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UNITED STATES REPORTS

VOLUME 153

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.

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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, Associate Justice.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1893.

PROPERTY OF UNITED STATES SENATE COMMITTEE COPY

LOWNDES *v.* HUNTINGTON.

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

No. 117. Argued December 18, 19, 1893. — Decided April 16, 1894.

The grant to the town of Huntington, made by the Governor General under the Duke of York, on the 30th of November, 1666, and confirmed by Governor General Dongan in 1688, and again confirmed, with a change in description, by Governor General Fletcher, in 1694, operated to convey to the grantee the lands under tide water in Huntington Bay, as defined by a line drawn from Lloyd's Neck to Eaton's Neck; and any title to such lands under water which came to the State of New York, was ceded to the trustees of the town by the State, by the act of its legislature of May 10, 1888, c. 279.

In reaching this conclusion this court follows the settled rules of decision in the courts of New York relating to the form of the action, the title to the submerged lands, and the special defences set up in this case.

On September 1, 1888, the defendant in error commenced an action in the Supreme Court of the State of New York for the county of Suffolk. Its complaint alleged that "the trustees of the freeholders and commonalty of the town of Huntington and their successors" were a body corporate, created and incorporated by and under three charters granted,

the first by Richard Nicolls, Governor General under James, Duke of York, of all his territories in America, and dated November 30, 1666; the second by Thomas Dongan, Governor General of the Province of New York under James the Second, King of England, and dated August 2, 1688; and the third by Benjamin Fletcher, Governor General under William and Mary, and dated October 5, 1694.

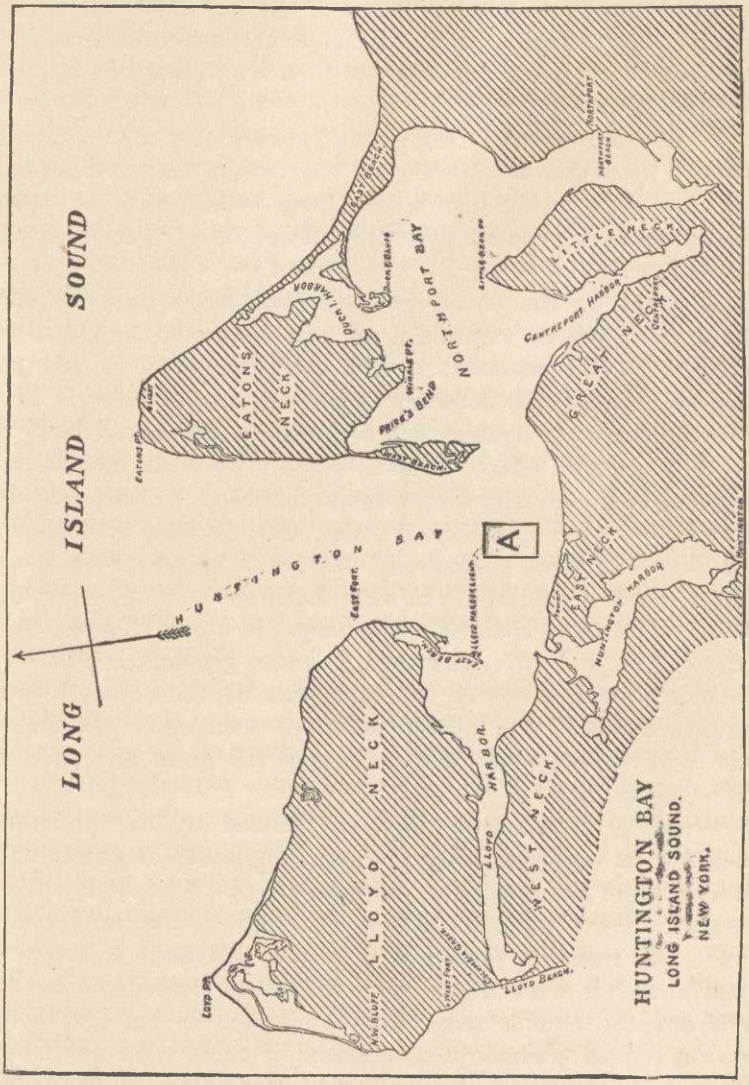
It also alleged that the plaintiff was the lawful successor of the said trustees, etc., and as such, and by virtue of said patents and charters, and the laws of the State of New York, was the lawful owner and seized in fee, subject to the right of navigation, of a certain described tract of land of about three hundred acres, lying under water in Huntington Bay, in the town of Huntington, and that, as such owner, it was entitled to the exclusive possession and use thereof for oyster cultivation.

The complaint further charged that the defendant had theretofore exercised, and still exercised, acts of ownership upon said lands, and claimed title thereto and a right to the exclusive possession thereof; that he had planted, or caused to be planted, oysters thereon, and unlawfully withheld the lands from the plaintiff.

There was also an allegation of notice to quit, and a prayer for judgment against the defendant for the immediate and exclusive control of the premises. The defendant, who was a citizen of the State of Connecticut, having been brought in by publication, removed the case to the Circuit Court of the United States for the Eastern District of New York. In that court he filed an answer denying plaintiff's title, and pleading possession since 1866. Thereafter, on the 14th of November, 1889, the case was tried before a jury, and, at the close thereof, the court directed a verdict for the plaintiff. On the verdict a judgment was duly rendered, and to reverse such judgment this writ of error was sued out.

In addition to the grants from the Governors General (the language of the description in the first of which is set forth in the opinion, *infra*) the plaintiff claimed under a grant from the State of New York, made by the act of May 10, 1888,

c. 279, which is also more fully set forth in the opinion of the court. The map below shows the locality of the disputed premises. The defendant's oyster bed is marked A.



Argument for Plaintiff in Error.

Mr. James C. Carter for plaintiff in error.

The main questions in dispute are two: First. Did the town of Huntington acquire title to Huntington Bay under its colonial charter? Second. If it did not, did the act of cession confer upon it such a title as to enable it to maintain an action of ejectment against the defendant below? These will be considered in their order.

I. The pretensions of the plaintiffs below that they acquired title to the whole of Huntington Bay by the colonial charters, should be promptly dismissed. Such construction of these instruments is rejected by every rule of interpretation applicable to them.

A grant by the sovereign power of lands under public navigable waters, especially of the character and extent alleged by the plaintiffs in the court below, is, in a high degree, unusual and contrary to ordinary public policy. The presumptions are against it. No conveyance should be held to have such an effect unless it appear by clear and unambiguous language that such was the intention. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Martin* v. *Waddell*, 16 Pet. 367; *Rice* v. *Railroad Co.*, 1 Black, 358; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Lansing* v. *Smith*, 4 Wend. 9; *S. C.* 21 Am. Dec. 89.; *Chenango Bridge* v. *Binghamton Bridge*, 27 N. Y. 87. Reversed, on other grounds, 3 Wall. 51.

Were there, however, no such rule as the above, a just interpretation of the colonial charters upon which the plaintiff below relied would not include in the grant any part of Huntington Bay.

What is Huntington Bay as claimed by the plaintiffs below? It is all that body of water lying south of a right line drawn from Eaton's Neck Point to Lloyd's Neck Point. Inasmuch as the claim of title to Huntington Bay rests solely upon the assertion that it is a harbor, and, as it is not pretended that it is specifically bounded by any description in the charters, the bounds must be taken as nature has laid them down, and as commonly understood, if there were any common understanding. But no proof was given of any com-

mon understanding, and the only approach to a boundary laid down by nature is that above stated. It can hardly be said that this is a possible boundary even, but there can be no other. There are no other points or headlands which would serve as the *terminus* of a line.

And such was the specific claim of the plaintiffs below, as proved by themselves on the trial.

Huntington Bay, therefore, as the claim is, is an indentation in the land some seven or eight miles wide at the mouth, in all other places between one and two miles wide and between three and four miles deep, and open to the wind and sea through at least six points of the compass. The notion that such a piece of water passed under these charters, as being a harbor, is wholly inadmissible.

There are no words in the charters describing it. Bays are not mentioned.

The plaintiffs below sought to overcome this insuperable difficulty by introducing some feeble testimony to show that, although this enormous tract of water was called a bay, it was in fact a harbor. This effort was an utter failure. They succeeded only in proving that it afforded a shelter for vessels against storms in certain conditions of the wind and not in others. Huntington Bay is not a harbor in any sense of the word, still less within the meaning of the charters.

It is not a harbor within any of the ordinary definitions. A harbor is a place where "ships can ride in safety" (Webster). This does not mean in immediate and present safety. Any straight shore where vessels can anchor may furnish that sort of security. That is not a place of safety where a vessel is in danger upon a change in the fickle wind. A place, in order to be a harbor, must be a harbor at all times and under all conditions, otherwise it is not a place of safety. And there is no pretence that Huntington Bay is a harbor when the wind is anywhere from N. N. E. to N. W. It is, indeed, a place often of extreme danger. If a vessel drawing such a depth of water, as not to permit her to enter Northport or the other harbors leading out of Huntington Bay, were

caught there by a violent north wind, she would be inevitably driven ashore. She would not be able to beat out.

It is not, and never was, called or known as a harbor.

It is in every sense of the word a bay. We hardly need to look into dictionaries to be told that "bay" is an indefinite word used to describe every sort of indentation in the land which is open at the mouth. According to Webster, it is "an arm of the sea extending into the land, not of any definite form, but smaller than a gulf, and larger than a creek."

Undoubtedly as the mouths of bays become narrower, they more and more approach the character of harbors, and would finally cease to be bays and become harbors. There might be instances near the boundary line, where it might be a question whether the word harbor or bay would more properly describe the place. The present, however, is no such instance. There is nowhere a narrowing of the mouth. That continually widens. The place has all the distinguishing features of a bay, and none of those of a harbor.

The case of the plaintiffs below is, in short, this: That although Huntington Bay is not in fact a harbor, and was never called or known as a harbor, it is enough to make it a harbor within the meaning of these charters, if vessels can anchor there and be protected against some winds, although not against others. And this, too, although the presumption is that it was not the intent of the charters to embrace Huntington Bay.

But this is not all. These charters are primarily and principally grants of land, and not of water, still less of public navigable water. So far as they are intended to be grants of water, it is only where the water is incident to the land, and within it. The words describing the waters designed to be conveyed are, "rivers, rivulets, waters, lakes, ponds, brooks, streams, creeks, harbors." It is impossible not to see that the intent and meaning was to convey strictly *interior* waters.

It is for this reason that the courts of New York have hesitated to allow that harbors of navigable waters passed by the grant, although that word was expressly employed. The rule of *ejusdem generis* strongly tends to confine the meaning of

the word harbors, employed in the instruments to harbors of the same kind as the other waters described, namely, creeks, ponds, etc. Except for the abundant proof of claim of title and acts of ownership through a period of two hundred years, the word harbors would not probably have been allowed as sufficient to pass the title to such navigable waters as the cases of *Brookhaven* v. *Strong*, 60 N. Y. 56, and *Robins* v. *Ackerly*, 91 N. Y. 98, related to.

It will be observed that all the proofs of ancient claim of title and acts of ownership contained in the record in this case are limited to Northport Harbor, which is a harbor in the strictest sense of the term, though only for vessels of light draught.

During the period of two hundred years since the grant of the charters, no pretence of title was ever set up to Huntington Bay until about the year 1881, and long after the occupation of the plaintiff in error began. The first act of the town involving any assumption of title to Huntington Bay was a lease for getting gravel in 1881.

If there were no other reason for rejecting the claim set up by the plaintiffs below, the single fact of indefiniteness would be sufficient. If Huntington Bay is not part of Long Island Sound, it must be possible to say where the former ends and the latter begins. But this is wholly impossible. Bay is a word of indefinite meaning, not designed for any purpose of accurate description, and therefore cannot be made a word of description of the premises conveyed by a grant.

Surely the presumption must be that it was the intent of the charters to furnish an intelligent description of the grant. To make the grant include "bays," which are not mentioned in it, is to substitute, in place of a clear and intelligent description, one which is wholly ineffective. What right have we to say that Huntington Bay extends to a line drawn between the headlands above mentioned?

An ancient and unbroken claim of title to Huntington Bay, accompanied by proof of acts of ownership during the whole period of the claim, would do much towards establishing the title in the town of Huntington, provided there was a distinct

northern boundary to which the proofs would apply; but such a boundary would be necessary.

There is no pretence of such claim of title or act of ownership. The first act of ownership proved is found in an obscure description in a lease by the town of Huntington of a gravel point between the harbor of Northport and Huntington Bay, which seems, although this is not certain, to embrace land under water in Huntington Bay. It is enough to say that this lease was executed in 1881, two hundred years after the charter. All prior acts of ownership proved by the plaintiffs below relate to Northport Harbor, and in no manner to Huntington Bay.

As to distinct claim of title, the first instance appears to be found in the communication of the Trustees of Huntington to the Commissioner of Fisheries. This was in 1886. Leases for oystering were first made in 1882.

When it is borne in mind that in respect to Northport Harbor there had been an effective assertion of title and acts of ownership for a period of one hundred years, (one at least as early as 1795,) the absence of similar assertions and acts in respect of Huntington Bay is of unmistakable significance.

It cannot be said that this was, or might have been, for the reason that there were no adverse claims, and consequently no necessity for affirmative and express assertion. The plaintiff in error had openly staked out his ground and occupied it continuously from 1867. He was never disturbed by suit, or even notice to quit, until 1888. And it was not until November, 1887, that the town came to the conclusion to try its fortunes by a suit at law. And this, too, while it had seven years before met an attempt to dispute its title to Northport Harbor by undertaking the defence of suits brought against its lessees. And even then it was not thought prudent to bring the action until the act of cession already mentioned had been obtained from the legislature.

II. The act of cession of 1888 by the State of New York is wholly ineffective as a support to the present suit.

This is an action of ejectment, and can be maintained only when the plaintiff is entitled to the possession of the property. This act confers no general title. It does not authorize a sale

of the property by the town, or a use of it for any other purpose save that of cultivating oysters. No right conferred upon the town by this deed could be interfered with by any occupation unless it conflicted with the right of the town to cultivate oysters. There is neither allegation nor proof that the occupation of the plaintiff in error at all obstructed the right thus conferred upon the town to cultivate oysters in Huntington Bay. There is no pretence that there was not abundance of other land in the bay equally adapted to the purpose, and sufficient to satisfy every call made upon the town for that purpose.

What the plaintiffs below must really maintain is that they gained by this act of cession the exclusive right to plant oysters in Huntington Bay. Such is not the language of the act, and surely it will not be aided by construction.

III. But it is hardly worth while to argue what the terms of the grant would have conferred upon the town had there been no qualification or exception, for there is an express proviso that the grant is to be "without prejudice to the legal rights, if any, of such persons as now have oysters planted on the lands aforesaid." This clause was expressly designed, and was entirely effectual to protect all such as were in the condition of the plaintiff in error.

It is believed that the design was to protect him alone, there being no other persons engaged in planting oysters there, except perhaps some who had engaged in the work under the recent pretended leases of the town, and who, of course, needed no protection against the town.

It may be argued that this clause is designed to protect those only who had legal rights against the State. This interpretation would be wholly unwarranted.

It does not say that, and an exclusive privilege in the town will not be created by implication.

But such an interpretation would be against settled and familiar rule. It would give the clause no effect. Any rights which any occupant might have had against the State could not have been affected by the conveyance of the State. They would have been fully saved and protected without any such clause.

Still further, and quite conclusively, there was no such class of persons. There was no way in which any right could have been acquired against the State by prescription or adverse user, and no prior grants or leases from the State are pretended. Had there been any such prior grants or leases, they would surely have been specially mentioned as such.

The class of persons whose rights are designed to be protected are described as being "such persons as now have oysters planted on the lands aforesaid." There were such persons, or at least one, the plaintiff in error, who had been carrying on the business on a very large scale for years without protestation by, and with the acquiescence of, the State, and who were still carrying it on at the time of the passage of the act. There can be no question that these were the persons intended to be protected by the State. The legislature had no intention whatever by any act of its own to destroy a privilege which it had cost the parties enjoying it much time, labor, and expense to gain, and which it had permitted to be enjoyed for upwards of twenty years.

What then were the legal rights of the plaintiff? These are fixed with great precision by the necessities and the universal customs of the business and confirmed by the adjudications of the courts. A man who wishes to cultivate oysters by planting them where they will grow to maturity and become fit for consumption, selects a place which is not a natural bed where oysters are produced. He frees it from the starfish, the great enemy of oysters, and from marine growths and trash by cleaning the bottom, and then plants his oysters. No one else has the right to take those oysters. They are his property. Nor has another person a right to plant his own oysters there, for this would destroy the prior right. It is an occupation in the highest degree useful to the public, inasmuch as it is the only way by which a constant supply of the best quality of a most useful food can be furnished.

As against all persons, except the State of New York, therefore, the plaintiff in error had a perfect legal right to the exclusive occupation and enjoyment of his bed.

This has been fully determined by the Supreme Court of the

State of New York, and by decisions which have never been questioned. *Fleet* v. *Hegeman*, 14 Wend. 42; *Decker* v. *Fisher*, 4 Barb. 592; *Lowndes* v. *Dickerson*, 34 Barb. 586; *People* v. *Haven*, 121 N. Y. 313, 316.

These legal rights the plaintiff in error enjoyed before the act of cession against all persons, including the town of Huntington. They were what the proviso in the act of cession was intended to preserve, unaffected by that act. Of course the act cannot be made the ground of affecting them.

The design of the act was not to transfer to the town of Huntington any right which the State might have had to oust the present occupants. The distinct object and purpose of the proviso was to prevent the act of cession from having that effect.

It is to no purpose for the town of Huntington to say that the plaintiff in error had no right to occupy the ground because he was not a resident of the State. That was no concern of the town of Huntington any more than it was of other parties. If the State did not choose to oust him, but had permitted him to remain there for years, it would be an indecency, which the law would not for a moment tolerate, for other parties to trespass upon him.

Nor is it necessary to go into the question whether, being a non-resident, his rights were less than those of residents of the State. He was a resident when he acquired his right, and remained so for many years; his loss of the right, if he did lose it, which is not admitted, by ceasing to be a resident, is a matter which concerns the State alone. Strangers would have no more right to take advantage of such a defect than one man would have a right to oust another from the possession of ordinary real property, on the ground, not that he had a title himself, but that the occupant had none. The town of Huntington stood towards the plaintiff in error prior to the act of cession just as other persons stood towards him, and this condition it was the purpose of the subject clause to preserve.

IV. It may be argued, in support of the judgment below, that while the view above set forth as to the purpose and

meaning of the subject clause in the act of cession may be sound so far as respects any *residents* of the State who might have been occupying lands in Huntington Bay for the cultivation of oysters, yet that the law of New York (Penal Code, § 441,[1]) makes it a misdemeanor for non-residents either to plant or gather oysters in the waters of that State without the consent of the owner, and that consequently the plaintiff in error being at the time of the act of cession a non-resident, had *no* "legal rights" within the meaning of the subject clause. This position is wholly erroneous.

The object and purposes of this penal legislation should be clearly understood. Prior to its passage, and from colonial times, the principal oyster grounds of New York were in the waters within and around Long Island and Staten Island. The Great South Bay extending along nearly the whole southern shore of Long Island, and many of the harbors and interior waters on the north side of the same island, were peculiarly adapted both to the production and cultivation of shellfish. These grounds were owned, some of them by the ancient chartered towns, some of them by private persons under ancient royal and public grants, and some were the property of the State. *Trustees, &c.*, v. *Smith*, 118 N. Y. 634. Those belonging to the towns were sometimes leased, but were commonly left open for operation and use to the inhabitants of the towns, and under this general license non-residents often engaged in the business of oystering. The waters belonging to the State were until a comparatively recent date left to be exploited by all persons indifferently; but in 1866 an act was passed, applicable only to the waters around and adjacent to Staten Island, designed to exclude non-residents from the benefits of such waters. Laws of 1866, c. 404, § 6. Acts prior to

[1] SEC. 441. A person who, not being at the time an actual inhabitant and resident of this State, plants oysters in the waters of this State, without the consent of the owner of the same, or of the shore, or gathers oysters or other shellfish from their beds of natural growth, in any such waters on his own account or for his own benefit, or the benefit of a non-resident employer, is guilty of a misdemeanor punishable by imprisonment not exceeding six months, or by fine not exceeding one hundred dollars, or both.

this time had been passed for the purpose of confining the privilege of taking natural oysters from interior waters to the inhabitants of the counties or towns within which such waters were situated, but these were not aimed in particular against non-residents of the State. The use of the abundant public waters of the State, even by non-residents, there being more than enough for all, for the purpose of increasing the supply of wholesome food, was encouraged, at least, by non-interference and tacit assent, until the jealousy of resident oystermen seeking to diminish competition succeeded in introducing a policy of restriction, which was partly begun in respect to waters far distant from the place in controversy by the act, above mentioned, of 1866.

An act was passed in 1878 and amended in 1879, which did aim to exclude non-residents of the State from certain oyster privileges; but it applied only to the taking of oysters from their natural beds, not to the cultivation. Down to 1866 the business of planting oysters for cultivation was protected by the universal custom, by the adjudications of the courts, and by the provisions of positive laws, and no distinction was made between residents and non-residents of the State.

The framers of section 441 of the Criminal Code seem to have constructed that section from the 6th section of chapter 404 of the Laws of 1866, which was aimed at both the planting of oysters and the taking of them from their natural beds in the waters of Richmond County by non-residents of the State, and from sec. 1 of chap. 87 of the Laws of 1879, which was aimed at the gathering of oysters from their natural beds by non-residents of the State. So far as planting is concerned, the prohibition, previously confined to Richmond County, was extended over all the waters of the State.

This provision of the Penal Code was applicable to any of the waters of the State held in private ownership. It is extremely questionable whether it was designed, or should be held, to extend to waters owned by the State. It was probably designed, on the analogy of statutes making wilful trespasses criminal, to afford a remedy more efficient than a suit for damages. The words, " the owner of the same or of the

shore," seem to point to private ownership alone; and there was no policy, up to the time when the statutes from which this section was drawn were enacted, to exclude non-residents from the business of occupying public waters useful for no other purpose than cultivating oysters. The jealous exclusion of non-residents from useful business within the State has never been the policy of the great State of New York, still less where the business was one calculated to increase the supply of wholesome food.

We are now to turn to the situation of the plaintiff in error, as affected by § 441 of the Penal Code. He started out and prepared his bed and began his planting as early as 1867. Even had he been a non-resident of the State, he would have acquired at that time a full and perfect right to hold and maintain that bed as against every one but the State; and even against the State until the license evidenced by the long continued practice and toleration had been revoked by some distinct act. The State could not have treated him as a trespasser. Moreover, its own express legislation above cited, of 1866, would have protected him.

But he was a resident of the State until 1872, and, of course, no question could be made as to the perfect acquisition of his right.

Can it be thought that it was the design of § 441 of the Penal Code to revoke the license and permission under which the plaintiff in error had acted, upon the strength of which he had expended much labor and money, and to destroy the useful business which he had been carrying on? Surely, no such interpretation can be sanctioned unless the language of the act compels it.

But there is no necessity for such a harsh interpretation. On the contrary, the language of the section does not permit it. The plaintiff in error has never planted oysters in Huntington Bay "without the consent of the owners of the same." It is not requisite that this consent should be in writing. Any evidence tending to show consent or acquiescence is sufficient. And, surely, the facts that from the first, and down to the time of the passage of this penal enactment, it had been the custom

for all, without distinction of residence, to use the public waters of the State for this useful purpose, and that they had been protected in that use not only by the common law and the adjudications of the courts, but by the express legislation of the State, are abundant proof of consent.

If any private individual or town authorities owning such land under water had so stood by, and seen a non-resident thus occupying their land, had encouraged him in such occupation, and protected him against strangers, could the occupant have been indicted and punished under this statute as having planted oysters "in the waters of this State without the consent of the owner of the same?" There is no reason for applying a different rule to the State. The State cannot be presumed to intend what "would be disreputable in an individual." Marshall, C. J., in *Grant* v. *Raymond*, 6 Pet. 218, 244.

We do not of course mean that the State could not withdraw its consent and put an end to its possession. But this would be done by some distinct affirmative act, such as a law declaring that non-residents who were in the occupation of its lands for such purposes should no longer be permitted to so occupy them. And, of course, such an act should make suitable provision, which, while preventing further planting, would allow the occupant the privilege of keeping his oysters on the ground until they had grown large enough for the market, and then of removing them.

Plainly it was no part of the purpose of this enactment to accomplish any revocation of prior consent.

Fortunately the act is capable of a reasonable construction; and that is to apply it to the future and not to the past; to make the future establishment of beds unlawful, leaving those already established unaffected. Should it at any time be thought to be a wise policy to break up the existing business of non-residents, legislation may easily be shaped for that purpose; but we should expect it to include provisions, giving a reasonable time to the occupant to take up his oysters after they had grown to a size suitable for the market. Such provision is found in the eighth section of the act of 1887.

This construction may indeed be said to be the necessary

one, for the act did not, in terms, give to residents any right to plant oysters, and yet it must be understood as recognizing an existing right in residents to plant. Such existing right could only be founded on the prior tacit consent of the State as evidenced by the custom, the adjudications, and the positive laws protecting it. But such custom, adjudications, and positive laws protected all actual occupants, whether residents or non-residents. In short, the statute should be treated as assuming, what was clearly the fact, that all those then engaged in the business had the consent of the owners of the waters, except it might be in cases where there was a private ownership, and the planting had been done by non-residents against the will of the owner.

The statute, it will be observed, requires much in the way of construction in order to render it constitutional. In the first place, the words "on his own account or for his own benefit, or the benefit of a non-resident employer," which are annexed to the offence of gathering, must also be understood as applying equally to the offence of planting. *People* v. *Lowndes*, 130 N. Y. 455. And the words, "without the consent of the owner of the same, or of the shore," annexed to the offence of planting, must be understood as applicable also to the offence of gathering; otherwise, the private owner of a natural bed of oysters would be forbidden to sell to non-residents oysters to be taken from the bed, or even to employ a non-resident workman to gather oysters for him — an interference with the inalienable rights of property and a discrimination against non-residents quite beyond the legislative power of the State.

And if there were any remaining doubt concerning the propriety of the suggested interpretation, it would be removed by a reference to the subsequent legislative provisions contained in the act of 1879, above referred to.

The first section of that act unmistakably intends to preserve and protect all existing occupations for the purpose of planting oysters, and the fifth section makes the rental exacted much less than in the case of future occupations. It cannot be that in this respect an unexpressed distinction was

intended between residents and non-residents, for the fact was notorious that the existing occupations were by non-residents as well as by residents; and had any such distinction been designed, it would certainly have been expressed, because where that distinction was intended it was expressed, as in the fourth section.

The provisions of the first and fourth sections can be made to stand together by limiting the operation of the fourth section to the cases not before provided for.

To hold that grants of leases to present occupants could be made only when such occupants were residents would require us to read into the first section, at the end thereof, the words, "and shall have resided in this State at least one year preceding the date of application." And even this would not make a consistent interpretation, for many occupations might cover, as that of the plaintiff in error did, more than two hundred and fifty acres, and the excess could not be leased to any one.

The manifest policy of this act was this: The land of the State under water suitable for the purpose of oyster planting was to be surveyed and leased for that purpose, and a revenue to be derived from it. All existing occupations were to be left unaffected, if the occupants wished to continue them and pay a rental of twenty-five cents per acre, and in such cases perpetual leases were to be given for the whole extent occupied. But, in respect to leases to new occupants, the privilege was to be confined to residents, the number of acres to be limited to two hundred and fifty, and the rental to be one dollar per acre.

This interpretation is consistent with justice and equity. It would have been an outrage for the State in seeking, not to reserve natural oyster beds for its own citizens, but the mere bottom of its public waters, where there were no natural oysters, to treat as trespassers such non-residents as had, under its own tacit permission and encouragement, and at great expense, prepared certain places for oyster cultivation and deposited there large quantities of young oysters, and compel them to lose their investment. No such design will be imputed to a great and sovereign State.

It should be observed, that the unnecessary and unwise discrimination in this act between residents and non-residents in respect to the use of the bottom of public waters for the cultivation of oysters was abrogated by c. 321 of the Laws of 1893.

Mr. David B. Hill for defendants in error. (*Mr. N. S. Ackerly*, *Mr. C. R. Street*, and *Mr. Thomas Young* were with him on his brief.)

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

The questions in this case are mainly of a local character, in respect to which the settled rule of decision in the courts of the State is controlling. They relate to the form of the action, the title of the plaintiff to submerged lands in Huntington Bay, and the special defences of the defendant.

By Rev. Stat. § 914, the practice, forms, and mode of proceedings in actions at law in the Federal courts are required to conform as nearly as may be to those in the state courts.

The present action is one in the nature of an action of ejectment, and to secure to the plaintiff the undisturbed control of the tract in controversy. In the State of New York there is but one form of action, the plaintiff being required by the statutes of that State to set forth in his petition the facts upon which he bases his cause of action, and the relief is given according to the facts as stated and proved.

In a certain sense these submerged lands are not in the actual possession of any one, but § 1502 of the Code of Civil Procedure of New York provides for just such an exigency. It reads: "Where the complaint demands judgment for the immediate possession of the property, if the property is actually occupied, the occupant thereof must be made defendant in the action. If it is not so occupied, the action must be brought against some person exercising acts of ownership thereupon, or claiming title thereto, or an interest therein at the time of the commencement of the action."

Opinion of the Court.

The defendant claiming the right to occupy this submerged land for the cultivation of oysters, must be deemed to have been in the actual possession thereof, or, if not, as exercising acts of ownership thereupon and claiming an interest therein. Under those circumstances he was properly made a defendant in an action to secure to the plaintiff the immediate possession of the premises; such an action is recognized as appropriate in New York. *Southampton* v. *Mecox Bay Oyster Co.*, 116 N. Y. 1, and cases cited in the opinion.

With respect to the matter of title, there are involved not merely the construction of public grants and charters, but also the extent and purposes to and for which the title and control of submerged lands may be passed away from the State to towns and individuals. The question is of the rights attaching to certain lands within the territorial limits of the State, and whatever becomes a settled rule of real property by the decisions of its courts is conclusive on this court. *Bondurant* v. *Watson*, 103 U. S. 281, 289; *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Gage* v. *Pumpelly*, 115 U. S. 454; *Hardin* v. *Jordan*, 140 U. S. 371, 382, 402; *Shively* v. *Bowlby*, 152 U. S. 1.

The title of the plaintiff rests primarily on the three charters referred to in the complaint, and which were admitted in evidence. Those charters are grants of both territory and corporate franchises. The description in the first, that from Governor Nicolls, is as follows:

"All ye Lands that already have been or hereafter shall bee Purchased for and on the behalfe of the said Towne of Huntington whether from the Natives Proprietors or others within the Limitts and Bounds herein exprest (vizt) that is to say from a Certaine River or Creeke on the west comonly called by the Indyans by the Name of Nackaquatack and by the English the Coldspring to Stretch Eastward to Nasaquack River on the North to bee Bounded by the Sound runing betwixt Long Island and the Maine and on ye South by the Sea Including there Nine Severall Necks of Meadow Ground all wch Tract of Land together with the sd Necks thereunto Belonging wthin the Bounds and Limitts aforesaid and all or any Plantacon there upon are to belong to the said Towne of

Huntington as also all Havens Harbours Creekes Quarryes Woodland Meadowes Pastures Marshes Waters Lakes ffishing Hawking Hunting and ffowling And all other Proffitts, Commodityes, Emolumts, and Hereditamts to the said Land and prmisses within the Limitts and Bounds aforementioned described belonging or in any wise appertaining To have & to hold the said Lands and Necks of Lands Hereditamts and prmisses with their and every of their Appurtenances and of every Part & Parcell thereof to the said Patentees and their Associates to the proper use and behoofe of the said Patentees and their Associates their Heires Successors and Assignes forever; And I do likewise hereby Confirme and Graunt unto the said Patentees and their Associates their Heires Successors and Assignes all the Priviledges belonging to a Towne within this Governmt and that the Place of their prsent Habitacon shall continue and retaine the Name of Huntington by wch name it shall bee distinguisht and knowne in all Bargaines and Sales Deedes Records and Writings."

The second charter, that from Governor Dongan, is a confirmation of the first, and the description is substantially the same. The third, from Governor Fletcher, refers to the prior charter from Governor Nicolls, and recites a petition of the freeholders, inhabitants of the town of Huntington, for a "Grant and Confirmation of the Premisses so only as that the Limits & Bounds of the sayd Towne of Huntingtone shall not be as above mentioned but as hereafter Expressed," and then grants by a description as follows:

"Bound on the West by a River Called & known by the Name of Cold Spring a Lyne Runing South from the Head of the sayd Cold Spring to the South Sea & on the North by the Sound that Runns between our sayd Isld of Nassaw and the maine Continent & on the East by a Lyne Runing from the West syde of a Pond called & known be the Name of fresh Pond to the West syde of Whitmans Dale or Hollow and from thence to a River on the South syde of our sayd Island of Nassaw on the East syde of a Neck called Sumpawwawins and from the sayd River Runing South to the sayd South Sea Togither with all and Singular the Houses Mes-

suages Tenements Buildings Mills Mill damms fenceing Inclosures Gardens Orchards fields Pastures Feedings Woods Underwoods Trees Timber Comon of Pasture Meadows Marshes Swamps Plaines Rivers Rivoletts Waters Lakes Ponds Brooks Streams Beaches Quarries Creeks Harbors Highways & Easements fishing fowleing hunting and hawking Mines Mineralls (Silver and Gold Mines Excepted) & all other franchises Profits benefits Comoditys & Hereditaments whatsoever to the sayd Tract of Land within the Limits and Bounds next above mentioned belonging or in any ways appertaining or there with all used Accepted Reputed or taken to belong or in any ways Appertaine to all intents and Purposes and Constructions w'tsoever and also all & Singular the Rents Arrearages of Rents Issues and Profits of the sayd Tract of Land & Premisses heretofore due and Payable."

It will be seen from these quotations that the boundary on the north, as given in the Nicolls charter, is the "sound runing betwixt Long Island and the Maine," and in the Fletcher, "the Sound that Runns between our sayd Isle of Nassaw and the maine Continent." And the question is whether the tract in controversy is south of this north boundary line. The map will help to a clear understanding of the question (*ante*, 3).

The tract in controversy, marked "A" on this map, is within the limits of what is named thereon "Huntington Bay." The contention of the defendant is that that body of water is a part of the Sound, and that, therefore, the north boundary granted to the town of Huntington runs to the south of the tract in controversy. Referring to the words used to describe the appurtenances to this grant, it is urged that, although the general term "waters" is found therein, its place alongside of the words "rivers, rivoletts, lakes, ponds, brooks, streams," indicates that it refers exclusively to interior waters, and not to anything in the nature of a harbor, bay, or haven; and that when we turn to the terms which may properly be construed as referring to exterior waters, only the two, "creeks" and "harbors," are found; that this Huntington Bay is not, strictly speaking, a harbor, in that it is not land-locked and a place of absolute safety for shipping, being entirely open

and exposed on the northerly side; that this, being a public grant, is to be construed strictly against the grantee; that, inasmuch as bays are not mentioned, bays are not granted; and that the description of the Sound as the north boundary excludes that body of water, with all its inlets and bays, from the scope of the grant.

We are unable to concur in these views. If the language in the description of boundaries is clear, that should control, and should not be narrowed and limited by any mere ambiguity in the subsequent statement of the appurtenances to the grant. Or, to state the proposition in another form, whenever we are considering the matter of boundary we naturally turn to the words by which the boundary is described, and accept those words as controlling, and do not look to those by which the scrivener attempts to define that which is to pass with the granted premises as appurtenant thereto, to see what is omitted therefrom, or what is uncertain therein. For when in the preparation of any instrument the attention is directed to a particular subject, it is to be expected that language expressing the exact thought of the writer in respect thereto will be selected, and the ordinary force and scope of that language should not be destroyed by words and phrases used in another portion of the instrument in the description of some other matter. As said by the Supreme Court of Kansas, in *Long* v. *Culp*, 14 Kansas, 412, 414: "It is also a rule of construction that when one section of a statute treats specially and solely of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto. Not because one section has more force as a legislative enactment than another, but because the legislative mind having been, in the one section, directed to this matter, must be presumed to have there expressed its intention thereon rather than in other sections where its attention was turned to other things. *Griffith* v. *Carter*, 8 Kansas, 565."

The northern boundaries in all these charters is given as "the Sound." That was then, and is now, a well-known body of water. It opens into the Atlantic Ocean, but is separate and distinct therefrom. Into it flow many rivers, and open

many bays, harbors, and inlets; but the fact of a connection between them and it does not make them a part of the Sound. If the words describing the appurtenances were omitted from this grant, should not its boundaries be understood to be the same as now? So the question is not whether this body of water in which the tract in controversy is situated is strictly a harbor or a bay, but whether it is neither, and only a part of the Sound. If it was then known as an independent body of water, by whatsoever name called, that is enough to eliminate it in tracing the boundary of the grant. That it was so known is not open to question; it was not, therefore, a part of the Sound, and the boundary of the grant ran on the north of it.

While not perhaps of much significance, it may be noticed that in the first charter, that from Governor Nicolls, the description of the appurtenances is "havens, harbors, creekes," etc. The word "haven" has perhaps a broader signification than "harbor." At any rate, the use of both words in the same grant suggests that all bodies of water which might come within the reach of either term were intended to be included in the grant. In Webster the first definition given to the word "haven" is "a bay, recess, or inlet of the sea, or the mouth of a river, which affords good anchorage and a safe station for ships." While this bay might not be a place of safety against all storms coming from any direction, it was protected on three sides, and to that extent was "a safe station for ships."

In the case of *Rogers* v. *Jones*, 1 Wend. 237, the controversy was in respect to the property in the town immediately west of the town of Huntington, to wit, Oyster Bay. An examination of a map of Long Island and the Sound shows that the bay of Oyster Bay is no more of a harbor than Huntington Bay. It is just as open on the northerly side. The town of Oyster Bay had a charter similar to that of the town of Huntington, the northern boundary being "the Sound," and the grant being "with all the woodland, plains, meadows, pastures, quarries, marshes, waters, lakes, rivers, fishing, hawking, hunting, and fowling, and all other profits and emoluments to the tract belonging." The action was one

to recover a penalty for taking oysters contrary to a by-law of the town. The facts, as stated in the record, were as follows:

"On April 8, 1825, Rogers, the defendant below, being a citizen of the State of New York, did fish and oyster in the waters of the bay or harbor of Oyster-Bay, and took and carried away 100 oysters. The place where the oysters were taken was adjacent to and within one mile of Long Island Sound, opposite the village or town of Oyster-Bay, nearer Lloyd's Neck than any other land, within about one hundred yards of the beach on the said neck, and where the water in the bay is at least twenty feet deep at low water. On April 11, 1825, the suit was commenced before the justice by Jones, who was, at the time, the supervisor of the town."

Comparing the maps of the two bays, it is obvious that the *locus in quo* in that case was as properly to be considered within the limits of Long Island Sound as that in the present case. It is true no discussion of the point here made is found in the opinion there filed, and, therefore, it is not a direct adjudication. It seems to have been assumed that the tract being within the limits of the bay was south of the Sound, and, therefore, within the boundaries of the grant, and the question considered and determined was whether the grant carried the land under water, together with the exclusive right of fishing in such water, and it was held that it did.

A case also in point is *Brookhaven* v. *Strong*, 60 N. Y. 56, 57. That action was, as stated, one "brought to recover damages for taking oysters from the Great South Bay which extends along the south side of Long Island, separated from the ocean by the Great South beach, and to establish the exclusive right of the town of Brookhaven to the oyster fisheries in that portion of said bay lying between Huntington, East Gut, and Long Point."

"The bay is a sheet of water some fifty miles long and in the widest part five miles wide. The tide ebbs and flows throughout its whole extent, and it is navigable for vessels drawing from seven to eight feet of water. Plaintiffs claimed to be the owner of the bay within the limits above mentioned,

and of an exclusive right of fishery therein. Defendant admitted the taking of the oysters, but denied the exclusive right claimed by plaintiffs, and alleged that the place where they were taken was within the bounds of the town of Islip and was part of the navigable waters of the State, and that he being a resident of the town of Islip had a right to take the oysters."

The south boundary of the grant made in 1666 to the town of Brookhaven was "the sea or main ocean," and it was held that the grant included this bay, the court saying: "Nor can the objection that the bay was not included in the grant be sustained. The general boundary is the ocean, which includes the beach, and of course the bay."

There is nothing in the case of *Robins* v. *Ackerly*, 91 N. Y. 98, 104, which makes against the conclusion we have expressed. In that case the question was as to oyster beds in Northport harbor, a body of water adjacent to Huntington Bay. That harbor, as appears from the map, is land-locked, and this fact was referred to in the opinion as among the matters indicating that it was within the grant to the town of Huntington. While the court refers to that as an additional reason for the conclusion reached, it does not make that the turning point. We quote its language:

"The northern boundary of the town is the Sound. This includes, we think, Northport harbor where the oyster beds in question are located. The language of the grant includes 'all havens, harbors, creeks,' as well as 'fishing, hawking, hunting and fowling.' In the *Brookhaven case* the south boundary was the ocean, and there was a sandy flat or beach between the ocean and the bay, and the question was raised that the South Bay was not within the grant. This court held that this objection could not be sustained, and that the southern boundary, which was the ocean, included the beach and of course the bay, etc. The patent under which the plaintiff claims is bounded on the north by the Sound. Adjacent to the Sound is Eaton's Neck and Eaton's Neck Beach, and south of this is Northport harbor. By analogy, both Eaton's Neck and Eaton's Neck Beach are within the patents and necessarily

the harbor also. The boundary by the sound includes all the land south of the Sound. That this was intended is indicated by the use of the words in the grant, 'harbor, havens,' etc. That Northport harbor was included within the limits of the boundaries was proved by the undisputed evidence of the surveyor and others. It was also proved that Eaton's Neck Beach was leased by the town. It should also be noticed that Northport harbor is land-locked, and has always been used and distinguished as a harbor."

Each of these three cases from the highest court of the State of New York treats that which is named as the boundary on the north or south, the Sound or the ocean, as referring directly to the body of water known by such name, and not as including waters opening into or connected with it.

Further, there is independent testimony tending to show that this Huntington Bay was called indiscriminately "bay" or "harbor" at the time of the original grant. Thus, in the grant made by Governor Nicolls, on June 22, 1667, of Eaton's Neck to George Baldwin, the description is "a Certain Parcell or Neck of Land Commonly called Eaton's Neck lying and being in the East Riding of Yorkshire upon Long Island on the North side of the said Island to the East of Huntington Bay where striking out into the Sound it is thereby bounded to the North East and South and on ye West with Huntington Harbour;" and in a conveyance of the same land made by Baldwin, on July 11, 1668, the description is "neck of Land commonly Called and known by the name of Easton Neck lying on the East side of Huntington Harbour bounded as is Specified in the patent granted for that Neck of Land." There is also other testimony to the effect that this body of water has been known as "Huntington Bay" as far back as any memory extends, or any records are found; and whether bay or harbor, it was a distinct body of water, always so known and called.

No question exists as to the validity of these ancient grants, or that they were broad enough to include oyster rights in the waters within them. The subsequent legislation of the colony and the State affirms their validity. Thus, on May 6, 1691,

the colonial legislature passed an act, entitled "An Act for Settling, Quieting and Confirming unto the Cities, Towns, Manors, and Freeholders within this Province their several Grants Patents and Rights respectively." The first section enacted:

"That all the Charters, Patents and Grants, made, given, and granted, and well and truly executed under the Seal of this Province, constituted and authorized by their late and present Majesties, the Kings of England, and registered in the Secretary's office, unto the several and respective Corporations or Bodies Politick of the Cities, Towns, and Manors, and also to the several and respective freeholders within this Province, are and shall forever be deemed, esteemed, and reputed good and effectual Charters, Patents, and Grants authentick in the Law, against their Majesties, Their Heirs, and Successors, forever."

And in the second section it was provided:

"And be it further Enacted by the Authority aforesaid, That all the Charters, Patents, and Grants made, given, and granted, as aforesaid unto all and every the several and respective Corporations or Bodies Politick of the Cities, Towns, and Manors, and their successors, and also unto all and every the respective Freeholders, their Heirs and Assigns, forever, within this Province, are, to all Intents and Purposes whatsoever, hereby ratified and confirmed."

Section 36 of the first constitution of the State of New York contained this provision:

"And be it further ordained: That all grants of land within this State, made by the King of Great Britain, or persons acting under his authority, after the fourteenth day of October, 1775, shall be null and void; but that nothing in the Constitution contained shall be construed to affect any grants of land, within this State, made by the authority of the said King, or his predecessors, or to annul any charters to bodies politic by him, or them, or any of them, made prior to that date."

A similar one is found in section 18 of article 1 of the constitution of 1846. See upon this question of validity, in addition to the authorities heretofore quoted, *People* v. *Van Rensselaer*, 9 N. Y. 291, 346.

Again, it is worthy of note that that fact is apparent from the testimony in this case, which was noticed by the Court of Appeals as significant in the case of *Brookhaven* v. *Strong*, 60 N. Y. 56, 71, to wit, a long-continued exercise and control over these submerged lands on the part of the town. Several entries taken from the records of the proceedings of the town were offered in evidence. One, dated June 1, 1795, is as follows: "Whereas sundry persons are making a practice of taking and carrying away clams and oysters from the harbors on the north side of the town of Huntington, for the prevention of which be it enacted and ordained by the trustees of the freeholders and commonalty of the town of Huntington, and it is hereby enacted and ordained by the authority of the same, that if any person or persons, after the 10th day of June, 1795, shall take and carry away out of any of the harbors of the north side of the township of Huntington any clams or oysters he or they, or any of them so offending, shall forfeit the sum of 40*s.* for every offence contrary to the true intent and meaning of this act, and shall be prosecuted," etc.; one substantially similar, of date June 20, 1796. Subsequently, in 1803, 1810, 1818, 1823, 1828, 1833, 1838, 1844, and 1849, by-laws were passed, aimed with more or less directness of expression at restraint upon the "fishing, clamming, oystering," catching oysters, clams, and fish in the waters of the town of Huntington. It is not meant by this to imply that any of these by-laws specifically named Huntington Bay as a part of the waters belonging to the town of Huntington; all that is meant to suggest is that there was during those years a continued assertion of the right on the part of the town to control the catching of oysters in the waters of the town. Obviously, the planting of oysters was not then a matter much thought of, but from 1855 the occupation of the submerged lands for the purpose of the cultivation of the oyster seems to have attracted the attention of the town authorities. Thus, on April 3, 1855, at a town meeting, this resolution was passed:

"*Resolved*, That all persons be prohibited from putting down stakes in any of the harbors of the town of Huntington to mark the lines of the oyster beds that will in any way obstruct fishing with nets, under the penalty of $12.50."

On April 7, 1857, at a town meeting, the trustees were authorized "to make rules and regulations for the planting of oysters, receive applications, and grant permissions to the inhabitants" of the town for planting oysters. On April 4, 1871, the town record contains this recital:

"At a town meeting, resolved that the trustees of this town be authorized, empowered, and directed to lease the lands immediately suitable for oyster beds in the bays and harbors belonging under the waters of the town of Huntington. Before doing so they shall take proper counsel therein as to the best and safest manner of leasing said grounds. None but residents have the privilege to said lease, and those residents having oysters already planted be entitled to the first privilege, and the trustees be required to give public notice for two weeks before adopting the resolution for the terms and manner of leasing."

And in the town records are found, subsequently to these entries, by-laws and resolutions of a similar import.

Still further, on May 10, 1888, c. 279, the legislature of New York passed an act which is as follows:

"SECTION 1. All the right, title, and interest which the people of the State of New York have, if any, in and to the lands outside of and beyond low-water mark under the waters of Huntington Bay, in the town of Huntington, Suffolk County, southerly of a line drawn from a granite monument now set near high-water mark on the northernly point of Eaton's Neck, and west of the United States Life Saving Station to a locust monument now set on Lloyd's Neck, which line runs on a course south fifty-nine degrees, twenty minutes and twenty-five seconds west, and which is the line claimed by the trustees of the town of Huntington as the northerly line of their grants under colonial patents, is hereby ceded to the present trustees of the town of Huntington, Suffolk County, and their successors in office, for the purpose of oyster cultivation. Provided, nothing in this act shall be held to interfere with the rights and powers of the commissioners of the land office to grant all the right, title, and interest of the State to lands under water in said bay, to the owners of

adjacent uplands for purposes of commerce or beneficial enjoyment, and nothing herein contained shall be construed as interfering with the rights of riparian owners. Subject, however, and without prejudice to the legal rights, if any, of such persons as now have oysters planted on the lands aforesaid." (Laws of New York, 111th Session, 1888, p. 494.)

In respect to this cession the Court of Appeals in *People* v. *Lowndes*, 130 N. Y. 455, 461, said: "If the *locus in quo* was not within the colonial patent or grant, it was the property of the State, and passed to the trustees of the town of Huntington by the legislative act of cession of May, preceding the time of the alleged offence." That was a case in which the defendant was prosecuted for a violation of section 441 of the Penal Code of the State of New York, which is as follows: "A person who, not being at the time an actual inhabitant and resident of this State, plants oysters in the waters of this State, without the consent of the owner of the same, or of the shore, or gathers oysters or other shellfish from their beds of natural growth, in any such waters on his own account, or for his own benefit, or the benefit of a non-resident employer, is guilty of a misdemeanor, punishable by imprisonment not exceeding six months, or by a fine not exceeding one hundred dollars, or both;" and the place at which the offence was charged to have been committed was in Huntington Bay. That case was, however, decided on the question of the sufficiency of the indictment, and perhaps, therefore, the quotation may be considered as simply dictum, but whether dictum or not, we think it is correct. Either the title to these submerged lands passed by virtue of the colonial grants to the town of Huntington, or else it was in the State of New York, *Martin* v. *Waddell*, 16 Pet. 367; *Pollard* v. *Hagan*, 3 How. 212; *Shively* v. *Bowlby*, 152 U. S. 1, and this act, whose validity seems not to be questioned, cedes all the right, title, and interest of the State in these lands to the town, so far at least as is necessary for the purpose of oyster cultivation.

