes* v. *Hatfield*, 13 Gray, 347.

IV. The order did not annul or repeal the ordinance. *Third Nat. Bank* v. *Harrison*, 8 Fed. Rep. 721; *Chicago &c. Railway* v. *United States*, 127 U. S. 406; *United States* v. *Benson*, 31 Fed. Rep. 896; *Chew Heong* v. *United States*, 112 U. S. 536; *Gilson* v. *Emery*, 11 Gray, 430.

V. Nor can there be any claim of a ratification by the city. *Turney* v. *Bridgeport*, 55 Connecticut, 412.

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

The facts, set forth in the written stipulation of the parties, bring this case within very narrow limits.

The grant of power to the Water Board, by the ordinance of March 22, 1876, was subject to the right of the city council, from time to time, by ordinances, orders, or resolutions, to instruct the Board, and to change and limit its authority, and, also, to the condition that no contract or purchase, estimated to involve an expenditure of more than ten thousand dollars, except a contract for the laying of pipe, should be made without an advertisement for sealed proposals in the mode prescribed by that ordinance.

The contract in question did involve an expenditure of more than ten thousand dollars, and, therefore, was one not within the authority of the Water Board to make, without first advertising for sealed proposals, unless, as the plaintiffs contend, the city council intended, by the ordinance of April 20, 1885, to dispense with advertising for proposals for exchanging such pumping engines and machinery as were found to be inadequate or insufficient, for engines and machinery required by the plans and specifications of the new high-service extension.

We are of opinion that the contention of the plaintiffs rests upon a sound interpretation of the ordinance of 1885. The city council was empowered by the statutes of the Commonwealth to create a Water Board with authority to exercise all the powers the city could exercise for the purpose of supplying the municipality with water, and to act as the agent of the city in establishing and maintaining works and appliances to that end. The city council having conferred upon the Water Board, subject to the conditions named, all the authority the city had in respect to such matters, that Board could have obtained, by exchange, the new engines and machinery specified in the agreement in question, upon duly advertising for sealed proposals. It would seem, therefore, that the only object of the ordinance of 1885 could have been to enable the Water Board to effect such exchange by contract, without advertising for proposals.

And there were reasons why that course should be pursued, if the intention was to secure, for the purposes of the high-service extension, the improved or high-duty Worthington

engine. The patent for that engine was owned and exclusively used by the firm of Henry R. Worthington, and the beneficial results ordinarily attending sealed proposals by competing bidders could not have been obtained in this instance by advertisement. Nothing could have been gained for the city by competition among bidders, one of whom only was entitled to use the patented engine it desired to obtain.

The city council had been fully informed by the Water Board of the cost of the high-service extension. The City Engineer had recommended the purchase of the improved Worthington engine. And the city council could not have been ignorant of the fact that the proposed new engines and machinery would cost not far from $100,000, and that plans and specifications, involving an expenditure of about that amount, had been adopted by the Water Board with the approval of the City Engineer. It was distinctly informed by the Board that the City Engineer had carefully considered the whole matter, and was of opinion that the public interests would be promoted if the small engines then in use were dispensed with altogether, by "exchange if possible," and the larger ones, required in the extension of the high service, substituted for them. The city council was, therefore, asked to give the board authority "to exchange" such pumping engines and machinery as were inadequate or insufficient for such as were required by the plans and estimates of the new high-service extension — an authority that need not have been specially conferred, if the Board was to pursue the method of advertising for proposals. The authority asked was given, not generally, but with express reference to particular plans and estimates, the expense of the exchange to be charged "to the appropriation for high-service extension." As that appropriation was based upon estimates furnished by the Water Board to the city council; as those estimates upon their face showed that the expense of engines and machinery required in the high-service extension would be large in comparison with the value of the small engines and machinery then in use and which were to be discontinued, the suggestion that the city council could not have contemplated an "exchange" of engines

and machinery worth only $3500 for engines and machinery worth over $100,000, is of little moment. It is manifest that the city council was aware, when it passed the ordinance of April 20, 1885, that the Water Board had in mind the new improved or high-duty Worthington engine. Interpreting that ordinance in the light of all the circumstances preceding and attending its passage, we are not at liberty to doubt that the city council was aware of the recommendations of the City Engineer, or that the object of the ordinance was to enable the Water Board, by contract, without advertising for sealed proposals from bidders, to exchange the engines and machinery then in use for the new and improved Worthington engine, exclusively manufactured by the firm of Henry R. Worthington. The Water Board was authorized by that ordinance to create a debt for engines and machinery, not without restriction as to cost, but of the capacity "required by the plans and estimates of the high-service extension," lessened by such amount as could be obtained, in exchange, for the insufficient engines and machinery then in use. The city council thus had in view the value of the inadequate engines and machinery then in use, and the value of the new engines and machines; the cost of the latter being made known to them by the plans and estimates submitted by the Water Board. The better interpretation of the ordinance of 1885 is, therefore, that the exchange, authorized to be made, was expected to be accomplished without resorting to an advertisement for proposals.

This conclusion has been reached independently of the fact that some years before the present transaction the city paid the sum of $20,000 for an engine obtained by the Water Board from Henry R. Worthington, by contract, without advertising for proposals. A single instance of that kind, showing a departure from the ordinance regulating the subject of contracts and purchases by the Water Board, cannot be allowed to operate as a repeal of that part of the ordinance requiring an advertisement for proposals where the Board makes a contract or purchase involving an expenditure of more than ten thousand dollars. We place our decision in the present case upon what

we regard the fair interpretation of the ordinance under which the exchange in question was made.

It was agreed that if, on the facts stated by the parties, the city was liable, judgment should be entered in favor of the plaintiffs for the sum of $35,000, with interest from April 15, 1889. We are of opinion the city is liable upon the contract made by the Water Board.