It is clearly exclusive in its scope. Such is the plain import of its terms. Even if the language were less clear, reliance

might be had on the rule of construction in respect to such grants laid down by the Court of Appeals. *Langdon* v. *New York City*, 93 N. Y. 129, 144. "But when the sovereign grants land under water, which cannot in its natural state be subjected to any of the uses to which dry land may be devoted, then a different rule of construction must be applied to the grant, so as to make it effectual for some purpose. Such a grant may be made to give an exclusive right of fishery, or of navigation, or to enable the grantee to fill up the land for wharves and docks or other buildings. The purpose may be plainly expressed in the grant; if it be not, then the intent of the parties must be ascertained from the nature and situation of the land granted and all the circumstances surrounding the grant which may properly be considered for the purpose of ascertaining such intent."

Proper notice to quit was served upon the defendant, and hence it follows that the judgment was rightfully entered against him, unless he has shown some affirmative title or right in himself. He pleads possession and use of the premises for the purposes of oyster cultivation for more than twenty years, but in order to create a title springing out of possession such possession must be adverse and exclusive, and of that the defendant makes no pretence. There was in evidence an application made by him on October 10, 1887, to the commissioner of fisheries of the State of New York for a perpetual franchise for planting and cultivating shellfish on the premises, which application was denied, and in respect to it he testified:

"The lands described in that exhibit are the lands embraced in this suit. These are the lands I occupy now. I did not get any grant on that application. The town put in a demurrer. When I commenced to plant oysters on these grounds, I claimed that the bottoms were owned by the State. I do yet. I don't claim to own the ground at all. In the year 1867 I planted probably — well, I never measured. I staked off a square what I thought would be competent to hold 3000 bushels or 2500, the amount I had money enough to buy and plant on it, indiscriminate of the number of acres. I didn't plant more than 3000 bushels then. I did not plant

more than ten acres in 1867. I don't think I planted more than ten acres in 1868."

In other words, all that he claims is that he had an implied license from the State, but such license (if one existed) was subject to revocation, and was revoked by the notice served upon him by the plaintiff, to whom the State had ceded all its rights.

These are the material questions in the case, and in the decision of them there was no error. Therefore the judgment is

Affirmed.

MR. JUSTICE WHITE was not a member of the court when this case was argued, and took no part in its decision.

SEEBERGER *v.* CASTRO.

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

No. 296. Submitted March 19, 1894. — Decided April 16, 1894.

The purchaser of an imported article in bond, pending an appeal from the assessment of duties upon it which is subsequently overruled, can, on paying the duties as assessed, maintain an action in his own name against the collector to recover an excess in the payment exacted.

Hager v. *Swayne*, 149 U. S. 241, distinguished.

Tobacco scrap, consisting of "clippings from the ends of cigars and pieces broken from the tobacco, of which cigars are manufactured in the process of such manufacture," "not being fit for any use in the condition in which the same are imported, and their only use being to be manufactured into cigarettes and smoking tobacco," was, under the tariff act of March 3, 1883, c. 121, subject to a duty of 30 per cent *ad valorem* as unmanufactured tobacco, and not to a duty of 40 cents per pound as manufactured tobacco.

THE defendant in error (plaintiff below) sued to recover duties which, he claimed, had been illegally exacted on certain importations of tobacco. The case, by stipulation, was submitted without the intervention of a jury. The court found

Counsel for Parties.

the facts to be as follows: The Rayner & Baxter Cigar Company imported the tobacco in question, which consisted of "clippings from the ends of cigars and pieces broken from the tobacco of which cigars are manufactured in the process of such manufacture, the said clippings and pieces not being fit for any use in the condition in which the same are imported, and their only use being to be manufactured into cigarettes and smoking tobacco." The collector assessed upon the tobacco a duty of forty cents per pound, under Rev. Stat. § 2502 as amended by the act of March 3, 1883, c. 121, 22 Stat. 488, 491, 503, which took effect on March 3, 1883, including it within the terms of the fifth paragraph of Schedule F of that act, which reads as follows: "Tobacco, manufactured, of all descriptions, and stem tobacco, not specially enumerated or provided for in this act, forty cents per pound."

The importer seasonably protested, contending that the tobacco was not dutiable under the above paragraph of Schedule F, but was so under the seventh paragraph of the same, which reads as follows: "Tobacco, unmanufactured, not specially enumerated or provided for in this act, thirty per centum ad valorem."

From an adverse ruling of the collector an appeal was duly brought to the Secretary of the Treasury. Pending this appeal, the importer sold the tobacco, in bond, to the plaintiff below, who, upon the affirmance of the collector's ruling by the Secretary, paid the duties, and in due time brought this suit to recover.

Upon the facts thus found the defendant asked the court to rule, first, that the plaintiff, as purchaser pending the decision of the Secretary, could not maintain the suit; second, that the defendant was, as a matter of law, entitled to a judgment. Reserving these questions, which were adversely decided, the defendant brought the case here.

Mr. Assistant Attorney General Whitney for plaintiff in error.

No appearance for defendant in error.

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

That a stranger, suing solely on an assignment of a claim from those who did not see fit to prosecute it themselves, cannot recover duties averred to have been illegally assessed, is settled by *Hager* v. *Swayne*, 149 U. S. 242. That case, however, has no application to the present one because the facts of the two are different. Indeed, in *Hager* v. *Swayne*, reference was made to this case as then reported, 40 Fed. Rep. 531, and we said: "Castro had purchased the merchandise of the importer while it was in bond, and pending an appeal, and after the decision of the appeal paid the duties assessed in order to obtain possession of the property, and thereupon brought the suit, . . . the purchaser obtained an interest in the thing itself" — thus plainly distinguishing between the case of an assignment of a claim, as exemplified in *Hager* v. *Swayne*, and the case of an assignment of the thing, such as is here involved.

Whether such tobacco as that with which we are here concerned is manufactured, in the sense of the word as used in the tariff act of 1883, is a question which has given rise to some contrariety of opinion. Attorney General Brewster, on January 25, 1884, held that it was, reaching his conclusion by a comparison of the provisions of the tariff act with those of certain internal revenue laws, holding that the two were *in pari materia*, and hence that the classification of tobacco scraps as manufactured tobacco in the internal revenue laws must be taken to indicate the intention of Congress to include them under the head of manufactured tobacco in the tariff law. 16 Ops. Attys. Gen. 646. On the other hand, in *Cohn* v. *Spalding*, 24 Fed. Rep. 19, decided May 26, 1885, the Circuit Court for the Northern District of Illinois decided that scrap tobacco was not manufactured within the meaning of the tariff act of 1883. And in a still later case, which arose under the provisions of the tariff act of 1890, *Sheldon* v. *United States*, 55 Fed. Rep. 818, it was held by the Circuit Court of Appeals for the Seventh Circuit that scraps like those

now in question were manufactured tobacco within the meaning of that act, the court calling attention to the fact that these scraps had a commercial value, and were the subjects of importation in the way of business.

It seems to us, however, that both the meaning of the word "manufactured" and the analogy of the internal revenue provisions require us to hold that these scraps are not manufactured tobacco. The court below found in this case that the scraps were "clippings from the ends of cigars and pieces broken from the tobacco of which cigars are manufactured in the process of such manufacture; that said clippings and pieces are not fit for any use in the condition in which the same are imported, and that their only use is to be manufactured into cigarettes and smoking tobacco." It is thus evident that the clippings are the mere waste resulting from a process of manufacture, and not in themselves manufactured articles. In *Lawrence* v. *Allen*, 7 How. 785, 794, the process of manufacturing was defined to be "making an article either by hand or machinery into a new form, capable of being used and designed to be used in ordinary life." A like view of what constitutes an article of manufacture had been previously announced by the Court of King's Bench: "The word 'manufacture' has been generally understood to denote either a thing made which is useful for its own sake and vendable as such," etc. *Rex* v. *Wheeler*, 2 B. & Ald. 349. In *Holden* v. *Clancy*, 58 Barb. 590, the test of whether an article was manufactured is thus defined: "A manufacture is defined as the process of making anything by art, or of reducing materials into a form fit for use by the hand or by machinery; and it seems to imply a proceeding wherein the object or intention of the process is to produce the article in question. The residuum or refuse of various kinds of manufactories is more or less valuable for certain purposes, and may be, and often is, the subject of sale; but it is not expected that the skill and attention of the manufacturer is to be devoted to the quality of the refuse material. This is not the object of the process, and its quality is wholly subordinate and disregarded, when attention to it would interfere with the most profitable mode or material to

be used in the process which is the main object of the manufacturer." Tested by either of these definitions, the tobacco in question is unmanufactured. To speak of it as "partly manufactured," and deduce a contention therefrom, is simply to assume the question at issue. It is equally unsound to divide the finding of fact so as to make it designate two distinct kinds of tobacco, thus: "First, 'clippings from the ends of cigars;' and, second, 'pieces broken from the tobacco of which cigars are manufactured in the process of such manufacture.'" The words "in process of such manufacture" qualify the whole sentence.

Resort to the provisions of the internal revenue laws regarding tobacco seems to us to strengthen rather than to militate against our conclusion. Various provisions of these laws have been brought to our attention: Revised Statutes, § 3244 (ninth) and § 3368; and the act of March 1, 1879, c. 125, § 14, 20 Stat. 327, 345, providing a substitute for Rev. Stat. § 3362. These are asserted to be *in pari materia*, and to show that the tobacco in question was manufactured, within the meaning of the tariff statute, without regard to the general understanding of the word "manufacture." We think the position unsound. The internal revenue laws referred to sought to accomplish two objects: First, the taxation of all forms of manufactured tobacco, including also the waste or scrap arising therefrom; and, second, the complete accounting by the manufacturer for all the product of his factory, including the waste. As waste was necessarily embraced in both objects, it was included in the provisions of the laws relied on. A detailed examination of the statutes will accentuate these views. The first of these provisions is that of section 61 of the act of July 20, 1868, c. 186, 15 Stat. 125, 153, which reads as follows: "That upon tobacco and snuff which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected the following taxes: . . . On all refuse, scraps, and sweepings of tobacco, a tax of sixteen cents per pound." Here is an obvious distinction taken between tobacco, etc., "manufactured and sold" on the one hand, and "refuse, scraps, and sweepings" on the other,

albeit the tax is the same on both. Its object, too, is plainly to tax tobacco of the various kinds named, in connection with their sale and removal "for consumption and use." The context of the section enforces this view. The tax is upon all tobacco manufactured, sold, or removed from the factory; and the provision as to refuse, scraps, etc., necessarily contemplates the regulation of the business of the factory, and not the grading of the tobacco.

The next section relied upon is section 62 of the same act, which is as follows: "That . . . all manufactured tobacco shall be put up and prepared by the manufacturer for sale, or removal for sale or consumption, in packages of the following description, and in no other manner: . . . all smoking tobacco, all fine cut shorts which is passed through a riddle of thirty-six meshes to the square inch, and all refuse scraps and sweepings of tobacco, in packages containing two, four, eight and sixteen ounces each." 15 Stat. 152–3. This section evidently has the same object as the first. The fact that it directs the manner in which the scraps and refuse shall be put up in the factory affords no evidence of a legislative determination that the scraps themselves are manufactured articles. Nor does section 59 of the same act justify the interpretation which is sought to be placed upon it. On the contrary, it distinguishes scraps by fair implication from both manufactured and partially manufactured tobacco. Its language is:

"Every person whose business it is to manufacture tobacco or snuff for himself, or who shall employ others to manufacture tobacco or snuff, whether such manufacture shall be by cutting, pressing, grinding, crushing, or rubbing of any leaf or raw tobacco, or otherwise preparing raw or leaf tobacco or manufactured or partially manufactured tobacco, or snuff, or the putting up for use or consumption of scraps, waste, clippings, stems, or deposits of tobacco, resulting from any process of handling tobacco, shall be regarded as a manufacturer of tobacco."

The interpretation of this section, which would hold that scraps were manufactured tobacco, would render the provision

of the section which relates to them absolutely useless. It would be a construction which would read out of the section by necessary implication, as unnecessary, the provision as to the waste or scrap tobacco found therein. Manufactured tobacco and partially manufactured tobacco had been already provided for. The waste or clippings must have been considered neither manufactured nor partially manufactured, since they were specially provided for after the manufactured and partially manufactured tobacco had already been regulated by the terms of the section. It follows, therefore, that if, under the rule of *pari materia*, we interpret the provision of the tariff act of 1883 along with the provision of the internal revenue acts, thus quoted, we could not hold the scraps or waste to be a manufactured article, unless we said that that which is neither manufactured nor partially manufactured was yet a manufactured article. We think the context of these sections makes it clear that their general purpose and object was to regulate the manufacture and disposition of all classes of tobacco, and that they conform by a fair construction and interpretation to the view that the scraps are neither a manufactured nor a partially manufactured article. We are here dealing with the waste or the scraps not from the internal revenue point of view, but as an article of commerce, separate from the manufacturer and the factory.

The judgment below is

Affirmed.

SPALDING *v.* CASTRO.

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

No. 297. Submitted March 19, 1894. — Decided April 16, 1894.

Seeberger v. *Castro*, *ante*, 32, followed.

A ruling by the court below, correct when applied to this case, is sustained without regard to its correctness as a general proposition.

Syllabus.

THE case is stated in the opinion.

Mr. Assistant Attorney General Whitney for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

This case is covered by that of the same person against Seeberger, collector, just decided. The tobacco was like that imported in the former case, and was likewise assessed. There was due protest by the importer, seasonable appeal to the Secretary of the Treasury, and, on his adverse ruling, a timely suit. The case was tried by a jury. The court instructed the jury that if they believed from the evidence that the tobacco in question required to have labor expended upon it in order to fit it for consumption, then it was unmanufactured tobacco, as claimed by the plaintiff, etc. Excepting to this ruling, the case was brought here. Whatever may have been the correctness of the instruction as a general proposition, it was correct when applied to the case in hand. *Evanston* v. *Gunn*, 99 U. S. 660. The judgment is

Affirmed.

WILSON *v.* HALEY LIVE STOCK COMPANY.

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

No. 332. Submitted March 30, 1894. — Decided April 16, 1894.

A defendant who proceeds to introduce testimony, after denial of his motion for a verdict in his favor on the close of the plaintiff's evidence in chief, thereby waives his exception to that denial.

A count in trespass *de bonis asportatis*, for the taking and detaining of personal property, can only be supported on the theory that plaintiff was either its owner, or entitled of right to its possession at the time of the trespass complained of.

Statement of the Case.

In an action of trespass *de bonis asportatis* the plaintiff cannot recover as upon a count for money had and received, at least without an amendment of the complaint.

Where a cause of action is not proven, not merely in some particular, but in its entire scope and meaning, the courts treat it, not as a case of variance merely, but as an entire failure of proof.

THIS was an action by the Haley Live Stock Company against Wilson and five others to recover damages for the forcible seizure on July 27, 1888, of 700 head of cattle, and the extortion from the plaintiff of $12,725.50 as a condition precedent to the defendants surrendering possession of the cattle to the plaintiff.

The answer of Wilson and Breeze, two of the defendants, denied the incorporation of the plaintiff, as well as all the allegations of the complaint, and set up in defence that Wilson, as treasurer of Routt County, and Breeze as his assistant, seized these cattle under a warrant for taxes for the year 1884 against one Ora Haley, by which warrant defendant Wilson was commanded to make the said sum of $12,725.50 out of the personal property of Haley, and by virtue whereof he distrained upon these cattle, and detained the same from July 27 to August 21, when Haley voluntarily paid the amount due. During this time, defendant Wilson was enjoined by Haley from selling them, and the cattle were properly cared for and in better condition than when seized. A similar answer was filed by the other defendants.

Upon the trial it appeared that articles of incorporation of the Haley Live Stock Company, under the laws of Iowa, signed by Ora Haley and Samuel Hass, were filed for record in the county recorder's office of Pottawattamie County, Iowa, on July 24, 1888; in Carbon County, Wyoming, on July 30; and in Routt County, Colorado, on August 10; and in the office of the Secretary of State of Iowa on August 29, though nothing appears to have been filed in the office of the Secretary of State of Colorado. The articles provided for a capital stock of $300,000, divided into 3000 shares; that the corporation should begin business on August 1, 1888, and that Haley should be superintendent and manager of the company.

Statement of the Case.

The cattle were seized on July 27, and released on August 21, upon payment of $12,725.50. At this time Wilson, as treasurer, executed the following receipt:

"YAMPA, ROUTT CO., COLO., *Aug.* 21, 1888.

"Received of Wilson Rankin for Ora Haley a certified check of Frank X. Aicher, on the German National Bank of Denver, Colorado. . . . This payment, it is understood, is paid in full settlement for the taxes of Ora Haley for the year 1884 under protest, and to release cattle now distrained for said taxes."

Haley testified that the Haley Live Stock Company became the owner of these cattle about the 24th of July by purchase from one Timothy Kinney; that Haley organized the company with a capital stock of 3000 shares, of which he owned 2990, the remaining ten shares being owned by four others; that the consideration for the cattle "was somewhere near the capital stock of the corporation;" that he, Haley, originally owned the cattle and had sold them to Kinney for about $300,000, taking his note and a chattel mortgage for the amount; that subsequent to this seizure Kinney brought suit in equity to enjoin the sale of the cattle for the taxes, upon the hearing of which suit both Haley and Kinney testified that the cattle were Kinney's property at the time of the seizure; that the sale to Kinney was *bona fide;* but that it was understood from the beginning that just as soon as the company was formed it was to take the property, Haley being advised "that that was a better method to get a corporation and have the property conveyed to it from a third party;" that the cattle were transferred to the company for the purpose of litigating the taxes in the Federal court. Haley further testified that "the minute the corporation had formed and was in shape to acquire title to it, it was the understanding between Hass, Kinney, and myself that that property was to be the property of the Haley Live Stock Company again."

"Q. Then the delivery was a mental operation, was it not?

"A. Yes; I expect it was.

"Q. You heard your affidavit read, made on the 4th of August, in which you testified that that property belonged to Timothy Kinney and was then in his possession. Was that true or was it false?

"A. Well, it was. He was one of the possessors. There had been no formal delivery of the property; only this understanding with the corporation."

It further appeared that, about 1885, he obtained an injunction against the collection of this tax, which was dissolved, that he then obtained a second injunction, which was dissolved by the Supreme Court, and the suit dismissed, *Breeze* v. *Haley*, 10 Colorado, 5; that he then obtained a third injunction, which was again dissolved, and the suit dismissed, *Breeze* v. *Haley*, 11 Colorado, 351; that he thereafter obtained a fourth and a fifth injunction, both of which were dissolved by the District Court of Arapahoe County, Colorado; that he took one of these cases to the Supreme Court of the United States, *Haley* v. *Breeze*, 144 U. S. 130; and that he obtained a release of the cattle under all these injunctions, except the last one.

The testimony of Wilson Rankin for the plaintiff was to the effect that he was in charge of the cattle at the time they were seized; that at the time of the payment he demanded a receipt in the name of the Haley Live Stock Company, which was refused, and a receipt taken in the name of Haley; that at the time of the seizure he was working for Kinney and knew nothing about the Live Stock Company; that he got a check from Haley, and that the first time he ever mentioned to Wilson or any one else the name of the company was when he asked for the receipt.

Defendants offered testimony tending to support the allegations of their answer; produced the tax roll in evidence; and showed that the Live Stock Company was never heard of by them until the day the taxes were paid and the cattle released.

The court submitted to the jury the question whether the money was paid by the Haley Live Stock Company or by Mr. Haley himself. The jury returned a verdict for $5266.92, upon which judgment was entered, and defendants sued

out this writ of error, assigning as error certain questions arising upon the admission of testimony and the charge of the court.

Mr. Daniel E. Parks and *Mr. H. B. Johnson* for plaintiff in error.

Mr. W. T. Hughes for defendant in error.

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

We shall not find it necessary to dispose of all the errors assigned to the action of the court below, as many of them are not properly presented by the record.

1. Upon the conclusion of the plaintiff's testimony, defendants moved the court to direct a verdict in their favor upon several grounds, among which were that the organization of the plaintiff corporation was fraudulent, and solely for the purpose of invoking the jurisdiction of the Federal court; that the property in question was never conveyed to the plaintiff until after the trespass was committed, and therefore it could not sue for the same; that the pretended conveyances from Haley to Kinney and from Kinney to plaintiff were without consideration and fraudulent; and there had been no delivery of the property to the plaintiff prior to the alleged trespass. The court denied this motion, and the defendants excepted. They did not, however, stand upon their exceptions, but proceeded to introduce testimony in their own behalf, and thereby, as we have repeatedly held, waived their exceptions. *Bogk* v. *Gassert*, 149 U. S. 17, 23. Nor did they renew their motion upon the conclusion of the entire testimony, as they might have done. This disposes of the third assignment of error, "that the court erred in overruling the motion of the defendants, made at the conclusion of the evidence of plaintiff, to instruct the jury to find a verdict for defendants." As the fourth, fifth, and sixth assignments are only to the opinion of the court in denying such motion, they must share the fate of the third. In addition to this, how-

ever, the reasons given by the court for its action upon the principal motion are not the proper subjects of exception. If the exception was improperly overruled, the reasons given by the court for its action are of no consequence.

2. There was an exception taken, however, to the following extract from the charge, which is also assigned as error, namely: "That if you believe from the evidence that this money was paid over by the Haley Live Stock Company, and not by Mr. Haley himself, then the plaintiff would have the right to recover it back as having been exacted under circumstances which showed no authority upon the part of Mr. Wilson to get it."

This charge must be taken in connection with the pleadings in the case, and can only be justified upon the theory that, consistently with the allegations of the complaint, plaintiff had a right to recover, if the money paid to obtain the release of the cattle was paid by the Haley Live Stock Company, and not by Mr. Haley himself. It is true that this portion of the charge was excepted to upon the ground that it assumed the invalidity of the tax proceedings; but, as it went to the foundation of the action, we think it may be construed as raising the same question that was raised at the conclusion of the plaintiff's testimony, viz., the right to recover upon the allegations of the complaint, and the admitted facts of the case.

The gist of the complaint is contained in the fifth paragraph, which is as follows: "That on or about July 27, 1888, the defendants, by force and arms, seized and took from the plaintiff about seven hundred head of beef cattle, which were bunched up and were being driven to market by plaintiff, and that, after seizing and taking from plaintiff said cattle, defendants drove said cattle great distances, and kept them bunched together, and greatly injured said cattle, and caused them to deteriorate and lose flesh, until on August 21, 1888, plaintiff was compelled to pay defendants a sum demanded by them of plaintiff, to wit, $12,725.50, as a condition precedent to defendants surrendering possession of said cattle to plaintiff."

This is, in its nature, a count in trespass *de bonis asportatis*,

for the taking and detaining of personal property, and can only be supported upon the theory that plaintiff was either the owner of the cattle, or entitled of right to the possession of them at the time of the trespass complained of. 1 Chitty on Pleading, 189.

The allegation that plaintiff was compelled to pay defendants a large sum of money to obtain the release of the cattle is, to all intents and purposes, an allegation that plaintiff suffered this amount of damages by reason of the unlawful seizure of its cattle, in addition to the damages suffered in driving said cattle great distances, keeping them bunched together, and causing them to deteriorate and lose flesh. Now, there is no evidence which would justify a jury in finding that plaintiff was the owner or entitled to the possession of the cattle until some time after the 27th of July, when the trespass is alleged to have been committed. By the articles of incorporation of the Haley Live Stock Company it was not authorized to begin business until the first day of August, 1888; and although these articles were filed in the county recorder's office of Pottawattamie County, Iowa, as early as July 24, they were not filed for record in the State of Colorado until August 10, fourteen days after the trespass was committed. In addition to this it appears that, in the suit in replevin instituted by Kinney against these same defendants, Wilson and Breeze, to obtain possession of these cattle, Haley, purporting to act as agent for Kinney, made affidavit on August 4 that Kinney was the owner of and was then lawfully entitled to the possession of the cattle in question.

Notwithstanding this, Haley swore that the Live Stock Company, of which he himself was practically the sole incorporator, became the owner of these cattle on the 24th of July, by purchase from Kinney, though he admits there was no formal delivery or transfer of possession. The truth seems to be that the company was organized for the sole purpose of bringing this suit as a non-resident; that Haley swore that the cattle became the property of the company on about July 24 simply because the company filed its articles of incorporation in Pottawattamie County, Iowa, upon that day; that no

purchase was ever actually made of these cattle by the company, at least until long after the date of the seizure, and, as Haley admits, the delivery and sale were only a mental operation, and if the company ever took title at all, it was long after the date of the alleged trespass.

Clearly there was nothing in any of these transactions that could give to the company the right to sue for the trespass committed in the seizure of these cattle on July 27. The Circuit Court held that the plaintiff had not acquired the title or possession at that time, and hence could not maintain an action for the seizure of the cattle and the loss accruing from that act. The court was, however, of opinion that if it could assume that the plaintiff paid the money for Kinney, or whoever was the owner of the cattle at the time, to secure the release of them, with the view of acquiring property in them, it might maintain an action for the money paid for that purpose; that the fact that the plaintiff was a stranger to the proceeding to collect the taxes was not material; and that, if the taxes were void, a stranger paying the amount for the use of the person against whom it was levied would be able to recover the money. We concur in its opinion that the plaintiff could not maintain an action for the trespass; but we think it was in error in holding that the plaintiff might continue the action for the recovery of the money paid to obtain the release of the cattle. As before stated, this was a mere item of the damages occasioned by the seizure. The gist of the action was the trespass, and if the plaintiff was not able to maintain that action, it fell to the ground, and carried with it all the damages incidental thereto. We are not called upon to determine whether, under the Code of Civil Procedure of the State of Colorado, the court might or might not have permitted the action of trespass to be turned into one for money had and received, and the plaintiff to recover upon the theory that the cattle had, before the payment of the money, become its property, and that such payment was made for the purpose of obtaining its release, and was, therefore, not voluntary. It is sufficient to say that we know of no system of pleading which enables a party to declare in trespass *de bonis asportatis*,

and without at least an amendment of his complaint, recover as upon an account for money had and received.

By section 78 of the Colorado Code of Civil Procedure it is provided that "if, upon the trial of an action before the court or jury, the evidence shall vary from the allegations of the pleadings, and either party is surprised thereby, he shall be allowed, on motion and showing cause therefor, and on such terms as the court may prescribe, to amend his pleadings to conform to proofs." No such amendment, however, was made in this case. While, undoubtedly, under the system of code pleading, a technical variance between the allegations and the proof is not deemed material, unless the adverse party is prejudiced thereby, still, where a cause of action or defence is not proven, not merely in some particular, but in its entire scope and meaning, it is treated by the authorities of those States, not as a case of variance merely, but as an entire failure of proof. See *Volkening* v. *De Graaf*, 81 N. Y. 268; *S. C.* 44 N. Y. Super. Ct. (12 J. & S.) 424; *Decker* v. *Saltzman*, 59 N. Y. 275. In *Degraw* v. *Elmore*, 50 N. Y. 1, it is held distinctly that the code does not authorize a recovery where the complaint alleges facts showing a cause of action in tort, by proving on the trial a cause of action in contract. To the same effect are *Ross* v. *Mather*, 51 N. Y. 108; *Walter* v. *Bennett*, 16 N. Y. 250; *Belknap* v. *Sealey*, 14 N. Y. 143; *Bernhard* v. *Seligman*, 54 N. Y. 661; *Barnes* v. *Quigley*, 59 N. Y. 265; *Farmer* v. *Cram*, 7 California, 135.

If in fact the cattle continued to be the property of Kinney or Haley up to the time the money was paid, it is difficult to see upon what theory a recovery could be permitted at all, since in such case the payment by the Haley Live Stock Company would be wholly voluntary. *Lamborn* v. *County Commissioners*, 97 U. S. 181, 185. If, upon the other hand, the cattle had become the *bona fide* property of a *bona fide* corporation, it is possible that such corporation might sustain an action for money paid for the release of its property, even though it were organized for the purpose of carrying the litigation into the Federal courts. *Seeberger* v. *Castro*, *ante*, 32. The difficulty in this connection is to find any tangible evi-

dence that the Live Stock Company paid this tax, or had any money with which to pay it. The proof was that Haley borrowed of one Aicher the money to pay these taxes, giving him his own notes for the amount, while Aicher gave to him a cheque which he endorsed personally and handed to the county treasurer. The name of the Live Stock Company was not used in the transaction, and at this time it had opened no books, had no money, and no account at a bank. In fact, the Haley Live Stock Company seems to have been a mere *alias* for Haley. The fact that Haley may have intended to sell the cattle as the property of the company and pay his note to Aicher from the proceeds, does not put the company in the position of an original payer.

We think the court was in error in submitting to the jury the question who paid these taxes, both because the pleadings did not justify it and because there was no proper evidence that plaintiff paid them. The judgment must, therefore, be

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

UNITED STATES *v.* PRIDGEON.

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

No. 1070. Submitted March 13, 1894. — Decided April 16, 1894.

On November 12, 1890, in the Indian country, within the boundaries of Oklahoma Territory, as defined by the act of May 2, 1890, c. 182, 26 Stat. 81, horse stealing was not a crime against the United States, punishable under the act of February 15, 1888, c. 10, 25 Stat. 33; but as to the Cherokee outlet, it remained Indian country after the passage of the Act of May 2, 1890, and such an offence, committed there, continued to be an offence against the United States.

An indictment in the District Court of the United States within and for Logan County in Oklahoma Territory, and for the Indian country attached thereto, charging the commission of the offence of horse stealing in November, 1890, and laying the venue of the offence "at and within that

part of the Territory of Oklahoma attached for judicial purposes to Logan County," with a description of territory which included part of Oklahoma and part of the Cherokee Outlet not in Oklahoma, and which averred the same to be "then and there Indian country, and a place then and there under the sole and exclusive jurisdiction of the United States of America," will not be held to be fatally defective when attacked collaterally by writ of *habeas corpus*.

Under a writ of *habeas corpus* the inquiry is not addressed to errors, but to the question whether the proceedings and judgment are nullities; and unless it appears that the judgment or sentence under which the prisoner is confined is void, he is not entitled to his discharge.

Where a court has jurisdiction of the person and the offence, the imposition of a sentence in excess of what the law permits, does not render the legal or authorized portion of the sentence void, but only leaves such part of it as may be in excess open to question and attack.

In accordance with this principle the court answers the third question certified in the negative, without expressing an opinion as to what would have been the proper action of the Circuit Court in dealing with the prisoner's application.

THE case is stated in the opinion.

Mr. Solicitor General for the United States.

Mr. D. K. Watson, *Mr. A. H. Johnson*, and *Mr. E. C. Irvine* for Pridgeon.

MR. JUSTICE JACKSON delivered the opinion of the court.

At the September term, 1890, of the District Court for the First Judicial District of Logan County, Oklahoma Territory, and for the Indian country attached thereto for judicial purposes, sitting with the powers of a District Court of the United States of America, the appellee, Sidney S. Pridgeon, was regularly indicted for horse stealing by the grand jurors of the United States of America, within and for Logan County and that part of the Indian country attached thereto for judicial purposes, after having been first duly sworn, empanelled, and charged to inquire of offences against the laws of the United States committed therein. He was thereafter tried and convicted of the offence with which he was charged, and the court thereupon, on February 12, 1891, entered judgment upon the conviction as follows, that "the said Sidney S. Prid-

geon, for the said offence by him committed, be imprisoned in the Ohio state penitentiary at Columbus (and confined at hard labor) for the term of five years, said term to begin at 12 o'clock M. February 12, 1891, and to pay the costs of this prosecution, amounting to the sum of two hundred and thirty-two dollars and fifty-three cents, and to stand committed until the amount of said costs shall have been fully paid."

In pursuance of this sentence Pridgeon was transported to and confined in the Ohio state penitentiary, in which the usual discipline for prisoners confined therein includes "hard labor."

On July 7, 1893, Pridgeon applied to the United States Circuit Court for the Southern District of Ohio, Eastern Division, for a writ of *habeas corpus* to be discharged from the custody of the warden of the state penitentiary, alleging in his petition that he was wrongfully restrained of his liberty, first, because the court which tried, convicted, and sentenced him had no jurisdiction in the premises; and, second, that the sentence imposed was beyond the power and jurisdiction of the court, and therefore void. Upon the hearing of the petition, the Circuit Court, without passing upon the question of jurisdiction of the court which imposed the sentence, held that the prayer of the petitioner should be granted, for the reason that the sentence should have been for imprisonment alone, and that the imposition of "hard labor" as a part of the punishment rendered the whole sentence void, and thereupon the petitioner was discharged. 57 Fed. Rep. 200. From this decision the United States appealed the case to the United States Circuit Court of Appeals for the Sixth Circuit. That court, in view of the important questions arising upon the record, and the doubt which it entertained as to the correct decision thereof, certified to this court the following questions:

"First. Was horse stealing on November 12, 1890, in the Indian country, within the boundaries of Oklahoma Territory, as defined by the act of Congress passed May 2, 1890, a crime against the United States, and punishable under the act of Congress passed February 15, 1888, denouncing horse stealing in the Indian Territory?

"Second. (Assuming the first question is answered in the negative.) Was the indictment against Pridgeon fatally defective on collateral attack by writ of *habeas corpus* in that it lays the venue of the offence 'at and within that part of the Territory of Oklahoma attached for judicial purposes to Logan County,' with a description of territory which includes part of Oklahoma and part of the Cherokee Outlet not in Oklahoma, and avers the same to be 'then and there Indian country, and a place then and there under the sole and exclusive jurisdiction of the United States of America?'

"Third. Are the sentence of Pridgeon and his commitment in accordance therewith void by reason of the fact that they included as part of his punishment during his imprisonment in the Ohio penitentiary confinement at hard labor?"

Assuming that the first question certified has reference to such parts of the Indian country as were embraced within the boundaries of Oklahoma Territory, and formed a part thereof, as defined and established by the act of May 2, 1890, c. 182, 26 Stat. 81, it admits of little or no doubt that this question must be answered in the negative. Indeed, the Solicitor General, on behalf of the United States, frankly and properly concedes that the act of February 15, 1888, c. 10, 25 Stat. 33, (the first section of which provides "that any person hereafter convicted in the United States courts having jurisdiction over the Indian Territory, or parts thereof, of stealing any horse, mare, gelding, filly, foal, ass, or mule, when said theft is committed in the Indian Territory, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than fifteen years, or by both such fine and imprisonment, at the discretion of the court,") was superseded by the act of May 2, 1890, with respect to so much of the Indian Territory as was included within the boundaries and made a part of the Oklahoma Territory.

The act of May 2, 1890, which created the Territory of Oklahoma out of part of the Indian Territory, after defining the territorial limits of the new Territory, and vesting the executive power thereof in a governor; the legislative power in the governor, and a legislative assembly; the judicial power in

a Supreme Court, district courts, probate courts, and justices of the peace, provided, by the eleventh section thereof, that certain named chapters and provisions of the Compiled Laws of the State of Nebraska, in force November 1, 1889, including part three, entitled the criminal code, "in so far as they are locally applicable, and not in conflict with the laws of the United States or with this act, are hereby extended to, and put in force in, the Territory of Oklahoma until after the adjournment of the first session of the legislative assembly of said Territory."

This provision of the act had the effect of establishing for the Territory of Oklahoma, until the first meeting and adjournment of its legislature, the criminal code of Nebraska. Among the criminal laws thus provisionally put in force in Oklahoma until after the adjournment of the first session of the legislature were sections 117 and 498 of the Nebraska criminal code, which provide that the punishment for horse stealing shall be imprisonment in the penitentiary for not more than ten years and for not less than one year, and "in all cases when any person shall be convicted of any offence, by this code declared criminal and made punishable by imprisonment in the penitentiary, the court shall declare in their sentence for what period of time within the respective periods prescribed by law such convict shall be imprisoned at hard labor in the penitentiary."

This criminal code remained in force from May 2, 1890, until December 24, 1890, when the first territorial legislature of Oklahoma adjourned. It thus clearly appears that the only law by which horse stealing within the territorial limits of Oklahoma, as defined by the act of May 2, 1890, could be punished on November 4 and 12, 1890, the dates of the offence for which Pridgeon was indicted, was the above criminal code of Nebraska which Congress adopted for the Territory. Larceny being a crime of local nature, it can hardly be supposed that Congress intended that the provisions of the act of February 15, 1888, prescribing punishment for horse stealing in the Indian Territory, should remain in force in the Territory of Oklahoma after the erection of the territorial government,

and the special adoption of the criminal code of Nebraska for the Territory until after the adjournment of its first legislature; or that the general provision of Rev. Stat. § 5356, relating to larceny "upon the high seas, or in any place under the exclusive jurisdiction of the United States," should apply to that Territory.

We are, therefore, clearly of opinion that the act of February 15, 1888, was not in force in the Territory of Oklahoma on November 4 and 12, 1890, but had been superseded by the provisions of section 11 of the act of May 2, 1890, adopting the criminal code of Nebraska as a provisional code for the Territory, and it follows that the first question certified by the Circuit Court of Appeals must be answered in the negative.

But, it is suggested on behalf of the United States, that the provisional and temporary adoption by Congress of the Nebraska criminal code for the Territory of Oklahoma had the effect of making larceny or horse stealing an offence against the United States, punishable on the Federal side of the courts of the Territory. The Supreme Court of the Territory has held that the criminal code of Nebraska, established by Congress, was to be treated as if it had been enacted by the territorial legislature, and was to be dealt with as if the crimes, thereby declared, were crimes not against the United States, but against the Territory. Thus in *Ex parte Larkin*, 1 Oklahoma, 53, 57, Green, C. J., says: "It was intended by Congress that the laws of Nebraska should constitute a *Territorial Code*, as distinguished from the laws of the United States in force in the Territory of Oklahoma, and that they should sustain the same relations to the courts and to the people of the Territory and to the legislative assembly as a code of laws enacted by the legislative assembly."

If, as suggested by counsel for the government, section 11 of the act of May 2, 1890, could be treated as establishing the provisional criminal code therein mentioned, as a law of the United States, and as creating offences against the Federal government, pending the first session and adjournment of the Oklahoma legislature, so as to make horse stealing during

that time a crime, not against the territorial government, but against the United States, the proceeding on the Federal side of the court was entirely lawful, the sentence of five years, as well as the imposition of "hard labor," being authorized by the Nebraska criminal code as above quoted.

It was certainly competent for Congress to have adopted the criminal code of Nebraska so as to make horse stealing a crime against the United States in the Oklahoma Territory, just as by section 5391, Revised Statutes, it has adopted the penal code of the States in respect to offences committed in forts, dock-yards, navy-yards, and other places ceded to the United States, where the offence is not prohibited, or the punishment thereof is not specially provided for by any law of the United States.

But we are of opinion that the Supreme Court of the Territory in *Ex parte Larkin* has taken the proper view of the effect of section 11 of the act of May 2, 1890, in holding that the laws of Nebraska were adopted as a territorial code, and this being so, a court of the United States did not have jurisdiction of the offence of horse stealing within the territorial limits of Oklahoma under the act of May 2, 1890, or by virtue of the Nebraska criminal code, provisionally adopted for the Territory.

It is contended by the appellee that inasmuch as the act of February 15, 1888, did not apply to the Territory of Oklahoma, and inasmuch as section 11 of the act of May 2, 1890, did not adopt the criminal code of Nebraska as a law of the United States, so as to make horse stealing in the Territory an offence against the United States, the District Court for the judicial district within and for Logan County, Oklahoma Territory, sitting as a court of the United States, had no jurisdiction over the offence charged against Pridgeon. This position, however, is not well taken. The boundaries of Oklahoma Territory, as defined by the act of May 2, 1890, creating a temporary government therefor, did not include the Cherokee Outlet. The first section of that act provides that "whenever the interest of the Cherokee Indians in the land known as the Cherokee Outlet shall have been extinguished, and the Presi-

dent shall make proclamation thereof, said outlet shall thereupon and without further legislation become a part of the Territory of Oklahoma." By the ninth section of the act, after defining the judicial power, and creating the courts for the Territory, and defining their jurisdiction, original and appellate, it was provided that the Territory should be divided into three judicial districts, and that a District Court should be held in each county thereof by one of the justices of the Supreme Court, at such time and place as may be prescribed by law, and "the territory not embraced in organized counties shall be attached for judicial purposes to such organized county or counties as the Supreme Court may determine; . . . and each of the said District Courts shall have and exercise, exclusive of any court 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."

In pursuance of the authority conferred upon it, of attaching territory not embraced in organized counties to organized counties for judicial purposes, the Supreme Court of the Territory, on October 6, 1890, entered an order, of which the following only is material: "It is ordered by the court that all of that part of the Cherokee Outlet which lies between the line dividing ranges three (3) and four (4) west of the Indian meridian, and the line dividing ranges six (6) and seven (7) east of the Indian meridian, except township twenty (20) of ranges one (1), two (2), three (3), and four (4) east of the Indian meridian; and all of the lands occupied by the Kansas, Tonkawa, Ponca, Otoe, and Missouri tribes of Indians; and all of that part of land occupied by the Osage Indians which lies west of the line between ranges six (6) and seven (7) east of the Indian meridian; and all that part of the Iowa and Kickapoo and Sac and Fox countries which lies north of the line which divides townships fourteen (14) and fifteen (15) north of ranges one (1), two (2), three (3), four (4), five (5), and six (6), east of the Indian meridian, is hereby attached to county number one (1), (Logan) for judicial purposes."

A comparison of the foregoing with the act of May 2, 1890,

shows that of the territory attached to Logan County for judicial purposes, by the order of the court, part was in Oklahoma, as established by the act creating the Territory, and part was in the Cherokee Outlet, not embraced within the boundaries of Oklahoma.

The part of the Cherokee Outlet so attached to Logan County for judicial purposes being "all that part of Cherokee Outlet which lies between the line dividing ranges three and four, west of the Indian meridian, and the line dividing ranges six and seven, east of the Indian meridian, except townships twenty of ranges one, two, three, and four, east of the Indian meridian," which part is outside of the boundaries of Oklahoma Territory.

It was further provided by section 9 of the act of May 2, 1890, that "in addition to the jurisdiction otherwise conferred by this act, said District Courts shall have and exercise exclusive original jurisdiction over all offences against the laws of the United States committed within that portion of the Cherokee Outlet not embraced within the boundaries of said Territory as herein defined;" and further, that "for all judicial purposes, as herein defined, such portion of the Cherokee Outlet not embraced within the boundaries of the Territory of Oklahoma shall be attached to, and be a part of, one of the judicial districts of said Territory as may be designated by the Supreme Court." That section also provided that "all acts and parts of acts heretofore enacted, conferring jurisdiction upon United States courts held beyond and outside 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."

By section 10 of the act "all offences committed in said Territory, if committed within any organized county, shall be prosecuted and tried within said county, and if committed within territory not embraced in any organized county, shall be prosecuted and tried in the county to which such territory shall be attached for judicial purposes."

It admits of no question that under these provisions the

District Court for the First Judicial District within and for Logan County, Oklahoma Territory, and for the Indian country attached thereto for judicial purposes, sitting as a District Court of the United States, had jurisdiction of offences committed against the laws of the United States in the Cherokee Outlet, which by the statute and the action of the Supreme Court was attached to Logan County, Oklahoma, for judicial purposes. It is equally clear in respect to the Cherokee Outlet so attached to Logan County, that it was at the passage of the act of May 2, 1890, and continued to be, Indian country, coming within the provisions of the act of February 15, 1888, and that the offence of horse stealing committed therein on November 4 and 12, 1890, was an offence against the United States. The provision of the ninth section, already referred to, clearly establishes the correctness of this conclusion, and the contention on the part of the appellee that the act of March 1, 1889, c. 333, 25 Stat. 783, establishing a United States court for the Indian Territory, and extending the jurisdiction of the United States courts over the Indian Territory, which was divided and annexed for judicial purposes to the District of Kansas and to the Eastern Judicial District of Texas, has no application to that portion of the Cherokee Outlet referred to in the ninth section of the act of May 2, 1890, attached to Logan County for judicial purposes. Neither is the Cherokee Outlet covered by section 29 of the act of May 2, 1890, it being expressly declared by section 9 of that act that "for all judicial purposes as herein defined such portion of the Cherokee Outlet not embraced within the boundaries of the Territory of Oklahoma shall be attached to, and be a part of, one of the judicial districts of said Territory, as may be designated by the Supreme Court;" and further, that "all acts and parts of acts heretofore enacted, conferring jurisdiction upon United States courts held beyond and outside the limits of the Territory of Oklahoma as herein defined, as to all causes of action or offences in said Territory, and in that part 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."

This language clearly shows that that portion of the Cherokee Outlet not embraced within the boundaries of the Territory of Oklahoma, but attached thereto for judicial purposes, was Indian country within the provisions of the act of February 15, 1888, and the offence of horse stealing committed therein was within the exclusive jurisdiction of the District Court of the First Judicial District of Oklahoma Territory, sitting as a court of the United States.

The courts created for the Territory of Oklahoma are clearly dual in their nature. They sit as territorial courts to administer the laws of the Territory and as courts of the United States to administer the laws of the United States. *Ex parte Crow Dog*, 109 U. S. 556, 559; *Ex parte Gon-Shay-ee*, 130 U. S. 343, 349.

The indictment charges the offence to have been committed in that part of Oklahoma attached to Logan County for judicial purposes, and described as follows: "All that part of the Cherokee Outlet which lies between the line dividing ranges three and four, west of the Indian meridian, and the line dividing ranges six and seven, east of the Indian meridian, except townships twenty of ranges one, two, three, and four, east of the Indian meridian, and all of the lands occupied by the Kansas, Tonkawa, Oteo, and Missouri tribes of Indians, and all that part of the land occupied by the Osage Indians which lies west of the line between ranges six and seven, east of the Indian meridian, and all that part of the Iowa and Kickapoo and Sac and Fox countries which lies north of the line which divides townships fourteen and fifteen north of ranges one, two, three, four, five, and six, east of the Indian meridian, in said Territory."

This description embraces that portion of the Cherokee Outlet lying west of the Indian meridian, and also a portion of the Territory of Oklahoma, being the same as that attached to Logan County for judicial purposes by the order of the Supreme Court of the Territory on October 6, 1890; so that in this description we have partly Oklahoma Territory and partly Indian Territory; but the indictment proceeds to aver that the offence was committed "at and within that part

of the Territory attached for judicial purposes to Logan County as aforesaid, which said part of said Territory was *then and there Indian country*, and a place and district of country then and there under the sole and exclusive jurisdiction of the United States of America."

This averment in the indictment has reference alone to the Cherokee Outlet, for the Outlet was the only Indian country not included in Oklahoma Territory, embraced within the order of the Supreme Court, and was the only place and district of country attached to Logan County for judicial purposes that was under the sole and exclusive jurisdiction of the United States. The indictment may, therefore, be fairly construed as charging the offence as having been committed in that portion of the Cherokee Outlet attached to Logan County for judicial purposes.

But whether this be so or not, it is very clear that there is nothing on the face of the indictment to show affirmatively that the District Court for the First Judicial District, within and for Logan County, Oklahoma Territory, and for the Indian country attached thereto for judicial purposes, sitting with the powers of a District Court of the United States, did not have jurisdiction of the offence for which Pridgeon was convicted, so as to render its sentence void on collateral attack. If the indictment does not fairly and sufficiently aver that the offence in question was committed in the Cherokee Outlet, it certainly does not show affirmatively upon its face that it was committed elsewhere, and without the jurisdiction of the court. It may be, that upon demurrer or writ of error, the indictment might have been found defective in not alleging with greater certainty the particular locality in which the offence was committed, within the rule laid down in *McBride* v. *The State*, 10 Humph. (Tenn.) 615, but it cannot be properly held that the indictment is so fatally defective on its face as to be open to collateral attack after trial and conviction, or that the sentence of the court pronounced thereon was void. The *habeas corpus* proceeding being a collateral attack of a civil nature, it must clearly and affirmatively appear that the indictment charged an offence of which the court had no juris-

diction, so that its sentence was void. This does not appear in the present case, and the second question certified must, therefore, be answered in the negative.

It being established that the court which sentenced Pridgeon had jurisdiction of his person and of the offence under the act of February 15, 1888, and that the indictment upon which he was tried and convicted is not void upon its face, so as to be open to collateral attack, is the sentence imposed, and the commitment in accordance therewith, void by reason of the fact that "hard labor" was included as a part of the sentence during the term of imprisonment in the Ohio penitentiary?

It admits of no question that the sentence, so far as it imposed imprisonment for the term of five years in the Ohio penitentiary, was regular and proper, and open to no objection. The question, therefore, narrows itself down to this: Was the sentence imposing that term of imprisonment rendered void by the addition of "hard labor" during his confinement?

In *Ex parte Karstendick*, 93 U. S. 396, 399, the claim was made on behalf of the petitioner that "where the punishment provided for by the statute is imprisonment alone, a sentence to confinement at a place where hard labor is imposed as a consequence of the imprisonment is in excess of the power conferred." Mr. Chief Justice Waite, speaking for the court, answered this contention by saying: "We have not been able to arrive at this conclusion. In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. But where the statute requires imprisonment alone, the several provisions which have been just referred to place it within the power of the court, at its discretion to order execution of the sentence at a place where labor is exacted as a part of the discipline and treatment of the institution or not, as it pleases. Thus a wider range of punishment is given, and the courts are left at liberty to graduate their sentences so as to meet the ever-varying circumstances of the cases which come before them. If the offence is flagrant, the penitentiary, with its

discipline, may be called into requisition; but if slight, a corresponding punishment may be inflicted within the general range of the law."

In the subsequent case of *In re Mills*, 135 U. S. 263, 266, Mr. Justice Harlan said: "An offence which the statute imperatively requires to be punished by imprisonment 'at hard labor,' and one that must be punished by 'imprisonment,' but the sentence to which imprisonment the court may, in certain cases and in its discretion, require to be executed in a penitentiary where hard labor is prescribed for convicts, are each 'punishable' by imprisonment at hard labor. The former offence certainly must be thus punished; and as the latter may, in the discretion of the court, be so punished, it may also, and not unreasonably, be held to be 'punishable' by imprisonment at hard labor."

Under the rule announced in these cases, while the act of February 15, 1888, does not specifically authorize the imposition of "hard labor" as a part of the sentence of imprisonment, still it was competent for the court to sentence the party convicted to imprisonment in a penitentiary where "hard labor" is a part of the usual discipline; so that the provision for "hard labor" in the sentence is nothing more or less than a sentence to simple imprisonment in the Ohio penitentiary, subject to its rules, regulations, and discipline, and if the sentence had been imposed in this form it could not justify the release of the prisoner on *habeas corpus* under the rule above announced. It is doubtful whether upon a writ of error the prisoner would have been entitled to a modification of his sentence by striking out the "hard labor" portion thereof. By section 5539, Rev. Stat., it is provided that "whenever any criminal, convicted of any offence against the United States, is imprisoned in the jail or penitentiary of any State or Territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State and Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory."

Suppose the five years sentence had embodied the provision of this section — which it could lawfully have done — would it have carried with it, in point of fact, "hard labor" as a part of the discipline of the Ohio penitentiary? This being so, it is difficult to see upon what principle it can be held that the sentence of imprisonment is vitiated and rendered void for expressly including the element or feature of "hard labor," which would have been otherwise implied in the sentence of simple imprisonment.

In *In re Coy*, 127 U. S. 731, 757, Mr. Justice Miller, speaking for the court, said: "An imprisonment under a judgment cannot be unlawful, unless that judgment is an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."

Without undertaking to review the authorities in this and other courts, we think the principle is established that where a court has jurisdiction of the person and of the offence, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack. In other words, the sound rule is that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offence, and only void as to the excess when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence.

Many well-considered authorities, in England as well as in this country, hold that where there is jurisdiction of the person and of the offence, the excess in the sentence of the court beyond the provisions of law is only voidable in proceeding upon a writ of error. *Ex parte Lange*, 18 Wall. 163; *Sennott's Case*, 146 Mass. 489, 493; *People* v. *Kelly*, 97 N. Y. 212; *People* v. *Liscomb*, 60 N. Y. 559; *People* v. *Jacobs*, 66 N. Y. 8; *Ex parte Shaw*, 7 Ohio St. 81; *Ex parte Van Hagan*, 25 Ohio St. 426; *In re Graham*, 74 Wisconsin, 450; *Elsner* v. *Shrigley*, 80 Iowa, 30; *Ex parte Max*, 44 California, 579.

Under a writ of *habeas corpus* the inquiry is addressed not

to errors, but to the question whether the proceedings and the judgment rendered therein are, for any reason, nullities, and unless it is affirmatively shown that the judgment or sentence, under which the petitioner is confined, is void, he is not entitled to his discharge.

It may often occur that the sentence imposed may be valid in part and void in part, but the void portion of the judgment or sentence should not necessarily, or generally, vitiate the valid portion. Rev. Stat. § 761, "the court, or justice, or judge, shall proceed in a summary way to determine the facts of the case [in *habeas corpus*] by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." There is no law or justice in giving to a prisoner relief under *habeas corpus* that is equivalent to an acquittal, when, upon writ of error, he could only have secured relief from that portion of the sentence which was void. In the present case the five years term of imprisonment, to which Pridgeon was sentenced, cannot properly be held void because of the additional imposition of "hard labor" during his confinement.

Thus in *In re Swan*, 150 U. S. 637, 653, it is stated that, "even if it was not within the power of the court to require payment of costs, and its judgment to that extent exceeded its authority, yet he cannot be discharged on *habeas corpus* until he has performed so much of the judgment, or served out so much of the sentence as it was within the power of the court to impose."

We have not deemed it necessary to review or to attempt to reconcile the authorities on the question, for the reason that while all concede that neither irregularities nor error, so far as they were within the jurisdiction of the court, can be inquired into upon a writ of *habeas corpus* — because a writ of *habeas corpus* cannot be made to perform the functions of a writ of error in relation to proceedings of a court within its jurisdiction — they differ widely as to what constitutes error, and what should be regarded as rendering the judgment or proceedings void.

We are clearly of opinion that the third question certified should be answered in the negative.

In answering this third question we have not considered it either necessary or proper to express any opinion as to what would have been the proper action of the Circuit Court in dealing with the petitioner's application. Whether the writ of *habeas corpus* should have been denied, and the petitioner put to his writ of error, or whether, after the allowance of the writ of *habeas corpus*, he should have been committed to the custody of the warden of the Ohio penitentiary, with directions to carry out and enforce only that portion of the sentence imposing imprisonment for five years, according to the rules, regulations, and discipline of the institution. These are matters which the Circuit Court of Appeals should settle and dispose of under the appeal of the United States from the judgment of the Circuit Court discharging the prisoner.

We accordingly direct that each of the three questions certified from the United States Circuit Court of Appeals for the Sixth Circuit be answered in the negative, and be so certified to that court.

THE MARTELLO.

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

No. 293. Argued March 15, 16, 1894. — Decided April 16, 1894.

A steamship, entering or leaving the port of New York in a fog through which vessels cannot be seen when distant more than a quarter of a mile, should reduce its speed to the lowest point consistent with good steerage way.

It is the duty of a steamship, hearing a blast from a fog-horn on its starboard bow, indicating that a vessel is approaching from a direction which may take it across the steamer's bow, to stop at once until she can assure herself of the bearing, speed, and course of the approaching vessel.

It is within the discretion of the court below to refuse to find a fact asked for several months after the disposal of the case on other issues, but if such finding is made it is binding on this court.

The requirement in article 12 of the International rules and regulations for preventing collisions at sea, that sailing vessels shall be provided with an efficient fog-horn, to be sounded by a bellows, or other mechanical

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means, is so far obligatory, as to throw upon the sailing vessel in fault the burden of proof, in case of collision, that the want of a mechanical fog-horn could not have contributed to it.

THIS was a libel and cross-libel for a collision between the American barkentine Freda A. Willey and the British steamship Martello, which occurred on the 8th day of May, 1887, at 8 o'clock in the morning, about two miles to the northward and eastward of the Sandy Hook lightship, in a fog, and resulted in the sinking of the barkentine.

The District Court found both vessels to have been in fault for excessive speed, and entered a decree dividing the damages and costs. On appeal to the Circuit Court this decree was reversed, and the Martello adjudged to have been wholly in fault, and a decree entered for the original libellants in the sum of $23,943.43, from which decree the owners of the Martello appealed.

Pursuant to the statute, the Circuit Court, on July 31, 1889, made and filed the following findings of fact and conclusions of law, viz.:

"1. The Martello is a British steamship of 2439 tons net register, 370 feet in length, 43 feet beam, and 28 feet in depth, owned by the respondents and appellants, Charles Henry Wilson and Arthur Wilson, and is one of the Wilson line of steamers plying between New York and Hull and other foreign ports.

"2. The Martello left her dock in Jersey City on Saturday afternoon, May 7, 1887, laden with a miscellaneous cargo of merchandise, bound for Hull, England. The weather was so foggy that she could not go down the channel, but anchored for the night in Gravesend Bay.

"3. The Martello got under way from Gravesend Bay about 6 A.M. Sunday, May 8, 1887, and started for sea in command of Captain Francis E. Jenkins, the senior captain of the New York service of the line, and in charge of Pilot Joseph Henderson. The weather was thick, but sufficiently clear to enable the buoys marking the channel to be seen. She proceeded down the swash channel and thence through Gedney's channel to sea.

"4. When about half a mile to the westward of the perch-and-ball buoy, *i.e.* about north from the black buoy No. 1, her engine was stopped for the purpose of slowing the vessel until the pilot could be discharged; that being done, the engines were at 7.10 A.M. moved slow ahead.

"5. About 40 minutes after discharging the pilot the horn, one blast of a sailing vessel, was heard on the starboard bow. At that time the captain and third officer were on the bridge, a competent lookout was in the cro'nest, about 100 feet abaft the stern, [?] the first officer was on the lookout on the forecastle, and the quartermaster was at the wheel.

"6. At that time the steamer was heading E. S. E.; the wind was about E. by N., blowing a five to six knot breeze; the fog had grown denser and vessels could not be seen over a quarter of a mile away; the whistle of the steamer had been blown regularly at intervals of thirty seconds or less, and her speed was about 5½ to 6 knots an hour; three knots an hour would give her good steerage-way.

"7. About a minute or two after hearing the horn the officers of the Martello saw the barkentine Freda A. Willey looming in sight through the fog.

"8. On April 24, 1887, the barkentine Freda A. Willey left Pensacola, bound through Long Island Sound for New Haven, with a cargo of yellow-pine lumber, and on Sunday, May 8, about 8 o'clock A.M., she was bound into the harbor of New York.

"9. The Willey, with all her sails set, can make ten knots an hour; with the wind, as found in the sixth finding, the Willey, if going at less than four knots an hour, would not have steerage-way sufficient to give her master thorough control of her to tack, wear, or manage her as occasion might require.

"10. About 4 A.M. of May 8 she was sailing with her mainsail, spanker, main-staysail, upper and lower fore-topsails, fore-topgallant sail, and three jibs; at 5 A.M. the wind freshened and she took in her royal; at 7 A.M., the wind freshening, her fore-sail was hauled up.

"11. There was on deck of the Willey, before the collision,

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Cobb, able seaman; on the lookout, Mathlin, able seaman; at the wheel, Ludvinger, second mate, and Willey, captain, about her deck; the rest of the crew were below; she was heading north, close-hauled on the starboard tack, sounding her horn at intervals of one or two minutes, and making about four knots an hour.

"12. While thus proceeding she thrice heard the steam whistle of a steamer, answering promptly each time with a single blast of her horn; at this last signal the Martello appeared in sight, bearing about four points on the port bow and a quarter of a mile away.

"13. As soon as the Willey loomed in sight of those on the Martello, as indicated in the seventh finding, the first officer of the steamship called out 'hard-a-port,' and the lookout reported a vessel on the starboard bow; the captain immediately ordered the helm hard-a-port and the engines reversed full speed.

"14. The speed of the Martello under a hard-a-port helm and with engines reversed at full speed became gradually reduced, and at the time of the collision was about two knots an hour.

"15. The place of collision was about $1\frac{3}{4}$ miles about N. by E. from Sandy Hook lightship.

"16. As the vessels neared each other the first officer of the Martello called out to the barkentine, 'Luff, luff all you can,' but his call was not heard by those on board the Willey.

"17. From the time of the hearing of the first whistle down to the time of the collision, the steamer, except as stated in the sixteenth finding, gave no signal or indication showing whether her intention was to go ahead of the barkentine or astern, or even whether she had reversed her engines. In consequence the Willey held her course as she was bound to do, but the steamer ran into her with great violence, the steamer's stem running into the port bow of the barkentine, cutting its way into her keel, knocking her stem over to starboard and driving her bow round to eastward.

"18. Had the steamer been going at three knots an hour, had she stopped her engines as soon as she heard the Willey's

horn and reversed when she sighted the barkentine, she would have stopped out of the Willey's course.

"19. The master of the barkentine was on deck; he had his vessel under control. If, when the steamer first sighted the barkentine, the master of the latter had been advised that the steamer was starboarding her wheel, he could have ported and avoided the collision. If, at that time, the steamer had ported her wheel, the barkentine, keeping her course, would have crossed the steamer's bow in safety. If, at that time, the master of the barkentine had been advised that the steamer was reversing, he could have ported and avoided the collision.

"*Conclusions of Law.*

"1. The Freda A. Willey was free from fault.

"2. The Martello was in fault for proceeding at an excessive rate of speed in a fog, and is solely responsible for the collision.

"3. There should be a decree for the Freda A. Willey and against the Martello in each case, with costs of the District and Circuit Courts."

Subsequently, on September 6, and upon request of counsel for the Martello, the Circuit Court made the following additional findings of fact:

"16. Captain Jenkins has held a master's certificate since 1856. Pilot Henderson has been a New York and Sandy Hook pilot for nearly forty-two years.

"30. Article XIII of the International Rules and Regulations for Preventing Collisions at Sea is as follows: 'Every ship, whether sailing ship or steamship, shall, in a fog, mist, or falling snow, go at a moderate speed.'

"31. The moderate speed required by this article is not a fixed rate of knots per hour, but something materially less than the vessel's full speed.

"32. The Willey at four o'clock on the morning of the collision was some twenty miles to the southward of the Sandy Hook lightship.

"35. The Willey at the time of the collision was carrying not less than 2191 square yards of canvas.

Opinion of the Court.

"44. The ordinary course of outward bound European steamers after leaving Gedney's channel is about E. S. E., and therefore across the course pursued by the barkentine.

"48. Article XIX of the International Rules and Regulations for Preventing Collisions at Sea is as follows: 'In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, viz.: one short blast to mean I am directing my course to starboard; two short blasts to mean I am directing my course to port; three short blasts to mean I am going full speed astern. The use of these signals is optional, but if they are used, the course of the ship must be in accordance with the signal made.'

"51. It was the duty of the barkentine, under the circumstances, and with danger imminent, to use all the means reasonably within her power to avert the collision.

"56. The crew of the barkentine consists of a captain, mate, second mate, five men before the mast, and the steward; nine in all."

Upon the further request of counsel for the Martello, the following additional finding was made and filed July 30, 1890:

"104. The horn of the Willey on board of her and sounded at the time of the collision, was not a horn sounded, or to be sounded by mechanical means, but was a tin fog-horn."

But the court refused to find, as a conclusion of law therefrom, that "the Willey was in fault for not having and using a horn sounded by mechanical means, as required by article 12 of the international rules for preventing collisions at sea."

Mr. J. Hubley Ashton, (with whom was *Mr. David Thomson* on the brief,) for appellants.

Mr. William W. Goodrich for appellees.

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

(1) The Circuit and District Courts agreed in holding the

Martello to have been in fault for too great speed. In this conclusion we concur.

By the finding of the Circuit Court, that, at the time the horn of the barkentine was heard upon the steamer, the latter was proceeding at a speed of from five and a half to six knots an hour, we are relieved from the necessity of examining the somewhat conflicting testimony upon the question of the steamer's speed. While it is possible that a speed of six miles an hour, even in a dense fog, may not be excessive upon the open ocean and off the frequented paths of commerce, a different rule applies to a steamer just emerging from the harbor of the largest port on the Atlantic coast, and in a neighborhood where she is likely to meet vessels approaching the harbor from at least a dozen points of the compass. Under such circumstances, and in such a fog that vessels could not be seen more than a quarter of a mile away, it is not unreasonable to require that she reduce her speed to the lowest point consistent with a good steerage way, which the court finds in this case to be three miles an hour. *The Southern Belle*, (*Culbertson* v. *Shaw*,) 18 How. 584; *The Bay State*, (*McCready* v. *Goldsmith*,) 18 How. 89.

Further than this, however, the court found (7) that "about a minute or two after hearing the horn, the officers of the Martello saw the barkentine, Freda A. Willey, looming in sight through the fog," and that (13) "as soon as the Willey loomed in sight of those on the Martello, as indicated in the seventh finding, the first officer of the steamship called out 'Hard-a-port,' and the lookout reported a vessel on the starboard bow; the captain immediately ordered the helm hard-a-port and the engines reversed full speed." These findings, taken together, indicate that the Martello took no action to avoid the collision until after she saw the Willey looming up in the fog, which was a minute or two after hearing the horn. Under the circumstances, we think the steamer did not act with sufficient promptness. By article 12, subdivision (*b*) of the "Revised International Regulations for Preventing Collisions at Sea," prescribed by act of Congress of March 3, 1885, c. 354, 23 Stat. 438, 440, "a sailing ship under way

shall make with her fog-horn, at intervals of not more than two minutes, when on the starboard tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam three blasts in succession." The wind at this time was E. by N. and blowing a five to six knot breeze. One blast of the horn, heard upon the steamer's starboard bow, indicated that the sailing vessel was approaching upon her starboard tack, from a direction which would unavoidably take her across the bow of the steamer, unless the speed of the latter were sufficient to carry her beyond the point at which the courses of the two vessels intersected, before the sailing vessel reached that point. The steamship, however, had no right to speculate upon this contingency. Hearing the horn as she did, and being thus apprised of the bearing and course of the approaching vessel, being, as she must necessarily have been, in doubt as to her distance from the steamship, it was the duty of the latter at once to stop, until, by repeated blasts of the horn, she could assure herself of the exact bearing, speed, and course of the approaching vessel. The necessity of instantly stopping, or at least of a reduction of speed to the lowest point consistent with the maintenance of steerage way, in the presence of an unknown danger, is one which the masters of steam vessels are slow to appreciate; but the courts have had occasion to enforce it so often, it can, as a matter of law, be no longer considered doubtful. The sound of a fog-horn upon either bow, if the blast be such as to indicate that the approaching vessel is upon a course crossing that of the steamer, is obviously such a danger. As we had occasion to observe of a somewhat similar collision in *The City of New York*, 147 U. S. 72, 84: "Upon hearing the fog-horn of the barque only one point on her starboard bow, the officer in charge should at once have checked her speed, and, if the sound indicated that the approaching vessel was near, should have stopped or reversed until the sound was definitely located, or the vessels came in sight of each other. . . . There is no such certainty of the exact position of a horn blown in a fog as will justify a steamer in speculating upon the probability of avoiding it by

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

Indeed, the American and English courts are in perfect accord with regard to the duty of the steamer under such circumstances, and we are simply applying to the Martello the law of her own flag as well as ours in holding her to have been guilty of negligence. Thus in *The Kirby Hall*, 8 P. D. 71, it was held to be the duty of a steamship, hearing the steam whistle of another steamship in close proximity, in a dense fog, but unable to ascertain her course and position, to stop and reverse her engines so as to take all way off of her, and bring her to a standstill. So, in *The John McIntyre*, 9 P. D. 135, it was held that while the master of a steamship was not at once bound the moment he heard a whistle, wherever it might be, to stop and reverse his engines; yet, if, in a dense fog, he hears the whistle or fog-horn of another vessel more than once on either bow and in the vicinity from such a direction as to indicate that the other vessel is nearing him, it is his duty to at once stop and reverse, so as to bring his vessel to a standstill. In *The Dordogne*, 10 P. D. 6, it was said to be the duty of a steamer, on hearing the first whistle, to reduce her speed, and as the vessels get nearer, to bring the ship to as complete a standstill as is possible without putting her out of command, and when the other vessel has come close to, even though not in sight, to stop and reverse the engines. See also *The Frankland*, L. R. 4 P. C. 529; *The Ceto*, 14 App. Cas. 670; *The Ebor*, 11 P. D. 25; *The Lancashire*, App. Cas. (1894) 1.

This case is much like that of *The Colorado*, 91 U. S. 692, — a collision in Lake Huron, in a dense fog, between a propeller and a barque, — in which the propeller, though moving only at the rate of from five to six miles an hour, was held to have been in fault in not bringing down her speed to a slower rate, and in giving conflicting orders to the wheel before the position and course of the barque had been ascertained.

Opinion of the Court.

(2) The Willey is also charged to have been in fault, not only for excess of speed, as to which we express no opinion, but for a failure to provide herself with a mechanical fog-horn, as required by article 12 of the Revised International Regulations, which reads as follows: "A steamship shall be provided with a steam-whistle or other efficient steam sound signals, so placed that the sound may not be intercepted by any obstructions, and with an efficient fog-horn, to be sounded by a bellows or other mechanical means, and also with an efficient bell. . . . A sailing ship shall be provided with a similar fog-horn and bell."

The finding of the Circuit Court that the Willey was not provided with a mechanical fog-horn was made under somewhat peculiar circumstances. The opinion of the court was delivered, and the usual findings of fact filed on July 31, 1889. On the 6th of September, upon request of counsel for the Martello, the court made certain additional findings; but neither in the findings originally requested by the Martello, nor in the findings actually made by the court, nor in the request for additional findings to the number of nearly one hundred was any allusion made to the failure of the Willey to provide herself with a mechanical fog-horn; but nine months after the last findings had been made, and in July, 1890, the court made an additional finding that "the horn of the Willey on board of her and sounded at the time of the collision was not a horn sounded or to be sounded by mechanical means, but was a tin fog-horn," refusing, however, to find as a conclusion of law therefrom that the Willey was in fault. In view of this lapse of time, and of the fact that the case had been tried upon the theory that the Willey had carried a sufficient horn, we think it was within the discretion of the court to have refused this finding; but as it appears upon this record as a fact in the case, we are compelled to accord it its proper weight.

Some question was made with regard to the meaning of the words, "similar fog-horn," required upon sailing vessels; but, if steamships must be provided with a horn "sounded by a bellows or other mechanical means" and sailing ships with a

"similar fog-horn," it follows necessarily that it must be sounded in a similar manner. Indeed, as the horn of a steam vessel is usually sounded by steam, we think it is probable that in the use of the word "bellows" sailing vessels were contemplated. Such has been the construction given to the statute, both in this country and in England. *The Love Bird*, 6 P. D. 80; *The Wyanoke*, 40 Fed. Rep. 702; *The Catalonia*, 43 Fed. Rep. 396; *The Bolivia*, 1 U. S. App. 26; *S. C.* 49 Fed. Rep. 169.

There can be no doubt that the Willey was guilty of a statutory fault in the failure to provide herself with the fog-horn prescribed by the international regulations, and the presumption is that this fault contributed to the collision. This is a presumption which attends every fault connected with the management of the vessel, and every omission to comply with a statutory requirement, or with any regulation deemed essential to good seamanship. In *The Pennsylvania*, 19 Wall. 125, 136, it was said that "in such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." In this case a barque was condemned for ringing a bell as a fog signal while under way, although in a case arising out of the same collision the Judicial Committee of the Privy Council held that, inasmuch as it appeared that the fog-horn would not have been heard a sufficient distance to have enabled the steamer to avoid the danger, the barque should not be condemned for a technical failure to comply with the statute. 3 Mar. Law Cas. (O. S.) 477; *S. C.* 23 Law Times, 55. In other words, both courts proceeded upon the same legal principle; but in the English court the evidence was considered sufficient to show that the sounding of a bell instead of a fog-horn could not have contributed to the collision. To the same effect are *Richelieu Navigation Company* v. *Boston Insurance Company*, 136 U. S. 408, 422; *Belden* v. *Chase*, 150 U. S. 674, 699; *The Fanny M. Carvill*, 13 App. Cas. 455 *n.*, in which the Court of Appeals observed that "if you can show that there is a defect in the lights, that vessel must be held to blame,

unless she can show that the defect which exists in her lights could not by any possibility have contributed to the collision." See also *The Duke of Buccleuch*, 15 P. D. 86; *S. C.* 1 App. Cas. (1891) 310.

While no case appears to have arisen in the highest court, either of this country or of England, where this presumption was applied to the absence of a mechanical fog-horn, several cases have come before the lower courts in which the requirement has been held to be obligatory and a non-compliance to create a presumption of fault. *The Love Bird*, 6 P. D. 80; *The Bolivia*, 49 Fed. Rep. 169, 170; *The Trave*, 55 Fed. Rep. 117; *The Wyanoke*, 40 Fed. Rep. 702; *The Catalonia*, 43 Fed. Rep. 396; *The Energy*, 42 Fed. Rep. 301.

Can it be said in this case that the absence of a mechanical fog-horn could not by any possibility have contributed to the collision? We think not. Upon the contrary, it seems to us not improbable that it did. It is apparent that the reason the regulations prescribed a horn blown by mechanical means is that a louder and more prolonged blast can be blown by that method than by the power of the lungs. The evidence is undisputed that the officers of the Martello heard but one blast of the Willey's fog-horn before she hove in sight, and that this (her appearance) was only a minute or two after hearing the horn. The finding is that "about forty minutes after discharging the pilot the horn, one blast of a sailing vessel, was heard on the starboard bow. At that time the captain and third officer were on the bridge, a competent lookout was in the cro'nest about 100 feet abaft the stern, [stem,] the first officer was on the lookout on the forecastle, and the quartermaster was at the wheel."

6. "At that time the steamer was heading E. S. E.; the wind was about E. by N., blowing about a five to six knot breeze," etc.

11. "She (the Willey) was heading north, close-hauled on the starboard tack, sounding her horn at intervals of one or two minutes, and making about four knots an hour."

12. "While thus proceeding she thrice heard the steamer whistle of a steamer, answering promptly each time with a

single blast of her horn; at this last signal the Martello appeared in sight, bearing about four points on the port bow and a quarter of a mile away."

The gist of this is that while the horn was sounded at intervals of from one to two minutes, and the steamer was to the leeward of the barkentine, but one blast was heard, while three signals of the Martello's whistle were heard upon the barkentine. Now, if the barkentine had been provided with a more powerful horn, it appears to us not only possible but probable that more than one blast would have been heard, and the steamer thus apprised of the course and distance of the barque, and of the fact that she was approaching her upon a course that would carry her across the bows of the steamer.

While we hold it to have been a fault upon the part of the steamer not to have stopped when she heard the horn, there was certainly some excuse for her failure to do so, and the master might not unreasonably have supposed that he would hear a second blast before the vessel hove in sight, and thus be able to gauge more accurately her course and distance. Had the officer of the Martello, however, failed to stop or check her speed after hearing two or three blasts of the horn gradually drawing nearer, his neglect would have been so much grosser than it actually was, that we cannot presume he would have been guilty of it.

In this particular *The Love Bird*, 6 P. D. 80, which was a case of collision between the barque Pansewitz and the screw steamship Love Bird, is directly in point. Two blasts of the fog-horn were admitted to have been heard upon the steamer. Counsel for the barque argued that, if the steamer had stopped when she first heard the trumpet, there would have been no collision, and hence that the absence of a mechanical fog-horn did not contribute to the disaster. On the other hand, it was argued for the steamer that, when she first heard the trumpet of the barque, she was so near to her that it was impossible to avoid her. Sir Robert Phillimore held that the testimony showed there were three blasts heard on board the steamer nearly ahead; that she proceeded on

her course, neither stopping nor reversing her engines, which it was clearly her duty under the circumstances to have done. He found, however, that the barque had not sustained the burden of showing "that by no possibility could the presence of a fog-horn have prevented the collision, for it might possibly have given more warning to the other vessel." He, therefore, condemned the barque, although the collision occurred within three days after the act requiring a mechanical fog-horn came into operation, and although the barque had left her port of departure (Dieppe) before the act took effect. It is true that this case was decided by a single judge, and does not seem to have been appealed, but the opinion seems to us to be founded upon sound legal principles.

After these vessels came in sight of each other they were so far *in extremis* that it would probably be unjust to impute fault to either of them. The action of the Martello in reversing her engines at full speed was obviously a proper one. Perhaps if, instead of putting her helm hard-a-port she had put it hard-a-starboard and the barkentine had at the same time luffed and come into the wind, the vessels might have escaped each other, or have come together with a glancing blow which would not have proved disastrous. But we impute no fault to the barkentine for her non-action in that particular, as she was entitled to hold her course, at least until she received a signal from the steamer to luff.

But as we think the barque has failed to sustain the burden of proving that the want of a mechanical fog-horn could not have contributed to the collision, the decree of the court below must be

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

WEST *v.* CABELL.

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

No. 258. Submitted February 2, 1894. — Decided April 16, 1894.

A warrant of a commissioner of a Circuit Court of the United States, commanding the arrest of a person of a certain name, not otherwise designating or describing him, upon a charge of murder, will not justify the arrest of a person who has never been known or called by that name, notwithstanding the commissioner testifies that he was the person intended.

THIS was an action brought November 5, 1887, by Vandy M. West against William L. Cabell and six other persons, upon a bond, dated May 19, 1886, given by Cabell, the marshal of the United States for the Northern District of Texas, as principal, and by the other defendants, as his sureties, with condition that Cabell, "by himself and by his deputies, shall faithfully perform all the duties of the said office of marshal." The breach alleged was that Edward W. Johnson, one of the deputies of Cabell, on August 16, 1887, unlawfully arrested and imprisoned the plaintiff upon a warrant issued by a commissioner of the Circuit Court of the United States "to arrest the body of James West" upon a charge of murder of John Cameron in the Indian country in the Western District of Arkansas; to the damage of the plaintiff in the sum of $10,000.

The answer denied the allegations of the petition; and alleged that the arrest and imprisonment were upon a valid warrant issued by the commissioner, charging the plaintiff with the crime of murder.

At the trial, there was evidence tending to prove the following facts: The plaintiff's name was Vandy M. West, and he was never known or called by any other name. He resided and did business as a grocer at Mineral Wells, Texas, having come there from Colorado in December, 1886; and had for many years before his arrest borne a good character as a

peaceable man, and was not the murderer of Cameron. On August 16, 1887, having gone with a wagon load of wheat to Weatherford, twenty miles from his home, he was there arrested by Johnson upon the warrant above mentioned; and protested against the arrest, on the ground that he was the wrong man, that his name was not James West, but Vandy West, and that he was innocent of the crime charged, and offered to make proof of his identity, if permitted to go with Johnson to his home, or to wait for an answer to a telegram; but Johnson refused to permit him to do either, and carried him, against his will, in a hack and in irons, sixty miles to Graham, and there lodged him in the jail of Young County, and immediately informed the commissioner of the arrest. On the next day, the commissioner issued and placed in the hands of Johnson a subpœna for William Sturdevant, who resided sixty miles off at Henrietta, and on whose information principally Johnson had made the complaint on oath against James West, on which the warrant was issued. Sturdevant was then too ill to travel; but on September 1, 1887, and after seeing the plaintiff in jail, he appeared before the commissioner, and stated on oath that the plaintiff was not the West who killed Cameron. Because of the absence of Johnson, who was serving civil process elsewhere, the plaintiff was detained in jail, and was never brought before the commissioner, until September 5, 1887, when Johnson returned, and, by order of the commissioner, discharged him. No order was ever issued by the commissioner for the arrest or commitment of the plaintiff, other than the warrant aforesaid, and a verbal order to Johnson, when he reported the arrest, to hold the prisoner until the commissioner was ready to try him.

The defendants offered oral evidence tending to show that the warrant by virtue of which the arrest was made was issued for the arrest of the plaintiff, although by a wrong name; that Johnson, upon whose complaint the warrant was issued, had made inquiries from different sources concerning the identity of the plaintiff with the West who was charged with the murder of Cameron; and that the commissioner, upon the complaint made to him, issued the warrant for the arrest of

James West, but intending it for the arrest of the plaintiff. The plaintiff objected to the introduction of this testimony, because, the warrant commanding the arrest of James West, it was not competent to show by parol testimony that the plaintiff, who bore another name, was the person for whose arrest the warrant was intended by the commissioner issuing it. But the court overruled the objection, and admitted the testimony; and the plaintiff excepted to its admission.

The commissioner, being called as a witness for the defendants, testified that he had no personal acquaintance with V. M. West, and that the only time he ever saw him was when he discharged him from imprisonment, and did not at that time know him to be V. M. West; that Johnson, at the time of making the complaint, informed him that "he had located a man by the name of West near Mineral Wells who was charged with murder in the Western District of Arkansas," and that he had written to the United States marshal for that district, and received a reply from him; that the commissioner had no other knowledge "of the charge against West," and of his own knowledge "did not know of any other West living at or near Mineral Wells," and, "from the information received from Johnson, the West living at or near Mineral Wells was the one the warrant was issued for." On cross-examination, the commissioner testified that he "put the name James West in the warrant of arrest, because James West was the man complained against."

Johnson testified that in the spring of 1887 Sturdevant informed him that "James West, sometimes called Bud West, who had killed John Cameron in the Indian Territory in 1886, was at or near Mineral Wells, Palo Pinto County, Texas," and gave him "a personal description of the West who killed said Cameron," and he then wrote to the United States marshal of the Western District of Arkansas, who replied that he did want West for the murder of Cameron; that Johnson then went to Palo Pinto County to investigate the matter, and there examined the tax books, and submitted to the sheriff of the county the description given by Sturdevant of the West who killed Cameron, and ascertained that the plaintiff was

the only West in the county, and in personal appearance corresponded to Sturdevant's description; that, before he made the complaint, he informed the commissioner of these facts; and that "in that section of the country it was frequently the case that men were known by other than their correct names, so much so that witness attached but little importance to the name by which a man was called."

The plaintiff requested the court to instruct the jury "that the warrant for the arrest of James West will not authorize the arrest of Vandy M. West, though Vandy M. West may have been the party intended, he not being named or described in the warrant."

The court refused so to instruct the jury; and instructed them as follows: "There is no proof in this case tending to show that the plaintiff was ever known by the name of James West, or by any other name than V. M. West and Vandy West. There is proof tending to show that for a number of years and in various places he has been always known by the name of Vandy West. The defendants claim, however, that the plaintiff is the man for whose arrest the warrant was issued, and it has been suggested to you in the argument of the defendants' counsel that Ed. Johnson, being the man who made the complaint, knew what man he had in his mind when he made the complaint. It is not material what was in the mind of Johnson when he made the complaint, but what was in the mind of the commissioner when he issued the warrant; *and if you believe from all the evidence that the plaintiff is the man for whose arrest the commissioner issued the warrant, you will find that the defendants are not liable for damages on account of the mere fact of the arrest.* If, in making the arrest or in holding the prisoner, any harsher means were used than were reasonably necessary for taking and safely keeping him, considering the gravity of the charge, the defendants would be liable for any damages thereby occasioned the plaintiff."

The plaintiff excepted to the refusal to give the instruction requested, and to that part of the instructions given which is above printed in italics; and, after verdict and judgment for

the defendants, tendered a bill of exceptions, and sued out this writ of error.

Mr. I. W. Stephens for plaintiff in error.

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

The question at issue is to be determined by the provisions of the Texas Code, in force at the time of the arrest, which, by Art. 26, are to be liberally construed so as to attain the object intended by the legislature. Those provisions are as follows:

"Art. 458. A capias shall be held sufficient if it have the following requisites: (1) That it run in the name of 'The State of Texas.' (2) That it name the person whose arrest is ordered, or, if unknown, describe him," etc.

"Art. 512. When the defendant is arraigned his name, as stated in the indictment, shall be distinctly called, and unless he suggest by himself or counsel that he is not indicted by his true name, it shall be taken that his name is truly set forth, and he shall not thereafter be allowed to deny the same by way of defence.

"Art. 513. If the defendant or his counsel for him suggest that he bears some name different from that stated in the indictment, the same shall be noted upon the minutes of the court, the indictment corrected by inserting therein the name of the defendant as suggested by himself, the style of the cause changed so as to give his true name, and the cause proceed as if the true name had been first recited in the indictment."

In *Martin* v. *The State*, 40 Texas, 23, 25, the court, after citing several provisions of the Criminal Code, and Code of Criminal Procedure, and especially that as to how the latter should be construed, say, "With these general provisions borne in mind, we can more readily comprehend the great changes sought to be effected by them; for these rules of construction are wholly variant from, and, indeed, in conflict with, the strictness of construction and the technical nicety of

phraseology and circumlocution of statement which marred and embarrassed the administration of justice under the common law rules and practice."

Applying the primary rule of construction to the provisions with reference to warrants, capiases, etc., that is, give them a *liberal construction*, so as to attain the objects and purposes of their enactment, to prevent, suppress, and punish crime, the result is obvious. The name of the accused was required to be given in the warrant, or, if not known, a description of him is intended alike for the protection of the citizen and officer executing the same. It was to so identify the accused that the officer could with certainty arrest the identical person for whose arrest the warrant was intended.

In the very recent case of *Cabell* v. *Arnold*, 23 S. W. Rep. 695, which was an action for damages for illegal arrest and false imprisonment, a complaint had been made before the United States commissioner at Dallas, charging Arnold with the offence of robbing the United States mail carrier of the mail, a warrant was duly issued and placed in the hands of Cabell, the then United States marshal, who was at Dallas. Cabell telegraphed to his deputy, then at Weatherford, that the warrant had been issued and placed in his hands for Arnold, and for the deputy to go to Palo Pinto County and arrest Arnold and bring him to Dallas. This was done, and on arriving at Dallas the deputy delivered Arnold to the marshal, who still held the warrant. The contention which was successfully maintained in the trial court and Court of Civil Appeals, was that as the deputy did not have the possession of the warrant at the time he made the arrest, it was an illegal arrest and detention, and therefore entitled Arnold to a recovery for the damages. But upon writ of error, the Supreme Court of Texas reversed the judgment, holding that the arrest was legal and that Arnold was not entitled to recovery.

This and the Martin case both show the liberal construction given to the provisions of the Code of Criminal Procedure by the court of last resort in this State.

No description of West was given either in the warrant or

information for the simple reason that both Johnson and the commissioner believed that his name was James West. From the information received and the investigation made, they believed that they had found and located, in the person of the plaintiff in error, the identical James West who had committed the murder in the Indian Territory. If they had been correct in this, of course there would have been no place for any other name than "James West" in the warrant. It is an indisputable fact that these officers believed that plaintiff in error was the offender James West, and he was the identical person that was intended in the complaint and warrant. If this had been a case against Johnson and the commissioner for malicious prosecution, then the inquiry might be material as to whether they had probable cause for proceeding as they did. But here the naked question presented is, that although the plaintiff in error was the identical person against whom the warrant issued, was the arrest illegal because of the mistake in his name? It seems that if the code is to be construed as directed by the legislature, there is neither substance nor shadow in the contention of plaintiff in error.

The case of *Williams* v. *Tidball*, by the Supreme Court of Arizona, 8 Pac. Rep. 351, is in point, and upon similar facts, and it was there held that the plaintiff could not recover. While the case of *Allen* v. *Leonard*, 28 Iowa, 529, is directly in point; there the name given in the warrant was "James Allen," the true name of the party was "William V. Allen," the action was for false imprisonment, the court held, "if the plaintiff was the party against whom the information was filed, and for whose arrest the warrant was issued, although there was a mistake in his name, he could not recover as for false imprisonment or for assault and battery done under the authority of the process, even if innocent of the offence charged." See also *Bailey* v. *Wiggins*, 5 Harrington, (Del.) 462.

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

This was an action upon a marshal's bond, in the usual

form, the condition of which was that the marshal, by himself and his deputies, should faithfully perform all the duties of his office, and upon which any person injured by a breach of the condition might maintain an action. Rev. Stat. §§ 783, 784; *Lammon* v. *Feusier*, 111 U. S. 17. The breach relied on by Vandy M. West, the plaintiff in this case, was his arrest, against his protest, by a deputy of the marshal, under a warrant issued by a commissioner, commanding the arrest of "James West," and not otherwise designating or describing the person to be arrested, upon a complaint of the deputy marshal, charging James West with the murder of John Cameron. The defence was that the arrest of the plaintiff under that warrant was lawful. At the trial, it appeared that the plaintiff had never been known or called by the name of James West, or by any other name than his own. Notwithstanding which, the court, against the objections and exceptions of the plaintiff, admitted oral testimony of the commissioner and of the deputy marshal that the warrant was issued and intended for the arrest of the plaintiff; and instructed the jury that, if they believed that the plaintiff was the man for whose arrest the commissioner issued the warrant, the defendants were not liable for damages on account of the mere fact of arrest.

By the common law, a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him. If it does not, the officer making the arrest is liable to an action for false imprisonment; and if, in attempting to make the arrest, the officer is killed, this is only manslaughter in the person whose liberty is invaded. 1 Hale P. C. 577, 580; 2 Hale P. C. 112, 114; Foster's Crown Law, 312; 1 East P. C. 310; 1 Chit. Crim. Law, 39, 40; *Huckle* v. *Money*, 2 Wilson, 205; *Money* v. *Leach*, 3 Burrow, 1742, 1766, 1767; *S. C.* 1 W. Bl. 555, 561, 562; *Rex* v. *Hood*, 1 Moody C. C. 281; *Hoye* v. *Bush*, 1 Man. & Gr. 775; *S. C.* 2 Scott N. R. 86. Likewise, a warrant of arrest in a civil action, which does not name or describe the person to be arrested, is no justification of the officer. *Cole* v. *Hindson*, 6 T. R. 234; *Shadgett* v. *Clipson*, 8 East, 328; *Finch* v. *Cocken*, 2 Cr., M. & R.

196; *S. C.* 1 Gale, 130, and 3 Dowling, 678; *Kelly* v. *Lawrence*, 3 H. & C. 1.

The principle of the common law, by which warrants of arrest, in cases criminal or civil, must specifically name or describe the person to be arrested, has been affirmed in the American constitutions; and by the great weight of authority in this country a warrant that does not do so will not justify the officer making the arrest. *Commonwealth* v. *Crotty*, 10 Allen, 403; *Griswold* v. *Sedgwick*, 6 Cowen, 456, and 1 Wend. 126; *Mead* v. *Haws*, 7 Cowen, 332; *Holley* v. *Mix*, 3 Wend. 350, 354; *Scott* v. *Ely*, 4 Wend. 555; *Gurnsey* v. *Lovell*, 9 Wend. 319; *Melvin* v. *Fisher*, 8 N. H. 407; *Clarke* v. *Bragdon*, 37 N. H. 562, 565; *Johnston* v. *Riley*, 13 Georgia, 97, 137; *Scheer* v. *Keown*, 29 Wisconsin, 586; *Rafferty* v. *People*, 69 Illinois, 111.

In *Commonwealth* v. *Crotty*, for instance, in which Morris Crotty and others were indicted and convicted for a riot in resisting the arrest of Crotty upon a warrant commanding the arrest of "John Doe or Richard Roe, whose other or true name is to your complainant unknown," the conviction was set aside by the Supreme Judicial Court of Massachusetts, upon the grounds that the warrant was insufficient, illegal, and void, because it did not contain Crotty's name, nor any description or designation by which he could be known and identified as the person against whom it was issued, and was in effect a general warrant, upon which any other person might as well have been arrested, as being included in the description; and that "the warrant being defective and void on its face, the officer had no right to arrest the person on whom he attempted to serve it; he acted without warrant, and was a trespasser; the defendant whom he sought to arrest had a right to resist by force, using no more than was necessary to resist the unlawful acts of the officer; an officer who acts under a void precept, and a person doing the same act who is not an officer, stand on the same footing; and any third person may lawfully interfere to prevent an arrest under a void warrant, doing no more than is necessary for that purpose." 10 Allen, 404, 405.

The Fourth Article of Amendment of the Constitution of the United States declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The provision of section 1014 of the Revised Statutes, which authorizes an offender against the laws of the United States to be arrested and imprisoned or bailed, by a judge of the United States or a commissioner of the Circuit Court, in any State where the offender may be found, "and agreeably to the usual mode of process against offenders in such State," is necessarily subordinate to the declaration of the Constitution that all warrants must particularly describe the person to be seized.

The laws of the State of Texas in this regard are in conformity with this article of the Constitution of the United States. By the constitution of Texas, art. 1, sec. 9, "no warrant to search any place or to seize any person or thing shall issue, without describing them as near as may be, nor without probable cause, supported by oath or affirmation." And by the statutes of the State the warrant, as well as the complaint, "must specify the name of the person whose arrest is ordered, if it be known; if not known, then some reasonably definite description must be given of him;" and "the officer or person executing a warrant of arrest shall take the person whom he is directed to arrest forthwith before the magistrate." Penal Code of Texas, arts. 233, 236, 247; *Alford* v. *State*, 8 Texas App. 545, 562; *Hays* v. *Creary*, 60 Texas, 445; *Formwalt* v. *Hylton*, 66 Texas, 288.

The only cases cited by the defendants in error, which have any tendency to support the rulings at the trial, were in Delaware, in which the Chief Justice dissented, and in Iowa and Arizona, whose statutes provided that "the warrant must specify the name of the defendant, and, if it be unknown to the magistrate, may designate him by any name;" and in none of those cases was any notice taken of opposing prece-

dents or constitutional injunction. *Bailey* v. *Wiggins*, 5 Harrington, (Del.) 462; *Allen* v. *Leonard*, 28 Iowa, 529; Code of Iowa of 1860, § 4535; *Williams* v. *Tidball*, 8 Pac. Rep. 351; Compiled Laws of Arizona of 1877, c. 11, § 89.

In the case at bar, the effect of the rulings and instructions of the court was to give the jury to understand that the private intention of the magistrate was a sufficient substitute for the constitutional requirement of a particular description in the warrant. For this reason,

The judgment is reversed, and the case remanded with directions to set aside the verdict and to order a new trial.

UNITED STATES *v.* SHIELDS.

APPEAL FROM THE COURT OF CLAIMS.

No. 1130. Submitted March 26, 1894. — Decided April 16, 1894.

A District Attorney, whose place of abode is at a distance from the place at which court is held, is not entitled to mileage for travel in going to his home every Saturday, and in returning to the place of holding court the following Monday morning, during the continuous session of the court.

Sunday is a non-judicial day, which does not interrupt the continuity of a term of court.

Fees allowed to public officers depend upon the provisions of the statute granting them, and are not open to equitable construction by the courts or discretionary action on the part of officials.

THE case is stated in the opinion.

Mr. Assistant Attorney General Dodge for appellants.

Mr. Charles C. Lancaster for appellee.

MR. JUSTICE JACKSON delivered the opinion of the court.

It appears from the record that Robert S. Shields was United States District Attorney for the Northern District of Ohio from July 1, 1885, to December 31, 1889. During this period he

made up his accounts for services rendered by him, and also for mileage for travelling from his home in Canton to the place of holding the United States Circuit and District Courts. Part of these accounts were disallowed by the Treasury Department, whereupon Shields brought suit against the United States to recover the amount thus disallowed. Upon the hearing of the case the court below rendered judgment in favor of the claim of the appellee, and thereupon the United States requested an additional finding of fact. This request was granted, and it is upon the state of facts thus presented that the United States assigns error in the judgment of the court below.

The additional finding of fact reads as follows: "The sum of $278.50 is mileage at ten cents per mile for travel performed by claimant as District Attorney during the terms of the United States Circuit and District Courts in returning each Saturday during said terms to his home at Canton from Cleveland, the place of holding court, and going each Monday morning following to Cleveland to attend said courts on the business of the United States. The distance travelled each round trip was 116 miles. The accounting officers allowed and paid claimant $11.60 mileage for one trip only for each term of court, and they disallowed the above amount as unauthorized by law. The twenty-four round trips disallowed were performed between July 13, 1885, and September 27, 1885, and January 2, 1886, and March 28, 1886. The District Attorney made no charge for intervening Sundays."

The only question now involved in the case is whether such an officer, whose place of abode is at a distance from the place at which court is held, is entitled to mileage for travel in going to his home every Saturday, and in returning to the place of holding court the following Monday morning, during the continuous session of the court?

The appellee relies in support of his claim for mileage and in affirmance of the judgment below on that part of section 824, Revised Statutes, which provides: "For travelling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examina-

tion before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning."

This provision of section 824 has been modified by section 7 of the act of February 22, 1875, c. 95, 18 Stat. 333, 334, which, in respect to mileage for attorneys, marshals, and clerks, enacts that "from and after the first day of January, eighteen hundred and seventy-five, no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law."

This being the provision of law in force as to mileage during the period covered by the claim of the appellee, can it be properly said that going to his home on Saturday afternoon and returning the Monday morning following was travel "actually and necessarily performed?" It certainly cannot be held to be travel necessarily performed in the public service. Mileage allowed to public officials involves the idea that the travel is performed in the public service, or in an official capacity. The appellee lived at Canton, Ohio, fifty-eight miles from Cleveland, where the court was held, and he made the journey to and from his home once a week for the purpose of spending Sunday with his family. If he is entitled to mileage for each one of these trips, made during the uninterrupted session of the court, it is difficult to see upon what principle he would not be entitled to mileage for a daily trip of that sort, which would enable him to spend each night of the week at home. Suppose that his place of abode had been ten, fifteen, twenty, or twenty-five miles from Cleveland, and instead of going home Saturday afternoon and returning Monday morning, he had made the trip to his place of residence each afternoon of the court week and returned the following morning, could it be held that it was the true meaning and intent of Congress that he should be allowed mileage for these daily trips? We think clearly not. Section 824, and the above-quoted act of February 22, 1875, will not admit of a construction which would give the right to mileage under such circumstances. There is, in principle, no essential difference

between the claim for mileage on a daily trip to and from the officer's home, and a weekly trip when performed for his own pleasure and convenience so as to spend Sunday at home. The travel, whether made daily or weekly, cannot be said to have been made in the character of a public official, or in the performance of a public service, but merely in a private and unofficial capacity.

The findings of fact in this case show that there was no interruption in the session of the court. Sunday was a non-judicial day, which did not interrupt the continuity of the term; besides, prior to the act of March 3, 1887, c. 362, 24 Stat. 509, 541, district attorneys were entitled to a per diem compensation of five dollars, including Sundays. This allowance clearly contemplated that an attorney, during the term of the court, might or would be detained on Sunday at the place where the court was held. It is true in the present case that the District Attorney has made no claim for a per diem allowance for Sunday, but it certainly cannot be held that this left it optional with him to waive his per diem fee and take mileage to and from his home in lieu thereof as a matter of pleasure or convenience to himself, especially when the mileage exceeded the per diem allowance. Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statute. They are not open to equitable construction by the courts nor to any discretionary action on the part of the officials.

The decision of the court below proceeded upon the authority of *United States* v. *Harmon*, 147 U. S. 268, 278, in which there was a claim for mileage by a United States marshal, and it was held that "if the court sits for any number of days in succession he should continue in attendance, and is entitled to only one travel. But if the court is adjourned over one or more intervening days, he is not obliged to remain at his own expense at the place of holding court, but may return to his home and charge travel for going anew to attend the term at the day to which it is adjourned. His right to charge travel for going to each special court or special term is, if possible, still clearer, and is scarcely contested."