The judgment is reversed, and the cause is remanded, with directions to enter judgment in favor of the plaintiffs accordingly.

APPENDIX.

I.

AMENDMENT TO RULES.

SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

It is ordered that the Rules of Practice in Equity be, and they are hereby, amended by striking out in Rule 82 the words "both the judges," and in Rule 89 the words "both judges," and by inserting in each rule, in place of the words stricken out, the words "a majority of all the judges thereof, including the Justice of the Supreme Court, the Circuit Judges, and the District Judge for the District," so that said two rules, as amended, shall read as follows:

82.

The Circuit Courts may appoint standing masters in chancery in their respective districts, (a majority of all the judges thereof, including the Justice of the Supreme Court, the Circuit Judges, and the District Judge for the District, concurring in the appointment,) and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the Circuit Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

89.

The Circuit Courts (a majority of all the judges thereof, including the Justice of the Supreme Court, the Circuit Judges, and the District Judge for the District, concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

(Promulgated April 16, 1894.)

II.

ASSIGNMENT TO CIRCUITS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

ORDER.

There having been an Associate Justice of this court appointed since the last term closed, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of said court among the Circuits, agreeably to the act of Congress in such case made and provided, and that said allotment be entered of record, viz.:

For the First Circuit, HORACE GRAY, Associate Justice.

For the Second Circuit, HENRY B. BROWN, Associate Justice.

For the Third Circuit, GEORGE SHIRAS, JR., Associate Justice.

For the Fourth Circuit, MELVILLE W. FULLER, Chief Justice.

For the Fifth Circuit, EDWARD D. WHITE, Associate Justice.

For the Sixth Circuit, HOWELL E. JACKSON, Associate Justice.

For the Seventh Circuit, JOHN M. HARLAN, Associate Justice.

For the Eighth Circuit, DAVID J. BREWER, Associate Justice.

For the Ninth Circuit, STEPHEN J. FIELD, Associate Justice.

Monday, April 2, 1894.

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EJECTMENT.

1. In an action of ejectment, in a Federal court, the legal title prevails. *Miller* v. *Courtnay*, 172.
2. The legal title to the premises in dispute passed to the grantor of the defendant by sale under execution and the sheriff's deed, and was not divested by the subsequent decree set forth in the statement of facts. *Ib.*

EQUITY.

1. The court being unable, in any view that it can take of the evidence, to reconcile the conflicting testimony of the witnesses respectively examined in behalf of the parties, holds that the evidence fails to show that the complainant is entitled to the relief prayed for. *Gumaer* v. *Colorado Oil Co.*, 88.
2. A garnishee, who occupies the double position of debtor to the principal defendant in a definite or ascertained amount, and also that of a creditor of such principal debtor by way of unliquidated damages arising out of the breach of a contract in existence when the garnishment proceedings were instituted, can, after an order at law subjecting the defined indebtedness to the payment of the garnishor, invoke the aid of a court of equity to restrain the garnisheeing creditor from enforcing the payment of the amount due until the unliquidated damages can be ascertained, and set off against such indebtedness, on the ground that the principal debtor is insolvent and a non-resident of the State in which the garnishee resides, and in which the garnishment proceedings are had. *North Chicago Rolling Mill Co.* v. *St. Louis Ore & Steel Co.*, 596.
3. Equity will entertain jurisdiction and afford relief against the collection of a judgment where there is a meritorious, equitable defence thereto, which could not have been set up at law, or which the party was, without fault or negligence, prevented from interposing. *Ib.*
4. The adjustment of demands by counter-claim or set-off rather than by independent suit is favored and encouraged by the law, to avoid circuity of action and injustice. *Ib.*
5. The insolvency of the party against whom a set-off is claimed is a sufficient ground for equitable interference; and in Illinois and some other States the non-residence of the party against whom the set-off is asserted, is also held to be sufficient ground therefor. *Ib.*
6. It is settled in England, where the law differs in no material respect from that of Illinois, that a garnishee order does not effect a transfer

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JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

1. This court has jurisdiction to review by writ of error a judgment of the highest court of the State of Oregon, deciding that a donation land claim under the act of Congress of September 27, 1850, c. 76, of land bounded by tide water, passed no title or right below high water mark, as against a subsequent grant from the State. *Shively* v. *Bowlby*, 1.
2. In a suit in a Circuit Court by a water company, to which a municipal government has granted the exclusive right to supply it and its inhabitants with water for fifteen years, against the municipality to prevent it from establishing or maintaining other water works within the limits of the municipality until after the expiration of said period, it did not appear affirmatively that it was contemplated that the other works complained of were to go into operation until after the expiration of that period; and as it did not appear from the record that there was over $5000 in controversy, *held*, that this court had no jurisdiction. *El Paso Water Co.* v. *El Paso*, 157.
3. The decision by the highest court of a State, that the conveyance by a corporation existing under the laws of the State (and acting in this respect under a statute of the State) to an individual, his heirs, executors, administrators, and assigns, of "all the property of said company, consisting of the charter and its amendments and franchises," and other enumerated property, and "all the property, goods, and chattels of said company of whatsoever nature or description," passed to him only a life estate in the franchises of the corporation, and that these did not pass to his heirs, presents no question of a Federal nature, but only one as to the extent of an authority given by statute to a corporation to dispose of its franchises. *Snell* v. *Chicago*, 191.
4. If, at the hearing of a bill in equity to redeem land worth more than $5000 from incumbrances, the only controversy is as to less than that amount of incumbrances, no appeal lies to this court. *Carne* v. *Russ*, 250.
5. When the Supreme Court of a State fails to give proper effect to a

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