In that case the agreed statement of facts on which the case was submitted to the judgment of the Circuit Court showed only that the sum in dispute was "charged for travel on days when said courts were held by an adjournment over an intervening day, and were not held on consecutive days." It did not appear whether such an adjournment included judicial or non-judicial days. The statement of facts, as well as the opinion of this court in that case, implied that there was an interruption in the term, and that the adjournment or suspension of the term was of such a character that the marshal would have been obliged to have remained at his own expense at the place of holding the court during the period of such interruption or adjournment, and from this fact it was considered that he might return to his own home and charge travel for going anew to attend the term at the day to which it was adjourned. In the present case there was, however, no cessation, interruption, or adjournment of the court for any judicial day of the term, but only from Saturday to Monday, leaving the District Attorney entitled to his per diem allowance for remaining at the place of holding the court for the non-judicial day — Sunday. Such an adjournment as that cannot be considered as an interruption of the term, or as a suspension of the business of the court, so as to bring the present case within the rule laid down in *United States* v. *Harmon*, 147 U. S. 268.

We are not inclined to extend the rule there laid down, and apply it to the case under consideration, in which we are clearly of opinion that the mileage charged and allowed the District Attorney for the twenty-four weekly trips, made during the term, is not sanctioned or supported by any fair construction of the law applicable to the question.

The judgment of the Court of Claims for the item of $278.50 is reversed and the cause remanded with directions to render judgment for the United States as to this item.

UNITED STATES *v.* KLINGENBERG.

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

No. 1066. Submitted March 26, 1894. — Decided April 23, 1894.

The action of a collector of customs under § 2 of the act of June 10, 1890, c. 407, 26 Stat. 131, in estimating the value of paper florins of Austria-Hungary, in which the value of imported merchandise is expressed in the invoices, and converting them into the currency of the United States, is not the subject of appeal to and reversal by the board of general appraisers.

A Circuit Court of the United States has jurisdiction to review the action of a board of general appraisers in entertaining such an appeal, and in reversing the action of a collector in that respect.

THE case is stated in the opinion.

Mr. Solicitor General for appellants.

Mr. W. Wickham Smith for appellee.

MR. JUSTICE JACKSON delivered the opinion of the court.

The question presented for our consideration by the record in this case is whether the Circuit Court of the United States for the Southern District of New York has jurisdiction to review the decision of the board of general appraisers reversing the action of the collector of the port of New York in estimating the value and converting paper florins into the currency of the United States on importations of merchandise, the invoices of which were expressed in paper florins of Austria-Hungary, from which country the importations were made.

The appellee, in July, 1892, imported certain merchandise, consisting of china and glass ware, from Austria-Hungary, which were entered for consumption at the port of New York on July 23, 1892. The invoices of this merchandise were made

out in (paper) florins of Austria-Hungary, in accordance with the provisions of section 2 of the Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131, which requires that "all invoices of imported merchandise shall be made out in the currency of the place or country from whence the importation shall be made." No consular certificate giving the value of the paper florin accompanied the invoices or was produced by the importer. In reducing the currency of the invoices into money of account of the United States the collector of the port estimated the florin at $0.482, which was the value of the gold florin as proclaimed by the Treasury Department July 1, 1892. The importer duly protested against this action of the collector, because the invoices accompanying the merchandise were not expressed in gold florins, and because in estimating the value of the Austrian florin the collector should have adopted the silver florin as the standard value, as last proclaimed by the Secretary of the Treasury, which was $0.32; that the collector's adoption of the value of the gold florin as the standard necessarily increased the amount of duties to be paid on the importations.

The protest of the importer having been made in due time and form was transmitted by the collector to the board of general appraisers at the port of New York, who, after hearing testimony, decided that the collector should have estimated the florins of the invoices at $0.32 instead of at $0.482, and directed the reliquidation of the entry of the goods on that basis.

Thereupon the collector, on behalf of the United States, made application to the Circuit Court of the United States for the Southern District of New York for a review of this decision of the board of general appraisers. The petition set out the facts already stated, and claimed that the board of general appraisers was in error in holding that the reduction of the currency of the invoice into money of account of the United States should have been $0.32 to the florin, for the reason that by the estimate of the Director of the Mint, and the proclamation of the Secretary of the Treasury, made July 1, 1892, in conformity with section 52 of the tariff act of Octo-

ber 1, 1890, 26 Stat. 567, it appeared that silver was "the nominal standard, paper the actual standard, the depreciation of which is measured by the gold standard," which, under the proclamation, was fixed at $0.482; that under the values fixed by this proclamation the board erred in reversing the decision of the collector, and in sustaining the protest of the importer in the premises.

The importer moved to dismiss the application of the collector on the ground that the decision of the board of general appraisers complained of could not be reviewed by the Circuit Court under section 15 of the Customs Administrative Act, because that decision related neither to the classification of the merchandise, nor to the rate of duty thereon. The Circuit Court being of opinion that it had no jurisdiction to enter upon, hear, and decide the questions presented by the collector's petition, granted the motion, and dismissed the application. The United States being dissatisfied with this ruling, the Circuit Court, under the provisions of section 5 of the act of March 3, 1891, c. 517, 26 Stat. 827, certified the question of its jurisdiction in the premises to this court.

It is insisted on behalf of the United States that the collector's decision as to the value of the florin, under the provisions of law and the proclamation of values made by the Secretary of the Treasury on July 1, 1892, was conclusive and not subject to review by the board of general appraisers. This position is rested upon the rule laid down in the cases of *The Collector* v. *Richards*, 23 Wall. 246, 259; *Cramer* v. *Arthur*, 102 U. S. 612; and *Hadden* v. *Merritt*, 115 U. S. 25, 27.

By section 1 of the act of March 3, 1873, 17 Stat. 602, it was provided "that the value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value, and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the Director of the Mint, and proclaimed on the first day of January by the Secretary of the Treasury." In pursuance of that act the Director of the Mint having estimated the value of the franc of France at nineteen cents and three mills, and the Secretary of the Treas-

ury having on January 1, 1874, proclaimed it, the question arose in the case of *The Collector* v. *Richards*, 23 Wall. 246, 259, whether goods invoiced in French francs and entered in a custom-house here in March, 1873, were to be charged at this new valuation of the franc. It was said by Mr. Justice Bradley, who delivered the opinion of the court in that case, that "it seems to us . . . that the statute adopts the true method of computing the value of foreign money. The basis of our dollar of account . . . is the standard gold dollar of 25.8 grains, containing one-tenth alloy. The actual coinage in circulation may be diminished in value by abrasion, and this may have some effect on the dollar of account. But the same thing is true in other countries, as the assays in the mint have shown; and the true method of comparing their money of account with ours, when both are based on actual coin, is to compare the standard coins of the two countries in a perfect state, and to ascertain the actual amount of pure metal in each. This is the result at which Congress seems to have arrived, and, as we think, wisely. In making the comparison of the moneys of different countries, their gold coins, if they have such, are employed for the purpose; gold having become the general medium of international exchange, whilst silver is regarded more as a domestic coin, and is usually made a legal tender for only limited amounts. This practice, together with the rejection of the alloy from the estimate, is in accordance with the rules laid down on the subject by the most enlightened economists."

This first section of the act of March 3, 1873, was carried into section 3564 of the Revised Statutes, and again came under consideration in *Cramer* v. *Arthur*, 102 U. S. 612, 619, in connection with section 2903, Revised Statutes, providing for the case of invoices made out in a depreciated currency issued and circulated under authority of any foreign government, and pursuant to which section regulations were established declaring that where the standard value of a foreign currency has been proclaimed by the Secretary of the Treasury, in the manner provided by law, such value shall control in estimating custom duties, unless collectors have been in-

structed otherwise, or unless a depreciation of the value of that currency, "expressed in an invoice from the standard of that currency, shall be shown by consular certificate thereto attached." There was a consular certificate in that case certifying the value of the Austrian florin, and the plaintiff sought to go behind the valuation estimated by the Director of the Mint, and proclaimed by the Secretary of the Treasury, but this was not permitted, for the reason that the value of the Austrian florin, as ascertained and fixed by the Director of the Mint and the proclamation of the Secretary of the Treasury, was as conclusive as though fixed by the statute itself, and all parties interested were conclusively bound thereby. Mr. Justice Bradley, speaking for the court, said: "The proclamation of the Secretary, and the certificate of the consul, must be regarded as conclusive. In the estimation of the value of foreign moneys for the purpose of assessing duties, there must be an end to controversy somewhere. When Congress fixes the value by general statute, parties must abide by that. When it fixes it through the agency of official instrumentalities, devised for the purpose of making a near approximation to the actual state of things, they must abide by the values so ascertained. If the currency is a standard one, based on coin, the Secretary's proclamation fixes it; if it is a depreciated currency, the parties may have the benefit of a consular certificate. To go behind these and allow an examination by affidavits in every case would put the assessment of duties at sea. It would create utter confusion and uncertainty."

In the subsequent case of *Hadden* v. *Merritt*, 115 U. S. 25, 27, construing sections 2838 and 3564, the former requiring all invoices of merchandise subject to a duty *ad valorem* to be made out in the currency of the place or country from whence the importation shall be made, and that they shall contain a true statement of the actual cost of such merchandise in such foreign currency or currencies, without any respect to the value of the coins of the United States, or of foreign coins, by law, made current within the United States in such foreign place or country, section 3564 was in the same language as

section 1 of the act of March 3, 1873, above referred to. It was held in that case that "the value of foreign coins, as ascertained by the estimate of the Director of the Mint and proclaimed by the Secretary of the Treasury, is conclusive upon custom-house officers and importers. No errors alleged to exist in the estimate, resulting from any cause, can be shown in a judicial proceeding to affect the rights of the government or individuals. There is no value, and can be none, in such coins, except as thus ascertained; and the duty of ascertaining and declaring their value, cast upon the Treasury Department, is the performance of an executive function requiring skill and the exercise of judgment and discretion which precludes judicial inquiry into the correctness of the decision. If any error in adopting a wrong standard, rule, or mode of computation, or in any other way, is alleged to have been committed, there is but one method of correction, that is, to appeal to the department itself. To permit judicial inquiry in any case is to open a matter for repeated decision, which the statute evidently intended should be annually settled by public authority; and there is not, as is assumed in the argument of the plaintiff in error, any such positive and peremptory rule of valuation prescribed in the statute as serves to limit the discretion of the Treasury Department in making its published estimate, or would enable a court to correct an alleged mistake or miscalculation. The whole subject is confided by the law exclusively to the jurisdiction of the executive officers charged with the duty, and their action cannot be otherwise questioned."

Section 2 of the Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131, is a substantial reproduction of section 2838 of the Revised Statutes, in providing that all invoices of imported merchandise shall be made out in the currency of the place or country from whence the importations shall be made, or if purchased in that currency shall be a true statement of the amount actually paid therefor; and section 52 of the tariff act of October 1, 1890, c. 1244, 26 Stat. 567, is a reproduction of section 3564, with the exception that it provides that the value of standard coins of foreign countries

shall be estimated quarterly, instead of annually, by the Director of the Mint, and be proclaimed by the Secretary of the Treasury on the first day of January, April, July, and October of each year.

These provisions being substantially reënactments of former laws, must, upon well-settled principles, be interpreted in the light of the decisions already referred to, and the estimate of the Director of the Mint, as proclaimed by the Secretary of the Treasury, fixing the values of foreign coin or currency in terms of the money of account of the United States, must be held equally conclusive both upon the government and the importer as under the former statutes.

In accordance with the provisions of section 52 of the tariff act of 1890, after the Director of the Mint had made his estimate of the value of foreign coins, the Secretary of the Treasury on July 1, 1892, issued his proclamation as to the "values of coins in terms of money of account of the United States, to be followed in estimating the value of foreign merchandise exported to the United States on and after July 1, 1892, expressed in any such currencies." (Treas. Synopsis, 13,003.) That portion of the proclamation relating to Austria-Hungary gave the value of the gold florin at $0.482, and of the silver florin at $0.32 in terms of the United States gold dollar. In a foot-note to the proclamation is this statement: "Silver, the nominal standard; paper, the actual standard, the depreciation of which is measured by the gold standard."

Under and in pursuance of this proclamation of the Secretary of the Treasury, fixing the value of the Austria-Hungary silver and gold florins, and in the absence of a consular certificate as to the value of the paper florin, the question which was presented for the collector's action and decision was whether the paper florin of the invoices should be estimated on the basis of the value of the gold or the silver florin. The collector adopted the value of the gold florin as the proper standard, while the importer insisted that the value of the silver florin, as proclaimed, should have been adopted as the standard.

We are of opinion that the collector's action and ruling on the question was correct, for the reason that in the proclamation and the foot-note attached thereto, silver was stated to be only the nominal standard, while paper was the actual standard, the depreciation of which was to be measured by the gold standard. It was not shown, however, that the paper florin of the invoices was actually depreciated, as compared with the gold standard, and the value was properly taken as that of the gold florin, — the real standard with which it was to be compared, — gold having become, as stated in *The Collector* v. *Richards*, 23 Wall. 259, 260, the general medium of international exchange, while silver was regarded more as a domestic coin. The collector was not authorized to presume that the paper florin was so depreciated as to be reduced to the value of the silver florin, which under the proclamation of the Secretary of the Treasury was only referred to as the nominal standard. If there had been a consular certificate with the invoices, showing that the paper florin was simply and merely of the value of the silver florin, the claim of the importer would have had some foundation upon which to rest, but in the absence of such a certificate the collector was clearly authorized in assuming that the currency of the invoices was equal in value to that of the real standard, which was the gold florin.

Section 52 of the Customs Administrative Act provides that the value of the foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of the coin of standard value, and the proper construction of the proclamation, in the absence of a consular certificate as to the value of the paper florin, required the collector to adopt the gold florin as the pure metal and the better standard, rather than the value of the silver florin, which was referred to as only a " nominal standard."

This being the proper construction to be placed upon the proclamation of July 1, 1892, we are of opinion that the collector's action in adopting the value of the gold florin at the estimate fixed therein was not subject to review by the board of general appraisers, under the principle laid down in the

authorities already referred to. If the action of the collector was conclusive, certainly the Circuit Court of the United States had jurisdiction to pronounce the decision of the board reversing the collector's ruling null and void.

But suppose the collector's construction of the law and the proclamation imposed on the importer a greater amount of duties than he was properly chargeable with, and that he had a right, after protest, to have that question reviewed on appeal by the board of general appraisers, is the decision of that board, reversing the collector's action, conclusive on him and on the United States, whom he represents? On the assumption that an appeal did lie from the collector's action to the board of general appraisers, the question as to the jurisdiction of the Circuit Court to review the adverse action of the board must depend upon the proper construction to be placed on sections 13, 14, and 15 of the Customs Administrative Act of June 10, 1890.

The thirteenth section of the act relates solely to the appraisement of imported merchandise, and declares that the decision of the board of general appraisers "shall be final and conclusive as to the dutiable value of such merchandise," and directs the collector to ascertain, fix, and liquidate the amount of duties to be paid on such valuation.

Section 14 provides that the decision of the collector as to the "rate and *amount* of duties, . . . including all dutiable costs and charges, and as to all fees and exactions of whatever character, except duties on tonnage, shall be final and conclusive," unless the importer appeals to the board of general appraisers. This section clearly allows and provides for an appeal by the importer from the decision of the collector, as to both rate and amount of duties, as well as dutiable costs and charges, and as to all fees and exactions.

By section 15, so far as it relates to the matter in question, it is provided that "if the importer . . . or the collector . . . shall be dissatisfied with the decision of the board of general appraisers as provided for in section 14 of this act, as to the *construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed*

thereon under such classification, they, or either of them, may . . . apply to the Circuit Court . . . for a review of the questions of *law and fact* involved in such decision." This section further provides for certifying all the evidence taken before the general appraisers and their decision thereon, (and for the taking of further testimony,) which is made to constitute the record on which the Circuit Court is to hear and determine the questions of law and fact involved in the decision of the board of general appraisers. This section in express terms provides that the Circuit Court shall have jurisdiction to review, not merely questions of law and fact respecting the classification of imported merchandise and the rate of duty imposed thereon under such classification, but such right of review extends to the decision of the board upon all questions and matters in respect to which an appeal will lie thereto under the provisions of section 14. In other words, the right of review by the Circuit Court is coextensive with the right of appeal to the board as to all matters except the *dutiable value* of the imported merchandise, as to which the decision of the board of general appraisers is by section 13 made conclusive.

Now, by section 14 of the act, if the decision of the collector imposes an excessive amount of duties, under an improper construction of the law, the importer may take an appeal to the board of general appraisers, whose decision on such questions is not made conclusive as it is in respect to the *dutiable value* of the merchandise, and not being conclusive, it is subject to review under the express provisions of section 15.

The action of the collector in the present case did not relate either to the classification of the goods, or to the rate of duty imposed thereon, but, as conceded by counsel for the appellee, merely increased the amount of duties to be paid by the importer to the extent of the difference between $0.32, as the value of the silver florin, and $0.482, as the value of the gold florin, in the currency of account of the United States. This involved no dispute between the parties as to either classification or rate of duty; or the dutiable value of the imported merchandise. But it did involve the proper construction of

the law, as embodied in section 52 of the tariff act of 1890, and the estimate of the florin as made by the Director of the Mint, and as proclaimed by the Secretary of the Treasury on July 1, 1892, made in pursuance thereof.

Now, it is claimed on behalf of the appellee that the rule laid down in *In re Fassett*, 142 U. S. 479, 487, and in *Passavant* v. *United States*, 148 U. S. 214, sustains the action of the Circuit Court in declining to take jurisdiction for the purpose of reviewing the decision of the board of general appraisers in reversing the action of the collector. There is nothing in *In re Fassett* even intimating that on the question here under consideration the Circuit Court has no jurisdiction to review the decision of the board of general appraisers. It was said in that case that "the appeal provided for in section 15 brings up for review in court only the decision of the board of general appraisers as to the construction of the law, and the facts respecting classification of imported merchandise, and the rate of duty imposed thereon under such classification." The question in that case was whether a British-built pleasure steamer yacht, purchased in England by a citizen of the United States, and entered at the port of New York, was liable to duty as an imported article. The case did not in any way involve the question here under consideration.

In the subsequent case of *Passavant* v. *United States*, 145 U. S. 214, the only question presented for the consideration and determination of the court was whether the *dutiable value* of imported merchandise, as fixed and ascertained by the board of general appraisers, was subject to review in the Circuit Court. It was held that it was not, for the reason that by section 13 of the act of June 10, 1890, the decision of the board of general appraisers was declared to be "final and conclusive" as to the dutiable value of such merchandise against all parties interested therein. This clear and explicit language of the statute left no room for construction, and the decision in *Passavant* v. *United States* went only to the point of holding that the *dutiable value* of imported merchandise, as fixed by the board of general appraisers, was conclusive, and not subject to review by the Circuit Court.

Neither of these cases, in their facts nor in the principles on which they proceed, is directly in point or controlling of the present case.

Under a proper construction of sections 14 and 15 of the act of June 10, 1890, it cannot be held that the right of review by the Circuit Court is limited and confined, as contended by the appellee, to the two subjects of classification and the rate of duty. By section 14, the collector's decision on rate and amount of duties, including all dutiable costs and charges, and as to all fees and exactions of whatever character, (except duties on tonnage,) may be the subject of appeal to the board of general appraisers. The subjects of review by the Circuit Court, provided for by section 15, extend to all questions of law and fact in respect to which the board of general appraisers have appellate jurisdiction, except the decision of that board as to the dutiable value of merchandise, which is provided for by section 13, and is made conclusive against all parties interested.

We, therefore, are of opinion, first, that the collector's action in estimating the value of the florin was not the subject of appeal to and reversal by the board of general appraisers, and if it was not it was proper for the Circuit Court to so declare, and reverse the board; secondly, if the right of appeal to the board did exist, then the Circuit Court of the United States had undoubted jurisdiction to review that decision on the application of the collector.

The action of the Circuit Court dismissing the bill for want of jurisdiction is accordingly reversed, and the cause remanded to be proceeded with in conformity with this opinion.

LUTZ *v.* MAGONE.

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

No. 336. Argued April 3, 1894. — Decided April 23, 1894.

Saccharine, imported into the United States in 1887, was not entitled to free entry as an acid.

THIS was an action by the administrators of Louis Lutz to recover duties alleged to have been illegally exacted by defendant upon certain importations of saccharine made by Lutz, in 1887, under the firm name of Lutz & Movius. The collector classified the article as a "chemical compound" under the act of 1883, c. 121, 22 Stat. 488, and as falling within the description of "All preparations known as essential oils, expressed oils, distilled oils, rendered oils, alkalis, alkaloids, and all combinations of any of the foregoing, and *all chemical compounds* and salts, by whatever name known, and not specially enumerated or provided for in this act, twenty-five per centum ad valorem." The plaintiffs claimed that the importations were entitled to free entry as "*acids* used for medicinal, chemical, or manufacturing purposes, not specially provided for or enumerated in this act." 22 Stat. 494, 516.

On the trial the collector claimed that they were "proprietary preparations, to wit, all . . . preparations or compositions recommended to the public as proprietary articles, or prepared according to some private formula, as remedies or specifics for any disease or diseases or affections whatever affecting the human or animal body, . . . not specially enumerated or provided for in this act, fifty per centum ad valorem." 22 Stat. 494.

The case was tried before a jury, and upon the conclusion of the testimony, counsel for the defendant moved the court to direct the jury to find for the defendant, upon the ground (1) that the article was not an acid used for medicinal, chemical, or manufacturing purposes; (2) that, whether or not it was an

acid, it was a preparation or composition recommended to the public as a proprietary article; and (3) that, if it were not so dutiable, then that it was dutiable as a chemical compound by whatever name known. The court granted this motion, and thereupon the jury returned a verdict for the defendant, and the importer sued out this writ of error.

Mr. Albert Comstock for plaintiffs in error.

Mr. Assistant Attorney General Whitney for defendant in error.

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

Upon the trial evidence was given tending to show that saccharine was invented in 1879; that, although about three hundred times as sweet as sugar, it was chemically an acid; that its chemical name is orthosulphamin benzoic acid anhydrid, and the last step in its manufacture is the separation from orthosulphamin benzoic acid of the water therein contained; that it is a patented article, made by a known formula, and a dry white powder, sweet to the taste, worth from $13 to $15 per pound; that it is used as a sweetening agent, in manufacturing purposes, such as soda water, liquors, wines, chewing tobacco, preserves, medicines, etc.; that it has no medicinal effect upon the human or animal system, and that its principal use is to sweeten articles of medicine or food in order to render them palatable. It was also shown that it possessed some of the inherent qualities of an acid, in the fact that it turned blue litmus paper red, and would neutralize an alkaline such as bicarbonate of soda; that it was what is termed an "anhydrid" or anhydrous acid, which means an acid free from water. The plaintiffs also offered in evidence a treatise on chemistry, which gave the formula for the manufacture of saccharine, and classed it as an acid. This book was excluded upon motion of the defendant.

Defendant also gave evidence tending to show that, in neither of the three patents obtained by the inventor, was

saccharine called an acid; although it was spoken of as a compound. There was also put in evidence a circular of the plaintiffs purporting to describe the origin, manufacture, and use of saccharine, in which it was stated to be "neither a drug nor a food, but a neutral and indifferent substance," and "of paramount value whenever a bitter taste has to be neutralized or counteracted;" of particular value in medicine to disguise the bitter taste of alkaloids, such as quinine, morphine, etc., and especially "an invaluable boon to all persons afflicted with diabetes," for sweetening their food. It appears to be manufactured from toluene, which is itself a product of coal tar.

Plaintiffs relied for its classification as an acid upon the scientific definition of the article, which is rather that of an "anhydrid," defined by Webster as "an oxyd . . . capable of forming an acid by uniting with the elements of water," than a true acid. It is entirely well settled, however, that in the interpretation of the revenue laws, words are to be taken in their commonly received and popular sense, or according to their commercial designation, if that differs from the ordinary understanding of the word. Customs officers are presumed to be acquainted with the ordinary meaning of words, and may also be presumed to have some familiarity with trade designations and the customs of dealers. They are not, however, supposed to be chemists, scientists, or professional men, nor to be conversant with the terms of particular arts. Thus in *The Two Hundred Chests of Tea*, 9 Wheat. 430, 438, it was argued that the tea in controversy, imported as Bohea, was in reality simply Congo tea, and not Bohea; that the latter was a pure unmixed tea, known in China by an appropriate name; and that to this pure and unmixed Bohea tea the acts of Congress referred, and not to any other mixed tea, though known by the common designation of Bohea. It was held, however, to be unnecessary to enter upon this inquiry, "because Congress must be understood to use the word in its known commercial sense." "The object of the duty laws," said Mr. Justice Story, "is to raise revenue, and for this purpose to class substances according to the general usage and known denomina-

tions of trade. Whether a particular article were designated by one name or another, in the country of its origin, or whether it were a simple or mixed substance, was of no importance in the view of the legislature. It did not suppose our merchants to be naturalists, or geologists, or botanists. It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic." See also *Marvel* v. *Merritt*, 116 U. S. 11; *Robertson* v. *Solomon*, 130 U. S. 412, 414; *Mason* v. *Robertson*, 139 U. S. 624, 627; *United States* v. *Breed*, 1 Sumner, 159, 164.

Particularly is this the case when the scientific designation contradicts so directly the popular idea of the article in question, as it does in the case of saccharine. To speak of a substance as an acid, which is admitted to be three hundred times as sweet as sugar, is to confuse all our natural impressions with respect to the relative qualities of acidity and sweetness. These terms should be received in their ordinary acceptation. An acid is described by Webster primarily as "a sour substance," and chemically as "one of a class of compounds, generally, but not always, distinguished by their sour taste, solubility in water, and reddening of vegetable blue or violet colors;" giving also some other distinguishing characteristics. To class saccharine as an acid because it imparts a reddish color to litmus paper is to make an accidental and occult property of the article dominate its well known and popular quality of sweetness, for which it is exclusively used. In the Encyclopædia Britannica flint is said to be "a true acid, because, when it is heated along with soda or lime, it forms the new body commonly called glass, which is chemically a salt of silicic acid." It would be little less, however, than an abuse of terms to classify flint as an acid for revenue purposes. While saccharine may be defined by scientists as an acid anhydrid, having "an acid reaction," or simply as an acid, it is not so denominated in the dictionaries, but is defined as "a trade name for benzoic sulphinide," which latter is said to "have acid properties, and forms salts." (Webster.) We do not wish to be understood as holding that in no case will the

scientific designation of an article be of value in fixing its proper classification for duties, but that in a case where the popular idea of an article and its actual use in the arts are so diametrically opposed to its scientific designation the latter should not prevail.

Counsel for the government has laid great stress upon the proposition that even if saccharine were to be considered as an acid, it is not used as an acid for medicinal, chemical, or manufacturing purposes, and, therefore, was not entitled to free entry under the paragraph relied upon. It is not perceived, however, that this argument lends any additional strength to the position of the government in this connection. It is used for manufacturing purposes, and if not used for such purposes *as an acid*, it is because it is not in its nature an acid, and not because it may be used for some other purposes as such.

In the view we have taken of this case it is unnecessary to determine whether defendant was correct in classifying saccharine as a "chemical compound," or whether it falls within the description of "proprietary preparations." For the purposes of this case it is sufficient to hold that the article was not entitled to free entry as an acid. If there were any errors in the exclusion of testimony, as to which we express no opinion, there were none such as worked a prejudice to the plaintiffs.

The judgment of the court below is, therefore,

Affirmed.

HEGLER *v.* FAULKNER.

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

No. 166. Submitted December 13, 1893. — Decided April 23, 1894.

A report of the names of Indians and half-breeds entitled to participate in an allotment of land, made under the act of July 31, 1854, 10 Stat. 315, to the Indian bureau under instructions to report in full a list of all applicants, showing names, age, sex, etc., is not admissible in evidence

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in an action between two parties, each of whom claims under the same person and the same allotment, in order to show the age of that person at the time of the allotment.

In view of the Nebraska statutes concerning the operation of statutes of limitation, there was no error in the instruction of the court below in that respect.

J. D. HEGLER, a citizen of the State of Ohio, brought an action in the District Court of Richardson County, Nebraska, on October 4, 1878, against George Faulkner, James Cottier, August Schoenheit, and Edwin S. Towle, citizens of the State of Nebraska, to recover from the defendants the possession of certain land situated in the county of Richardson, to which land the plaintiff, in his petition, claimed title, and also to recover the rents and profits of the said property for the period for which such possession had, as alleged, been withheld. Upon motion of the defendants, the case was removed, on March 25, 1879, into the Circuit Court of the United States for the District of Nebraska, where the defendants filed an answer to the petition, on May 17, 1879, denying that the plaintiff then had, or had ever had, any title to the land in question, and asserting title thereto in themselves. The case was tried in the Circuit Court, before the court and a jury, and, a verdict having been found for the defendants, judgment in their favor was entered on January 10, 1885. The case was then brought to this court upon a writ of error sued out by the plaintiff, but because the record, as then filed, contained no petition or order for the removal of the case from the state court to the said Circuit Court, nor any statement of the citizenship of the parties, and because it did not appear, therefore, that the Circuit Court had had jurisdiction of the case, the judgment was reversed, and the case remanded for further proceedings. 127 U. S. 482. Those defects in the record were afterwards cured, and on June 13, 1889, judgment was again entered in the court below in favor of the defendants, and the plaintiff again sued out a writ of error from this court.

On the trial the plaintiff introduced evidence tending to show that on April 15, 1859, George Washington, a half-breed

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Indian of the Iowa tribe, received from William M. Stark, special Indian agent, a certificate of allotment of the land in controversy, issued by virtue of the provisions of the act of Congress of July 31, 1854, c. 167, § 5 [4], 10 Stat. 315, 332, which gave effect to a treaty made on July 30, 1830, 7 Stat. 328, under which certain lands belonging to the tribes, which joined in the treaty, were set apart for the half-breeds of those tribes, by directing the President to cause the reserved tracts described in the treaty to be surveyed and allotted in fee simple to the persons entitled to receive them; that on April 16, 1859, George Washington conveyed the land so allotted to him to Houston Nuckolls; that Nuckolls conveyed the same on April 20 to A. S. Ballard; that Ballard conveyed to James McMillan on September 16, and that on October 13, 1859, McMillan conveyed to the plaintiff. On September 10, 1860, as the plaintiff's evidence further tended to show, George Washington received from the government a duly executed patent for the land.

The defendants also claimed to derive title from George Washington, the evidence on their behalf tending to prove that by deed, dated November 3, 1866, he conveyed the land to the defendants Schoenheit and Towle, and that on February 28, 1868, he executed another deed to the same parties for the same property.

For the purpose of showing that George Washington was of full age when he transferred the land to Nuckolls, the plaintiff offered in evidence a list bearing the heading, "Office of Indian Affairs," the date February 4, 1858, and containing the name, sex, age, degree of blood, and tribe of certain Indians. Upon this list was the name of George Washington, and opposite the name appeared the figures 20, in the column headed "Age." The agent, Stark, testified that this list was received by him from the Indian department, and that it contained the names of the half-breeds entitled to allotment of land in the reservation described in the treaty.

To show under what directions of the government the list was prepared, the plaintiff offered in evidence a letter from the Commissioner of Indian Affairs to Joseph L. Sharp, which

Counsel for Plaintiff in Error.

began with a statement of the provisions of the treaty above referred to, and of the said act of Congress, and proceeded as follows:

"To enable the President to comply with the act it is necessary to ascertain the number and names of the half-breeds and mixed bloods entitled to participate. You have been appointed commissioner to act under the following instructions: To give notice for all persons interested to appear before you with their applications and evidence. Before commencing to take testimony consult with the Indian agents and chiefs of the tribes. In making report have regard not merely to proof applicants may submit, but also to information from above mentioned and other sources you consider reliable. You will be furnished by the superintendent of Indian affairs at St. Louis with all the information he may discover bearing on the subject. I direct that you prepare your report in full to embrace a list containing names of all applicants, arranged by tribes and families and single persons, showing names, age, sex, relationship to the tribe, place of residence, who are orphans or wards, and such other facts as you consider useful and proper. In every case, whether admitted or rejected, give briefly your reasons. Transmit your report, with evidence taken, to this office without delay. The several Indian agents for the particular tribes will be instructed to render you all proper assistance in the premises. Before commencing your duties take and subscribe an oath of office before some officer authorized to administer oaths, that you will support the Constitution of the United States and faithfully discharge your duties as such commissioner, which transmit to this office."

Upon objection made by the defendant, the court excluded the portion of Stark's testimony relating to the list, and refused to admit the list or the letter of instructions to Sharp in evidence. To these acts of the court the plaintiff excepted, and likewise to certain instructions given and refused.

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

Argument for Plaintiff in Error.

The statutes then in force in Nebraska, so far as applicable to this case, are as follows: "Sec. 42. A minor is bound not only by contracts for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority and restores to the other party all money or property received by virtue of the contract and remaining within the control of the ward at any time after attaining his majority. Sec. 43. No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority or from his having engaged in business as an adult, the other party has good reason to believe the minor capable of contracting." Sess. Laws Neb., 2d session, 165.

This act was taken from the Iowa Code. See for its interpretation, *Oswald* v. *Broderick*, 1 Iowa, 380; *Prouty* v. *Edgar*, 6 Iowa, 353.

A reasonable time for an infant to disaffirm is not a question of law, as held by the court, but a question of fact to be determined upon the circumstances of each case. *Jenkins* v. *Jenkins*, 12 Iowa, 195; *Stout* v. *Merrill*, 35 Iowa, 47; 1 Greenl. Ev. § 49 (14 ed.). Two years is an unreasonable time, but the court in this case erroneously instructed that, as a matter of law, a year or so was not unreasonable. *Wright* v. *Germain*, 21 Iowa, 585. At the time of the transactions involved herein, the law of Nebraska limiting the time for infants to sue after coming of age was as follows: "Sec. 246. The above limitation of action for the recovery of real property shall not apply to minors so far as to prevent them from having at least one year after attaining their majority within which to commence such actions." Sess. Laws Nebraska, 1865, 1st sess., p. 81. By analogy we can fairly say that, unless there be special circumstances taking the case out of the general rule, infants must disaffirm deeds within one year after becoming of age.

A superficial glance over this record will convince the court, the great fundamental error committed by the court below was, in permitting itself to go behind the finding and judgment of the President of the United States through a branch

of the executive department of the government, in matters committed especially to the President by Congress. The allotment of these lands to the half-breeds was expressly devolved upon the President by act of Congress (10 Stat. 332) in order to carry out the treaty of July 15, 1830 (7 Stat. 328).

Here we have a matter, belonging in the necessity of things to the executive branch of the government, and placed there in so many words by act of Congress. The power is given to the President to carry out and enforce these treaty stipulations. He is left to arrange his own means of so doing.

The President, under this law, called upon the Indian Bureau, a part of the Interior Department, as the record shows, to do this, and it was done, and in its doing all questions of age, breed, and of whatever else was required under the treaty to authorize the finding or judgment, are supposed to have been found, and cannot under ordinary rules be questioned in this way, and certainly they cannot be so questioned by any co-ordinate branch of the government. It is surrounded with this sanctity as well as that of the judgment of a court of competent jurisdiction. It is *res judicata* in the highest and best sense of the term, and in every sense of it. *Johnson* v. *Towsley*, 13 Wall. 72; *Martin* v. *Mott*, 12 Wheat. 19; *Allen* v. *Blunt*, 3 Story, 742.

This order or judgment has never been appealed from; it has never been charged or attacked directly with fraud or mistake, and if this finding is to be disregarded because of proof, or supposed proof as to age or any other fact in a proceeding of this kind, then this determination of the executive is utterly worthless for any purpose.

See how iron-bound are the final findings — the decisions of the departments — as against all attacks of the incoming heads of those departments, just as much as the decisions of the courts are as against the attacks of new and succeeding judges in those courts, and it must naturally be so. *United States* v. *Bank of the Metropolis*, 15 Pet. 377; *Ex parte Randolph*, 2 Brock. 447. And how else could public business be transacted and the government relations kept up and enforced? These papers from the Interior Department

were competent as offered, and should have been received in evidence. Rev. Stat. §§ 882–4; *United States* v. *Percheman*, 7 Pet. 51; *United States* v. *Wiggins*, 14 Pet. 334; *United States* v. *Davenport*, 15 Howard, 1; *Culver* v. *Uthe*, 133 U. S. 655.

So that when the court below went back of this finding and rejected it, it travelled away beyond its authority and put aside all law, and here is the error, regardless of all others, that is fatal to this decision in that court, and it is hoped it will be reversed.

Mr. Isham Reavis and *Mr. C. F. Reavis* for defendants in error.

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

The plaintiff contended, in the court below, that the Indian, George Washington, was of full age on April 16, 1859, the date of the conveyance to Nuckolls, or, at all events, so represented himself to be, and that Nuckolls relied upon such representations, and purchased and paid for said land accordingly. These questions of fact were submitted by the court to the jury, and found by them in favor of the defendants.

The errors assigned are to the action of the court in rejecting evidence offered by the plaintiff, and in refusing instructions asked for him. The first offer was that of an exemplification from the records of the Indian department of instructions given to one Joseph L. Sharp, dated May 14, 1856, under which Sharp acted as an agent for the United States in ascertaining the number and names of the half-breeds entitled to participate in the division of the lands granted by the treaty of Prairie du Chien. Among such instructions the agent was directed to prepare "a report in full to embrace a list containing names of all applicants, arranged by tribes and families and single persons, showing names, age, sex, relationship to the tribe, place of residence, who are orphans or wards." This was followed by an offer of a certified copy of a census

or list of half-breeds entitled to lands, bearing the heading "Office of Indian Affairs," dated February 4, 1858, containing the name, sex, age, degree of blood, and tribe of certain Indians. Upon this list was the name of George Washington, and opposite the name appeared the figures "20" in the column headed "Age." The purpose of these offers was stated to be to show that George Washington was twenty years of age at the date February 4, 1858, and that he was, therefore, of full age when, on April 16, 1859, he conveyed the land allotted to him to Houston Nuckolls. The court below regarded the evidence offered as inadmissible for that purpose, and the rejection of the offers is the subject of the first and second assignments of error.

As leading up to the controlling question, namely, the age of the half-breed George Washington, the offer of the instructions under which the agent acted in procuring information for his report would seem to be unobjectionable, but its rejection would not constitute reversible error unless the offer that followed was admissible. That was the offer to put in evidence a census or list filed in the Office of Indian Affairs, containing the names and ages of half-breeds, who, upon testimony presented to that office, were regarded as entitled to participate in the allotments or assignments of the lands awarded by the treaty. If the latter offer was not a proper one, then the rejection of the preceding offer was immaterial.

Was, then, this list, filed in the Indian department, and which, or a copy of which, had been sent to William M. Stark, special agent to assign or allot these lands, admissible in evidence in a legal controversy, to prove the age of one of said Indians?

It is contended, on behalf of the plaintiff in error, that this list is in the nature of a finding or judgment of the executive department of the government, in matters committed specially to the President by Congress; that the allotment of these lands to the half-breeds was expressly devolved upon the President by act of Congress, 10 Stat. 332, in order to carry out the treaty; that this act of Congress was one making appropriations for the Indian department and for fulfilling treaty

stipulations; that the department, under the directions of the President, made rules and regulations to enforce this provision of law, and did enforce it.

It is, indeed, true that the President speaks and acts through the heads of the several departments, in relation to subjects that pertain to their respective duties, and that the allotment of these lands by the Indian department must be considered as made by the President in pursuance of the terms of the act of Congress, and of the treaty. And it may be admitted that the decision of the special Indian agent, in identifying the Indian half-breeds entitled to participate, and in allotting the portion of each, would, in the absence of fraud, be conclusive. *Wilcox* v. *Jackson*, 13 Pet. 498, 511.

Conclusiveness is a characteristic of the judgment of every tribunal acting judicially, whilst acting within the sphere of its jurisdiction, where no appellate tribunal is created. But such conclusiveness is restricted to those questions which are directly submitted for decision. In the case in hand, doubtless the identity of the half-breed George Washington, and his right to receive the land in question as his share of the lands appropriated by the treaty, were finally found. But neither the treaty, the act of Congress, nor the instructions of the department contemplated any special inquiry into the ages of the Indians. It is true that, in the letter of instructions, the agent was directed to report as well the age as the sex and tribal relations of the claimants. But this was merely to enable the agent, when he came to allot the lands, to identify the persons entitled to participate. When the allotment was completed, and was followed, first, by a certificate, and, finally, by a patent, the purposes of the inquiry were fulfilled, and the list used to aid the government functionaries in the task of allotting the lands cannot be regarded as a record to be resorted to afterwards, in disputes between other parties, to prove the age of the Indians. No provision was made, in either the act of Congress or the rules and regulations of the Indian department, to preserve the list as a muniment of title, much less as a public record admissible to prove merely incidental recitals based on hearsay. Such a

list does not come within the rule which permits, for some purposes, the use of "official registers or books kept by persons in public office, in which they are required . . . to write down particular transactions occurring in the course of their public duties and under their particular observation." 1 Greenl. Ev. § 483. "It must be remembered that official registers are not in general evidence of any facts not required to be recorded in them, and which did not occur in the presence of the registering officer. Thus, a parish register is evidence only of the time of a marriage and of its celebration *de facto*, for these are the only facts necessarily within the knowledge of the party making the entry. So a register of baptism, taken by itself, is evidence only of that fact. . . . Neither is the mention of the child's age in the register of christenings proof of the day of its birth, to support a plea of infancy." 1 Greenl. Ev. § 493.

In *Mutual Benefit Life Ins. Co.* v. *Tisdale*, 91 U. S. 238, where the right of action depended on the death of a third person, it was held that letters of administration upon the estate of such person granted by the proper probate court, in a proceeding to which the defendant was a stranger, afforded no legal evidence of such death; and it was said: "The only ground for the admission of the letters of administration is, that granting them is a judicial act; but a judgment is not evidence of any matter to be inferred by argument therefrom, or which comes collaterally in question, or is incidentally cognizable" — citing the *Duchess of Kingston's case* and many others.

In *Connecticut Life Ins. Co.* v. *Schwenk*, 94 U. S. 593, it was held that an entry in the minute-book of a lodge of Odd Fellows, of which the deceased was a member, made prior to the issue of a policy, and showing his age as recorded by the secretary of the lodge in the usual manner of keeping its records, was not admissible as evidence of such age.

We do not deem it necessary to discuss this question at greater length. Our conclusion is that the court below did not err in excluding the list offered. It was not an official record, intended as a mode of preserving the recollection of

facts, nor was it based upon the personal knowledge of the party making the entry. It was mere hearsay.

Error is assigned to the instructions given by the court to the jury on the subject of disaffirmance by George Washington within a reasonable time after becoming of age. The statutes of Nebraska on this subject were as follows:

"Sec. 42. A minor is bound not only by contract for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority and restores to the other party all money or property received by virtue of the contract and remaining within control of the ward at any time after attaining his majority.

"Sec. 43. No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority or from his having engaged in business as an adult, the other party had good reason to believe the minor capable of contracting." Act of January 26, 1857, c. 53. Sess. Laws Neb., 2d Session, 1856, 165.

The instruction excepted to was in the following terms: "There might be some question about the rescinding of the contract within a reasonable time, but if the testimony should satisfy the jury that George Washington was but fifteen or sixteen years old, or thereabout, in 1859, when it is claimed he made the deed to Houston Nuckolls, then it would take until 1865 for him to attain his majority, and he would have to disaffirm the contract within a reasonable time after attaining his majority, and within a year or so would be a reasonable time."

The ground of the objection is the contention that a reasonable time for an infant to disaffirm is not a question of law, but a question of fact to be determined upon the circumstances of each case.

It cannot be fairly said that the court below treated the question as one of law and gave a binding instruction upon it. On the contrary, the question was left to the jury, with the observation that within a year or so would be a reasonable time. The Nebraska statutes of 1855 contain the following section: "Sec. 246. The above limitations of action for the

recovery of real property shall not apply to minors so far as to prevent them from having at least one year after attaining their majority within which to commence such actions." There is no substantial difference between "at least one year after attaining majority," and "within a year or so," and even if the remark of the learned judge be regarded as an instruction, it would seem, by analogy to the statute of limitations, to have been well founded.

The record discloses several other exceptions, but they do not seem to be relied on in the brief of the plaintiff in error. It is said that the charge contained inconsistencies and must have confused the jury. Such a statement is not entirely without foundation, but we think that upon the whole the case was fairly submitted. It is obvious that the case turned upon the question as to the age of George Washington at the time of the allotment and at the time of making the conveyance by him to Houston Nuckolls, under whom the plaintiff claims, and that question is treated in the briefs of both parties as the controlling one in issue.

With the list furnished by the department for the use of the agent out of the case, the weight of the evidence as to the minority of the half-breed at the time of his conveyance to Nuckolls was plainly with the defendants, and warranted the verdict of the jury in their behalf.

The judgment of the court below is

Affirmed.

MORGAN *v.* DANIELS.

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

No. 313. Argued March 21, 22, 1894. — Decided April 23, 1894.

When a question between contending parties, as to priority of invention, is decided in the Patent Office, the decision there made must be accepted as controlling, upon that question of fact, in any subsequent suit between the same parties, unless the contrary is established by testimony which, in character and amount, carries thorough conviction.

Statement of the Case.

On October 30, 1889, the appellee, Fred H. Daniels, commenced suit against the defendant in the Circuit Court of the United States for the District of Massachusetts. In his bill, he alleged that he was the original, sole, and first inventor of an improvement in machines for coiling wire or wire rods; that on June 26, 1886, he filed in the United States Patent Office an application in due form for a patent; that on September 4, 1886, the Commissioner of Patents declared an interference between his application, and one filed by the defendant on June 24, 1886; that thereafter, testimony was taken on such interference, and a decision rendered on March 22, 1889, adversely to his claim of a priority in invention; that a rehearing was had, which rehearing resulted, on October 28, in affirming the original decision. The bill further averred that the defendant was not, as decided by the Commissioner of Patents, the first inventor or discoverer, and prayed for a decree that he, plaintiff, be entitled to receive a patent for his invention, as specified in his claims, and that defendant be enjoined from taking any steps to use or dispose of letters patent for said invention, or any part thereof.

This suit was brought under the authority of section 4915, Revised Statutes, which is as follows:

"Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

To this bill, on January 10, 1890, the defendant filed an answer, denying that plaintiff was the inventor, as alleged. The case was submitted to the Circuit Court upon the testimony used in the interference proceedings, and upon such testimony a decree was entered, finding that plaintiff was the original inventor, and entitled to receive a patent for the invention. From such decree, the defendant brings this appeal.

Mr. George S. Boutwell and *Mr. Philip Mauro*, (with whom was *Mr. Anthony Pollok* on the brief,) for appellant.

Mr. J. E. Maynadier for appellee.

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

It is worthy of notice that hitherto in the progress of this litigation upon the same testimony different persons have reached different conclusions. Thus, in the opinion filed June 5, 1888, by the examiner of interferences and assistant examiner, it was found that the defendant was the original inventor. On an appeal from that decision the examiners-in-chief (two members being present) came to a different conclusion, and awarded priority to the plaintiff. On a further appeal the Commissioner of Patents on March 22, 1889, reversed the judgment of the examiners-in-chief, and sustained that of the original examiners. A motion for rehearing was brought before a succeeding Commissioner and overruled. When this case was submitted, without any additional testimony, to the Circuit Court the conclusion finally reached in the Patent Office was dissented from, and it was found that the plaintiff was the original inventor. An examination of the opinions filed by these different officers indicates that by each of them the matter was carefully considered. Evidently, therefore, the question as to which was the prior inventor is not free from doubt. What, then, is the rule which should control the court in the determination of this case? It is

insisted by counsel for the appellant that the decision of the Patent Office should stand unless the testimony shows beyond any reasonable doubt that the plaintiff was the first inventor, and, in support of their contention, they cite the cases of *Coffin* v. *Ogden*, 18 Wall. 120, 124, and *Cantrell* v. *Wallick*, 117 U. S. 689, 695. In the first of these cases, which was a suit for infringement, the defence was a prior invention, and in respect to this defence the court observed: "The invention or discovery relied upon as a defence must have been complete, and capable of producing the result sought to be accomplished; and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him." In the other case the same defence in a suit for infringement was set up, and there the court thus stated the rule: "The burden of proof is upon the defendants to establish this defence. For the grant of letters patent is *prima facie* evidence that the patentee is the first inventor of the device described in the letters patent and of its novelty. *Smith* v. *Goodyear Dental Vulcanite Co.*, 93 U. S. 486; *Lehnbeuter* v. *Holthaus*, 105 U. S. 94. Not only is the burden of proof to make good this defence upon the party setting it up, but it has been held that 'every reasonable doubt should be resolved against him.'"

These two cases are closely in point. The plaintiff in this case, like the defendant in those cases, is challenging the priority awarded by the Patent Office, and should, we think, be held to as strict proof. In the opinion of the court below the rule is stated in these words: "The complainant, on the issue here tendered, assumes the burden of proof, and must, I think, as the evidence stands, maintain by a clear and undoubted preponderance of proof that he is the sole author of that drawing." 42 Fed. Rep. 451. This language is not quite so strong as that just quoted. The case as presented to the Circuit Court was not that of a mere appeal from a decision of the Patent Office, nor subject to the rule which controls a chancellor in examining a report of a master, or an appellate court in reviewing findings of fact made by the trial court. There is always a presumption in favor of that which has

once been decided, and that presumption is often relied upon to justify an appellate court in sustaining the decision below. Thus, in *Crawford* v. *Neal*, 144 U. S. 585, 596, it was said: "The cause was referred to a master to take testimony therein, 'and to report to this court his findings of fact and his conclusions of law thereon.' This he did, and the court, after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand." See also *Camden* v. *Stuart*, 144 U. S. 104, and *Furrer* v. *Ferris*, 145 U. S. 132.

But this is something more than a mere appeal. It is an application to the court to set aside the action of one of the executive departments of the government. The one charged with the administration of the patent system had finished its investigations and made its determination with respect to the question of priority of invention. That determination gave to the defendant the exclusive rights of a patentee. A new proceeding is instituted in the courts — a proceeding to set aside the conclusions reached by the administrative department, and to give to the plaintiff the rights there awarded to the defendant. It is something in the nature of a suit to set aside a judgment, and as such is not to be sustained by a mere preponderance of evidence. *Butler* v. *Shaw*, 21 Fed. Rep. 321, 327. It is a controversy between two individuals over a question of fact which has once been settled by a special tribunal, entrusted with full power in the premises. As such it might be well argued, were it not for the terms of this statute, that the decision of the Patent Office was a finality upon every matter of fact. In *Johnson* v. *Towsley*, 13 Wall. 72, 86, a case involving a contest between two claimants for land patented by the United States to one of them, it was said: "It is fully conceded that when those officers (the local land officers) decide controverted questions of fact, in the absence of fraud, or imposition, or mistake, their decision on those

questions is final, except as they may be reversed on appeal in that department."

Upon principle and authority, therefore, it must be laid down as a rule that where the question decided in the Patent Office is one between contesting parties as to priority of invention, the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony which in character and amount carries thorough conviction. Tested by that rule the solution of this controversy is not difficult. Indeed, the variety of opinion expressed by the different officers who have examined this testimony is persuasive that the question of priority is doubtful, and if doubtful the decision of the Patent Office must control.

What was the invention which the parties each claim to have made and in respect to which an interference was ordered in the Patent Office? It was thus stated by the examiner: "In a device for coiling wire or wire rods, the combination with a rotating coiling receptacle or reel for receiving and laying in coils the rod as it is delivered from the rolls, of a spider or platform for supporting the coil mounted on a vertical shaft concentric with the reel-supporting shaft, and means for elevating the platform shaft independently of the other."

Plaintiff claims to have conceived the idea of this combination in July, 1878, and to have made in that and the succeeding year sketches and drawings which fully disclosed it. It is conceded that a machine embodying the invention was first constructed and put into successful operation in the spring of 1886, and that this was done under the direction and superintendence of defendant.

During the years 1878 and 1879, the defendant, a man about 47 years of age, was, as he had been since 1864, the general superintendent of the Washburn & Moen Manufacturing Company, a corporation engaged in the manufacture of iron and steel wire; while the plaintiff, 24 years of age, was in the employ of the same company as a draughtsman, working under the direction of the defendant. The business of the company had, during the years of defendant's superintendency, grown

to be enormous. In the actual work of the mill, as the finished wire came from the rolls it was coiled on reels. At first this was done through the agency of an attendant seizing the wire by a pair of tongs and engaging it with the reel, but this operation was attended with both danger and delay. To obviate this, the parties interested in this manufacture sought the invention of machinery which should seize the finished wire and engage it with the reel, and thereafter dislodge the completed coil therefrom.

The defendant locates the time of his conception of the idea embodied in this combination in October, 1878, and that which enables him to locate it is a transaction with Daniel C. Stover. It appears that in October, 1878, Stover (who was a manufacturer and inventor) came to Worcester, Mass., and while engaged in examining the machinery in the mill had his attention directed to the way in which the wire was coiled on the reels, and thought that some device could be invented for picking up the wire immediately after its leaving the rolls. After some reflection he conceived the idea which he subsequently embodied in patent No. 219,124. He suggested his idea to the defendant, who replied that it was not new, and that others were working at it. He prepared a model which contained not only a device for picking up the wire, but also one for discharging the completed coil, and exhibited it to defendant, who, on his part, showed Stover a model which he had prepared. It is not pretended that either the model of Stover or that of defendant disclosed the exact combination for which a patent was claimed in this case. Nor is it important to notice all the details of the transactions at the time between Stover and the Washburn & Moen Company. It appears that Stover sold and assigned a one-half interest in his invention to the Washburn & Moen Company. The time of Stover's visit is established by the date of that assignment and the application which he made for a patent, and by other writings. There is significance in the fact that although the plaintiff was present when Stover's model was shown, it does not appear that he made any suggestion that he had invented anything of a similar character; and yet, if his present claim

is true, he had for months been considering the matter, and had at least three months before conceived the very idea of the combination now in dispute. But it is enough to say in respect to this branch of the case that the story of the invention by defendant at the time stated is reasonable, probable, and to a certain extent supported by the testimony of Stover.

As against this the plaintiff claims to have conceived the idea of this combination in July, 1878, and relies mainly on the testimony of two witnesses, Lambert and Fowler. Though he was a draughtsman he presented no sketch or drawing made prior to November, 1878, which in any manner pictures his invention. It is true he testifies to having made sketches prior thereto, but none have been preserved. One of them he claims to have shown to Lambert in July, 1878, and Lambert was called as a witness to support this statement; but Lambert's testimony does not, it seems to us, carry the weight which is claimed for it. He was a tinsmith by occupation, employed at times by the Manufacturing Company, and testifies that in July, 1878, or about that time, very soon after Daniels' return from Europe, he came to his shop and showed him a sketch, and asked him to make a model of it. He declined, saying that he was too busy. Nothing more took place at that time, but in the fall of 1886, at Daniels' request, he made a model of the machine which, as he says, was disclosed by that sketch. This model was in evidence. Now, it is possible that one seeing for a few minutes a sketch of a complicated machine can eight years thereafter remember the details of that sketch so clearly as to make an accurate model. But, if it is possible, it surely is not probable. If the invention disclosed in the sketch impressed either Daniels or Lambert as something of great value, and, therefore, fixed itself firmly in the mind, it is strange that neither seemed anxious to impress it upon the attention of others, carry it into actual use, or derive profit from it. On the other hand, if it was one which did not impress either as of any special value, it seems almost morally certain that the details of the sketch and the precise character of the invention would not have been accurately remembered through all those eight years. We must not be

understood as imputing to Lambert intentional falsehood. He was familiar with the machinery actually in use in the wire mill. He saw in the course of his acquaintance with that machinery many models and many machines, and the machine embodying this invention, as perfected, had been in actual use in the mill several months before he made this model. He may well have gotten some of these matters confused in his mind, and introduced into this model elements and parts which were not seen by him in the sketch displayed in 1878, and which were in fact taken from other sketches and drawings, or from models, or machines. At any rate, when there was nothing to specially arrest the attention, it taxes credulity for one to claim that he bears in mind for over eight years the details of a sketch of a complicated machine which is casually shown to him, and which he sees but for a short time, and is enabled to thereafter reproduce the details of that sketch in a model.

Equally unreasonable is the testimony of Fowler, which is to the effect that on July 20, 1878, (the date being fixed by a memorandum in his diary,) Daniels came to visit him. This diary notes the fact simply of the visit of Daniels, but contains nothing in respect to the matters involved in this case. His testimony as to this was in these words: "He explained by rough sketches an arrangement he had for coiling the wire after it was delivered from the rolls, which was a round box mounted on an upright shaft, and in the bottom of the box was a plate, perhaps I should say a movable plate, which could be lifted for the purpose of raising the coil of wire. That was his method of getting hold of the coil, to get it out of the box." None of these rough sketches were preserved. There was apparently nothing to impress the matter upon the mind of Fowler, and his attention was not directed to it until some time in the early part of 1887, nearly nine years thereafter, when Daniels called on him for the purpose of securing his testimony in this case. Doubtless Fowler means to be truthful. There is no reason to impugn his integrity, but his testimony is subject to a criticism similar to that placed upon the testimony of Lambert. As one of the matters which was

being considered and discussed by the Manufacturing Company was how to do the work which is now being done by the machine finally constructed by defendant, it is not at all unlikely that Daniels, one of the employés of that company, spoke of the matter to Fowler at the time named; very likely he may have drawn rough sketches to suggest the ideas which were in his mind; but it is not probable that in the absence of some special reason therefor the memory would carry for eight or nine years the details of the plan or idea suggested by Daniels and illustrated by these sketches. While, of course, it is possible, yet such testimony is not of a character to carry great weight.

There is other testimony on both sides of this controversy. It is unnecessary to notice it in detail. It is enough to say that the testimony as a whole is not of a character or sufficient to produce a clear conviction that the Patent Office made a mistake in awarding priority of invention to the defendant; and because of that fact, and because of the rule that controls suits of this kind in the courts,

We reverse the judgment and remand the case, with instructions to dismiss the bill.

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

Syllabus.

THE BRITANNIA (1).[1]
THE BRITANNIA (2).
THE BEACONSFIELD.

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

Nos. 340, 341, and 342. Argued April 3, 4, 1894. — Decided April 23, 1894.

In entering the port of New York, the steamship Britannia came so close to Governor's Island as to graze the bottom. This made it necessary for her pilot to direct the engines to be put at full speed till she cleared the ground. After that the speed of the vessel was slowed, and her wheel was put hard-a-port to round into East River. About the time of touching bottom the Britannia sighted the steamship Beaconsfield on her starboard bow, and blew a single whistle. The Beaconsfield, going out from the port, had also seen the Britannia when it came around Governor's Island, and about the time it was disengaging itself from the ground, blew a single blast of her whistle, put her helm to port a little, and went on at a slow speed. The whistle of the Britannia was heard upon the Beaconsfield, but that of the Beaconsfield was not heard on the Britannia. After clearing the bottom and reducing her speed, the Britannia did not respond promptly to her helm, owing to the fact that the condition of the wind and tide was such as to form a flood eddy on the north side of the channel between the Battery and Governor's Island, and an ebb tide on the south side of the channel. These tides operate to turn the head of a vessel attempting to enter the East River near Castle William to the westward, as it crosses the ebb until it enters the flood eddy. Such tidal action, and its effect upon vessels, were known to the pilot of the Beaconsfield, and should have been known to the pilot of the Britannia. It retarded the efforts of the Britannia to pass astern of the Beaconsfield. The Beaconsfield thereupon blew another single whistle, and, hearing no answer, put her wheel hard-a-port, stopped her engines and reversed full speed. Her engines were kept in this condition until her headway was stopped. Then she lay still in the water until struck by the Britannia and sunk. *Held*,

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[1] The docket titles of these three cases were: 340, Steamship Britannia, La Compagnie Française de navigation à vapeur, Cyprien Fabre et Compagnie, Appellants, *v.* Elizabeth Cleugh, Executrix of George Cleugh, deceased; 341, The Steamship Britannia, etc., Appellant, *v.* John Lucas Cotton; 342, La Compagnie Française de navigation à vapeur, Cyprien Fabre et Compagnie, Appellants, *v.* The Steamship Beaconsfield and Elizabeth Cleugh, Executrix of George Cleugh, etc.

Statement of the Case.

(1) [All concurring,] That the Britannia was in fault in running, at a place where she was liable to meet outward going vessels, across the ebb tide in such a way that the current prevented her from answering her helm with promptness, and that such fault was enough to render her liable, in whole or in part, for the loss occasioned by the collision;

(2) [Brown and Jackson, JJ., dissenting,] That the Beaconsfield was also in fault (*a*) in disregarding Rule 23 of the Rules for preventing Collisions on the Water, Rev. Stat. § 4233, directing that when, by Rule 19, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of Rule 24; and (*b*) in remaining motionless for a minute and a half, in full view of the tardy motions of the Britannia in getting astern.

The statement in Finding 31, that "the conduct of those in charge of the Beaconsfield . . . does not warrant the inference that there was, on their part, negligence contributory to produce the collision," is not a finding of fact, within the meaning of the rule, but is a conclusion of law upon the previous facts.

The act of August 19, 1890, c. 802, 26 Stat. 320, not having been proclaimed by the President, as required by sec. 3 thereof, it is not yet operative, and this court is not bound by the construction put by English courts on Art. 21, providing that "where, by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed."

In the District Court of the United States for the Southern District of New York, George Cleugh, of Newcastle, England, filed his libel and complaint, as owner of the steamship Beaconsfield, against the steamship Britannia, alleging that, on the 19th day of November, 1886, the Beaconsfield, while proceeding to sea, loaded with a full cargo of grain, between Governor's Island and the Battery, was run into by the Britannia, bound in from sea, and so badly damaged that she sank shortly afterwards in shoal water, to which she had been towed by tug boats, and suffered damage, with loss of freight, to the amount of $48,000. The libel further alleged that the Britannia was running at too high a rate of speed for the place the vessels were in, without proper lookout or sufficient attention to her navigation, and without regard to the rules of navigation, and that the Beaconsfield was wholly without fault. An amended libel was subsequently filed containing a more detailed statement of the position and movements of the vessels at the time of the collision.

To this original and amended libel the owners of the Britannia filed an answer traversing those allegations which attributed fault to the Britannia, alleging that the Beaconsfield had been carelessly and negligently managed in several particulars, which caused the collision, and praying that the libel be dismissed.

Subsequently, J. L. Cotton, master, and George Cleugh, owner, of the Beaconsfield, filed another and joint libel against the Britannia, to recover for loss of cargo, containing substantially the same allegations as those made in the libel previously filed by Cleugh. This libel was likewise amended so as to make a more particular and detailed statement of the facts as claimed by the libellants.

To this libel an answer was duly filed by the owners of the Britannia, denying fault on her part and alleging careless and improper management of the Beaconsfield, which was the real cause of the collision. They also gave security and procured the discharge of their vessel. Thereafter the owners of the Britannia filed a petition against the Beaconsfield, again charging the fault of the collision upon her, alleging damages suffered by the Britannia, and praying process against the Beaconsfield to the end that such damages might be assessed in the same suit.

This petition was met by an answer on the part of George Cleugh, the owner of the Beaconsfield, traversing the allegations of the petition.

At a subsequent term, the owners of the Britannia filed, in the same court, a libel and complaint, subsequently amended, against the Beaconsfield, containing a detailed statement of the transaction, and praying process against and condemnation of the Beaconsfield. To this libel, as amended, exceptions were filed on behalf of the owner of the Beaconsfield, on the ground of insufficiency and indefiniteness in certain particulars. Some of these exceptions were sustained, which led to a further amendment of said libel. An answer to the amended libel was then filed by the owner of the Beaconsfield.

These three cases were so proceeded in that, on the 9th day of July, 1889, final decrees were entered, adjudging that both

the Britannia and the Beaconsfield were in fault, and apportioning the damages between them in such a way that there was found due from the Britannia to the Beaconsfield, the sum of $14,978.90, and that there was due by the Britannia to J. L. Cotton and George Cleugh, as bailees of the cargo of wheat laden on the Beaconsfield, the sum of $25,124.63, being a moiety of the whole loss to cargo, the other moiety of said loss being adjudged against the Beaconsfield. 34 Fed. Rep. 546.

From these decrees of the District Court appeals were taken by the owners of both vessels to the Circuit Court. That court held that the Britannia was alone in fault, and accordingly dismissed the libel of the Britannia, and awarded to Cleugh's executor for the damages to the Beaconsfield, $38,808.05, with costs, and to Cotton, for damages to the cargo, $52,925.46, with costs. 42 Fed. Rep. 67.

From all three decrees, the owners of the Britannia have appealed to this court.

Mr. Robert D. Benedict for the Britannia, appellant.

Mr. George A. Black for the Beaconsfield and Elizabeth Cleugh, appellees.

Mr. Sidney Chubb for Cotton, appellee.

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

As both the District Court and the Circuit Court, though for somewhat different reasons, found the Britannia to be in fault, and as we agree with them in that conclusion, it is not necessary for us to go at length into that part of the controversy. It is sufficient to say that it appears that the Britannia came so close to Governor's Island that she grazed the bottom, and rendered it necessary for her pilot to direct her engines to be put at full speed till she cleared the ground. After that the speed of the vessel was slowed, and her wheel was put

hard-a-port to round into East River. As found by the Circuit Court, at about the time of touching the bottom, she sighted the Beaconsfield on her starboard bow, and at that time, she blew a single whistle to the Beaconsfield, thus signifying an intention to pass under the stern of the Beaconsfield. After clearing the bottom and reducing her speed, the Britannia did not respond promptly to her helm, owing to the fact, as found in the fourth finding, that "the condition of the wind and tide was such as to form a flood eddy on the north side of the channel between the Battery and Governor's Island, and an ebb tide on the south side of the channel. These tides operate to turn the head of a vessel attempting to enter the East River near Castle William, on Governor's Island to the westward, as she crosses the ebb until she enters the flood eddy. Thereupon her head is turned to the eastward. Such tidal action was within the knowledge of the pilot of the Beaconsfield, and should have been within the knowledge of the pilot of the Britannia." Having placed herself in this predicament, the Britannia's efforts to pass astern of the Beaconsfield were retarded, and her fault was in that particular, that is, in running, at a place where she was liable to meet outward going vessels, across the ebb tide in such a way that the current prevented her from answering her helm with promptness. While this fault was not, as we shall hereafter show, the sole cause of the accident, it contributed to it, and upon the findings, we agree with both the lower courts in thinking the fault was enough to render the Britannia liable, in whole or in part, for the loss occasioned by the collision. In exoneration of the Britannia her advocate cites the case of *The Rhondda*, 8 App. Cas. 549, 555. That was a case somewhat similar in its facts to the present one. The Rhondda was coming around a point in the Straits of Messina, meeting another steamer, the Alsace-Lorraine. They came into collision, and the Alsace-Lorraine was sunk. Her owners libelled the Rhondda, but the Privy Council sustained the navigation of the Rhondda. She had the other vessel on her starboard bow, and therefore it was her duty to keep out of the way of the Alsace-Lorraine. This she attempted to do by going to

the starboard and passing under the stern of the other vessel. There was a current which checked the swing of the Rhondda to the starboard, and her captain, as soon as he saw that his vessel was not swinging off to starboard, under his port helm, as he had expected, stopped and reversed his engines. The court held that, as it appeared that the Rhondda had ported her helm, and that such action would have carried her clear of the other steamer if she had not been prevented by the current, the Rhondda was free from blame. The manœuvres, therefore, of the Britannia and the Rhondda were alike. They were both meeting another steamer on their starboard bow. They both, in compliance with the rule of navigation applicable to such a case, endeavored to pass under the stern of the other vessel by porting the helm, and they both, when it was seen that the vessel was not swinging as rapidly to the starboard as was expected, stopped and reversed engines. The reason why, if the Rhondda was justly exonerated, the Britannia is not entitled to a like judgment, is found in the different circumstances in which the vessels were placed.

As we have seen, the Britannia was entering one of the most crowded harbors in the world, and was liable to meet other vessels outward bound at any moment. It was also obvious, from her course in running close to Governor's Island, that any vessel she would meet, as she entered the strait after she cleared the island, would probably be on her starboard bow. Knowing, as she was bound to know, that, in the condition of the tide at the time, there was a conflict between the current and the eddy which would be apt to thwart or retard her movement to the starboard, it was her duty to have rounded the island at the very lowest rate of speed which would have enabled her to answer to her helm. This she failed to do, and, although her subsequent movements were skilful and in accordance with the rules, she must be held answerable for her original fault in rounding the island so closely that it was found necessary to put her engines, for a time, at full speed in order to clear her from the ground. This temporary enhancement of speed, and the failure to anticipate and guard against

the consequences of a well-known current, rendered her subsequent efforts to avoid the collision unavailing.

On the other hand, in the case of the Rhondda, Sir James Hannen, in the course of his opinion, said: "Undoubtedly it was strongly in evidence that there was such a stream at this place, whether it be called current or eddy, as was calculated to have an effect in the manner suggested on a vessel coming round into the neck of the channel, . . . and would be felt upon the starboard bow of a vessel precisely at the point where the Rhondda had arrived." But he proceeded to say: "The Rhondda had no reason to anticipate that the operation of the current or eddy would have any bearing upon her duty with reference to the Alsace-Lorraine, *because she had a right to expect that the coast would be clear from steamers coming out in the direction in which the Alsace-Lorraine was.*"

This brings us to a consideration of the conduct of the Beaconsfield, and here the courts below parted company — the District Court having held that the Beaconsfield's management was faulty, while the Circuit Court found her free from blame. Of course, this court must accept the facts as found for us by the Circuit Court, but we do not observe any substantial difference in the facts as understood by the respective courts. Their diversity in opinion arose from a difference in their application of the rules of navigation to the admitted or established facts.

What were those facts? The Beaconsfield descried the Britannia when the latter vessel came around Governor's Island, and about the time she was disengaging herself from the ground. The Beaconsfield thereupon blew a single blast of her whistle, which meant that she expected the Britannia to pass under her stern. It is found that this whistle of the Beaconsfield was neither heard nor seen on the Britannia, but the latter's whistle, given while getting clear of the bottom, was heard on the Beaconsfield, and taken to be an answer to her own whistle. It is thus evident that the pilots of both vessels agreed in the view that the proper thing to avoid collision was for the Britannia to swing to starboard and pass behind the Beaconsfield. It was next found that the Beacons-

field, when she blew her first whistle, put her helm to port a little and went on at a slow speed. Her observation of the Britannia did not show that the latter was swinging to starboard, but even was disclosing a little more of her starboard side to the Beaconsfield. Thereupon the latter blew another single whistle, which still signified her expectation that the Britannia would pass astern, and, hearing no answer, put her wheel hard-a-port, and stopped her engines and reversed full speed. Her engines were kept reversed until her headway was stopped. Then her engines were stopped, and, at the time of the collision, she was nearly, if not quite, dead in the water. After her headway was thus stopped, the Beaconsfield took no further action, and lay still in the water until struck. The time from such stopping of her headway until the collision, during which she lay still, was about a minute and a half. It is further found that if the Beaconsfield had not stopped and backed, it is probable that the Britannia would have passed a short distance astern of her; and, indeed, under the finding as to her rate of speed before she stopped, this is quite evident.

Was this behavior of the Beaconsfield in stopping her headway and remaining still, without further effort, for a minute and a half, proper, or, at least, excusable, as held by the Circuit Court? Or was it improper, and did it put her in contributory fault, as held by the District Court?

In answering this question we must have regard to the well-known rules of navigation. Those chiefly applicable to the present controversy are rules nineteen, twenty-one, twenty-three, and twenty-four. Rev. Stat. § 4233.

The nineteenth rule is as follows: "If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." We do not understand this rule to signify, as the Circuit Judge seems to have thought, that the Britannia was, at all hazards and in some way or other, to avoid the Beaconsfield. Such a rendering of the rule would dispense with all inquiry beyond the single one, which vessel had the other on her starboard side. The plain meaning of

the rule was, as applied to the situation under consideration, that the Britannia, which had the Beaconsfield on her starboard side, should yield the path to the latter, and pass behind her. This reading of the rule was recognized and complied with in the first instance by the pilots of both vessels in signalling each other that the Britannia would go astern.

Rule twenty-one provides that "every steam vessel when approaching another vessel so as to involve risk of collision shall slacken her speed, or, if necessary, stop and reverse." This rule was likewise obeyed by both ships, in that, so long as they were advancing, after having seen and signalled each other they went at a slow rate of speed. Later, in the history of the incident, they both stopped and reversed. In so doing the Britannia was clearly obeying the letter and spirit of the rule. Whether the Beaconsfield was justified in stopping and reversing we shall presently consider.

The twenty-third rule directs that "when by rules . . . nineteen, . . . one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of rule twenty-four." This rule throws light on the meaning of the nineteenth rule, and confirms the view that the latter rule means that the vessel having the other on her starboard shall yield the way or path to the other, and it further provides that the latter vessel not only may but must keep on her course, except as qualified by the twenty-fourth rule. That rule is as follows: "In construing and obeying these rules due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger."

As we have seen, the Britannia fulfilled the duty imposed on her, by signalling that she would keep out of the way and pass to the stern of the Beaconsfield, by slackening her speed, and, finally, by stopping and reversing. Her only fault was in overlooking or disregarding the effect of the wind and tide, so that when she endeavored to swing to the starboard, she was unable to do so with reasonable quickness.

But did not the Beaconsfield manifestly depart from and

disobey rule twenty-three in not keeping her course, and thus avoiding collision? Her excuse, in application of rule twenty-four, is that the Britannia, after having signalled that she was going astern, did not appear to be doing so, and that this erratic behavior justified the Beaconsfield in stopping and reversing. But, as already stated, the pilot of the Beaconsfield was well aware of the existence of the counter current against which the Britannia had to contend in changing her course to the starboard, and if we are obliged to impute fault to the Britannia, in not having foreseen and provided against that current, so we must likewise blame the Beaconsfield for overlooking the effect of such current in delaying the movement of the Britannia to the starboard. The course of the Britannia was precisely what might have been anticipated, after her first and only fault, and did not, in our judgment, warrant the Beaconsfield in disregarding the injunctions of the twenty-third rule, which, if obeyed, would have prevented the collision.

We think there was likewise fault in the action of the Beaconsfield in remaining motionless for a minute and a half, in full view of the tardy motion of the Britannia in getting astern. This is sought to be excused by the fact that her pilot feared certain rocks, or a rocky bottom, which were not far from the place where his vessel was. The actual existence of such rocks or rocky bottom was somewhat in dispute; but accepting, as we do, the statement of the Circuit Court on the subject, we cannot sustain the conduct of the Beaconsfield. That statement is that "a careful collocation of the testimony of those on both steamers and elsewhere, assisted by elaborate plotting on the chart, indicates that the probabilities are that the Britannia would have passed astern of the Beaconsfield if the latter had kept her headway, even though she straightened out sufficiently to clear the reef her pilot spoke of, but by a very small margin only."

Stress is laid in the argument for the Beaconsfield on the eleventh finding, that "at the time the Beaconsfield reversed she had approached so near the New York shore that, in view of her draft of water and the condition of the bottom in that locality, there was some risk of her running aground

should she continue her way much longer under her port helm."

But the exigency, as shown by the other findings, did not require that she should continue her way "much longer." Had she advanced one hundred and fifty feet, the collision would not have taken place.

This alleged danger of running aground on the New York shore, if she continued her course, was not set up in the thrice amended pleadings, and seems, as well as the suggestion that there were rocks, not shown on the charts, on the course the Beaconsfield was going, to have been an afterthought, by way of excuse, of the pilot of the Beaconsfield.

But allowing the finding to stand, it does not establish as a fact in the case that there was any real danger to the Beaconsfield in keeping on her course for the very short distance that would have avoided the collision. Nor was it necessary, as the findings show, that in going on the Beaconsfield should have approached any closer to the New York shore. There was plenty of time and room for her to have changed her course sufficiently to have avoided a nearer approach to the north shore.

As for the other excuse, advanced by the pilot of the Beaconsfield, that there were rocks ahead, as already stated, it was disposed of by the learned judge of the Circuit Court, who, when asked to affirmatively find that there was no reef of rocks about 1500 feet from the Battery flag, or in that neighborhood, as testified to by the pilot of the Beaconsfield, refused on the stated ground that it was "*immaterial*, as by findings already made the collision happened well inside of such point."

The thirteenth finding, that "shortly after the Beaconsfield began reversing the Britannia commenced to swing to starboard, a motion which was perceived on the Beaconsfield," is important, and strengthens the case against her. Seeing the Britannia at last, however tardily, taking the direction which the rule and the exchanged signals required, it was misconduct in the Beaconsfield to continue reversing, and to finally remain motionless.

Opinion of the Court.

It cannot be reasonably held that the thirty-first finding was a finding of fact, obligatory upon this court. It is in these words: "The conduct of those in charge of the Beaconsfield, as specifically set forth in the foregoing finding, does not warrant the inference that there was, on their part, negligence contributory to produce the collision."

Of course, if this *were* a finding of fact, within the meaning of the rule, it would be conclusive of the case, and all the other findings would become mere surplusage. But it is evident that the learned judge did not intend it to be so regarded. It was plainly meant as an additional conclusion in law. He speaks of it as "an *inference* from the foregoing findings." Nor can we assent to the proposition that it is competent for the judge, who is to find the facts for this court, to shut us off from a consideration of the legal effect of the other facts found, by a conclusive finding that, in his opinion, a particular inference is or is not warranted by the facts so found.

Regarding, therefore, this finding as merely expressive of the learned judge's view of the legal conclusion that arose upon the facts as found, and giving reasonable effect to his findings of fact, we are unable to concur in his conclusion.

The disregard by the Beaconsfield of the Britannia's signal, her failure to obey the rule and keep her course, and her supine negligence in remaining motionless for so long a period, while she saw the Britannia approaching her, clearly put her in fault.

It is argued that the words "shall keep her course" do not mean that she shall maintain her speed, and English cases are cited to the effect that the rule does not imply that the vessel shall *maintain the same speed.* If this is all that is meant in the cases cited, and we so read them, we have no reason to disagree with them, and they do not, in the slightest degree, impugn our reasoning. But if the contention is, and if those cases must be understood as holding that a vessel, whose duty it is to keep her course, complies with that duty by reversing her engines and ceasing to move at all, we are unable to concur in such a view. It is inconsistent with both the words and

the sense of the rule. A vessel which voluntarily becomes motionless cannot properly be said to keep her course. The word "course," both from its etymology and the primary meaning given to it by lexicographers, signifies a running or moving forward — a continuous progression or advance.

The collocation of the rule, and its direct references to rules 17, 19, 20, and 22, plainly point to the meaning that, while the other vessel must keep out of the way, the preferred vessel shall not interfere with or thwart the movements of such other vessel by bringing a new element into the calculation, which would be done if, instead of pursuing her course, she stopped her headway. It is not meant that some exigency or obvious danger might not justify her in checking her speed, and even in stopping altogether. But such a case is provided for in the twenty-fourth rule. As we have seen, no such exigency is found to have existed in the present case.

We are relieved from any force there may be in the suggestion that we ought to follow the construction supposed to have been put upon this rule by the English courts, in order that there should be no difference between the courts of the two countries in construing the same rule, by the act of August 19, 1890, 26 Stat. 327, which declares that the rule shall be read as follows: "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course *and speed*." It, however, appears that this act awaits the proclamation of the President to become operative.

The case of *The Northfield and The Hunter*, 4 Ben. 112, 116, is applicable to the present question in regard to the management of the Beaconsfield. There, the Northfield, a Staten Island ferry-boat, had left her slip to go west of Governor's Island, and was swinging round from south to southwest. The Hunter was coming down the North River and heading south to go down west of Governor's Island. The vessels were therefore in similar positions in respect to each other as the vessels in the present case. The District Court for the Southern District of New York held, per Blatchford, J., as follows: "Under the circumstances, the Northfield had the Hunter on her own starboard side, and it was the duty of

the Northfield, under the rule, to 'keep out of the way' of the Hunter. It was equally the duty of the Hunter 'to keep her course.' The Northfield ported her helm to a sufficient extent to enable her to pass safely under the stern of the Hunter. When, however, the Hunter was about three hundred yards distant from the Northfield, instead of keeping her course, she stopped her engines. It is quite clear that if the Hunter had not stopped at all, but had kept her course, the Northfield would have passed safely under the stern of the Hunter. The stopping by the Hunter was the cause of the collision." Disposing of the excuse set up by the Hunter for her stopping, that her navigator assumed that the Northfield was intending to pass ahead of the Hunter rather than astern of her, the learned judge said: "In so assuming they took the risk of being wrong in the assumption." This case was affirmed in the Circuit Court, and also in this court, in which this language was used: "The officers of the tug perfectly understood that under the rule it was their duty to keep the tug on its course. The officers of each vessel had the right to assume that the other vessel would do its duty, and to make their course and keep their speed on that assumption." *Hutchinson* v. *Northfield*, 24 L. C. P. Co. Rep. 680, 681. In the case of *The Elizabeth Jones*, 112 U. S. 514, 523, it was said: "Conceding it to have been the duty of the Willis, under article 12, to keep out of the way of the Jones, it was equally the duty of the latter not to baffle or to prevent the efforts of the Willis to that end. Her departure from the requirement of article 18 that she should keep her course cannot be justified under article 19, because there were no special circumstances in such departure necessary in order to avoid immediate danger."

In *Belden* v. *Chase*, 150 U. S. 699, it was said: "It is a settled rule in this court that when a vessel has committed a positive breach of statute she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so. Obedience to the rule is not a fault, even if a different course would have prevented the collision. . . . Masters are bound to obey the rules and entitled to rely on the assumption that they will be obeyed, and

should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules."

In *Crockett* v. *Newton*, 18 How. 581, 583, it was said by Mr. Justice Curtis: "It must be remembered that the general rule is, for a sailing vessel meeting a steamer, to keep her course while the steamer takes the necessary measures to avoid a collision. And though this rule should not be observed when the circumstances are such that it is apparent its observance must occasion a collision, while a departure from it will prevent one, yet it must be a strong case which puts the sailing vessel in the wrong for obeying the rule." "But the duty of the steamer [to port her helm and go to the starboard] implies a correlative obligation of the ship to keep her course." *The Scotia*, 14 Wall. 170, 181.

"It is the duty of a steamer to keep out of the way of a sailing vessel when they are approaching in such directions as to involve a risk of collision. The correlative obligation rests upon the sailing vessel to keep her course and the steamer may be managed upon the assumption that she will do so." *The Free State*, 91 U. S. 200.

It is true that some of the cases just cited were cases wherein the vessel whose duty it was to keep her course was a sailing vessel, yet the principle involved is the same in the case of two steamships crossing, where it is the duty of the one who has the other on her starboard bow to keep out of the way of the other, and of the latter to keep on her course.

The conclusion reached is the same as that arrived at in the District Court, and, accordingly, we reverse the three decrees, and remand the causes to the Circuit Court, with directions to enter decrees in accordance with this opinion, that both vessels were in fault, and the damages should be divided.

Reversed.

Mr. Justice Brown, with whom concurred Mr. Justice Jackson, dissenting.

I cannot agree with the court in holding the Beaconsfield to have been in fault for this collision. Her conduct, so far

from being reckless or in violation of the rules of good seamanship, appears to me to have been characterized by an excess of prudence, which, even if it were an error, was not a fault for which I would willingly condemn her. This court has had frequent occasion to hold steamers liable for too great speed. This is the first in which we have condemned one for too little. Indeed, cases in which steamers have been held liable for not maintaining their speed are extremely rare, both in this country and in England; and, if any such exist, I think they will be confined to those wherein tugs descending a river with tows have been held in fault for stopping and allowing their tows to spread out in the path of ascending vessels. It seems to me that the conclusion that the Beaconsfield was in fault for stopping and reversing can only be reached by ignoring the most vital findings of fact with respect to her conduct, and proceeding upon the theory that, because the collision would not have happened if she had kept her speed, it was necessarily a fault that she had not done so.

The findings, so far as they bear upon the questions at issue, are as follows:

"Fifth. . . . When about midway between Diamond Reef and the New York piers she saw the Britannia as the latter came clear of Castle William, and blew a single whistle to her. The Beaconsfield was then heading about W. N. W. or W. by N. The full speed of the Beaconsfield was between nine and ten knots, with fifty-six revolutions. At this time her engines were moving under an 'easy ahead,' with thirty revolutions, which would make her speed through the water about five knots. The retardation due to the action of the wind and to that of the flood eddy (described in the fourth finding) greatly reduced her speed over the ground as she came within the influence of the eddy to considerably less than four knots."

"Eighth. . . . While getting clear of the bottom, and with her engines at full speed, she [the Britannia] blew a single whistle to the Beaconsfield. The whistle of the Beaconsfield referred to in the fifth finding was neither heard nor seen on the Britannia, but the latter's whistle, given while get-

ting clear of the bottom, was heard on the Beaconsfield, and taken to be an answer to her own signal. At the time the Britannia thus signalled the distance between the steamers was not quite half a mile.

"Ninth. After clearing the bottom the Britannia ported and hard-a-ported her helm, but her bow while in the ebb tide near Governor's Island did not swing to starboard, but, on the contrary, did for a brief space take a slight but perceptible swing to the westward. . . .

"Tenth. When the Beaconsfield blew her first whistle her wheel was put to port a little and kept steady-a-port, and under her slow engine she drew ahead, her head inclining a little toward the New York docks. A careful watch was kept on the movements of the Britannia, and it was observed not only that she did not swing to starboard, but also that she was showing a little more of her starboard side to the Beaconsfield; thereupon those upon the Beaconsfield, while still about four lengths from the Britannia, blew another single whistle, and hearing no answer put their wheel hard-a-port, and stopped and reversed full speed. Her engines were kept reversed until her headway was stopped. Then her engines were stopped, and at the time of the collision she was nearly, if not quite, dead in the water.

"Eleventh. At the time the Beaconsfield reversed she had approached so near the New York shore, that in view of her draft of water and the condition of the bottom in that locality, there was some risk of her running aground should she continue her headway much longer under her port helm. At that time the Britannia, not yet swinging to the eastward, was heading so as to cross the bows of the Beaconsfield, had advanced over a considerable part of the distance which separated them when she blew her first whistle, and was manifestly coming into the northern part of the channel.

"Twelfth. This second whistle from the Beaconsfield was not heard on the Britannia. The latter also blew a second single whistle and thereafter a third, neither of which was seen or heard on the Beaconsfield.

"Thirteenth. Shortly after the Beaconsfield began reversing,

the Britannia commenced to swing to starboard, a motion which was perceived on the Beaconsfield.

"Fourteenth. The captain of the Britannia had noticed that she did not swing as promptly as he had expected after clearing the bottom, and after she did begin to swing he saw that she needed to come more to starboard, and that the ships for some reason did not get clear of each other; and, differing from the pilot as to the chance of clearing the Beaconsfield if he kept on, he gave the order to reverse his engines; thereafter he let go his port anchor when about one hundred feet from the Beaconsfield."

"Twenty-fourth. At the time these steamers sighted each other and signalled, they were crossing so as to involve risk of collision, within the meaning of the nineteenth rule, and the Britannia had the Beaconsfield on her starboard side.

"Twenty-fifth. At the time when the Beaconsfield stopped and reversed, the vessels were approaching each other so as to involve risk of collision. A prudent navigator viewing the situation at that moment from the deck of the Beaconsfield would have reached the conclusion that, if neither the course of the Britannia were altered nor her headway checked, collision was imminent and inevitable, unless avoided by some change in the movements of the Beaconsfield.

"Twenty-sixth. The Britannia's movements, visible to the Beaconsfield, were not in accordance with the single whistle she had blown, but were such as to create a natural, reasonable, and strong apprehension of collision in those in charge of the Beaconsfield, and they were thereby justified in taking the statutory precaution to avoid risk of collision, which is prescribed by the 21st rule for a vessel approaching another vessel so as to involve risk of collision."

Although the collision occurred in November, 1886, after the Revised International Regulations, adopted by act of Congress of March 3, 1885, c. 354, 23 Stat. 438, took effect, the case was treated by court and counsel as covered by the rules prescribed in Rev. Stat. § 4233, which do not, however, differ materially from the Revised Regulations.

In connection with the above findings, the following rules are pertinent:

"Rule nineteen. If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

"Rule twenty-one. Every steam vessel, when approaching another vessel, so as to involve risk of collision, should slacken her speed, or, if necessary, stop and reverse."

"Rule twenty-three. Where, by rules seventeen, nineteen, twenty, and twenty-two, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of rule twenty-four.

"Rule twenty-four. In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger."

Two questions are naturally raised by the above findings: (1) Whether the obligations imposed upon the privileged vessel by rule 23, to "keep her course," also obliges her to maintain her speed. (2) Granting that it does, whether this requirement applied to the Beaconsfield under the peculiar circumstances of this case.

(1) The *first* proposition depends upon what is meant by keeping the course of a vessel. The word "course," as used in this connection, is defined by the lexicographers as follows: By Webster, as "progress from point to point without change of direction; any part of a progress from one place to another, which is in a straight line or in one direction." By Worcester, as "the track or line of motion; direction in which motion takes place." And by the Imperial Dictionary, as "the direction of motion; the line in which a body moves; as what *course* shall the pilot steer; the *course* of a projectile through the air."

Now, unless we are to give to the word "course" a meaning quite different from that given by the grammarians, we must hold that the steamer discharged her obligation to "keep her course" by keeping steadily in the direction in which she had been previously going. But we are not without authority upon this point. In the case of *The Beryl*, which was a collision in the North Sea between the steamship Abeona and the

steamship Beryl, the two vessels were approaching each other at right angles, the Beryl being upon the starboard side of the Abeona. The Abeona admitted that the Beryl kept her course, but claimed that she kept it too long, directly the contrary of the claim made by the Britannia in this case. The Beryl eased her engines from a quarter to half a mile distant from the Abeona. It was held by the admiralty court, 9 P. D. 4, that although the obligation to keep her course was applicable, yet the Beryl was bound not to disregard the obligation of the other article to stop and reverse, if necessary to avoid a collision, and that both articles were applicable to the case. The admiralty court held that the Beryl did act in time in stopping her engines, but on appeal to the Court of Appeals the case was reversed, 9 P. D. 137, 140, 141, 142, 144, and the Beryl held to be in fault, *not for failing to maintain her speed*, but for failing to stop and reverse her engines in due time. In delivering the opinion of the court, Brett, Master of the Rolls, observed: "It was suggested to us to-day that 'keep her course' meant keeping her course at the same pace at which she was going before she was called upon to obey this rule. But keeping her course means that she is to keep on the same direction as before: it has nothing to do with the question of speed. . . . The Abeona was bound to get out of the way of the Beryl; the moment that rule applied to the Abeona, art. 22 applied to the Beryl, namely, to keep her course. . . . The Abeona did everything that was wrong; and then the question arises, did the Beryl break any of the rules? She kept her course, and when she saw that the Abeona was not doing her duty she whistled. . . . Seeing the Abeona was still keeping on, she whistled again and slackened her speed. The first question upon that is this — were the circumstances such, then, that there was risk of collision? The vessels were at a distance of from a quarter to half a mile. At that time the officer of the Beryl slackened his speed."

Bowen, Lord Justice, observed: "It has been suggested that the expression 'keep her course,' used in art. 22, refers to the speed of the vessel as well as to the direction of her

head, but this is an untenable argument. In art. 18 we find the words 'stop and reverse if necessary,' which obviously are intended to point out that the vessel, when it is necessary, is to do more than simply slacken her speed. It may, however, be a matter of consideration whether 'if necessary' is to be construed as meaning if it is actually necessary, or only if the captain should reasonably think that a necessity has arisen; but even if we were to take the latter as the construction most favorable to the master of the Beryl, the answer of our assessors to the question put to them, which the Master of the Rolls has already referred to, puts him clearly in the wrong, and obliges us to hold that the Beryl was also to blame for this collision."

Fry, Lord Justice, was of the same opinion, and thought that the Beryl should have stopped and reversed earlier than she did.

This case is not only inconsistent with the opinion of the court in the case under consideration, but is absolutely the reverse of it.

In view of the fact that these rules are international and have been pronounced by this court to be a branch of the international law, *The Scotia*, 14 Wall. 170, it is of the utmost importance that the same construction should be placed upon them by all courts upon which they are obligatory, and the fact that the courts of the country in which they were first adopted has given them a certain construction is a cogent argument in favor of a similar construction elsewhere. There is a peculiar propriety in its application in this case in view of the fact that the Beaconsfield was a British vessel, and its officers presumably acquainted with the law of their flag. The only case to the contrary to which our attention has been called is that of *The Northfield and The Hunter*, 4 Ben. 112, in which, however, no such general rule of construction was laid down. But, under the peculiar circumstances of that case, to which I shall advert hereafter, as distinguishing it from the case under consideration, it was held that the privileged vessel was in fault for stopping and reversing.

(2) But, whatever be the interpretation of this rule, it seems to me clear that, under the circumstances of the particular case, the Beaconsfield was guilty of no fault in stopping and reversing. It will not for a moment be claimed that a steamer is bound to keep up her speed, if her master can see that by so doing she must inevitably be brought into collision with the other vessel. He is not, by a persistent adherence to any rule, at liberty to thrust himself directly in the path of an approaching vessel. There is certainly a point in every case beyond which he is not bound to proceed. The obligation to avoid a collision, if it be possible to do so, must be read into and made a part of all steering and sailing rules, and is specially provided for in rule 24, that "in construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger." There is no rule of more general observance than that which requires sailing vessels to keep their course when approaching a steamer, and yet in *The Sunnyside*, 91 U. S. 208, a sailing vessel was condemned for persistently adhering to the rule, and running down a steam tug, which lay motionless upon the water, although the latter was conceded to be in fault for not getting out of her way. "Negligence more manifest," said Mr. Justice Clifford, "culpable or indefensible, in view of the circumstances, is seldom exhibited in controversies of this character; and the only excuse offered for it is, that the 18th sailing rule provides that, where one of two ships is required to keep out of the way, the other shall keep her course; entirely overlooking the fact that the mandate of that rule is declared by the rule itself to be subject to the qualification" of rule 24. See also *The Isaac Newton*, (*Crocket* v. *Newton*,) 18 How. 581; *Wilson* v. *Canada Shipping Co.*, 2 App. Cas. 389.

So, rule 23, which requires the privileged steamer to keep her course, must, like all others, be read in connection with rule 21, that every steam vessel when approaching another vessel so as to involve risk of collision shall slacken her speed, or, if necessary, stop and reverse.

This case then reduces itself to the question whether, at the time the order was given upon the Beaconsfield to stop and reverse, the master had a right, in the exercise of a reasonable judgment, to suppose that, if he persisted in his speed, a collision was probable — in other words, had he reason to believe there was *danger* of collision? The sequence of events after the steamers came in sight of each other, as appears from the findings, was as follows:

When about midway between Diamond Reef and the New York piers she (the Beaconsfield) saw the Britannia as the latter came clear of Castle William and blew a single whistle to her. Owing, probably, to a strong wind then blowing from the west, (about 22 miles an hour,) this whistle of the Beaconsfield was not heard upon the Britannia. The latter, however, while getting clear of the bottom and her engines at full speed, blew a single whistle to the Beaconsfield, which was heard and taken to be an answer to her own signal. At this time the vessels were not quite half a mile apart. Although, after clearing the bottom, the Britannia ported and hard-a-ported her helm, her bow, while in the ebb tide near Governor's Island, did not swing to starboard, but on the contrary, for a brief space took a slight but perceptible swing to the westward — to port. It was seen upon the Beaconsfield, not only that the Britannia did not swing to starboard, but that she was showing a little more of her starboard side to the Beaconsfield; whereupon the Beaconsfield, while still about four lengths from the Britannia, blew another single whistle, and hearing no answer, put her wheel hard-a-port, and stopped and reversed at full speed until her headway was stopped, when her engines were stopped and she remained motionless in the water.

Was she in fault for so doing? There were three circumstances calculated to excite the apprehension of her master. (1) The Britannia, instead of swinging to starboard, appeared to be swinging to port. That this also alarmed those on the Britannia is evident from the fourteenth finding, that after she began to swing her master saw that she needed to come more to starboard; that the ships did not, for some reason,

get clear of each other, and, differing in opinion from the pilot, he gave the order to reverse the engines. (2) She did not at once answer the Beaconsfield whistle — a circumstance tending to show either that she did not hear it, or disregarded it. In view of the fact that the steamers were not more than ten or twelve hundred feet apart, this silence was certainly alarming. (3) At this time, too, the Beaconsfield had approached so near the New York shore that, in view of her draft of water and the condition of the bottom, there was some risk of her running aground, should she continue her headway much longer under her port helm. In this condition of things we are confronted by the 25th and 26th findings, that at the time the Beaconsfield stopped and reversed, the vessels were approaching so as to involve risk of collision. That a prudent navigator, viewing the situation from the deck of the Beaconsfield, would have reached the conclusion that, if the course of the Britannia were not altered nor her headway checked, a collision was imminent and inevitable, unless avoided by some change on the part of the Beaconsfield. And (finding 26) that the Britannia's movements visible to the Beaconsfield were not in accordance with the single whistle she had blown, and were such as created a natural, reasonable, and strong apprehension of collision in those in charge of the Beaconsfield. Under these circumstances I agree with the opinion of the court below that the Beaconsfield was justified in taking the statutory precautions to avoid risk of collision prescribed by the 21st rule, as to stopping and reversing.

The case of *Northfield and Hunter*, 4 Ben. 112, decided by Judge Blatchford, whose experience as an admiralty judge undoubtedly entitles his opinions to most respectful consideration, is clearly distinguishable from this. In that case the Northfield was going at a speed of from nine to ten knots an hour, while the Hunter, the privileged vessel, with a schooner in tow, was not going more than two knots an hour. The master of the Hunter, who was fearful that the schooner would get adrift if any extra strain should come upon his lines, stopped his vessel. But the court expressly finds that such stopping did not occur *in articulo periculi*, but took

place at a distance from the Northfield which would have enabled the latter easily to have avoided her.

The only excuse for holding the Beaconsfield in fault is, that her pilot was bound to know the existence of the eddy, which gave the Britannia's bow a swing to port, before she answered her wheel to swing to starboard. Considering, however, the proximity of the two vessels at this time, and the failure of the Britannia to promptly respond to the Beaconsfield's whistle, I do not think the pilot of the latter was bound to know the precise moment when the Britannia would begin to answer her helm, and swing her bow to starboard. The vessels were in such proximity that seconds became of the utmost importance, and the failure on the Britannia to do exactly what she ought to have done meant inevitable disaster.

The case of *The Rhondda*, 8 App. Cas. 549, so far from being an authority in favor of the position assumed by the court in this case, is, as I read it, directly the contrary. The Rhondda, having the Alsace-Lorraine on her starboard side, was rounding Faro Point at the entrance of the Straits of Messina, when she observed the Alsace-Lorraine at a distance of half a mile and about a point on her starboard bow. The Rhondda at once put her helm hard-a-port, but failed to answer her wheel in consequence of the strong current at the entrance of the straits — the ancient Charybdis. She then blew her whistle and *stopped and reversed her engines* at full speed, and was held to have performed her full duty. The Alsace-Lorraine *did not ease or stop her engines*, but put her helm hard-a-port, and was struck by the Rhondda nearly amidships, and was held to have been in fault. I think the case tends to show that the Beaconsfield was right in her manœuvre.

I would apply to this case the observations of this court in the case of *The Favorita*, 18 Wall. 598, 603, in which a collision occurred under somewhat similar circumstances: "It is said if the Manhasset had advanced instead of stopping she would have cleared the steamship. This may or may not be true; but if true, she is not in fault for this error of judgment. It was a question whether to advance or stop and back, and the emergency was so great that there was no time to

deliberate upon the choice of modes of escape. In such a moment of sudden danger, caused by the misconduct of the Favorita, the law will not hold the pilot of the Manhasset, acting in good faith, guilty of a fault, if it should turn out after the event that he chose the wrong means to avoid the collision, unless his seamanship was clearly unskilful. And this we do not find to be the case. On the contrary, if there were error at all, it was such a mistake of judgment as would likely be committed by any one in similar peril." (See *S. C.* 1 Ben. 30; 8 Blatchford, 539.)

I agree with the court that the thirty-first finding is a finding of law and not of fact, but I think it was such a legal conclusion as was justified by the other findings.

For these reasons I am of opinion that the decree of the Circuit Court should be affirmed.

Mr. Justice Jackson concurred in this opinion.

WHARTON *v.* WISE.

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

No. 1054. Argued March 5, 6, 1894. — Decided April 23, 1894.

The compact of March 28, 1785, between the States of Virginia and Maryland, having been duly ratified by each State, is binding upon both as to the subjects embraced within it, so far as it is not inconsistent with the Constitution of the United States.

That compact was not prohibited by Article 6 of the articles of Confederation, forbidding any treaty, confederation or alliance between two or more States without the consent of Congress; and it continued in force after the adoption of the Constitution, except so far as inconsistent with its provisions, and received the assent of Congress by the adoption or approval of proceedings taken under it.

The compact of 1785 contained no reference to fish of any kind in Pocomoke River or Pocomoke Sound, and no clause in that compact gave Maryland a right to fish in that river or sound.

Hendricks v. *Commonwealth*, 75 Virginia, 934, criticised and questioned.

Statement of the Case.

The 10th section of the compact of 1785 does not forbid the State of Virginia from trying and convicting citizens of Maryland for offences committed in Virginia against its laws regulating the oyster fisheries.

THIS case came before the court on appeal from an order of the Circuit Court of the United States for the Eastern District of Virginia, dismissing a writ of *habeas corpus*, sued out for the discharge of the appellant, a citizen of Maryland, from a judgment of imprisonment until a fine should be paid, imposed upon him by the county court of Accomack County in that State, upon a conviction of violating a law of Virginia in taking oysters, contrary to its prohibitions, from Pocomoke Sound, within her limits. An act of that Commonwealth, approved in February, 1892, provides that if any person, other than a resident of the State, "take or catch oysters or other shellfish in any of the waters of the State, he shall, upon conviction thereof, be fined five hundred dollars." Acts of the Legislature of Virginia, 1891–2, c. 363, amending § 2153 of the Code of Virginia, paragraph 10, p. 603.

At March term, 1893, of the county court of Accomack County, the appellant was indicted by the grand jury of the county for that, being a non-resident of Virginia, he did unlawfully take and catch oysters in the waters of the State and within the jurisdiction of the county, to wit, on Ledge Rock in Pocomoke Sound, against the peace and dignity of the Commonwealth. At the following April term he appeared in court and filed a special plea to its jurisdiction, alleging that at the time the offence charged was committed he was a citizen of Maryland, residing in Somerset County of that State, and that the act of the assembly of Virginia, under which the indictment was found, had not been adopted or ratified by the general assembly of Maryland; that, by the compact of 1785, between those States, which had never been repealed, or annulled, but was still in effect, and operative, the court had no jurisdiction to try the defendant for the alleged offence, Pocomoke Sound mentioned in the indictment being a part of Pocomoke River mentioned in the compact. The Commonwealth demurred to the plea, and the court sustained the demurrer, adjudging the plea to be insufficient. Thereupon

the defendant, under the plea of not guilty, was tried and convicted, and was sentenced to pay a fine of five hundred dollars, the sum prescribed by the statute for the offence, and the costs of the prosecution, and ordered to be committed to the jail of the county until the fine and costs were paid. Averring that he intended to apply to the Circuit Court for a writ of error, he moved the county court to be admitted to bail pending his appeal, but the motion was denied, on the ground that the law of the State did not provide for admitting a person to bail after conviction. He was thereupon taken to the jail by the sheriff of the county and detained by him in default of payment of the fine and costs. He then applied to the Circuit Court of the United States for the Eastern District of Virginia for a writ of *habeas corpus* to be directed to John H. Wise, the sheriff of the county of Accomack, by whom, under the judgment, he was imprisoned, requiring the officer to produce the petitioner before that court, with the authority for his detention, alleging that his imprisonment was unlawful on grounds, which, as stated by counsel, were similar to those now urged for a reversal of the judgment before us, namely : That the compact of 1785, between the States of Virginia and Maryland, was still a subsisting agreement, binding upon and enforceable by each of those States and the citizens thereof ; that by its provisions the citizens of Maryland possess and are entitled to enjoy freely a right of fishery, including the right to take oysters in common with the citizens of Virginia, in the Pocomoke River ; that that river, as mentioned in the compact of 1785, embraces what is now commonly called Pocomoke Sound, which is nothing but the mouth of Pocomoke River ; that the law of Virginia, under which the petitioner was arrested, indicted, and convicted, was never adopted by the concurrent legislation of Maryland, and was therefore inoperative as against the citizens of that State, and that the conviction thereunder of the petitioner, who was a citizen of Maryland, was void. And on the further ground that, assuming the law of Virginia was not inoperative against citizens of Maryland, still, under the tenth section of the compact of 1785, the petitioner, as a citizen of that State, could not be lawfully tried in the

courts of Virginia for the offence charged, but was to be tried in the courts of Maryland.

The writ was issued, directed to the sheriff of Accomack County, and made returnable before the Circuit Court of the United States for the Eastern District of Virginia at Norfolk on the 11th of May, 1893, and was then adjourned for hearing in Richmond on the 1st of June following, at which time and place the case was fully heard. At the succeeding term the court rendered its decision to the effect that the writ of *habeas corpus* be dismissed, and that the petitioner be remanded to the custody of the sheriff of Accomack County. From this judgment the petitioner appealed to this court.[1]

Mr. John Prentiss Poe, Attorney General of Maryland, *Mr. Bradley T. Johnson*, and *Mr. Thomas S. Hodson* for appellant.

The compact of 1785, between Virginia and Maryland, is still a subsisting agreement, binding upon and enforceable by each of these States, and the citizens thereof, according to its true interpretation, except in so far as some of its provisions have been superseded by the Constitution of the United States. By the true interpretation of those parts of such compact as are still in force, the citizens of Maryland now possess and are entitled to enjoy freely a right of fishery, including the right to take oysters, in common with the citizens of Virginia, in the Pocomoke River.

This compact was arranged immediately after the Revolution, and was a commercial necessity, at that time, to both States, in their new and changed condition.

The Mount Vernon Commissioners understood the necessity for uniformity in the regulations and in the punishment for

[1] The provisions of the compact of 1785 involved in this case, will be found in the opinion of the court, *infra;* and also references to the legislation of Maryland and Virginia and of Congress touching it. The Pocomoke River and the Potomac River, the two subjects of the compact, enter the Chesapeake Bay about opposite each other — the Pocomoke coming down to the eastern shore from the north and east, the Potomac to the western shore from the north and west.

infractions of them. They therefore provided for it in the 8th section of the compact, which provides that "all laws for the preservation of fish or for the performance of quarantine, in the river Potomac, or for preserving or keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out of ballast or of giving any other obstruction thereto, shall be made with the mutual consent and approbation of both States."

The letter of this section can be construed in two ways. One construction excludes the Pocomoke River wholly from that portion of the 8th section which refers to "laws for the preservation of fish." This is the construction now put upon it by the law officers of Virginia in this suit. This view is of recent origin and was unknown in the earlier history of the States under the Constitution of the United States.

The second view of the proper construction of the letter of the 8th section is that there is a *complete* mutuality as to both rivers, and the rights to be enjoyed in them by the people of the two States. Both these are grammatical constructions, and the latter has the greater weight both in years and in authority, and makes the letter and the spirit of the compact to agree.

The legislature of Virginia by an unbroken series of acts, beginning with its first oyster law and extending down to 1880, has practically put upon the 8th section the latter interpretation, and has conceded to Marylanders in both rivers the same oyster rights as Virginians. The laws will be referred to, particularly, hereafter.

The Court of Appeals of Virginia in *Hendricks* v. *Commonwealth*, 75 Virginia, 934, 941, in discussing an indictment founded, expressly and confessedly, upon the 8th section, says: "The effect of this section (the 8th of the compact) is to give to the State of Virginia, concurrent jurisdiction with the State of Maryland over the Potomac River from shore to shore, and over that part of Pocomoke River which is within the limits of Virginia, to enact such laws, with the consent and approval of Maryland, as may be deemed necessary and proper for the preservation of fish in said waters."

If the 8th section is to be interpreted according to its *spirit* and not its mere letter, there is but one construction possible to be placed upon it. Maryland was giving up certain rights "in the river Potomac" within the limits of Maryland, and receiving in return, "mutual" and similar concessions in "the river Pocomoke within the limits of Virginia."

It seems to be now universally conceded that the term "fish" includes oysters. Gould's Laws of Waters, § 20, and note.

Marylanders, from time immemorial, enjoyed the right of oystering in Pocomoke Sound, without molestation, until shortly before the line was determined by the arbitrators in 1877, and located by commissioners appointed by the two States in 1883.

Interpreted then either by the letter or by the spirit of the compact, there is an entire mutuality or equality of privileges in both rivers, for both States. And all the departments of the government of Virginia have acted in conformity with this view since the making of the compact in 1785.

It has been suggested that the Acts of Assembly supposed to sustain the above construction of the compact were not concessions of the Maryland right, but only a temporary suspension of the exclusive right of Virginia pending the controversy as to the line.

This cannot be true. There never has been any real controversy between the two States as to the line, on land, on the eastern shore of Maryland and Virginia. Nobody ever cared about this land and no controversy could have been aroused with reference to that. There was unfortunately a controversy as to the territory between the north and south branches of the Potomac, in what is now West Virginia. But for this, no controversy, on the eastern shore, would have ever been heard of.

The compact and the legislative action of Virginia, and the peaceable enjoyment of their equal rights to fish in Pocomoke by citizens of Maryland, was for more than half a century a complete and satisfactory settlement of the whole controversy on the lower Potomac and in Pocomoke Sound. The disputed

location of the line, as to the upper branches of the Potomac, alone, kept the controversy open.

[Counsel then contended at some length, in an historical argument, that Pocomoke Sound is a part of Pocomoke River, and was so understood to be by the negotiators of the compact of 1785; but in view of the action of this court, this contention is unimportant.]

Inasmuch as the statute of Virginia under which the appellant was arrested, indicted, and convicted was never adopted and enacted by concurrent legislation of Maryland, as stipulated in the compact, it was and is inoperative by virtue of that compact, as against citizens of Maryland, and that, therefore, the conviction thereunder of the appellant, who was and is a *bona fide* citizen of Maryland, was illegal and void.

Assuming, but not conceding, that the citizens of Maryland do not possess and are not entitled to a free right of fishery, including the right to take oysters, in common with the citizens of Virginia, in Pocomoke River, and assuming further that Pocomoke River, as mentioned in the compact, does not embrace Pocomoke Sound, and assuming further that the statute of Virginia in question did not require the concurrence of Maryland in order to render it operative as against citizens of Maryland, still under the tenth section of the compact, the appellant as a citizen of Maryland could not lawfully be tried in the courts of Virginia for an alleged violation of that statute, but was entitled to be tried in the courts of Maryland; and consequently his trial and conviction in Accomack County Court was illegal and void.

Being thus unlawfully deprived of his liberty, contrary to the Constitution and laws of the United States, by the void judgment of a court which had no jurisdiction to try him, and being unable in any other mode to obtain a proper hearing of his case, and a release from such unlawful judgment and imprisonment, the court below, upon petition of the appellant for the writ of *habeas corpus*, had ample jurisdiction to order his discharge, and should have done so upon the case made. Consequently the order of the court below, dismissing the writ and remanding the appellant to the custody

of the sheriff of Accomack County, was erroneous and should be reversed.

Mr. R. Taylor Scott, Attorney General of the State of Virginia, *Mr. James H. Fletcher, Jr.*, *Mr. William A. Jones*, and *Mr. Waller R. Staples* for appellee.

Mr. Justice Field, in delivering the opinion of the court, stated the case as above reported, and continued:

The disposition of the appeal will require an examination of certain provisions of the compact between the States of Maryland and Virginia of 1785, as upon their interpretation and effect the controversy which has given rise to the present proceeding, and similar controversies between citizens of those States, and their respective rights to fish in the waters of Virginia for oysters, will be determined. The questions involved are of deep interest to both States, and they have been presented by distinguished counsel on their behalf with great ability.

Previously to June, 1784, great inconveniences were experienced by citizens of both Maryland and Virginia from the want of established and recognized regulations between those States respecting the jurisdiction and navigation of the river Potomac, which constituted a boundary between the two States for over one hundred miles. In that month and year the general assembly of Virginia, reciting that such inconveniences resulted from want of some concerted regulations between the States, "touching the jurisdiction and navigation of the river Potomac," passed the following resolutions:

"*Resolved*, That George Mason, Edmund Randolph, James Madison, Jr., and Alexander Henderson, Esquires, be appointed commissioners, and that they, or any three of them, do meet such commissioners as may be appointed on the part of Maryland, and in concert with them frame such liberal and equitable regulations concerning the said river as may be mutually advantageous to the two States, and that they make report thereof to the general assembly.

"*Resolved*, That the executive be requested to notify the above appointment, with the object of it, to the State of Maryland, and desire its concurrence in the proposition."

The resolutions were communicated to the Executive of Maryland, and by him laid before the legislature of that State, which responded to the invitation by a resolution, passed on the 18th of January, 1785, appointing commissioners on her part to meet those of Virginia, but with powers somewhat enlarged. The resolution, as adopted by the Senate of Maryland, declared that Thomas Johnson, Thomas Stone, Samuel Chase, and Daniel of St. Thomas Jenifer (selected by the House of Representatives two days before) should be commissioners for the State of Maryland to meet the commissioners appointed by the Commonwealth of Virginia, "for the purpose of settling the *navigation* and *jurisdiction* over that part of the bay of Chesapeake which lies within the limits of Virginia, and over the rivers Potomac and Pocomoke;" and that the commissioners, or any two of them, should have full power, on behalf of Maryland, "to adjudge and settle the jurisdiction to be exercised by the said States, respectively, over the waters and navigation of the same, the proceedings to be laid before the general assembly of the State to be ratified," etc.

The commissioners met at Mt. Vernon in the following year, and on the 28th of March a compact between the two States was mutually agreed upon by them.

In its first clause Virginia disclaimed all right to impose any toll, duty or charge, prohibition or restraint on any vessel sailing through the capes of Chesapeake Bay to the State of Maryland, or from that State through the capes outward bound, and agreed that the waters of Chesapeake Bay and Pocomoke River within the limits of Virginia should be forever considered as a common highway for the use and navigation of any vessels belonging to the State of Maryland or any of its citizens, or for carrying on any commerce to or from that State or with any of its citizens, and that any such vessel inward or outward bound might enter any of the rivers within the Commonwealth of Virginia as a harbor or for safety against an enemy, without the payment of port duties or any other

charge; and that the waters of Chesapeake Bay and Pocomoke River should be free for the navigation of vessels from one part of the State of Maryland to another.

In the second clause the State of Maryland agreed that any vessel belonging to Virginia or any of its citizens, or carrying on commerce to or from that State, or with any of its citizens, might freely enter its rivers as a harbor, or for safety against an enemy, without the payment of any port duty or other charge.

In the third clause it was provided that war vessels, the property of either State, should not be subject to the payment of any port duty or other charge.

The fourth and fifth clauses related to commerce between citizens of the two States in their produce, providing that vessels of a certain size might enter and trade in the ports of either State with a permit from the naval officer of the district, and should not be subject to port charges.

The sixth clause declared that the river Potomac should be considered a common highway for the purpose of navigation and commerce to the citizens of both States, and all other persons in amity with the two States, trading to or from Virginia or Maryland.

The seventh clause provided that "the citizens of each State, respectively, shall have full property in the shores of Potowmack River adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to and equally enjoyed by the citizens of both States; provided, that such common right be not exercised by the citizens of the one State to the hindrance or disturbance of the fisheries on the shores of the other State; and that the citizens of neither State shall have a right to fish with nets or seines on the shores of the other."

The eighth clause provided that "all laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine in the river Potowmack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of

Virginia, by preventing the throwing out ballast or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both States."

The tenth clause provided that "all piracies, crimes, or offences committed in that part of Chesapeake Bay which lies within the limits of Virginia, or that part of the said bay where the line of division from the south point of Potowmack River, (now called Smith's Point,) to Watkins' Point, near the mouth of Pocomoke River, may be doubtful and on that part of Pocomoke River within the limits of Virginia, or where the line of division between the two States upon the said river, is doubtful, by any persons not citizens of the Commonwealth of Virginia against the citizens of Maryland, shall be tried in the court of the State of Maryland which hath legal cognizance of such offence. And all piracies, crimes, or offences committed on the before-mentioned parts of Chesapeake Bay and Pocomoke River, by any persons, not citizens of Maryland, against any citizen of Virginia shall be tried in the court of the Commonwealth of Virginia which hath legal cognizance of such offence. All piracies, crimes, and offences committed on the said parts of Chesapeake Bay and Pocomoke River, by persons not citizens of either State, shall be tried in the court of the Commonwealth of Virginia having legal cognizance of such offences. And all piracies, crimes, and offences committed on the said parts of Chesapeake Bay and Pocomoke River, by any citizen of the Commonwealth of Virginia or of the State of Maryland, either against the other, shall be tried in the court of that State of which the offender is a citizen."

There were other provisions in the compact, but those to which reference is made are all that are important in the disposition of the present case.

The compact provided that its articles should be laid before the legislatures of the two States and, their approbation being obtained, should be confirmed and ratified by a law of each State, never to be repealed or altered by either without the consent of the other. The articles were accordingly laid before the legislatures of those States and were approved,

ratified, and confirmed by a law of each substantially identical in terms. The concluding clause of the act of ratification of the legislature of Virginia is as follows: "And whereas this general assembly are of opinion that the said compact is made on just and mutual principles for the true interests of both governments, and the same having been confirmed by the general assembly of the State of Maryland, be it therefore enacted that the said compact is hereby approved, confirmed, and ratified by the general assembly of Virginia, and that every article, clause, matter, and thing therein contained shall be obligatory on this State and the citizens thereof, and shall be forever faithfully and inviolably observed and kept by this government and all its citizens according to the true intent and meaning of this compact; and the faith and honor of this State are hereby solemnly pledged and engaged to the State of Maryland and the government and citizens thereof that this law shall never be repealed or altered by the legislature of this commonwealth without the consent of the State of Maryland."

A similar clause concludes the act of ratification by the State of Maryland, with a change only in the terms required to indicate it as the act of Maryland instead of that of Virginia.

The provisions of the compact were well designed to promote the peace, good neighborhood, and welfare of both States, and facilitate intercourse between their citizens, and it was clearly within their competency at the time to adopt them, if not restrained by the Articles of the Confederation, then in existence and in which they had joined. They were then sovereign States, possessing, unless thus restrained, all the rights and powers of independent nations over the territory within their respective limits, and could exercise any control and dominion over their navigable waters and make any regulations necessary for the protection of their navigation or to promote the commerce upon them of their respective States. Those articles expressly provided that each State composing the Confederation retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which was

not by them expressly delegated to the United States in Congress assembled. The Confederation was a league of friendship of the States with each other, so declared in the articles and entered into "for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever." But its articles did not form a constitution or ordinance of government, with power to enforce its provisions upon each other, or even a compact having any coherence or binding force other than that of a league of friendship, which its members only claimed them to constitute.

The validity of the compact of 1785 has been questioned as in conflict with the second clause of the sixth article of the Confederation, which provided that no two or more States should enter into any treaty, confederation, or alliance whatever between them without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same was to be entered into, and how long it should continue; and also as having been superseded by the Constitution of the United States subsequently adopted. A few words upon each of these positions. The articles inhibiting any treaty, confederation, or alliance between the States without the consent of Congress were intended to prevent any union of two or more States, having a tendency to break up or weaken the league between the whole; they were not designed to prevent arrangements between adjoining States to facilitate the free intercourse of their citizens, or remove barriers to their peace and prosperity; and whatever their effect, such arrangements could not be the subject of complaint by the States making them until, at least, the Congress of the Confederation interposed objections to their adoption or enforcement, which was never done.

The provisions of the compact, so far as they were inconsistent with the Constitution of the United States, subsequently adopted, and to which Maryland and Virginia were parties, were of course suspended and superseded by it.

But as an operative agreement, binding the action of the two States upon the subjects embraced, where not inconsistent with the Constitution, its validity has often been recognized by their authorities. Neither of the governments has ever denied or repudiated its obligation, but, as in the present case and in all controversies between the States, it has been treated as of obligatory force.

In determining the effect of the prohibition of the clause in the sixth article of the confederation upon the validity of the compact, the observations of this court, in the recent decision of the controversy between Virginia and Tennessee, upon the meaning of the clause of the Constitution of the United States which is similar, in one particular, with that in the Articles of Confederation, and broader in another, may be properly considered. The article of the confederation inhibits "any treaty, confederation, or alliance" between two or more States without the consent of Congress. The Constitution of the United States prohibits, without such consent, any agreement or compact of one State with another. In the case mentioned there was an agreement between the States of Virginia and Tennessee to appoint commissioners to run and mark the boundary between them, made without the consent of Congress, and the question considered was whether the agreement was within the prohibition of the clause cited from the Constitution of the United States, and we said: "The terms 'agreement' or 'compact,' taken by themselves, are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.

"There are many matters upon which different States may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter

State might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter State to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that State to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that State in that way. If the bordering line of two States should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public ground, to obtain the consent of Congress for the bordering States to agree to unite in draining the district, and thus removing the cause of disease. So in case of the threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one State and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?

"We can only reply by looking at the object of the constitutional provision, and construing the terms 'agreement' and 'compact' by reference to it. It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.

"Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is

directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States. Story, in his Commentaries, (§ 1403,) referring to a previous part of the same section of the Constitution in which the clause in question appears, observes that its language 'may be more plausibly interpreted from the terms used, "treaty, alliance, or confederation," and upon the ground that the sense of each is best known by its association (*noscitur a sociis*) to apply to treaties of a political character; such as treaties of alliances for purpose of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political coöperation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges;' and that the 'latter clause, "compacts and agreements," might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of States bordering on each other.' And he adds: 'In such cases the consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief.'" *Virginia* v. *Tennessee*, 148 U. S. 503, 518, 519, 520.

So, in the present case, looking at the object evidently intended by the prohibition of the Articles of Confederation, we are clear they were not directed against agreements of the character expressed by the compact under consideration. Its execution could in no respect encroach upon or weaken the general authority of Congress under those articles. Various compacts were entered into between Pennsylvania and New Jersey and between Pennsylvania and Virginia, during the Confederation, in reference to boundaries between them, and to rights of fishery in their waters, and to titles to land in

their respective States, without the consent of Congress, which indicated that such consent was not deemed essential to their validity. Virginia and Maryland were sovereign States with no common superior and no tribunal to determine for them the true construction and meaning of its provisions in case of a conflict of opinion upon the subject. Each State was left to decide for itself as to their true construction and meaning, and to its own sense of the obligations of the compact for their enforcement. If, therefore, the Congress of the United States, which, as said above, never complained of the compact of 1785, had interposed objections to its adoption or enforcement as being within the meaning of the terms treaty or confederation, or as establishing an alliance within the prohibition of the articles mentioned, yet it would not lie in either of the States that were parties to the contract to allege its invalidity on the subject. As said by Mr. Steele, in his very able and elaborate opinion, upon the construction of provisions of the compact, given to the governor of Maryland, and which is referred to in the record, they cannot complain that there was in its adoption any breach of good faith towards themselves, and we may add, or any rupture by them of the league of friendship declared to be the object of the articles to establish.

In our judgment the compact of 1785 was not prohibited by the Articles of Confederation. It was not a treaty, confederation, or alliance within the meaning of those terms as there used, and it remained as a subsisting operative contract between them, in full force when the confederation went out of existence upon the adoption of the present Constitution of the United States. And it was not affected or set aside by the prohibitory clause of that instrument. Its prohibition extends only to future agreements or compacts, not against those already in existence, except so far as their stipulations might affect subjects placed under the control of Congress, such as commerce and the navigation of public waters, which is included under the power to regulate commerce.

As stated by counsel, stipulations as to riparian rights of fishery, and as to jurisdiction in and over waters lying between

the two States, remained as they previously existed, neither suspended or impaired.

We are therefore of opinion that the compact continued in full force after the adoption of the Constitution, except so far as inconsistent with its provisions; and such we understand has been the clear declaration of the two States whenever they have been called upon to express their opinion upon the subject, and such is the concession of counsel. In the acts of both States, passed in 1874, designating arbitrators to ascertain and fix the boundary between them, the validity of the compact was affirmed in the declaration that "neither of the said States, nor the citizens thereof, shall, by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact between them, entered into in the year 1785, but that the same shall remain to and be enjoyed by the said States and the citizens thereof forever." Act of March 28, 1874, c. 135, Laws of Virginia, 1874, 151; Act of April 11, 1874, c. 274, Laws of Maryland, 1874, 365.

As justly observed, there could not be a more solemn and conclusive recognition and assertion — so far as the two States were concerned — of the continued existence and obligatory force of the compact than is contained in this language of both in appointing the arbitrators and designating the conditions upon which their award should be accepted. The States of Maryland and Virginia not only consented to the appointment of the arbitrators, upon the conditions mentioned, but their award was approved by both States and by an act of Congress. That approval covered all the conditions and stipulations upon which the award was made, and renders the compact of 1785, the rights and privileges of which were to remain and be enjoyed by the States and the citizens thereof forever, thus consented to by Congress, free from constitutional objections, if any, that were valid, had previously existed. The act of Congress of March 3, 1879, c. 196, 20 Stat. 481, 483, recited that arbitrators, duly appointed on the part of the States of Virginia and Maryland for the purpose of ascertaining and fixing the boundary between them, did proceed to examine into and ascertain the true line of said boundary, and

had made their award, which was set forth, and that that award had been ratified and confirmed by the legislatures of those States, respectively, and then enacted that the consent of Congress was given to the agreement or award and to each and every part and article thereof. That consent, taken in connection with the conditions upon which the award was authorized, operated as an approval of the original compact, and of its continuance in force under the sanction of Congress. The consent of Congress to any agreement or compact between two or more States is sufficiently indicated, when not necessary to be made in advance, by the adoption or approval of proceedings taken under it. *Green* v. *Biddle*, 8 Wheat. 1, 85, 86, 87.

We proceed, therefore, to consider the clauses of the compact, upon the construction of which the present controversy must be determined.

The appellant, a citizen of Maryland, is under a judgment of imprisonment for not paying a fine and costs of prosecution imposed for unlawfully catching and taking oysters in the waters of Virginia in violation of its laws. That State is the owner of the navigable waters within its limits and the lands under them, holding them in trust for the public, and authorized to pass all necessary laws for the protection of the fish therein, whether floating or shell, and the punishment of any citizens of its own or other States for taking them against its prohibitions.

The oyster grounds of the State are of large extent, very productive, and of great value. Pocomoke Sound is represented to have an area of 92 square miles, of which about 52 square miles consist of natural oyster rocks and beds, particularly adapted for the growth of the oyster. Many millions of oysters, are the product from these rocks and beds each year. The business of taking them from the water and carrying them to the different markets of the country constitutes an extensive and profitable industry, giving occupation and support to several thousand people of the State and to their families, and furnishing an article of food extremely palatable and delicious to many thousands in other States. Great care

is taken in their culture and protection, and a vigorous police of the State is maintained to prevent their unlawful removal, or any encroachment with respect to them upon the rights of the State. The preservation of the oysters and of these rocks and beds, so well and peculiarly fitted for their increase, has been for many years a matter of special interest on the part of the State, and the act under which the appellant was indicted and convicted constitutes a part of its legislation for that purpose.

The contention of Maryland, as made by her counsel on behalf of the appellant, is that by the true construction of the seventh and eighth sections of the compact of 1785, her citizens are lawfully entitled to possess and enjoy and exercise a common right of fishery, including the right to catch and take oysters in the Potomac River and in the Pocomoke River, including what is also called Pocomoke Sound, which is alleged to be part of that river, and to constitute its mouth; and further, that if her citizens do not possess such right of fishery in the Pocomoke River and Pocomoke Sound, they cannot be subjected to trial in the courts of Virginia for the offences charged to have been committed in those waters against the citizens of that State. We will briefly consider each of these positions.

The seventh section of the compact refers, so far as fishing is concerned, only to the Potomac River, and provides "that the right of fishery therein shall be common to and equally enjoyed by the citizens of both States," with the proviso that such common right shall not be exercised by the citizens of one State to the hindrance of the fisheries on the shores of the other State; and that the citizens of neither State shall have a right to fish with nets or seines on the shores of the other. It is conceded that the right of fishing, when not qualified, extends to the taking of both floating fish and shellfish. This concession, however, is of no importance as to fishing in the Potomac, as the offence charged in the case before us is limited to taking oysters in Pocomoke Sound, to which no reference is made in the section in question.

The eighth section is equally free from any reference to the

offence complained of. Its language is that "all laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the river Potowmack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out of ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both States."

There is no ambiguity or obscurity in this language. It simply provides that necessary laws and regulations for the preservation of fish in the river Potomac, and for the performance of quarantine with respect to the river, and for preserving and keeping open the channel and navigation of that river and of the river Pocomoke within the limits of Virginia, by preventing the throwing out of ballast or giving any other obstruction thereto, shall be enacted by the mutual consent and approbation of the two States. There is nothing in these provisions having any reference to fish of any kind in the Pocomoke River or in the Pocomoke Sound, whether that sound be deemed a part of that river or otherwise. As observed by counsel, no clause of the compact having given any right to Maryland to fish in Pocomoke River, there was no reason why Maryland should be allowed to interfere in any way by legislation or regulation for the preservation of its fish.

The case of *Hendricks* v. *Commonwealth*, 75 Virginia, 934, 939, decided by the Court of Appeals of that State, is cited as authorizing the contention that a right to fish in the Pocomoke River is given by the compact, equally with the right to fish in the Potomac. The language of the court in that case gives color to that view, but it is plain that the Court of Appeals fell into a mistake in its judgment from a misquotation of section eight of the compact, upon which it relied. The language of the court is: "By article eight all laws and regulations which may be necessary for the preservation of fish in the river Potomac or the river Pocomoke, within the limits of Virginia, shall be made with the mutual consent and approbation of both States." It then adds as its conclusion: "The effect of this article is to give the State of Virginia concurrent

jurisdiction with the State of Maryland over the Potomac from shore to shore and over that part of Pocomoke River which is within the limits of Virginia, to enact such laws, with the consent and approval of Maryland, as may be deemed necessary and proper for the preservation of fish in said waters." Turning to the eighth article of the compact, we find that it does not contain any language having reference to the preservation of fish in the Pocomoke River, and by this misquotation the error in the conclusion of the court followed. There being an error of citation, a decision founded upon the supposed correctness of the citation cannot be accepted as authoritative any more than a decision founded upon a mistranslation of a passage in an author will be followed when the mistake or error is discovered. There was no question before the Court of Appeals in the case cited, relating to fishing in the Pocomoke River. We shall hereafter refer to that decision on another point, in which it is not open to any criticism.

The question whether Pocomoke Sound is to be considered as part of Pocomoke River is immaterial in view of the conclusion we have stated, that the compact gives no right to the citizens of Maryland to fish in the waters of that river, and only refers to the river in providing that legislation or regulations, preserving and keeping open its channel free from obstructions, shall be enacted by the mutual consent and approval of the two States. But owing to the earnestness with which the identity of the river and sound has been pressed, it is proper to state that, after careful examination of the documentary evidence offered on the subject, we are clear that the river and sound were at the time the compact was made, and for many years preceding it, considered and designated as separate and distinct bodies of water, and after that date, down to what is termed the "Black-Jenkins award of 1877," they never lost their separate and distinct character and designation. And we agree with the statement of the court below, in considering this subject, that there is no map of these waters and no joint official document existing in relation to them, which has confounded the river with the sound, or claimed that the sound is the river or any part of the river

Syllabus.

Pocomoke. The objection to the jurisdiction of the courts of Virginia to try the appellant for the offence charged does not find any support in the tenth section of the compact of 1785. That section only provides for the trial of citizens of Maryland in that State where offences are committed by them in Virginia upon citizens of that State. It was so held by the Court of Appeals of Virginia in *Hendricks* v. *Commonwealth*, above cited. The offence charged against the appellant, and for which he was tried and convicted, was one against the State of Virginia, and not one against any of her individual citizens. It was for catching and taking oysters in her waters, which were the property of the State, against her prohibitions, he being a citizen of Maryland.

The objections of the appellant to the jurisdiction of the county court of Accomack, in rendering judgment against him, being untenable, the judgment of the Circuit Court of the United States for the Eastern District of Virginia in refusing to discharge him from imprisonment for failure to pay the fine imposed upon him for a violation of the laws of Virginia and the costs of his prosecution, must be *Affirmed.*

Mr. Justice Harlan and Mr. Justice Gray concur in the result.

ERHARDT *v.* STEINHARDT.

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

Argued March 30, April 2, 1894. — Decided April 23, 1894.

Whether Boonekamp bitters, imported in September, 1889, were so similar to absinthe as to be susceptible of being assessed under the clause applicable to it, was a question of fact properly left to the jury.

The jury having determined that fact adversely to the government, it follows that such bitters were at that time to be classified under the proprietary preparation clause of Schedule A of the act of March 3, 1883, c. 121, 22 Stat. 488, 494.

The rate of duty on the bottles was dependent upon the rate of duty on the contents.

Statement of the Case.

THIS was an action to recover duties paid under protest on certain goods imported in September, 1889, and invoiced as Boonekamp Bitters. The collector rated them under the paragraph in Schedule H of section 2502, (act of March 3, 1883, c. 121, amending Rev. Stat. Title 33, 22 Stat. 120, 505,) reading: "Cordials, liquors, [liqueurs,] arrack, absinthe, kirschwasser, ratafia, and other similar spirituous beverages or bitters, containing spirits, and not specially enumerated or provided for in this act, two dollars per proof gallon;" and assessed the bottles in which the bitters were imported at three cents apiece under the paragraph of the same schedule, reading: "Wines, brandy, and other spirituous liquors imported in bottles, shall be packed in packages containing not less than one dozen bottles in each package; and all such bottles, except as specially enumerated or provided for in this act, shall pay an additional duty of three cents for each bottle."

The importers claimed by their protest that the articles should have been assessed under the paragraph of Schedule A of said act, (22 Stat. 494,) which provided as follows: "Proprietary preparations, to wit: All cosmetics, pills, powders, troches, or lozenges, sirups, cordials, bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters, essences, spirits, oils or preparations or compositions recommended to the public as proprietary articles, or prepared according to some private formula, as remedies or specifics for any disease or diseases, or affections whatever, affecting the human or animal body, including all toilet preparations whatever, used as applications to the hair, mouth, teeth, or skin, not specially enumerated or provided for in this act, fifty per centum ad valorem;" and that the bottles should have been subjected to thirty per cent ad valorem under the paragraph of Schedule B, (22 Stat. 495,) reading: "Green and colored glass bottles, vials, demijohns, and carboys, (covered or uncovered,) pickle or preserve jars, and other plain, moulded, or pressed green and colored bottle glass, not cut, engraved, or painted, and not specially enumerated or provided for in this act, one cent per pound; if filled, and not otherwise in this act provided for, said articles shall pay thirty per centum ad valorem in addition to the duty on the contents."

Statement of the Case.

It appeared that the bitters in question are made in Antwerp and advertised as a proprietary preparation compounded according to a private formula. The wrapper represented the enclosed articles as "fine stomachic bitters known as 'Boonekamp,' the outcome of a fortunate discovery made by Mr. A. E. Boonekamp, of Antwerp, Belgium, in the year 1815." That they possessed valuable properties "as an appetizer and as a regulator to the human system;" and as having "aperient and digestive qualities;" that "as a preventative against all forms of epidemic disease they are invaluable," while "taken in doses of one spoonful before each meal, they aid digestion and impart a healthy and vigorous action to the system. They also make a pleasant refreshing beverage taken with water, gin, or aniseed cordial."

A certified copy of the Flemish label, as registered in the Patent Office, and the invoice in French were put in evidence.

Testimony was given tending to show that the bitters were prepared by a secret formula; that they were claimed to be valuable for aperient, digestive, and tonic qualities, and used for the cure or relief of cramps, dyspepsia, dysentery, and sick stomach; that they were called patent medicines; and sold by dealers in such medicines and by grocers. It was admitted by plaintiffs that their principal trade in the article was with liquor dealers, and evidence was adduced that they were sold by liquor firms and in the wine and spirit department of wholesale groceries, and generally dealt out from retail bars. One bartender testified that he dispensed these bitters to his customers, and "that some liked it in whiskey, some in gin, and some liked it straight." Another witness said they were not made to please the palate, as cordials were, and that "people will shake themselves when they drink them." It further appeared that the bitters were below proof, containing only about 47½ per cent of alcohol by weight, while "proof spirits" require 49½ per cent, and that they contained rhubarb, orange peel, turmeric, and an essential oil, supposed to be oil of anise.

Samples of these bitters were before the jury for examination and comparison, and there was evidence to the effect that

Counsel for Parties.

substantially all bitters contained more or less alcohol; that absinthe contained wormwood and anisette, and was bitter; that neither absinthe, nor kirschwasser, nor arrack, nor curaçoa, was a proprietary preparation; and that cordials, liqueurs, and the like, did not contain drugs. Testimony was given as to the value and character of the bottles, but it was not returned in the bill of exceptions. The court charged the jury as follows: "It is unnecessary for me to detain you, except to state the question which it will be for you to answer in this case, affirmatively or negatively: Is plaintiffs' bitters substantially similar to either cordials, liqueurs, arrack, absinthe, kirschwasser, or ratafia? In determining the question of substantial similarity you may take into consideration any or all of these compositions; the appearance presented to the senses; its adaptability for use; the uses for which it is sold; and the effect that it produces. Looking at the question of similarity or dissimilarity on those various grounds, you will determine whether it does or does not present any substantial similarity to those enumerated articles."

The defendant excepted "to the ruling of the court in sending the specific question to the jury, as embodied in the charge."

The jury, after deliberation, answered the question submitted by the court in the negative. Defendant's counsel then moved the court for the direction of a verdict for the defendant on the ground that the articles, although proprietary, were also bitters, containing spirits; that the articles being equally provided for in both sections, the collector was entitled to assess the higher rate of duty under the last paragraph of section 2499 of the Revised Statutes as amended. This motion was denied, and defendant excepted. The jury thereupon rendered a verdict, under the direction of the court, for the plaintiffs, and, judgment having been rendered thereon, this writ of error was sued out.

Mr. Assistant Attorney General Whitney for plaintiff in error.

Mr. Edward Hartley for defendant in error.

Opinion of the Court.

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

Counsel for plaintiff in error concedes that the bitters in question are proprietary preparations, and would be dutiable as such if there were no other governing clause; but contends that, as between the paragraph relating to proprietary preparations, and the paragraph relating to cordials, liqueurs, and other similar spirituous beverages, or bitters containing spirits, the latter should control; that the familiar rule that the more specific designation governs cannot be applied, because neither of the two paragraphs is more specific than the other; and that the beverage rate should be applied under the last clause of section 2499 of the Revised Statutes as amended in 1883, (22 Stat. 491,) providing that "if two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates."

But we are of opinion that this contention cannot be sustained on the ground simply that Boonekamp bitters were a proprietary bitters, and also a bitters containing spirits. The proprietary paragraph has such enumerating force that a proprietary bitters, having a special character and value as such, protected by trade-mark and recommended as a remedy, although it contains spirits, as bitters generally do, cannot be treated as non-enumerated, or as so falling within two separate clauses as to involve the same result, unless that conclusion be compelled by other facts and circumstances disclosed in regard to it. The real inquiry here was whether the article, though confessedly dutiable as a proprietary preparation within the statute, was so similar to cordials, liqueurs, arrack, absinthe, kirschwasser, or ratafia as to be also susceptible of being assessed under the clause applicable to the latter. This was a question of fact, and we think properly left to the jury, if there was any evidence upon which a verdict for defendant in error could be justified. The question was, indeed, reduced to a very narrow compass, for it was admitted that absinthe was the only article named in the cordials' clause, to which

the government could claim that Boonekamp bitters bore substantial similarity, a concession based on the view that absinthe was the only "bitters" specified in the clause.

Absinthe, according to the Century Dictionary, is "the common name of a highly aromatic liqueur of an opaline-green color and bitter taste," and is prepared by "steeping in alcohol or strong spirit bitter herbs," the chief of them being wormwood. It was not denied that it is bitter; that it is used as a beverage; and is not a proprietary preparation. It appeared that the wormwood "has a medicinal effect upon the human system as a tonic," and that the article contains anisette, a cordial. On the other hand, Boonekamp bitters is a proprietary preparation, recommended to the public as such, and is prepared according to a private formula, as a remedy for certain specific maladies. The label is duly registered at the Patent Office. There was evidence tending to show that it contains rhubarb, orange peel, turmeric, and an essential oil, probably oil of anise; that it is bitter; that it is not attractive as a beverage, and hardly used distinctively as such; and that while it is sold largely by liquor dealers, and used at bars, it is chiefly sold for use and used in water, wines, or spirits, as a bitter, and for its cathartic, as well as tonic, qualities. A bottle of the bitters was produced for the inspection and consideration of the jury. Both articles contain alcohol in about the same proportion.

We are unable to conclude otherwise than that there was evidence tending to show that Boonekamp bitters were not substantially similar to absinthe, and that there was, therefore, no ground for taking the case away from the jury. The verdict that there was no such similarity determined that these bitters were properly classified under the proprietary preparation clause and this excluded them from all other provisions. The rate of duty on the bottles was dependent on the rate of duty on the contents, and the determination as to the latter controlled.

Judgment affirmed.

GOURKO *v.* UNITED STATES.

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

No. 972. Submitted November 17, 1893. — Decided April 16, 1894.

A person who has an angry altercation with another person, such as to lead him to believe that he may require the means of self-defence in case of another encounter, may be justified, in the eye of the law, in arming himself for self-defence; and if on meeting his adversary, on a subsequent occasion, he kills him, but not in necessary self-defence, his crime may be that of manslaughter or murder, as the circumstances, on the occasion of the killing, make it the one or the other.

If, looking alone at those circumstances, his crime be that of manslaughter, it is not converted into murder by reason of his having previously armed himself.

THE plaintiff in error, a white man and not an Indian, was charged by indictment in the Circuit Court of the United States for the Western District of Arkansas with the crime of having, on the first day of November, 1892, at the Choctaw Nation, in the Indian Territory, within the above District, feloniously, wilfully, and with malice aforethought killed and murdered one Peter Carbo. A verdict of guilty was returned, and, a motion for a new trial having been overruled, the defendant was adjudged to suffer death. The present writ of error brings up that judgment for review.

John Gourko and his brother Mike Gourko, and the deceased Peter Carbo, all of Polish nativity, were engaged as laborers at certain coal mines in the vicinity of the town of Alderson, Choctaw Nation, Indian Territory. Between Carbo and the Gourko brothers — the two latter being respectively about 19 and 17 years — there was considerable ill feeling, growing out of a charge made by the former that the latter had clandestinely appropriated for their benefit money due for the taking out of several lots of coal that he claimed to have dug, and with the taking of which from the mines they had no connection. Although the Gourko brothers denied this charge, Carbo

persisted in repeating it, and, according to the testimony of the younger Gourko, threatened to kill them both and "to shoot John like a dog." Carbo was about 40 or 45 years of age, weighed about 200 pounds, possessed extraordinary physical strength, and was regarded as a dangerous character. The defendant was in delicate health, weighed about 135 pounds, and was deemed a quiet, peaceable boy.

On the morning of November 1, 1892, — that being a holiday for the Polish laborers, — there were quite a number of miners in the town of Alderson. About nine o'clock Carbo and the defendant were observed to be engaged in an angry conversation near the post office.

The postmistress at Alderson, describing what occurred, testified that Carbo would swear and call Gourko "names and make threats that he would hit him or something of the kind, and shook his fist right in his face." Being afraid that Carbo was "going to hurt the boy," she spoke to Mr. Anderson, who was working in the store, and said, "'Pete is going to kill John, I am afraid.' . . . The boy did not show any disposition to want to quarrel with him or want to fight; he would step back as much as two or three steps away, and Pete would follow him up and shake his fist in his face, and the boy went on; and as he came back I spoke to John the defendant, and asked him not to have any trouble there by the office, and he said he wasn't going to; he said 'I have just gone to get a marshal to come and have him arrested,' and he said, 'I will wait until the marshal comes home.'"

Another witness, John Silluski, also a Polander, gave this account of the meeting between the deceased and the defendant near the post office: "That day was a holiday, the first of the month of November, and on this holiday all Poles stay at home; I staid at home too. John Gourko was sick. He worked a couple of days, and staid at home three or four; I don't know how many. On that day I staid at home and he staid at home too. He felt bad on that day. About 9 o'clock or half-past 9 I go to the post office, and John Gourko too, and Pete Carbo was standing in front of the post office, and three other men were standing there, and he was talking to

them, and I passed him and went inside of the post office. I heard John say, 'Pete, how many cars of coal do you say I stole from you?' and Pete say, 'I don't say you stole; you and your brother together work at that place, and I lost about six cars.' John wasn't mad that time. Pete said he stole about six cars. John left home that morning, he did; he wasn't well; he was sick, didn't work; he had chills and fever; was sick all the time. John said, 'You old sucker, I never stole no six cars of coal.'" Being asked what next happened, the witness stated that Carbo "cursed Gourko all the time," applying to him epithets of the most degrading kind, and which need not be here repeated. The witness further said: "And Pete said, 'You want to fight this morning. Come on here,' and John said, 'I don't want to fight; I am a sick man; I am going to arrest you; I don't feel well.' And he said, 'Come on and fight if you want to fight this morning,' and he said, 'I don't want to fight.' John looked behind the store for a policeman or something; he wanted to arrest him, I guess; I don't know."

It appears from the evidence that the killing occurred about twenty or thirty minutes after the difficulty at the post office, and near a saloon in which a billiard table was kept. The witness who gave the fullest account of the difficulty up to the time of the killing was Mr. Anderson. He testified, in substance, that he saw the beginning of the trouble in front of the post office, in which was the store where he worked. Being asked to state what occurred, he said: "Well, I was in the store there, and, as usual, around the post office there was a crowd gathered there for the mail, at distributing times, and other times men congregate around in front of the store and in the store, and this morning, which was the morning of the first of November, 1892, there was quite a crowd gathered right in front of the window and door of the store or post office, and it was not long until my attention was called to the loud talking out there by the postmistress. . . . The man who was doing the loud talking was Peter Carbo, the man who was killed. He appeared at that time to be angry, and was talking pretty loud when I first saw him. I heard him

talking there before I got in position where I could see him. I saw him then quarrelling with John Gourko; . . . and I seen Peter Carbo shake his fist at John, and putting his fist up under his nose, and using considerable bad language. . . . I heard him say that frequently, several different times, and John Gourko there, when he would be shaking his fist at him he would be stepping back, backing away. I seen him back as far as from here to you, and pass around the crowd. And it would only be a few minutes until Peter would be there. Q. Peter would follow him up? A. Yes, sir. And in the interval he would sometimes have one hand in his bosom and the other hand behind him. Of course, I didn't know whether he was armed or not. I stood in the store where I belonged, and after a little while the disturbance out there ceased, and they separated, and then in a few minutes after that, just a short space of time, I don't know just how long, Mr. Gourko there came back to the store, and the postmistress spoke to him, called him in and had a talk with him, and told him she didn't wish any more trouble. And I was speaking to Mr. Gourko there, as I was acquainted with him, and told him that the postmistress didn't want any more trouble in front of here, in front of her window, and no more such language as that was, and I told him to keep away from Peter Carbo, and have no more trouble with him. I also asked him if he was armed, and he said he was not. And presently — just about that time — there was a customer come in, and I had to leave him and go back to my work, and after I went back to my work, waiting on the customers, I can't tell how long that was, but I got through the customers, and I happened to walk to the store door, and I leaned up against the side of the door, and was standing there, and presently I saw Mr. Gourko there coming right to me from behind the billiard hall, that was in front and to the right of me, right across the street or passageway; he was coming around that, and he was coming directly towards me, as though he was coming to the post office, or me and the door, just as though he was coming right over to our store, and as he got up almost opposite the front of the billiard hall I was in the act of call-

ing to him, or saying something to him — I am pretty noisy sometimes to the boys around there and call to them or say something — and just as I was going to speak, Pete Carbo and him got into conversation, and I said nothing. . . . When I first saw him he was right in front of the billiard hall, standing out in front, and Gourko was coming right up this way, and when the conversation occurred Gourko stepped out here at the right-hand corner of the billiard hall and Peter Carbo advanced right up towards him, that way, until they were a few paces apart, and they were saying something I could not understand; I don't think it was in our language; if it was I didn't understand it. Still, I didn't think of any trouble; they were not talking loud at that time, as I understood it. Gourko drew a small bright pistol from his pocket, and he shot at Carbo, and he apparently shot almost in that direction, over his head, and he then almost instantly shot the second time, and Carbo dodged to the right and down'ard, and he shot again, and the third time he shot he dropped his gun further down and fired and Carbo fell." Being asked to describe Carbo's attitude and what was the position of his hands, the witness said: "I can't remember just which hand it was, one hand apparently was thrust in his bosom and the other hand was behind him, but which hand it was I cannot call to mind. It wasn't but just a short time from the time he began to advance until the shooting was done." He further stated, in reply to an inquiry as to when Carbo put his hands behind him: "I think when he started out in front of the billiard hall, about ten or twelve feet from the front of the billiard hall is where I saw him start from, advance out to where Gourko stood. Q. I will ask you to state if you know whether he began to talk to the defendant here when you saw him start out of the billiard hall, when he started towards him? A. Yes, sir; but I could not understand what he said. I think that was in the Slavish language — in some language besides mine. But as he went out there he was talking. I could hear their voices, but I could not understand anything that was said. Q. I believe you say they came around from the front, and Peter came out from the back? A. No, sir; Peter

was standing in front, and Gourko, the first I seen of him, he was opposite the rear of the store, coming up the street or passageway, or whatever you call it, the pass way, and when he got up opposite there, where he could see by the corner of the billiard hall here, like this was the billiard hall, and Gourko was coming up this way, bearing right across, just as though our store was right over here, and he was bearing over from this, as though he was coming over right direct to where I was standing in the door; and Peter Carbo, the first I seen of him, was right in front of that store, and when they began to talk Peter Carbo advanced right out that way, and when he got up in three or four paces of him Gourko stopped. Q. They met right there? A. Yes, sir; when they got together Peter was talking, and I don't know whether this man was saying anything or not. Q. They were saying something in their own language which you did not understand? A. Yes, sir; that boy was standing still when Peter was advancing, and he was standing still when the first shot was fired. Q. The first shot was fired over his head? A. Yes, sir."

There was evidence, on behalf of the government, tending to show that just before the killing Carbo was in the saloon referred to watching a game of billiards; that while he was there Gourko came to the door, and opened a conversation with Carbo which indicated that he was indignant at the language the latter had previously used towards him and did not intend to rest quietly under the insults that had been put upon him; that the parties quickly, and as if by mutual agreement, left the saloon to "settle" the dispute between them; that in a moment or two after they got on the outside the killing occurred; and that Carbo, at the time he was shot, was facing Gourko, with one hand across his bosom, under the lapel of his coat, and the other behind or across his back. There was evidence tending to show that the deceased was often seen, when not quarrelling, with his hands in that position. The third shot fired by defendant took effect, and resulted in the instant death of Carbo. It was clearly proved that he was unarmed at the time he was shot.

The evidence disclosed other circumstances, but those above

stated are the principal facts, and are sufficient for the purpose of presenting the grounds upon which the defendant seeks a reversal of the judgment.

No appearance for plaintiff in error.

Mr. Assistant Attorney General Conrad for defendants in error.

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

The court below made a long charge in reference to the principles of law which it conceived to be applicable to murder, manslaughter, and self-defence. Among other things, the court said to the jury: "A man has a deliberate intent to kill in the absence of a right to kill under the law of self-defence, and in the absence of that which would mitigate the offence to manslaughter. He cannot have a deliberate intent to kill and then say that his offence was only manslaughter, because the fact that he had an intent to kill implies that he deliberated over that purpose, that he prepared himself for it, and, as you will learn further on, where deliberation, premeditation upon a purpose to slay, where previous preparation to execute that purpose exists, there is banished from the case that condition known as manslaughter, because that grows into existence upon sudden impulse, without previous preparation to take life. Whenever that exists we have malice, and nothing else, unless it is a case where a man prepares himself for self-defence, and then, in order to exonerate himself from that killing, he must execute that preparation where the law gives him a right to do it, and in a defensive way; he may prepare himself for self-defence, but if he kills when there is no case of self-defence, such act of previous preparation becomes criminal in its character because of his subsequent act, and it becomes attached to that act. It does not necessarily import especial malevolence toward the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit; a heart regardless of social duty, and a mind deliberately bent on mischief. It

imports premeditation." To this part of the charge the defendant duly excepted.

The defendant asked the court to instruct the jury "that preparation in the heat of blood may be followed by manslaughter as well as under a certain state of case it may be followed by murder or self-defence." The court refused to give this instruction, without modification, and to that action of the court the defendant excepted. The court modified the proposition embodied in this instruction by saying to the jury: "If a party prepares to defend himself in a case where he could defend himself, he has a right to do that; but if he prepares himself as I have already told you, and then executes a deadly purpose by killing under circumstances where he would have no right to kill, where there was an absence from the case of the right of self-defence or an absence of the mitigating conduct that I have given to you that would reduce the grade of the crime to manslaughter, then the fact of his previously preparing himself shows deliberation for a deadly criminal purpose, and there could not be manslaughter under such conditions as that. He may prepare himself, as I have already told you, to defend himself in a proper way; but because he has prepared himself to act upon the defensive, if he afterwards abandons that purpose and kills, if he has no right to kill in the absence of facts that would give him the right to defend, then the fact of previous preparation becomes evidence of deliberation, evidence of design. As I have already told you, manslaughter cannot spring out of a state of case where a man prepares himself to kill wrongfully, when he prepares himself to take human life when he has no right to do it. That is evidence of malice aforethought, and it is the distinguishing line between manslaughter and malice aforethought."

We are of opinion that the part of the charge to which the defendant took exception, as well as what the court said in modification of the instruction asked by the defendant, were wanting in the clearness that was requisite in order that the jury might not misapprehend the principles of law by which they were to be controlled.

Assuming, for the purposes of the present inquiry, that the

defendant was not entitled to an acquittal as having acted in self-defence, the vital question was as to the effect to be given to the fact that he armed himself with a deadly weapon after the angry meeting with Carbo in the vicinity of the post office.

If he armed himself for the purpose of pursuing his adversary, or with the intention of putting himself in the way of his adversary, so as to obtain an opportunity to kill him, then he was guilty of murder. But if, in view of what occurred near the post office, the defendant had reasonable grounds to believe, and in fact believed, that the deceased intended to take his life, or to inflict upon him great bodily harm, and, so believing, armed himself solely for necessary self-defence in the event of his being pursued and attacked, and if the circumstances occurring on the occasion of the meeting at or near the saloon were such as, *by themselves*, made a case of manslaughter, then the defendant's arming himself, after the difficulty near the post office, did not have, in itself, the effect to convert his crime into that of murder. Stated in another form: Although the defendant may not have been justified on the occasion and under the particular circumstances of the difficulty at the billiard saloon in believing that the taking of his adversary's life was, then and there, necessary to save his own life or to protect himself from serious bodily harm; nevertheless, the jury were not authorized to find him guilty of murder because of his having deliberately armed himself, provided he rightfully so armed himself for purposes simply of self-defence, and if, independently of the fact of arming himself, the case tested by what occurred on the occasion of the killing was one of manslaughter only.

The court, in effect, said — or the jury may, not unreasonably, have understood the court as declaring — that preparation, by arming, although for self-defence only, could not be followed, in any case, by manslaughter, if the killing, after such arming, was not, in fact, in necessary self-defence. Such we understand to be the meaning of the charge. In our opinion the court erred in so charging the jury. If the accused was justified in the eye of the law in arming himself for self-

defence, and if, without seeking, but on meeting, his adversary, on a subsequent occasion, he killed him, not in necessary self-defence, then his crime was that of manslaughter or murder, as the circumstances, on the occasion of the killing, made it the one or the other. If guilty of manslaughter, looking alone at those circumstances, he could not be found guilty of murder by reason of his having previously armed himself solely for self-defence.

The judgment is reversed and the cause remanded for a new trial.

HANRICK *v.* HANRICK.

HANRICK *v.* HANRICK.

BRADY *v.* HANRICK.

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

Nos. 337, 338, 339. Argued and submitted April 3, 1894. — Decided April 30, 1894.

Under the act of March 3, 1887, c. 373, corrected by the act of August 13, 1888, c. 866, (as under earlier acts,) one of several defendants, being a citizen of the same State as a plaintiff, cannot remove a cause from a state court into the Circuit Court of the United States upon the ground of prejudice and local influence between himself and the other defendants.

A defendant, who wrongfully removes a cause from a state court into the Circuit Court, from whose decree appeals are taken by himself and other parties to this court, must, upon reversal of the decree by this court for want of jurisdiction in the Circuit Court, pay the costs in that court, as well as of all the appeals to this court.

THIS was an action, brought December 17, 1878, in the District Court of Falls County in the State of Texas, to recover two undivided thirds of land in that county, of which Edward Hanrick, a citizen of that State, was seized at the time of his death in 1865, intestate and without issue. His

Statement of the Case.

heirs, at the time when this suit was brought, were his sister Elizabeth; Nicholas Hanrick and others, the children of his deceased brother James; and Edward G. Hanrick, the only son of another deceased brother. The plaintiffs were Elizabeth and the children of James, and were some of them citizens of the State of New York, and the others subjects of the United Kingdom of Great Britain and Ireland and residents of Ireland. The defendants were Edward G. Hanrick, a citizen of Texas, residing in the Northern District of Texas, who contended that the plaintiffs had no title, because both Elizabeth and James were aliens; and Philip O'Brien and wife, residents of the State of Massachusetts and citizens of the United States, to whom some of the plaintiffs had conveyed their interests by a deed absolute in form, but alleged to be in trust for the grantors.

The petition, which stated the above facts, was afterwards amended by joining as defendants William Brady, a citizen of New York; John B. Sargent, a citizen of Massachusetts; and Wharton Branch and Edward J. Gurley, citizens of Texas. Brady, Sargent and Branch severally claimed interests in the lands under conveyances from the defendants O'Brien and wife; and Gurley claimed an undivided third of the land under a deed from Edward G. Hanrick pursuant to a contract made by Edward Hanrick in his lifetime. The amended petition prayed for a partition of the whole land, having due regard to any valid conveyances of interests therein, and to other equitable considerations.

On June 15, 1887, Brady, relying on section 639 of the Revised Statutes, and the acts of March 3, 1875, c. 137, and March 3, 1887, c. 373, filed in the state court a petition, supported by his affidavit, for the removal of the suit into the Circuit Court of the United States, on the ground that there was in the cause a controversy between himself, a citizen of New York, and the defendants Edward G. Hanrick, Branch and Gurley, citizens of Texas, and that by reason of prejudice and local influence, created by said Hanrick, Brady could not obtain justice in the courts of the State. Thereupon the state court ordered the case to be removed as prayed for.

Opinion of the Court.

On November 21, 1887, the defendants Hanrick and Gurley moved the Circuit Court to remand the case to the state court, because there was no controversy between the defendant Brady and the plaintiffs; because Brady was a citizen of the same State as some of the plaintiffs; because all the defendants were not citizens of a different State from the plaintiffs; because there was no separable controversy between Brady and any other party to the suit; and for other reasons.

On November 23, 1887, the Circuit Court, against the exception of the defendants Hanrick and Gurley, made an order denying their motion to remand the case to the state court; reciting that it had been made to appear to the court that from prejudice and local influence the defendant Brady would not be able to obtain justice in the courts of the State; and adjudging that the cause be removed from the state court to the Circuit Court.

The pleadings were then, by order of the Circuit Court, reformed according to the equity rules of the court; and, after further proceedings and hearings, it was decreed that the parties were entitled to undivided interests in the land as follows: The plaintiffs, two ninths; the defendant Edward G. Hanrick, two ninths; the defendants Brady and O'Brien and wife, two ninths; and the defendant Gurley, one third. A final decree of partition was entered accordingly, from which appeals were taken to this court by the plaintiffs, by the defendant Hanrick, and by the defendants Brady and O'Brien and wife.

Mr. W. Hallett Phillips for appellant in No. 337. *Mr. L. W. Goodrich* also filed a brief for same.

No appearance for other parties.

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

The first question to be decided is whether the Circuit Court of the United States lawfully acquired and retained jurisdiction of the case. The determination of this question really

depends upon the construction and effect of the act of March 3, 1887, c. 373, as corrected by the act of August 13, 1888, c. 866; but will be aided by referring to the earlier acts of Congress and to the construction of those acts by this court.

The Judiciary Act of September 24, 1789, c. 20, § 12, authorized "a suit" commenced in any state court "by a citizen of the State in which the suit is brought against a citizen of another State" to be removed by the defendant into the Circuit Court of the United States upon a petition filed in the state court. 1 Stat. 79. Under that statute, it was held to be essential to the jurisdiction of the Circuit Court that all the defendants should be citizens of a different State from any of the plaintiffs. *Strawbridge* v. *Curtiss*, 3 Cranch, 267; *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Barney* v. *Latham*, 103 U. S. 205, 209.

The earliest act of Congress for the removal of causes on the specific ground of prejudice and local influence was the act of March 2, 1867, c. 196, by which "where a suit is now pending, or may hereafter be brought, in any state court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State," the suit might be removed into the Circuit Court of the United States by "such citizen of another State, whether he be plaintiff or defendant," upon filing a petition and affidavit in the state court. 14 Stat. 558.

Under that act, it was held, after able arguments and full consideration, that the phrase "a suit in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State" had the same meaning as the shorter description, in the act of 1789, of "a suit between" such parties; that each term implied a proceeding in a court of justice by a party plaintiff against a party defendant; and consequently that all the defendants must be citizens of other States from any of the plaintiffs, and that one of several defendants could not remove the suit. *Case of Sewing Machine Cos.*, 18 Wall. 553, 585; *Vannevar* v. *Bryant*, 21 Wall. 41; *Blake* v. *McKim*, 103 U. S. 336, 338, 339.

The act of 1867 was substantially reënacted in clause 3 of

section 639 of the Revised Statutes, which, however, (like the act of 1789,) described the case to be removed as "a suit" between a citizen of the State in which it is brought and a citizen of another State, (instead of describing it, as in the act of 1867, as "a suit in which there is controversy between" such parties,) and was likewise held to require that all the necessary parties on one side of the suit should be citizens of different States from those on the other, and not to permit a removal because of a separable controversy between one of the defendants and the plaintiff. *Myers* v. *Swann*, 107 U. S. 546; *American Bible Society* v. *Price*, 110 U. S. 61; *Cambria Iron Co.* v. *Ashburn*, 118 U. S. 54; *Hancock* v. *Holbrook*, 119 U. S. 586; *Young* v. *Parker*, 132 U. S. 267, 270, 271.

The act of March 3, 1875, c. 137, § 2, authorized any suit in a state court "in which there shall be a controversy between citizens of different States" to be removed by "either party" into the Circuit Court of the United States; and added this clause: "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 plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States." 18 Stat. 470.

Under that statute, it has been uniformly held that, in order to justify a removal of the suit because of "a controversy which is wholly between citizens of different States," the whole subject matter of the suit must be capable of being finally determined between them, and complete relief afforded as to the separate cause of action, without the presence of other persons originally made parties to the suit; and that when there was but one indivisible controversy between the plaintiffs and the defendants, as in the case of a suit for partition, the suit could not be removed by one of several plaintiffs or defendants. *Blake* v. *McKim*, 103 U. S. 336; *Torrence* v. *Shedd*, 144 U. S. 527; *Bellaire* v. *Baltimore & Ohio Railroad*, 146 U. S. 117; *Wilson* v. *Oswego Township*, 151 U. S. 56; *Merchants' Cotton Press Co.* v. *Ins. Co. of North America*, 151 U. S. 368.

The act of 1875 contained nothing concerning removal on the specific ground of prejudice or local influence, and did not repeal clause 3 of section 639 of the Revised Statutes. *Bible Society* v. *Grove*, 101 U. S. 610; *Hess* v. *Reynolds*, 113 U. S. 73; *Baltimore & Ohio Railroad* v. *Bates*, 119 U. S. 464.

The act of March 3, 1887, c. 373, corrected by the act of August 13, 1888, c. 866, was intended, as this court has often recognized, to contract the jurisdiction of the Circuit Courts of the United States, whether original over suits brought therein, or by removal from the state courts. It not only amends the act of 1875; but it allows to none but defendants the right to remove any case whatever, and, by new regulations of removals for prejudice or local influence, supersedes and repeals the earlier statutes upon this subject. 24 Stat. 553; 25 Stat. 434; *Smith* v. *Lyon*, 133 U. S. 315; *Fisk* v. *Henarie*, 142 U. S. 459; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454.

This act, after other provisions which need not be stated, reënacts the last clause of section 2 of the act of 1875, above quoted, except that it omits the words "plaintiffs or." It then takes up the subject of the act of 1867, and enacts that in the case, defining it in the words of that act, "where a suit is now pending or may be hereafter brought, in any state court," a removal may be had, not, as under that act, by "such citizen of another State, whether he be plaintiff or defendant," but only by "any defendant being such citizen of another State;" and not upon petition to the state court and the mere affidavit of the petitioner to his belief in prejudice or local influence, but upon petition to the Circuit Court of the United States and "when it shall be made to appear to said Circuit Court" that prejudice or local influence exists.

Whether this act permits one of two or more defendants to remove any case which he could not have removed under earlier statutes is a question upon which there have been conflicting decisions in the Circuit Courts, and upon which we are not now required to express a definitive opinion.

Beyond doubt, the existing act, like every act which pre-

ceded it, does not authorize one defendant to remove a suit into the Circuit Court of the United States from a state court, upon the ground of prejudice or local influence between himself and other defendants. The whole object of allowing a defendant to remove a suit or controversy into the Circuit Court of the United States is to prevent the plaintiff from obtaining any advantage against him by reason of prejudice or local influence. Unless such prejudice or influence in favor of the plaintiff is alleged and proved, he cannot be prevented, under the clause of the existing statute upon this subject, from prosecuting his suit against all the defendants in the court in which he originally brought it.

The present case was a suit for partition, to which all the plaintiffs and all the defendants were indispensable parties. *Torrence* v. *Shedd*, 144 U. S. 527; *De la Vega* v. *League*, 64 Texas, 205; *Stark* v. *Carroll*, 66 Texas, 393. Each and all of the defendants contested the rights which the plaintiffs asserted; the defendant Brady was a citizen of the same State as some of the plaintiffs; and the only prejudice and local influence which he alleged as a ground of removal was between himself and other defendants. For this reason, independently of other reasons urged against the validity of the removal, Brady's removal of the cause into the Circuit Court of the United States was not warranted by any of the acts of Congress on which he relied.

Brady, having wrongfully removed the case into the Circuit Court, must pay the costs in that court, as well as the costs of the three appeals to this court. *Mansfield &c. Railway* v. *Swan*, 111 U. S. 379; *Torrence* v. *Shedd*, and *Tennessee* v. *Union & Planters' Bank*, above cited.

Appeal of the plaintiffs sustained, and decree reversed, with costs of the three appeals against Brady; and case remanded to the Circuit Court, with directions to render judgment against him for costs in that court, and to remand it to the state court.

THE EDWIN I. MORRISON.[1]

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

No. 227. Argued January 24, 1894. — Decided April 30, 1894.

When it is agreed by a charter party, on the part of the vessel, that she shall be tight, staunch, strong, and in every way fitted for the voyage, the owner is bound to see that the vessel is seaworthy and suitable for the service on which she is to be employed, and he is not excused by the fact that a defect is latent and unknown to him; but no obligation in that respect rests upon the owner of the cargo.

In a suit in admiralty, where the libellant sought to recover for injuries to a cargo caused by the vessel taking in water through a hole in her side, made by the breaking away of the cap from one of the bilge-pump holes, and where the defence was that such breaking was caused by a danger of the sea within the exception in the charter party and bills of lading, the court below, after finding that such bilge-pumps were not unusual, and describing them and the dangers to be apprehended from them, and after finding that before sailing the cap and plate showed no indications of looseness, in an examination which, after detailing it, was found to be such as a reasonably prudent master might be expected to give, and after finding the condition of the hole at the end of the voyage, found further that "at the time of the contract and lading of cargo and commencement of voyage the vessel was tight, staunch, and strong, and in every way fitted for the contemplated voyage;" that "there was no latent defect in the vessel which contributed to the injury to the cargo;" and that "the whole of said damage to cargo was caused by a danger of the sea, and was within the exception in charter party and bills of lading." *Held*,

(1) That these were findings determined by the interpretation which the law put upon the circumstances of the transaction as stated in the previous findings, and, as such, open to revision here;

(2) That these deductions were incorrect, and the specific conclusions of law did not follow.

This was a libel filed by the Bradley Fertilizer Company in the District Court of the United States for the Southern District of New York against the schooner Edwin I. Morrison,

[1] The docket title of this case is "The Bradley Fertilizer Company, Appellant, *v.* The Schooner Edwin I. Morrison, her tackle, etc. — Stephen S. Lavender *et al.*, claimants."

to recover for the damage done to a cargo of guano by sea water taken aboard on January 10, 1884, on her voyage from Weymouth, Massachusetts, to Savannah, Georgia. The libel set up the charter, the loading, the bills of lading, the sailing from Weymouth, the arrival at Savannah, and the delivery of the cargo in a damaged condition; and also alleged that the schooner, when she left Weymouth and before, "was not tight, staunch, strong, and every way fitted for said voyage as agreed;" "and that the cap was gone from off the bilge-pump hole on the port side of said schooner, or was then so loosely, insecurely and negligently fastened and screwed that the same worked and came off without any danger of the sea intervening, whereby said vessel was unseaworthy and unfit for said voyage, or after leaving port said cap was removed and not properly and securely replaced and screwed down, or was negligently and improperly loosened and left insecure by those in charge of said schooner, so that by the unseaworthiness of said schooner or by the negligence and improper navigation of those in charge of her, said cap came off from said pump-hole without any danger of the sea," and that about seven feet of water was admitted through it into the hold and upon the cargo.

The answer admitted the charter, shipment, bills of lading, sailing, arrival, and delivery of the cargo in a damaged condition, and in excuse thereof alleged: "That on said voyage the said vessel encountered very rough and tempestuous weather, in consequence of which she shipped large quantities of water, and was greatly damaged by the seas, and it was found on the arrival of the said vessel at Savannah that her said cargo or a portion thereof was damaged by the said perils of the seas encountered on the said voyage, or from causes excepted in the said contract or contracts of affreightment."

The District Court found that nine-tenths of the damage to the cargo was occasioned by sea water taken in through the bilge-pump hole on the port side, and that the vessel was not seaworthy in respect of the proper security of this port cap and plate, and rendered a decree in favor of libellant. The opinion is reported in 27 Fed. Rep. 136.

Statement of the Case.

The schooner sailed on the 5th of January, and, according to the log, on the afternoon of January 9 met a very strong gale and heavy seas, and shipped great quantities of water. The log of January 10 read as follows:

"This day begins with a strong westerly gale and sea still running very high. At 8 A.M., set two-reefed foresail; set storm-trysail *and hove vessel to, heading about south;* find that the vessel is making water faster than we can pump it out with both pumps, *the men not being able to work at pumping steadily because of heavy seas sweeping her decks.*

"(NOTE.—The words in italics are inserted on margin of log in lead pencil.)

"Sounded pumps and find that she has 7 ft. of water in the hold.

"(NOTE. — The figure 7 is written over an erasure.)

"Cut the boat lashings and got all ready to leave the vessel, when found that the cap had washed off the bilge-pump hole on the port side; nailed a piece of sheet lead over it and started both pumps agoing; pumped two hours and sound again and find that we are freeing her very rapidly. So ends this day. No latitude; no longitude."

The bilge-pump hole referred to in the above extract was a hole in the port side in the waterway, a short distance only in front of the poop, and ran down through the waterway between the ceiling and the skin of the ship. It was from three to four inches in diameter, and covered by a brass plate about four inches square, countersunk into the timber, through which was a hole, covered by a brass cap, which screwed into the plate, and the plate was fastened into the waterway by screws. There was a similar hole on the starboard side. The District Judge was of opinion that these holes, which had never been used, were dangerous unless the caps and plates to cover them were kept perfectly tight and secure; that "the obligation to keep watch of their condition was as stringent as the danger from weakness in them was extreme;" and that there was no satisfactory evidence that there had been more than a casual examination of them since the schooner was built, some eleven years previous.

Statement of the Case.

The theory of the defence was that the plate and cap were perfectly tight, but that, through the many seas taken aboard, they were knocked off by accident or by some blow from floating articles. The District Judge held that this was possible, but for reasons, which he gave, that its probability was exceedingly small; and that even if it could be supposed that the plate had been knocked off through the blow of some object washed across the deck, it would still be incumbent on the claimant to show that the cap and plate were so made and fastened as not to be knocked off by ordinary collisions of that kind, which had not been done; that while there could be scarcely any doubt that the cap and plate were carried off through the action of the sea, yet that the evidence indicated clearly that this was done before the vessel was subjected to any extraordinary conditions, aside from her deep loading, and that there was no indication of any such violence about the wood work in that quarter as would be necessary to knock away such a cap if properly secured; and that the only reasonable conclusion was that after eleven years' service the fastenings had become weak, and that the plate had been carried away from that cause, and not from any extraordinary contingencies.

The case having been taken to the Circuit Court, the testimony of one Candage, an expert, was given to the effect that these bilge-pump plates in the waterways were regarded as permanent fixtures not requiring to be removed for examination; that by taking hold of the cap one could judge of the firmness of the plate; that he had sometimes unscrewed the cap, but usually could judge of condition by the eye; that by unscrewing one could judge of the condition of the wood slightly better; that he never thought it necessary to unscrew the plate, which, if done frequently, would have a tendency to weaken the fastenings; that if the plate of the Morrison had been there for ten or eleven years and never removed, and had been painted over from time to time with the ways, no examination was necessary other than by the eye; that he would say as matter of opinion there would be no gradual weakening of the fastenings of the plate; that upon the de-

tails stated in a hypothetical question it was his opinion that the loss of the bilge-pump plate was attributable to the fact that some hard substance had been dashed against it by the force of the waves and the rolling of the vessel, though the force of the water alone could not have ripped it out and carried it away. The Circuit Judge was of opinion (40 Fed. Rep. 501) that "the vessel was not originally unseaworthy because she had bilge-pump holes covered as these were. The presumption of continuing seaworthiness in respect to this part of the ship is not rebutted by the single fact that no special test was made as to their condition, in view of the testimony (especially that taken in this court) as to what is the usual examination given to such structures." And he concluded that the inference to be drawn from the testimony was "that there was no defect, patent, or latent; that the fastenings were sufficient, and were knocked out by a blow such as could not reasonably have been anticipated, and which was caused by a danger of the sea."

The Circuit Court made its findings of fact and conclusions of law, which are given in the margin,[1] (and to which, in

[1] "I. The schooner Edwin I. Morrison, owned by the claimants, was chartered on December 19, 1883, by a written charter party, to the libellant for a voyage from Weymouth, Mass., to Savannah, Ga., to carry a complete cargo of guano in bags and (or) bulk for a price agreed upon.

"II. By the charter party it was agreed on the part of the vessel that she 'should be tight, staunch, strong, and every way fitted for such a voyage,' and 'the dangers of the sea (were) mutually excepted.'

"III. Under this charter there was loaded on board said schooner by the libellant a cargo of guano, superphosphate, and other fertilizers, viz., $343\frac{1680}{2240}$ tons in bulk and $410\frac{35}{61}$ tons in bags, besides 3925 empty bags and sacks. Six bills of lading were given therefor, which acknowledged the receipt of said cargo in good order and condition and agreed to deliver the same in like good order and condition at Savannah, the dangers of the sea only excepted. The bulk cargo was stowed between decks and the remainder in the lower hold.

"IV. The cargo was what is known as a 'dead cargo,' and a hard one for a vessel to carry in severe weather.

"V. The vessel was not overloaded. She was accustomed to and able to carry that amount of cargo of the same character at that season.

"VI. The vessel was built in 1873; had three masts; was about 155 feet long over all, carrying spanker, mainsail, foresail, forestaysail, jib, flying

whole or in part, and to certain refusals to find, libellant filed twenty-seven exceptions,) and rendered a decree reversing the

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jib, outer jib, fore-topsail, main-topsail, and mizzen-topsail. She was properly manned and equipped. Her officers and crew consisted of a master, first mate, second mate, steward, and four sailors. On this voyage she had two passengers on board, viz., the master's wife and a lady friend.

"VII. On the port side of the vessel, in the waterway, and close to the bulwark, there was a hole about three inches in diameter, made when she was built, for the purpose of introducing a hose-pipe into her bilges to free her of any water accumulated there. The waterway (of yellow pine) was about three and a half inches above the deck. The hole was a short distance in front of the poop and ran down through the waterway, between the ceiling and the skin of the ship. The hole was covered by a brass plate about four inches square, countersunk into the timber flush with the top of the waterway and fastened by four brass screws. In the brass plate was a removable cap, also of brass, intended to be unscrewed from the plate when the hole was to be used, but it had not, in fact, been used for four or five years (if, indeed, at all) and was painted over whenever the waterway was painted. The removable cap projected about three-eighths of an inch above the surface of the plate, the edges being bevelled so as to leave not more than an eighth of an inch of perpendicular surface. There was a similar plate and cap on the starboard side of the vessel, but somewhat further aft and upon the poop deck.

"VIII. Such bilge-pump holes are not unusual in vessels constructed in some localities. The plates are generally considered permanent fixtures, not peculiarly susceptible to deterioration from age. Verdigris sometimes forms around brass screws, thus weakening the hold of the wood; but waterways located as this was, well covered up and well painted, are not liable to rot, and their reasonable expectation of sound life is largely in excess of twelve years.

"If the plates and caps which are generally used to cover such holes are not kept tight and secure, the holes become dangerous; but that mode of covering was generally deemed secure by seafaring men, and seldom, if ever, have any accidents arisen from their use.

"IX. The bilge-pump hole, heretofore described as located in the waterway, was opposite a port in the bulwarks of the vessel. The opening of the port was about a foot square, beginning about two inches from the bulkhead of the poop deck. The poop deck was about four and a half feet above the main deck, and extended from just about the mainmast to the stern.

"X. Said bilge-pump plate was in plain view, upon a casual inspection, at the time of making the charter and loading the vessel. The vessel was loaded several times before this voyage by the libellant.

"XI. Before the vessel sailed the cap and plate appeared to be in good order, with no indication of looseness. The examination which was at that

decree of the District Court, and dismissing the libel with costs, whereupon the cause was brought by appeal to this court.

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time made of them consisted of such inspection as could be given by the eye, and to such an inspection they were from time to time subjected. They were not tested either by unscrewing the cap or the plate, or by tapping the plate with a hammer. Tapping with a hammer or unscrewing the cap might have developed any insecurity (if there were any) in the bilge-pump plate. Immediately after the loss of the port-bilge plate (hereafter described) the mate tested the condition of the similar plate on the poop deck, starboard side, by tapping with a hammer, and found it apparently sound.

"XII. The examination which was made of the cap and plate, as set forth in the XIth finding (viz., by a survey without the use of special tests, unless there is some appearance of defect,) is such as a reasonably prudent master or owner might be expected to give them in order to determine the seaworthiness of his vessel before beginning a voyage.

"XIII. The voyage began the 5th day of January, 1884, and the vessel actually got to sea on the 7th, when she encountered a strong northwest gale. The light sails were furled and the mainsail and foresail double-reefed. The gale caused her to labor heavily and ship large quantities of water, some of which entered the cabin and reached the cargo. The vessel was driven out of her course and into the Gulf Stream. The gale moderated somewhat the latter part of the day, but the vessel still continued to roll heavily and shipped plenty of water. The pumps were attended to and the vessel was found to be making considerable water. The next day the gale continued, with a very heavy sea running, until about 4 P.M., when it moderated, and at 6 P.M. topsails were set. The latter part of the day there was a strong breeze, and two reefs were made in the spanker. The vessel made little water this day. The next day, the 9th, began with a strong southeast breeze, which freshened to a strong gale. Two reefs were made in main and foresails. At 4 P.M. the spanker and jib were furled. The middle part of the day there was a very sharp gale and heavy sea running. The vessel labored heavily and shipped great quantities of water. The pumps were carefully attended to, and she was found to be making considerable water. The latter part of the day the wind was still increasing and the foresail and the fore staysail were furled. It was then blowing a 'living' gale from the westward. The weather through the night continued to be extremely severe; there was a 'terrific gale of wind.' Planks were carried away from the bulwarks of the starboard side of vessel, also one of the ports; the waterway on starboard side was started off. The covers of the chain locker and a spar were found loose in the morning, floating in the waist of the vessel on both sides. Coal washed about decks; also buckets and bucket racks; also pieces of bulwark. The forecastle door and galley door were washed off, but were not lost. The men could not stand at pumps on main deck because it was continually swept by the seas, and it was with

Names of Counsel.

Mr. George A. Black for appellant.

Mr. George Bethune Adams for appellee.

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difficulty that they were able to work at the pump on the poop deck, which was about four and a half feet higher than the main deck, on account of the sea breaking over. Before midnight the vessel was hove to under a storm trysail, two-reefed foresail, and fore staysail on the port tack. The vessel was shipping water through the cabin windows, doors, and down the booby hatch. The cabin was situated in the after part of the poop deck. The top of the cabin house was about three and a half feet above the deck. They commenced to take water in the cabin while eating supper, and all through the night it forced its way in. This was unusual and indicated very bad weather and a rough sea. Everything in the cabin was drenched, excepting the berths, with water washing around the cabin with motion of vessel. Water reached the cargo during the night through the cabin, a strained waterway, and otherwise. The pumps were tried every two hours, and by four o'clock Thursday morning it was discovered, by the pumps bringing up guano with the water, that the cargo was wet. The master of the vessel did not go to bed during the night, but was mostly on deck. Previous to 4.30 o'clock in the morning they were able to get a suck on the pumps, indicating that there was no water then in the well, but after that they were unable to do so. At this time the weather was very bad, a very bad sea flooding the decks continually and washing everything movable about. About five o'clock they sounded and found eighteen inches of water in the well. In about half an hour afterwards they wore ship, putting the vessel before the wind, so that the men could stand at the pumps. This gave the vessel a list to port. The only outlets on the port side for the seas that came aboard were the open port above mentioned and the scuppers. They continued pumping, but still were unable to get a suck, and at nine o'clock soundings showed about seven feet of water in the vessel. Preparations were then made to abandon the vessel, as she was supposed to be sinking. The lashings of the boat on the poop deck were cut and the women on board came up from the cabin to take the boat. Between ten and eleven o'clock they wore ship and the vessel slowly righted up, the booms swinging from the port to the starboard side, bringing the port side out of the water. The vessel was then working heavily in the sea, losing steerage-way, and settling fast. When the vessel righted up and rolled her lee side out of water, the second mate, who with others fastened with lines to prevent them from being washed away, was working at the pump on the main deck, heard a heavy gurgling sound, and let go the pump and went over to the port side, put his hand against the rail, and looked down under it to where the bilge-pump plate was, and saw a hole large enough to put his hand in. He ran his hand and arm down the hole and sung out to the captain, 'Look here!' Being greatly excited and not looking for such a thing, he hardly realized what the trouble was. The captain came and

Argument for Appellee.

I. The findings of the Circuit Court are conclusive as to the facts.

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said, 'My God, this is the bilge pump!' It was found that the whole bilge-pump plate, with the screws, was gone.

"XIV. The wood to which the plate had been fastened looked white and sound. From the holes out of which the screws had come part of the clear wood was itself hauled, the splinters hanging around the edges of the holes, the holes thus presenting a ragged look. The screw-holes were not smooth nor black nor rusty. The wood of this particular waterway in the vicinity of the plate did not look rotten, and when after arrival at Savannah the temporary plugging referred to in the XVIIth finding was removed, and the hole plugged and covered with sheet lead, the timber into which the plug was driven and on which the lead was nailed was found solid, and since that time the covering had not been further repaired nor the timber changed in any way.

"XV. No marks of violence other than the splintering of the wood about the screw-holes were visible upon the waterway or upon the adjacent bulwarks or stanchions.

"XVI. As no one witnessed the removal of the bilge-pump plate, direct evidence of the cause of this mishap is not obtainable. It is, however, to be inferred from the facts proved that it was knocked out by something striking violently against it subsequently to the time when they wore ship after finding eighteen inches of water in the well, which would be between 5 A.M. and 5.30 A.M.

"XVII. The hole was at once plugged up, covered with canvas, and sheet lead nailed over the canvas.

"XVIII. At this time the wind had abated somewhat. The vessel's wheel was tied hard up and the sails trimmed so that she would lie to, and the crew went to work pumping again and gained on the water. By eleven or twelve o'clock that night they succeeded in getting her free of water, so far as the pumps could do so, and the journey was continued.

"XIX. Afterwards it was found that the mainmast had been loosened by the working of the vessel, and that the coating was broken; also that a scupper on the starboard side was broken.

"XX. The weather continued severe during almost the entire voyage and the injury to the cargo was increased thereby.

"XXI. The vessel arrived in Savannah, January 27th.

"XXII. Upon the arrival she delivered her cargo, some of it in a damaged condition. The extent of the damage was $9175.40.

"XXIII. At the time of the contract and lading of cargo and commencement of voyage the vessel was tight, staunch, and strong, and in every way fitted for the contemplated voyage.

"XXIV. There was no latent defect in the vessel which contributed to the injury to the cargo.

"XXV. There was no fault or negligence in the navigation of the vessel or care of the cargo.

Argument for Appellee.

The argument made by appellant in its brief is a manifest attempt to obtain in this court a review of the findings made by the Circuit Judge under the act of 1875. The whole argument is such as would be appropriate before a court of original jurisdiction on the trial of the cause, but is clearly out of place on this appeal. This court has repeatedly held that under the act of 1875, it is only ultimate facts which the Circuit Court is bound to find, that refusals to find mere incidental facts, amounting only to evidence from which the ultimate fact is to be obtained, will not be noticed; but that if the Circuit Court refuses to make a finding, one way or the other, as to a material fact established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence, this court will review the rulings, provided exceptions are properly taken, and the questions are presented by bill of exceptions. *The E. A. Packer*, 140 U. S. 360; *The City of New York*, 147 U. S. 72, and cases cited.

II. The question of seaworthiness was purely one of fact. *Walsh* v. *Washington Ins. Co.*, 32 N. Y. 427.

III. The circumstances under which the plate was lost raised a presumption that it was caused by dangers of the seas.

Aside from the inferential finding of fact that the plate was knocked out by something striking violently against it, the same result would follow as a necessary conclusion from the facts which were directly testified to and found.

Bilge-pump holes covered with such plates were not unusual, and their reasonable expectation of sound life was largely in excess of the age of this vessel. This mode of covering the holes was generally deemed secure by seafaring men, and seldom, if ever, had any accidents arisen from their use. The District Judge found to the same effect.

"XXVI. The whole of said damage to cargo was caused by a danger of the seas, and was within the exception in charter party and bills of lading.

"*Conclusions of Law.*

"First. The damage is to be attributed to the dangers of the seas, and not to the fault of the vessel.

"Second. The decree of the District Court is reversed and the libel dismissed with costs of both courts."

Opinion of the Court.

Before commencing this voyage the vessel had been examined in the usual manner, and the plate seemed to be in good order. The examination made was such as a reasonably prudent master or owner might be expected to give in order to determine the seaworthiness of his vessel. At this time she was tight, staunch, and strong, and in every way fitted for the contemplated voyage.

Almost immediately after the commencement of the voyage, she encountered a storm of unprecedented violence, from the effect of which she took in eighteen inches of water which came in contact with the cargo and soaked it to some extent directly, and by capillary attraction.

While in this condition, the port then being the weather side, she wore ship. Just before this time the weather was very bad, a bad sea was flooding the decks continually and washing everything movable about. The covers of the chain locker and a spar were found loose in the morning, coal washed about decks, also buckets, racks, pieces of bulwark, the forecastle door and the galley door. The wearing of the ship gave her a list to port, and the only outlet on that side for the seas and wreckage, excepting the scuppers, was the open port opposite which the plate was located.

After she took in 5 or 6 feet more of water, the loss of the plate was discovered, and we will assume *arguendo* that this additional water was due to its loss.

It was then found that the wood where the plate was fastened was sound, that the screws in coming out had hauled part of the clear wood, leaving splinters hanging around the edges of the holes, the holes thus presenting a ragged look. The screw holes were not smooth, black, or rusty.

Under these circumstances the authorities fully sustain the legal conclusion: "The damage is to be attributed to the dangers of the seas and not the fault the vessel." *The Rover*, 33 Fed. Rep. 515; *Lunt* v. *Boston Marine Insurance Co.*, 6 Fed. Rep. 562.

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

Assuming, as we must, that the damages awarded by the District Court resulted from the loss of the cap and plate covering the bilge-pump hole, the question to be determined is whether that loss was occasioned by a peril of the sea or by the condition of that covering as it was when the vessel entered upon her voyage. If through some defect or weakness the plate and cap and the screws which secured it came off, or if the cap and plate were so made or so fastened as to be liable to be knocked off by any ordinary blows from objects washed by the sea across the decks, then the vessel was not seaworthy in that respect, and the loss could not be held to come within the exception of perils of the sea, although the vessel encountered adverse winds and heavy weather. By the charter party it was agreed on the part of the vessel that she should be tight, staunch, strong, and in every way fitted for the voyage, and the rule is well settled that the charterer is bound to see that his vessel is seaworthy and suitable for the service for which she is to be employed, while no obligation to look after the matter rests upon the owner of the cargo. *The Northern Belle*, 9 Wall. 526; *Work* v. *Leathers*, 97 U. S. 379. If there be a defect, although latent and unknown to the charterer, he is not excused. 3 Kent, *205; Valin, Com. Ord. de la Mar. liv. III, tit. III, Du Fret; art. XII, vol. 1, 654; *Lyon* v. *Mells*, 5 East, 428; *Work* v. *Leathers*, *supra*.

As said, on circuit, by Mr. Justice Gray, in *The Caledonia*, 43 Fed. Rep. 681, 685: "In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship owner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence." In *The Glenfruin*, 10 P. D. 103, 108, the same rule is thus expressed by Butt, J.: "I have always understood the result of the cases from *Lyon* v. *Mells*, 5 East, 429, to *Kopitoff* v. *Wilson*, 1 Q. B. D. 377, to be that under his implied warranty of seaworthiness, the ship

owner contracts, not merely that he will do his best to make the ship reasonably fit, but that she shall really be reasonably fit for the voyage. Had those cases left any doubt in my mind, it would have been set at rest by the observations of some of the peers in the opinions they delivered in the case of *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72."

Perils of the sea were excepted by the charter party, but the burden of the proof was on the respondents to show that the vessel was in good condition and suitable for the voyage at its inception, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants, contributed. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 438. It was for them to show affirmatively the safety of the cap and plate; and that they were carried away by extraordinary contingencies, not reasonably to have been anticipated. We do not understand from the findings that the severity of the weather encountered by the Morrison was anything more than was to be expected upon a voyage, such as this, down that coast and in the winter season, or that she was subjected to any greater danger than a vessel so heavily loaded, and with a hard cargo, might have anticipated under the circumstances. The especial peril which seemed at one time to threaten her safety was directly attributable to the water taken aboard through the uncovered bilge-pump hole, which rose from eighteen inches about 5 A.M. to seven feet at about 9 A.M., so that she was necessarily sinking deeper and deeper, while the absorption by the guano added to the dead weight, and increased the danger of her going down.

Among other exceptions, libellant excepted to the refusal to amend one of the findings by adding: "No spars nor sails were carried away and no repairs were made to the vessel at Savannah beyond nailing a few boards on the starboard side where the bulwarks had been broken, which was done by the crew; and the vessel, after discharging, loaded with a cargo of phosphate rock, which is a much harder cargo to carry than guano, and delivered it safely." These facts were established in substance by uncontradicted evidence, and as they

tended to show that the schooner was not injured to any appreciable degree, and therefore that the weather was not of such an extraordinary character as would have damaged the cargo to the extent that it was if the vessel had been seaworthy in the respect under consideration, we think the amendment was material, and should in effect have been made. What happened to the vessel after the loss of the bilge-pump plate throws but little, if any, light upon the situation at the time of the loss; and libellant excepted to parts of the thirteenth finding so far as they involved the inference that certain incidents therein detailed occurred before the cap and plate came off, as unsupported by evidence; and also to that part of the sixteenth finding which stated that it was to be inferred that the plate was knocked out "subsequently to the time when they wore ship after finding eighteen inches of water in the hold" on the same ground. But without going into these details or inquiring how far they are open to examination, the significant fact is found that although at half-past four in the morning the pumps sucked, indicating that there was then no water in the well, they did not suck (twenty minutes later, as disclosed by the evidence, nor) again until the hole was discovered and stopped up, when they gained on the water, and after several hours freed the vessel.

In any aspect, the real point in controversy is, did the respondents so far sustain the burden of proof which was upon them as to render the probability that the cap and plate were in good condition and knocked off through extraordinary contingencies so strong as to overcome the inference that they were not in condition to withstand the stress to which on such a voyage it might reasonably have been expected they would have been subjected? If the determination of this question is left in doubt, that doubt must be resolved against them.

The 8th, 11th, 12th, 14th, 15th, and 16th findings were as follows:

"VIII. Such bilge-pump holes are not unusual in vessels constructed in some localities. The plates are generally considered permanent fixtures, not peculiarly susceptible to deterioration from age. Verdigris sometimes forms around

brass screws, thus weakening the hold of the wood; but waterways located as this was, well covered up and well painted, are not liable to rot, and their reasonable expectation of sound life is largely in excess of twelve years.

"If the plates and caps which are generally used to cover such holes are not kept tight and secure, the holes become dangerous; but that mode of covering was generally deemed secure by seafaring men, and seldom, if ever, have any accidents arisen from their use.

"XI. Before the vessel sailed the cap and plate appeared to be in good order, with no indication of looseness. The examination which was at that time made of them consisted of such inspection as could be given by the eye, and to such an inspection they were from time to time subjected. They were not tested either by unscrewing the cap or the plate, or by tapping the plate with a hammer. Tapping with a hammer or unscrewing the cap might have developed any insecurity (if there were any) in the bilge-pump plate. Immediately after the loss of the port-bilge plate (hereafter described) the mate tested the condition of the similar plate on the poop deck, starboard side, by tapping with a hammer, and found it apparently sound.

"XII. The examination which was made of the cap and plate, as set forth in the XIth finding (viz., by a survey without the use of special tests, unless there is some appearance of defect) is such as a reasonably prudent master or owner might be expected to give them in order to determine the seaworthiness of his vessel before beginning a voyage.

"XIV. The wood to which the plate had been fastened looked white and sound. From the holes out of which the screws had come part of the clear wood was itself hauled, the splinters hanging around the edges of the holes, the holes thus presenting a ragged look. The screw-holes were not smooth nor black nor rusty. The wood of this particular waterway in the vicinity of the plate did not look rotten, and when after arrival at Savannah the temporary plugging referred to in the XVIIth finding was removed, and the hole plugged and covered with sheet lead, the timber into which the plug was

driven and on which the lead was nailed was found solid, and since that time the covering had not been further repaired nor the timber changed in any way.

"XV. No marks of violence other than the splintering of the wood about the screw-holes were visible upon the waterway or upon the adjacent bulwarks or stanchions.

"XVI. As no one witnessed the removal of the bilge-pump plate, direct evidence of the cause of this mishap is not obtainable. It is, however, to be inferred from the facts proved that it was knocked out by something striking violently against it subsequently to the time when they wore ship after finding eighteen inches of water in the well, which would be between 5 A.M. and 5.30 A.M."

There was no direct evidence that the plate was knocked out, or, if this were so, that it was by some extraordinary collision; and while the fourteenth finding tends to support the inference of the sixteenth, it will be observed that the tendency of the fifteenth is to rebut it. If it appeared that the wood was solid, and the screw-holes splintered, the drawing out of the screws might be imputed to a blow or blows; but, on the other hand, if there were no marks of violence in the vicinity, since such blow or blows to effect the result, if the cap, plate and waterway were in good condition, must necessarily have been of great violence, it seems almost incredible that no marks thereof appeared on the stanchions and bulwarks on the port side, and that nothing but the cap and plate were carried away. And it is proper to note that no survey of the vessel was had, and that respondents introduced no proof of exact measurements to show the height of the cap above the waterway, or of the perpendicular edge, nor was the duplicate cap on the starboard side produced.

If, however, the vessel had been so inspected as to establish her seaworthiness when she entered upon her voyage, then upon the presumption that that seaworthiness continued the conclusion reached might follow, but we are of opinion that precisely here respondents failed in their case.

From the sixth and seventh findings it appears that the vessel was built in 1873; that the bilge-pump hole had not been

used for four or five years, if at all; and that the cap and plate were painted over whenever the waterway was painted; and from the findings above quoted that these holes were dangerous unless the caps and plates were kept tight and secure; that the hold of the wood might become weakened by the formation of verdigris about the brass screws; that tapping with a hammer or unscrewing the cap might have developed any insecurity, if there were any; that no such tests were applied; but that the caps and plates appeared all right to visual observation. But this was not enough to establish the fact of security; and the twelfth finding, that examination by the eye is such as a reasonably prudent master or owner might be expected to give such coverings in order to determine their seaworthiness, does not give it that effect. The obligation rested on the owners to make such inspection as would ascertain that the caps and plates were secure. Their warranty that the vessel was seaworthy in fact "did not depend on their knowledge or ignorance, their care or negligence." The burden was upon them to show seaworthiness, and if they did not do so, they failed to sustain that burden, even though owners are in the habit of not using the precautions which would demonstrate the fact. In relying upon external appearances in place of known tests, respondents took the risk of their inability to satisfactorily prove the safety of the cap and plate if loss occurred through their displacement.

We are unwilling, by approving resort to mere conjecture as to the cause of the disappearance of this cap and plate, to relax the important and salutary rule in respect of seaworthiness. *The Reeside*, 2 Sumner, 567, 574; *Douglas* v. *Scougall*, 4 Dow, H. L. 269.

The findings that "at the time of the contract and lading of cargo and commencement of voyage the vessel was tight, staunch, and strong, and in every way fitted for the contemplated voyage;" that "there was no latent defect in the vessel which contributed to the injury to the cargo;" and that "the whole of said damage to cargo was caused by a danger of the seas, and was within the exception in charter party and bills of lading," were findings determined by the interpreta-

tion which the law put upon the circumstances of the transaction as stated in the previous findings, and, as such, open to our revision. *Sun Mutual Insurance Co.* v. *Ocean Insurance Co.*, 107 U. S. 485; *United States* v. *Pugh*, 99 U. S. 265; *The Britannia*, *ante*, 130; *Gilroy* v. *Price*, App. Cas. (1893) 56, 64.

In our judgment these deductions were incorrect, and the specific conclusions of law did not follow.

The decree of the Circuit Court is reversed and the cause remanded with a direction to enter a decree for libellants for the amount found due by the District Court with interest and costs.

MR. JUSTICE BREWER, not having heard the argument, and MR. JUSTICE WHITE, not being a member of the court when the hearing was had, took no part in the consideration and decision of the case.

RUNKLE *v.* BURNHAM.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 266. Argued March 12, 13, 1894. — Decided April 30, 1894.

A contract for a loan and water works in Havana having been awarded to R., G., L. and M., a deposit was required as a guarantee. N. was employed by R. to raise the money. He borrowed it from B. R. became the assignee of the interests of his co-contractors, and then failed to perform the contract. In order to procure a general release from the liabilities arising from such failure, he gave a power of attorney to Q., who thereupon, in his name and as attorney in fact, entered into an agreement in writing with B. by which it was, among other things, agreed that R. should pay to B. an agreed balance of $19,087.36 in three months from date, with interest at 9 per cent. That sum not being paid when due, B. sued R. to recover it. *Held*,

(1) That the power granted by R. to Q. was outstanding when the agreement was executed;

(2) That the agreement made by Q. with B. was authorized by the power;

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(3) That R., having taken an assignment of the respective interests of his co-contractors, stood in their shoes, and that evidence touching the transaction, admissible against an assigning co-contractor, was admissible against him.

The rejection of evidence immaterial to the result did not constitute reversible error.

A witness may be asked as to the relations of the parties at the time of the execution of a written power of attorney, although his answers may have a bearing upon their obligations arising under a written contract made under the power.

Findings of fact made by the court below are binding here when there is any evidence to support them.

A defendant who, after denial of his motion for a nonsuit made at the close of plaintiff's evidence in chief, offers evidence in his own behalf, thereby waives his motion and an exception to the denial of it.

THE defendant here, who was plaintiff below, brought an action of assumpsit against Daniel Runkle to recover the sum of $19,087.36, with interest at the rate of nine per cent from the 4th of August, 1884, to the time of entering suit.

After issue joined the case was by stipulation submitted to the court without the intervention of a jury.

The contract in issue purported to have been "subscribed" by one Mestre as "attorney in fact of the defendant."

At the close of the plaintiff's case, the defendant moved for judgment in his favor, which motion was overruled, and this action of the court was excepted to. Defendant did not thereupon rest, but proceeded to offer evidence on his own behalf. After both parties had concluded, the defendant requested the court to find: 1st, that it does not appear that Mestre had any authority to assume an obligation in the name of the defendant; and, 2d, that the contract of August 4, 1884, does not place any liability on the defendant. These requests were refused, and the defendant duly excepted to their refusal. The court then proceeded to find the facts as follows:

"First. That on the eighteenth day of March, eighteen hundred and eighty-two, contracts for a loan and water works were awarded by the city of Havana to David Runkle, the defendant, Walter H. Gilson, Joseph H. Lyles, and Maddison & Co., of London, and on the 27th of the same March, Lino Martinez deposited the sum of $64,000 in Spanish gold in the

municipal treasury of Havana as a guarantee for the proposition which Messrs. Gilson, Runkle, Lyles, and Maddison & Co., of London, had presented to the municipality of Havana for the loan of $5,600,000.

"Second. That Martinez had been employed by Runkle, who was acting for himself and his co-contractors, to raise the amount required to be deposited as a guarantee for the fulfilment of a contract, and in pursuance of this employment Martinez had borrowed the sum of $64,000 from the plaintiff Burnham.

"Third. Runkle, Gilson, and Lyles undertook to repay this sum of $64,000 to Martinez at any time he should ask for the same, if it should be demanded by the city in consequence of their not having carried out the contract for the water works, or for any cause for which the city might retain the deposit, and as a remuneration and for the payment of interest to Martinez they assigned to him the amount of $25,000, payable monthly, at the rate of one and $\frac{137}{1000}$ per cent from the amounts they should receive for the works. This undertaking fell through in consequence of the final abandonment of the contract, but the fact remains that it was the understanding of all the parties that Martinez was to be repaid the sum of $64,000, with interest, and also to be remunerated for his services or expenses.

"Fourth. Subsequently to these proceedings Runkle became the assignee of all the rights and interests of his co-contractors under their contract with the city of Havana, and thenceforward was solely entitled to all the profits that might accrue from its performance and liable for the consequences of its non-performance.

"Fifth. Runkle failed to perform the contract for the water works, and by reason of his default the sum deposited with the city of Havana as a guarantee was forfeited, and he became liable for such damages as were sustained by the city on account of his failure. He also became responsible to Martinez for the repayment of the guarantee deposited, with interest, and expenses incurred in effecting the loan from Burnham, amounting in all to the sum of $83,087.36, as per

account stated between Burnham and Martinez on the 4th of August, 1884.

"Sixth. Runkle, being desirous of procuring a full and general release from all liability on account of his connection with the contract for the loan and water works, executed in due form on the 25th of June, 1884, a letter of attorney to José M. Mestre, who was in the city of Havana, authorizing him 'to demand, collect, and receive such sum or sums of money and property of any kind' belonging to Runkle, 'under or in connection with the contracts for the loan and water works, made in consequence of the public bid therefor on the 18th of March, 1882, and which loan and contract were awarded to me (him) together with Walter H. Gilson and Maddison & Co., and also Joseph H. Lyles,' . . . 'and to do all things necessary in the judgment of my said attorney and to obtain my release from all liability as one of the contractors in connection with the said loan and water works, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present,' etc.

"Seventh. By virtue of the authority conferred on him by the aforesaid power of attorney, Mestre, on the fourth day of August, 1884, acting for and in the name of Runkle, entered into a written agreement of stipulation in the Spanish language with Burnham, of which the following is a translation:

"'This present is to certify, to which I desire to give all the force of a public instrument, that I, Mr. S. J. Burnham, having received from Mr. Lino Martinez the sum of sixty-four thousand dollars, gold, on account of the sum of $83,087.36, which results in my favor from the account that under this date has been presented to Mr. Lino Martinez in relation to the drafts drawn on the 24th of March, 1882, by Mr. H. J. Overman upon Mr. E. C. Maddison, of London, and endorsed to my order by the said Mr. Lino Martinez, the which were protested for non-payment and protected in due course by Messrs. Baring

Brothers and Company, of London, as the representatives of the Messrs. J. C. Burnham and Company, have agreed in regard to the balance of $19,087.36 that still remains unpaid as follows:

"'Recognizing, as I recognize, Mr. Daniel Runkle as the assignee of Mr. Walter Gilson, who in his turn was the assignee of Mr. E. C. Maddison, for himself and for the firm of Maddison and Company, I bind myself to place at the disposal of said Mr. Runkle the shares of the Charnwood Forest Railway Company, of the nominal value of fourteen thousand pounds sterling, which the aforesaid Messrs. Maddison & Company deposited in my hands and transferred to me as guarantee for the reimbursement of the amount of the aforesaid drafts and the expenses and interest relating thereto so soon as such balance of $19,087.36 shall be satisfied by the aforesaid Mr. Runkle, which it is to be done within the period of three months counting from the date hereof, it being left to his discretion either to do so directly or to direct that if the said shares deposited there be sold (in accordance with such instructions that for such purpose he may give) such portion as may be necessary for the reimbursement of such balance of $19,087.36, which being covered, the remaining shares shall remain all at the free disposal of Mr. Runkle, as well as any balance in cash that may arise on the partial sale of such shares.

"'The sum owing shall carry interest at nine per cent per annum until its complete payment.

"'Mr. José Manuel Mestre, as the attorney-in-fact of Mr. Runkle, subscribes this present stipulation by way of assent in the name of his principal.

"'That in order that it may have all its due effect this is done and signed in triplicate of the same tenor, one for each party, at Havana, the 4th of August, 1884.

"'*Memorandum as to Corrections.*

"'NOTA.—At the moment of signing Mr. S. J. Burnham stated that he assigns and transfers to Mr. Candido Zabarte y Paris all the rights and rights of action that belong to him

under the foregoing instrument, subrogating him in his place and stead by reason of having received from him the aforesaid balance of $19,087.36, but on the understanding that said Burnham remains always bounden to sell the shares of stock in question to the order of Mr. Runkle, as set forth, and to deliver to the latter the balance of the proceeds of the sale and the shares remaining. Dated as above.

"'(Signed) José Man'l Mestre.
"'L. Martinez.
"'S. J. Burnham.
"'Cando Zabarte Paris.

"'As witnesses:
"'E. Coscallucla.
"'Antonio Pais.'

"Eighth. Runkle had no property or debts belonging to him in the city of Havana, and the letter of attorney was executed for the sole purpose of authorizing Mestre to procure his release from any and all liability as a contractor in connection with the water works, and there is no proof that Mestre received notice of the revocation of the letter before he signed the agreement with Burnham.

"Ninth. Martinez exerted himself to obtain from the authorities of Havana the release of Runkle and the return of the deposit money in consideration of Runkle entering into the agreement with Burnham.

"Tenth. The right of action accruing to Burnham under the agreement was assigned by him to Candido Zabarte y Paris, and by the latter to Francisco G. Mediavilla."

From the facts thus found the court then drew the following legal conclusions:

That the agreement of August 4, 1884, was assented to by Runkle through Mestre, who had full power under the letter of attorney to bind his principal. The consideration of the agreement on the part of Runkle was his release from all liability under his contract with the city of Havana, and the return of the deposit money, both of which purposes were accomplished through the instrumentality of Martinez.

Judgment was entered for the plaintiff for $19,087.36 with interest at the rate of nine per cent from August 4, 1884, to date of entry thereof.

Defendant excepted to the findings of fact and to the conclusions of law deduced therefrom, and brought the case, by error, here.

Mr. Hamilton Wallis and *Mr. William D. Edwards* for plaintiff in error.

Mr. Frederic R. Coudert, (with whom were *Mr. Robert O. Babbitt* and *Mr. Charles Frederic Adams* on the brief,) for defendant in error.

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

1. By not resting on his motion for a non-suit, and by thereafter offering his own evidence, the defendant waived his motion, and the overruling thereof cannot be assigned for error here. *Union Pacific Railway* v. *Daniels*, 152 U. S. 684, and authorities there cited.

2. The exceptions taken during the progress of the trial are numerous. We will content ourselves with examining the merits of those which have been specifically assigned as error.

The plaintiff offered in evidence an account, growing out of the purchase and protest of the draft, and kept between Martinez and Burnham, which was objected to, on the ground that it was *res inter alios.*

Runkle, Gilson, Lyles, and Maddison & Co. were parties to the water works contract. In order to furnish the $64,000, which was to be deposited with the city of Havana, Martinez bought a draft drawn by an agent of Maddison & Co. on that firm in London. This draft, on being endorsed and guaranteed by Martinez, was discounted by Burnham, who forwarded it to London for collection. There it was protested for non-payment. The result was that Burnham held Martinez and Maddison & Co. on the draft, which was taken *supra* protest, by Baring Brothers, at the request of Burnham. Maddison &

Co. thereupon deposited with Burnham, as collateral to secure their obligation on the draft, certain shares of the "Charnwood Forest Railroad Company." Inasmuch as Runkle appears, both in the contract sued upon and in the power of attorney upon which the contract is predicated, as the assignee of Maddison & Co., and as standing in their place and stead, we think it clear that the account was not *res inter alios* as to him. He represented Maddison & Co., and held their rights, and, therefore, the account was as much admissible against him as it would have been against the firm.

3. For the purpose of showing that the power of attorney, under which Mestre acted as the agent of Runkle, had been revoked, the defendant offered a series of telegrams addressed to Olcott, the attorney-at-law of Runkle in New York, which read as follows:

"HAVANA, *July* 23, 1884.

"To Olcott, 35 Broadway, N. Y.:

"Telegraph if power is coming to-morrow steamer.

"MESTRE.

"MARTINEZ."

"HAVANA, *July* 18, 1884.

"To Olcott, 35 Broadway, N. Y.:

"The powers received are insufficient. It is urgent to send by to-morrow's steamer new Spanish power, in Spanish, from Runkle, Lyles, Gilson, and Maddison & Co., to Martinez, Mestre, confirming the power of March 6th and June 26th, amplifying them specially, to cancel the contract to loan, to accept return of deposit, giving common council liberty of action, and to execute a general release; all well explained.

"MESTRE.

"MARTINEZ."

"HAVANA, *July* 22, 1884.

"To Olcott, 35 Broadway, N. Y.:

"Send, anyhow, first steamer, power according telegram eighteenth.

"MESTRE.

"MARTINEZ."

"To Runkle, Lyles, Gilson, care Olcott, 35 Broadway, N. Y.:

"I urge forward pending powers. I protest against damage delay.

"MARTINEZ."

These telegrams were rejected on the ground that they had not been properly proved. Whether their rejection was warranted is unnecessary to be considered. The telegrams called for a confirmation of the existing power, and not for its revocation. If they had been admitted, they could not have affected the question of the revocation of the power. Their rejection being immaterial to the result, no reversal for error in this particular can be had. *Cavazos* v. *Trevino*, 6 Wall. 773; *Railroad Co.* v. *Pratt*, 22 Wall. 123; *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527; *Mining Co.* v. *Taylor*, 100 U. S. 37.

4. Martinez was asked whether, pending the negotiations in Havana for the settlement of the transactions out of which the present contract grew, he had exacted from Mestre, agent of the defendant, any agreement as to the debt due to Burnham, as a part of the final adjustment. This question was objected to, on the ground that it was an attempt to show the assumption by parol of an obligation, when such obligation, if it existed, must result from the written contract. We think the objection was untenable. The question was asked the witness not for the purpose of proving a liability on the written contract, but in order to show the relations existing between the parties at the time the authority given by the power of attorney was acted on. The obligation of course must result from the text of the written contract, or by necessary implication therefrom. Testimony, however, was admissible to show the condition of affairs at the time the agent acted, not in order to vary or change the written contract, but to throw light upon the situation. *Le Roy* v. *Beard*, 8 How. 451.

5. The numerous other exceptions to the admissibility of evidence found in the record are, we think, not well taken. We have considered them all. The requests for findings made by the defendant upon the whole case, as we have seen, were

as follows: "1st, that it does not appear that Mestre had any authority to assume an obligation on the part of the defendant; 2d, that the contract of August 4, 1884, does not impose any liability upon the defendant." These requests involved both questions of law and fact, and were refused, and exceptions were reserved to their refusal. The findings of fact made by the court below are binding here, if there be any evidence to support them. *St. Louis* v. *Rutz*, 138 U. S. 226.

It is contended that there is no evidence to show that the power of attorney, which is relied on, was an existing power at the time the contract was signed by Mestre as Runkle's agent. This position is not supported by the record. True, there is evidence tending to show that Mestre, the agent of Runkle in Havana, requested enlarged powers from Runkle, and there is also evidence tending to show the arrival at Havana, on the day on which the contract was made, of an instrument conferring the enlarged powers which Mestre deemed desirable to justify him in dealing with the city of Havana. There is, however, no evidence that the second power, if received, revoked the power which is in evidence. As to the letter which Runkle wrote to Mestre, and which, it is contended, was a revocation of the power, its contents imply the very reverse. There was certainly no reason why Runkle should have said to Mestre that he "would like" a particular provision as to the Maddison & Co. liability inserted in the contract, unless the agent had authority to deal with reference to this matter. Indeed, although Runkle and Olcott, his attorney, were both examined, and although they both referred to the alleged new power of attorney, their testimony seems sedulously to avoid any statement that the new power revoked the power of June 25. If the new power of attorney was sent, and revoked the one relied on here, Runkle or his attorney could have dispelled all doubt by offering it in evidence, or by testifying as to its contents. Their silence must necessarily make against them on the question of revocation. Mansfield, J., in *Holdane* v. *Harney*, 4 Burr. 2484, 2487. The doctrine that the production of weaker evidence, when stronger might have been produced, lays the producer open to the sus-

picion that the stronger evidence would have been to his prejudice was expressly adopted in the case of *Clifton* v. *United States*, 4 How. 242.

This leaves only for consideration the question of whether the power authorized the contract with Burnham and whether that contract bound Runkle for the debt sued on. It will be observed that the power of attorney expressly designates Runkle as the assignee of Lyles and Gilson and the "transferee" of Maddison and Co., and then authorizes the agent "for me, and in my name, place, and stead, to ask, demand, collect, and receive such sum or sums of money and property of all or any kinds to which in any capacity aforesaid I have, or may have, the right or claim or demand, under or in connection with the contracts for the loan and water works in the Island of Cuba, made in consequence of the public bidding therefor in the city of Havana, in the Island of Cuba, on the 18th day of March, 1882, . . . to compound and compromise all such claims as I may have aforesaid, . . . and to obtain my release from all liability as one of the contractors in connection with the said loan and water works." The contention is that this power, while it authorized the agent to enforce any demands which Runkle may have had, did not authorize him to assume an obligation on behalf of Runkle. The finding below is that, at the time the power was exercised, it was necessary that the agent, in order to obtain his principal's discharge by the city of Havana, should settle the Martinez-Burnham liability.

In addition to these findings, the face of the power of attorney indicates the necessity of the agent's action in order to carry out the purposes of the power. The power itself states that Runkle is the assignee or "transferee" of all those who had been parties with him to the water works contract. It represents him as the "transferee" of Maddison & Co., and as entitled to all of Maddison & Co's rights. We have seen that Maddison & Co. were bound, with Martinez, to Burnham on the draft which Burnham had discounted and which was protested, and that the stock of Maddison and Co. was pledged to secure payment of the draft. A settlement of Runkle's

relations, as the assignee of Maddison & Co., necessarily included an adjustment of the debt of Burnham under the very terms of the power of attorney. This power was evidently executed not alone for the purpose of adjusting the water works contract with the city of Havana, but also with the object of arranging the debt due to Burnham, back of which was the stock which had been pledged by Maddison & Co., and which belonged to Runkle as their assignee.

We now come to the consideration of the contract itself, which, it is contended, did not justify the conclusion that Runkle had assumed the indebtedness to Burnham. The contract recites the drawing of the draft upon Maddison & Co., the indorsement by Martinez, and the protest. It credits the receipt from the city of Havana of the $64,000, which had been deposited on account of the loan and water works contract, and states a balance due on the draft to Burnham. In stating the balance thus due, it "recognizes" Runkle as the assignee, binds Burnham to place the Charnwood Forest Railroad stock at the disposal of Runkle upon the payment of the debt, and binds him also, in the event of the sale of the stock, and the application of the proceeds thereof, to the debt, to pay over to Runkle any balance that might remain. It is insisted that this contract does not make Runkle ultimately liable for any deficiency, and that, therefore, the contract imports no debt on his part. This claim necessarily contradicts the finding of the court below, which is that Runkle had assumed responsibility for the balance, and it also contradicts the contract itself. The stock was not primarily Runkle's, but Maddison & Co.'s. Any dealing with Runkle, and by Runkle, as owner of the stock, and as assignee of Maddison & Co., imported that Runkle had succeeded to the claims of Maddison & Co. and, by fair inference, to all their obligations with reference to this part of the transaction. Indeed, the careful manner in which the contract states the drawing of the draft, its protest, and the transfer by Maddison & Co. to Runkle, seems to have been intended to emphasize the fact that Runkle, in acquiring the rights of Maddison & Co., had put himself in their place and stead. That Runkle was the

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general assignee of Maddison & Co., and considered himself as not only entitled to their rights, but also as the representative of their obligations in connection with the loan and water works contract, results from the terms of the power of attorney, in which he authorizes the agent not only to acquire Maddison & Co.'s rights, but to stipulate for the discharge of their obligation. In other words, the contract, read in connection with the terms of the power of attorney, leaves no doubt that Runkle was dealing and treating in the capacity of a person who was not only entitled to the rights, but was also subject to the liabilities of all the original parties to the loan and water works contract. This view is strengthened by the fact that, although Runkle testified on the trial, the assignment from Maddison & Co. to him was not offered in evidence, nor even referred to. The failure to produce it, or to testify in reference to it, when its contents were peculiarly within the knowledge of Runkle, justifies the presumption that its provisions would have been unfavorable to Runkle's position.

Judgment affirmed.

BURKE *v.* DULANEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

No. 326. Argued and submitted March 28, 1894. — Decided April 23, 1894.

In an action by the payee of a negotiable promissory note against the maker, evidence is admissible to show a parol agreement between the parties, made at the time of the making of the note, that it should not become operative as a note until the maker could examine the property for which it was to be given, and determine whether he would purchase it.

This action was brought by the testator of the appellees, upon a writing purporting to be the promissory note of the appellant for forty-three hundred and eight dollars and eighty cents, dated Salt Lake City, Utah, August 10, 1883, and payable one year after date, for value received, at the bank of Wells, Fargo & Co. in that city, with interest at the rate of six per cent per annum from date until paid.

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The defendant, Burke, denied his liability upon the note, and at the trial below was sworn as a witness on his own behalf. In support of his defence, as set forth in the answer filed by him, he stated the circumstances under which the note was given. He said: "Mr. Dulaney bought this group of mines — the Live Yankee and the Mary Ellen. He came to the Walker House in Salt Lake, and wanted me to run them for him. I said I would not do it unless I got a show to get some interest in the property. He says, I will carry an interest for you, and you can take it if you want it, and if not, you can give it back to me after you see the property." To this testimony the plaintiff objected, and, the defendant admitting that the agreement referred to by him was oral, the objection was sustained. To this ruling he excepted.

Being asked what he did after giving the note in suit, he answered: "I gave the note. I worked on the property, which was done some time in September; worked the property until March; settled up all of its debts, paid them, notified Dulaney I wanted nothing more to do with the property; that I was going to Idaho Territory, to Cœur d'Alêne mines, and as I was ready to give him a deed at any time he would send me my note. That is all." Objection being made by the plaintiffs to this testimony, the defendant offered to prove "that at the time of the giving of the note and prior thereto, Dulaney, the payee of the note, agreed with Mr. Burke, the maker of the note, that the note should be given to represent the price of the interest that Mr. Burke was to have, conditioned upon his demanding it after an inspection of the mining property mentioned." He offered also to prove that after inspecting the property and testing it, the defendant notified testator that he did not want the interest; that he was prepared to make a deed for the interest to the latter, and demanded the delivery of his note. All this evidence was excluded by the court upon motion of the plaintiffs, to which ruling the defendant excepted.

The defendant having stated that the conversation with the testator above referred to, and which was excluded by the court, took place prior to the execution of the note, he

offered to prove that at the time the note was made, the same agreement was made orally between him and the testator. This testimony was also excluded, and he excepted.

The following question was propounded to him at the trial: "State whether or not prior to your making the note the plaintiff agreed with you that you could explore, work, and develop the mining claims mentioned in the answer, and if at any time before the maturity of the said note you should desire so to do that he would relinquish said option of purchase — that you could relinquish your said option of purchase, and that he, plaintiff, would cancel the note and accept the deed in full discharge of the note and the cancellation thereof." The defendant having admitted that the agreement referred to in the question was oral, the court excluded the evidence, and he excepted. The court also refused to allow him to state whether he examined, worked, and developed the mining claims mentioned in his answer, and whether he had refused to take such claim under the agreement with the plaintiff.

At the trial the defendant offered in evidence a deed executed by him to the plaintiff, conveying to the latter, in consideration of the surrender of the note in question, all his right, title, and interest in the above property — the same deed that had been filed by the defendant with his answer. The court held this evidence to be inadmissible unless the defendant proposed to show that the plaintiff accepted the deed. To this ruling the defendant excepted. The defendant was not present when Dulaney took a deed from the owner of the mining property, nor was it ever delivered to him. 23 Pac. Rep. 915.

Mr. W. B. Heyburn, for appellant, submitted on his brief.

Mr. Leigh Robinson for appellee.

It is not easy to conceive of a more complete contradiction and variation of a promissory note to pay a certain sum, to a certain party, than the contradiction and variation and trans-

formation which would be accomplished by the admission of proof to turn a precise and distinct negotiable note into an option to purchase real estate.

If parol evidence of an agreement, made contemporaneously with a promissory note, which contains an absolute promise to pay at a specified time, is not admissible in order to extend the time for payment, or to provide for the payment out of any particular fund, or in any other way than that specified in the instrument, or to make the payment depend upon condition, (*Brown* v. *Spofford*, 95 U. S. 474, 482,) how can it be admitted for the revolutionary purposes sought by this defence?

If "it is a firmly settled principle, that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or endorsing of a bill, cannot be permitted to vary, qualify, or contradict, or add to or subtract from the absolute terms of the written contract," *Forsythe* v. *Kimball*, 91 U. S. 291, 294, and there is no fraud, no accident, no mistake to be corrected, by what principle can parol proof turn the paper in suit into an option incapable of transfer or negotiation, over which the holder has no control whatever, but the absolute control whereof is in the maker? An option is delivered by the one who gives it to him who receives it, but this alleged option is reversely treated, the sole memorial thereof being claimed to have been delivered by the donee to the donor.

It will be observed that the trial judge was willing to admit evidence in variation or explanation of the written instrument, if such cotemporaneous agreement was in writing. His refusal to admit was limited to parol evidence of a different or modified contract. The principle thus applied is not, as appellant's counsel suggests, subject to the qualification, that the note must be one which has passed beyond the original parties. In a suit at law, by the payee against the maker, "evidence is inadmissible to show that the note was not intended to be a promissory note, but was given as a memorandum not to be enforced against the maker." *Burnes* v. *Scott*, 117 U. S. 582. In that case the defence sought to show

that the note was given by one partner to another partner, at a time when the partnership affairs had not been settled, that defendant was requested as trustee of the partners to make the note, "with the understanding that the same was not to be sued on, but was to be deemed a mere memorandum of the amount that should be estimated as the share of said W. on account of said bonds, in a settlement among said partners;" that the defendant executed the note accordingly, "as trustee of the partnership and not as his individual note, and the plaintiff acquired title to the note with knowledge of these facts." p. 584. But this evidence, in the judgment of this court, was properly excluded. "Its purpose was to vary and contradict by an alleged contemporaneous *verbal* agreement the contract which the parties had reduced to writing. It was offered to show that a promissory note in the usual form was not intended by the parties to be a promissory note, but was a mere memorandum by which the maker promised nothing; which gave no rights to the payee, and was to all intents and purposes vain, futile, and of no force or effect whatever. It is not necessary to cite authority to show that the evidence was inadmissible for such a purpose." pp. 585–586.

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

The general rule that a written contract cannot be contradicted or varied by evidence of an oral agreement between the parties before or at the time of such contract, has been often recognized and applied by this court, especially in cases in which it was sought to deprive *bona fide* holders of or parties to negotiable securities of the rights to which they were entitled according to the legal import of the terms of such instruments. *Renner* v. *Bank of Columbia*, 9 Wheat. 576, 587; *Brown* v. *Wiley*, 20 How. 442; *Specht* v. *Howard*, 16 Wall. 564; *Forsythe* v. *Kimball*, 91 U. S. 291; *Brown* v. *Spofford*, 95 U. S. 474; *Martin* v. *Cole*, 104 U. S. 30; *Burnes* v. *Scott*, 117 U. S. 582; *Falk* v. *Moebs*, 127 U. S. 597.

Opinion of the Court.

Several of these cases were cited in the opinion of the court below, and have been cited here, as supporting the exclusion of the evidence which the appellant offered to introduce. 23 Pac. Rep. 915. It is supposed that *Burnes* v. *Scott* is particularly in point for the appellees. That was an action by the indorsee of a negotiable note against the maker. The defendant in that case offered to prove that the note was not intended by him or by the payee as a promissory note, but was given to and was received by the payee as a mere memorandum of the estimated value of the payee's interest in certain railroad bonds placed in the hands of the maker, and which were to be accounted for in the settlement of certain partnership affairs in which the maker and payee were interested; and that upon such settlement it would appear that the payee had received, prior to the giving of the note, more than his proper share of the partnership assets, and, therefore, was not entitled to claim anything in virtue of such memorandum. This court held the evidence inadmissible upon the ground that, by an alleged contemporaneous verbal agreement, it varied and contradicted the written contract of the parties. If that action had been brought by the original payee against the maker, and if the evidence above referred to had been excluded, a different question would have been presented. But, as we have seen, the issue in *Burnes* v. *Scott* was between the indorsee of a negotiable note and the maker. The rule is settled that a negotiable instrument, in the hands of an innocent holder for value, cannot be contradicted, to his prejudice, by evidence of an oral agreement or understanding between the original parties variant from the terms of their written contract.

The authorities cited do not determine the present case. The issue here is between the original parties to the note. And the evidence offered by the appellant, and excluded by the court, did not in any true sense contradict the terms of the writing in suit, nor vary their legal import, but tended to show that the written instrument was never, in fact, delivered as a present contract, unconditionally binding upon the obligor according to its terms from the time of such delivery, but was left in the hands of Dulaney, to become an absolute obligation

of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question. In other words, according to the evidence offered and excluded, the written instrument, upon which this suit is based, was not — except in a named contingency — to become a contract, or a promissory note which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations. The exclusion of parol evidence of such an agreement could be justified only upon the ground that the mere possession of a written instrument, in form a promissory note, by the person named in it as payee, is conclusive of his right to hold it as the absolute obligation of the maker. While such possession is, undoubtedly, *prima facie*, indeed, should be deemed strong evidence that the instrument came to the hands of the payee as an obligation of the maker, enforcible according to its legal import, it is open to the latter to prove the circumstances under which possession was acquired, and to show that there never was any complete, final delivery of the writing *as the promissory note of the maker*, payable at all events and according to its terms. The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract. The authorities supporting these views are numerous, and to some of them it will be well to refer.

In *Ware* v. *Allen*, 128 U. S. 590, 595, which was an action upon a written instrument, the defence was that it was understood between the parties at the time the instrument was signed that it should not be of any effect unless in certain named contingencies, which, it was shown, never occurred. Mr. Justice Miller, speaking for this court, said: "We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a

question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter" — citing *Pym* v. *Campbell*, 6 El. & Bl. 370, 373; *Davis* v. *Jones*, 17 C. B. 625; *Wallis* v. *Littell*, 11 C. B. (N. S.) 369; *Wilson* v. *Powers*, 131 Mass. 539; and *Pawling* v. *United States*, 4 Cranch, 219.

Pym v. *Campbell*, above cited, was an action upon an alleged agreement by the defendants to purchase from the plaintiff an interest in an invention of the latter. The defendants gave in evidence that, in the course of negotiations with the plaintiff, they got so far as to agree upon the price at which the invention should be purchased, if bought at all, and had appointed a meeting at which the plaintiff was to explain his invention to two engineers, when, if they approved, the machine would be purchased. At the appointed time the defendants and the two engineers attended, but the plaintiff did not come, and the engineers went away. Shortly after they were gone the plaintiff arrived. One of the engineers was found, and expressed a favorable opinion. The other could not then be found. It was then proposed that, as the parties were together and might find it troublesome to meet again, a writing should be then drawn up and signed, which, if the absent engineer approved the invention, should be the agreement; but if he did not approve it, should not be one. The absent engineer did not approve of the invention when he saw it, and the defendants contended that there was no bargain. The jury were directed that if it was agreed among the parties before the paper was signed that it should not operate as an agreement until the absent engineer approved of the invention, they should find for the defendants. A verdict was accordingly returned for the defendants. Upon a rule *nisi* for a new trial on the ground of misdirection, the cause was heard before the Court of Queen's Bench. Erle, J., said that, while the production of a paper purporting to be an agreement of a party, with his signature attached, affords a strong presump-

tion that it is his written agreement, and if, in fact, he did sign the paper *animo contrahendi*, the terms contained in it were conclusive, and could not be varied by parol evidence, yet, if it were proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party could not fix it as an agreement upon those so signing. "The distinction in point of law," he said, "is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible." p. 374. Crompton, J., said that he knew of no rule of law estopping parties from showing that a paper, purporting to be a signed agreement, was in fact signed on the terms that it should not be an agreement till money was paid or something else done. "The parties," he observed, "may not vary a written agreement, but they may show that they never came to an agreement at all, and that the signed paper was never intended to be the record of the terms of the agreement; for they never had agreeing minds. Evidence to show that does not vary an ageeement, and is admissible." pp. 374, 375. Lord Campbell, C. J.: "I agree. No addition to or variation from the terms of a written contract can be made by parol; but in this case the defence was that there never was any agreement entered into. Evidence to that effect was admissible; and the evidence given in this case was overwhelming. It was proved in the most satisfactory manner that before the paper was signed it was explained to the plaintiff that the defendants did not intend the paper to be an agreement till Abernethie had been consulted, and found to approve of the invention; and that the paper was signed before he was seen only because it was not convenient to the defendants to remain. The plaintiff assented to this, and received the writing on those terms. That being proved, there was no agreement." See also *Lindley* v. *Lacey*, 17 C. B. (N. S.) 578, 585; *Clever* v. *Kirkman*, 33 L. T. (N. S.) 672; *Gudgen* v. *Besset*, 6 El. & Bl. 986; 2 Taylor's Ev. (8th ed.) § 1135.

The case of *Wilson* v. *Powers*, above cited, was an action brought by the payee against the sureties in a promissory note. The defence was that the sureties had been discharged

from liability by a written agreement between the payee and the principal, which was delivered to the principal, whereby the time of payment was extended. To this the plaintiff replied, and sustained his position by proof, that the writing signed by him, and which was relied upon as discharging the sureties, was delivered as a proposition merely, and upon the agreement that it should become binding only upon the assent of the sureties. The Supreme Judicial Court of Massachusetts said: "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced." 131 Mass. 539, 540.

In *Benton* v. *Martin*, 52 N. Y. 570, 574, the principle is thus stated: "Instruments not under seal may be delivered to the one to whom upon their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions, the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it, or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which delivery is made. And so, also, as between the original parties and others having notice, the want of consideration may be shown." To the same effect are *Juilliard* v. *Chaffee*, 92 N. Y. 529, 535, and *Reynolds* v. *Robinson*, 110 N. Y. 654, in the latter of which it was said that the rule was now well established that "parol evidence is admissible to show that a written paper which, in form, is a complete contract, of which there had been a manual tradition, was, nevertheless, not to become a binding contract until the performance of some condition precedent resting in parol."

The same doctrine was announced in *McFarland* v. *Sikes*, 54 Connecticut, 250, 251, 252. That was an action upon a

note, which, the defendant alleged, had been executed and delivered to the plaintiff upon an agreement that it should be cancelled under certain named circumstances, and in the event he demanded, by a named day, that it be returned to him. The trial court having ruled that the facts relied upon by the defendant did not constitute a defence, the Supreme Court of Errors of Connecticut, reversing the judgment, said: "The error was in applying to the case the familiar and well-established rule that parol evidence is inadmissible to contradict or vary a written contract. A written contract must be in force as a binding obligation to make it subject to this rule. Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled. If the payee of a note has it in his possession, that fact would be *prima facie* evidence that it had been delivered; but it would be only *prima facie* evidence. The fact could be shown to be otherwise and by parol evidence. Such parol evidence does not contradict the note or seek to vary its terms. It merely goes to the point of its non-delivery. The note in its terms is precisely what both the maker and the payee intended it to be. No one desires to vary its terms or to contradict them."

For the reasons stated, and without considering the case in other aspects, we are of opinion that it was error to exclude the evidence offered by the defendant tending to show that the writing sued on was not delivered to or received by Dulaney as the promissory note of the defendant, binding upon him as a present obligation, enforcible according to its terms, but was delivered to become an obligation of that character when, but not before, the defendant examined and, by working them, tested the mining properties purchased by the plaintiff, and elected to take the stipulated interest in them. According to the evidence so offered and excluded the writing in question never became, as between Burke and Dulaney, the absolute obligation of the former, but was delivered and accepted only as a memorandum of what Burke

Statement of the Case.

was to pay in the event of his electing to become interested in the property, and from the time he so elected, or could be deemed to have so elected, it was to take effect as his promissory note, payable according to its terms. His election, within a reasonable time, to take such interest, was made a condition precedent to his liability to pay the stipulated price. The minds of the parties never met upon any other basis, and a refusal to give effect to their oral agreement would make for them a contract which they did not choose to make for themselves.

The judgment is reversed and the cause is remanded, that a new trial may be ordered, and further proceedings had in conformity with this opinion.

CALIFORNIA *v.* SOUTHERN PACIFIC COMPANY.

ORIGINAL.

No. 9. Original. Submitted March 12, 1894. — Decided April 30, 1894.

Depositions placed in the custody of the clerk as taken in this case may be opened and filed, as well as map exhibits, and an order is made for the taking of further testimony, and for the receiving of such documents and maps as the city of Oakland may offer touching its title to the lands in dispute, and for the opening and filing of the same when returned to the clerk.

THE State of California filed its bill in this suit November 6, 1893, and its amended bill March 5, 1894, in which it contests the claims of ownership set up by the Southern Pacific Company to lands under water in the harbor of Oakland, opposite to San Francisco. On the 5th of March, 1894, the city of Oakland prayed leave to intervene in the suit, which motion was denied on the 12th of March, 1894, but leave was given it to file briefs, accompanied by documents and maps, illustrative of its alleged title.

On the same 12th day of March the Attorney General of the State made the following motion in the case :

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The plaintiff moves the court as follows:

First — That the court make an order directing that the depositions heretofore taken upon notice and the stipulation of the parties in the above entitled action, now in the custody of the clerk of this court, be opened and filed in this cause, and the same be printed as a part of the record whenever said record shall be printed; and that the map exhibits now in the custody of said clerk, referred to by the witnesses in their several depositions, be also filed by said clerk in said cause; and that said depositions and map exhibits may be used as evidence upon the hearing of said case, subject to the objections therein specified, in the same manner as if the same had been regularly taken and returned in pursuance of the order herein applied for, a printed copy of which testimony and of the map exhibits has been deposited with the clerk of this court, to which I respectfully refer.

Second — That this honorable court make an order designating one of its members, or some other person or officer, to take, in the State of California, such further testimony and evidence in the above entitled cause as may be offered by either of the parties hereto.

Third — That the person or officer designated to take such testimony as aforesaid, have the power and be instructed to return such testimony as may be offered by either of the parties to said action, and to receive and return such documents and maps illustrative of the alleged title of the city of Oakland as said city may deem proper to offer, pursuant to the order of this court made on March 12, 1894, and that said officer so appointed notify the respective parties and the city of Oakland of his appointment; and thereupon either of the parties shall be authorized, within ten days thereafter, or as soon as convenient, to proceed before said officer or person to take additional evidence, and said person or officer to receive and take such documents and maps as may be offered by said city of Oakland under the said order of March 12, 1894, as hereinbefore specified; and that the taking and re-

ceiving of said evidence, documents, and maps shall be completed and certified by said person or officer and forwarded to the clerk of this court on or before the first Monday of July, 1894; upon the receipt whereof, the clerk of this court is hereby instructed to open and file the same, and thereafter to have printed the record in this cause, (embracing the depositions heretofore taken,) upon the parties hereto paying therefor, the record to be thereupon filed in this court; that there be printed in addition to the requisite number of copies for this court, ten copies for the plaintiff, ten copies for the defendant, and ten copies for the city of Oakland.

That in printing such record it shall not be necessary for the clerk to print copies of the map exhibits; *provided*, there shall be furnished to the court a sufficient number of the map exhibits required by the rules of this court, and one copy thereof to each of the parties hereto, and one copy to the said city of Oakland.

Fourth — That the parties hereto and the city of Oakland are hereby permitted, during the vacation of this court, to file their briefs and points in said action with the clerk of said court without further order of the court.

Fifth — That the court make an order setting down this cause for trial and hearing on the second Monday of October, 1894, or as soon thereafter as may be convenient for the court.

Sixth — That such other and further orders be made as to the court may seem meet.

For the purpose of the hearing and consideration of this motion, I respectfully refer to:

The order of this court made March 12, 1894, a copy of which is hereto annexed, marked Exhibit "A";

The stipulation signed by the parties, hereto attached, marked Exhibit "B";

The statement of the Attorney General of the State of California, solicitor for plaintiff, hereto attached, and marked Exhibit "C";

The consent of the defendant to the granting of the orders asked for, hereto attached, and marked Exhibit "D."

All of which papers are hereby referred to and made a part hereof.

Washington, D. C., March 12, 1894.

WM. H. H. HART,
Attorney General of California,
Solicitor for Plaintiff.

Exhibit A referred to was the order on the motion of the city of Oakland for leave to intervene. Exhibit C stated personal reasons why the Attorney General desired to have the evidence taken and the cause brought to a hearing early in the next term of the court. Exhibit D was the consent of the defendant to the granting of the orders asked for. Exhibit B was entitled in the cause and was as follows:

Now come the parties to the above entitled suit, by their respective solicitors, and state to the court as follows:

That on the 17th day of January, 1894, it was stipulated and agreed between the parties to the said suit, by their solicitors, as follows: "The defendant herein having given the plaintiff notice of the taking of the depositions of Horace W. Carpentier and others, for the purpose of using said testimony as evidence upon the trial of this cause, and whereas some doubt may arise as to the legality of the taking of the same; and whereas, the said plaintiff also desires to take certain testimony to be used on the trial of said action, and, in order to obtain the testimony desired by each of the parties hereto, *therefore*, it is hereby stipulated by and between the parties hereto, that the testimony may be thus taken of said Horace W. Carpentier, and of such other persons as each of the parties hereto may determine from time to time until the testimony is closed, subject to such objections as either of the parties may deem proper to make.

"Said testimony may be taken before John A. Robinson, Commissioner of the United States Circuit Court for the Northern District of California, and the same may be used upon the trial of this cause the same as if taken in any other manner agreeable to the court, and may be used by either party with the same effect as though taken upon an order

regularly made by the honorable Supreme Court of the United States, and the same may be used upon said trial upon any and all issues that may be made, either upon amendment of the pleadings, or otherwise."

That under and in pursuance of the said stipulation the defendant took, before the said John A. Robinson, Commissioner of the United States Circuit Court for the Northern District of California, the depositions of certain persons, as witnesses on its behalf, in the above entitled suit, namely: Horace W. Carpentier, G. F. Allardt, Calvin Brown, L. J. LeConte, G. L. Lansing, E. B. Ryan, R. J. Wilkinson; and the plaintiff took before said commissioner the depositions of certain persons, as witnesses on its own behalf, namely: Lyman Bridges, G. D. Flack, L. J. LeConte, Charles Morris, and J. R. Wilkinson.

That the defendant, on the examination of the witness, Horace W. Carpentier, offered in evidence on its behalf certain documents, which were marked by the said commissioners as *Defendant's Exhibits*, Nos. 1 to 66, inclusive, and the defendant, in connection with the testimony of its witnesses, introduced in evidence certain *map exhibits*, which were marked by the said commissioner from No. 1 to No. 8, both inclusive.

That the plaintiff, on the examination of witnesses on its behalf, offered certain exhibits, which were marked by the said commissioner, respectively, as "*Plaintiff's Exhibit A*," "*Plaintiff's Exhibit B*," and "*Plaintiff's Exhibit C*," and *Map Exhibit No. 8.*

That on the 9th day of February, 1894, the parties, by W. H. H. Hart, Attorney General, solicitor for plaintiff, and Harvey S. Brown, solicitor for defendant, filed a stipulation, in writing, as to certain facts bearing upon the issues in said suit, wherein it was agreed as follows:

"It is further stipulated that this case shall be submitted to the court for its decision upon the amended bill and answer herein and replication thereto, and upon the depositions and exhibits hereto annexed, and upon map exhibits referred to in the said depositions, numbered from 1 to 8, both inclusive, and upon this stipulation."

(The depositions and exhibits referred to being the depositions and exhibits taken and offered by the parties before the commissioner, as mentioned.)

That John A. Robinson, the commissioner, transmitted by mail to the clerk of this court, in sealed packages, the said stipulation in writing as to facts, and the said depositions and exhibits, and the said packages are in the hands of the clerk, unopened.

Wherefore, the said parties, by their solicitors, hereby stipulate that an order be made and entered herein, directing that the said packages be opened by the clerk of the court, and that the said stipulation as to facts, and the said depositions of the said witnesses for the parties, respectively, taken before the said John A. Robinson, Commissioner of the United States Circuit Court for the Northern District of California, and the said exhibits offered by them, and marked by the said commissioner, as mentioned, be filed by the clerk in this cause, and further directing that the said depositions and the said exhibits shall and may be used by the parties, respectively, upon the hearing or trial of the above entitled cause, with the same effect as if the same had been taken and offered in evidence before the said commissioner, under an order of this court duly appointing him an examiner to take the testimony and proofs on behalf of the parties to the said cause, and to certify and to return such testimony and proof to this court.

WM. H. H. HART,
As Attorney General of California,
Solicitor for Plaintiff.
HARVEY S. BROWN,
Solicitor for Defendant.

AYLETT R. COTTON,
Of Counsel for Plaintiff.

Mr. William H. H. Hart, Attorney General of the State of California, and *Mr. Aylett R. Cotton* for plaintiff.

Mr. Harvey S. Brown for defendant.

PER CURIAM: The motion of the State of California, by its Attorney General, in this behalf, having been considered:

Opinion of the Court.

It is hereby ordered that depositions heretofore placed in the custody of the clerk of this court, as taken in this cause, may be opened and filed, together with the map exhibits therein referred to.

And it is further ordered that William A. Maury, Esq., of the District of Columbia, be and he is hereby designated and appointed a commissioner to take testimony herein, and he is hereby empowered and instructed to take and return such testimony as may be offered by either of the parties hereto, and to receive and return such documents and maps illustrative of the alleged title of the city of Oakland as said city may deem proper to offer, pursuant to the order of this court made herein on March 12, 1894.

It is further ordered that said commissioner notify the respective parties and the city of Oakland of his appointment; and, thereupon, within ten days thereafter, or as soon as convenient, he shall proceed to take such evidence as either of the parties hereto may produce, and he shall receive and take such documents and maps as may be offered by the city of Oakland under said order of March 12, 1894, as hereinbefore specified; and that the taking and receiving of said evidence, documents, and maps shall be completed and certified by said commissioner and forwarded to the clerk of this court on or before the first Monday of September, 1894; upon the receipt whereof the clerk is hereby instructed to open and file the same.

It is further ordered that in printing the record it shall not be necessary for the clerk to print copies of map exhibits; *provided*, there shall be furnished to the court a sufficient number of map exhibits as required by the rules; and that the parties hereto, and the city of Oakland, are hereby permitted, during the vacation of this court, to file their briefs and points in said cause with the clerk without the further order of the court; and the question of setting said cause for hearing is hereby reserved until the next term.

So ordered.

In re CITY NATIONAL BANK OF FORT WORTH, Petitioner.

ORIGINAL.

No number. Submitted April 9, 1894. — Decided April 30, 1894.

Mandamus is the proper remedy when a mandate of this court has been disregarded.

In this case the court cannot hold that its mandate was disregarded by the decree rendered under it by the Circuit Court.

THE court stated the case as follows:

This is an application for leave to file a petition for mandamus directing the Circuit Court of the United States for the Northern District of Texas to vacate or modify a decree heretofore entered by that court in a certain cause therein pending, wherein Hunter and others were complainants and the City National Bank of Fort Worth, Texas, was defendant, on the ground that in rendering such decree the Circuit Court departed from the mandate of this court sent down on the disposition of an appeal from a former decree in the cause as reported in *City National Bank* v. *Hunter*, 129 U. S. 557.

We do not feel required to restate the case as set forth at length when it was then before us. Briefly, on May 20, 1880, one O'Neal was indebted to Hunter, Evans & Co., and also to the City National Bank, each of whom claimed to hold a lien, to secure the indebtedness, on certain cattle owned by O'Neal. One Dawson was desirous of purchasing the cattle, and the result was that the parties in interest entered into three written agreements, under which the cattle were sold and delivered to Dawson, he executing a note for the purchase price, payable to the order of Hunter & Co. and the bank, to be paid and the proceeds distributed according to certain terms and stipulations agreed on. The note was delivered upon its execution to Henry E. McCulloch, who was selected by Hunter & Co. and the bank, as their joint agent, to accom-

pany the cattle and receive and distribute the proceeds as sales were made by Dawson. Certain amounts were received and distributed accordingly. Shortly after, and on May 31, Hunter & Co. filed a petition in Montague County, Texas, against O'Neal and Dawson, to foreclose a mortgage given by O'Neal to them, on the cattle then in possession of the latter, and sequestrated the cattle. Thereupon Dawson replevied the cattle, and gave a bill of sale of them to the bank, which furnished the security upon the replevin bond and agreed to hold the parties harmless from any liability thereon. The bank notified McCulloch that his agency had ceased, and took possession of the herd through its agent, one Ellis, who had a power of attorney from the bank to make title to the cattle as sold off by Dawson and receive the proceeds. The suit of Hunter & Co. in Montague County was removed to the Circuit Court, and they there filed an amended bill, September 30, 1881, to which they made the bank a party defendant, and prayed in the alternative that, if they were mistaken in seeking a foreclosure, a decree be rendered against Dawson and the bank for the amount of money coming to them from the proceeds of the cattle. The cause was heard in the Circuit Court and a decree rendered, which, upon appeal to this court by the bank, was reversed and the cause remanded, with a direction to enter a decree in conformity with the opinion. The opinion found the amount due from O'Neal to Hunter & Co., February 20, 1880, to which certain interest was to be added as pointed out, down to the date at which Dawson paid the balance due on his note into the bank, a matter not made clear on that record, and also directed the amount of the bank's debt to be ascertained by adding certain interest to O'Neal's note held by it down to the same date. From these two indebtednesses the *pro rata* to which complainants and the bank were entitled out of the fund to be distributed was to be computed, and from the amount to come to complainants according to this computation certain deductions were directed to be made, and the balance to be paid out of the money deposited by Dawson, as of the date of such deposit, the bank retaining the remainder. After the

cause was remanded the parties entered into the following stipulation:

"It is agreed between Hunter, Evans & Co., on the one part, and the City National Bank of Fort Worth, Texas, on the other part, that the proceeds of the cattle in controversy in this case were paid over to James F. Ellis, one of the securities on the replevin bond, who, for himself and as agent for the other securities on said bond, accompanied said cattle to the Indian Territory and collected the balance due on the note from Dawson to Hunter, Evans & Co. and said City National Bank, and that said Ellis, on behalf of himself and said other securities on said bond, deposited said amount collected by him in said City National Bank as a general deposit, with the understanding that said money should remain on deposit in said bank to abide the determination of this suit for the purpose of indemnifying them, said securities, against any loss by reason of their signing said bond.

"Said deposit was made in the name of the 'Dawson bond account,' and the amount has remained and still remains on general deposit as aforesaid in said bank.

"It is further agreed that said deposit was made at the following dates and in the following amounts respectively:

"1. June 26th, 1880, three thousand one hundred and twenty-eight dollars.

"2. August 3rd, 1880, five thousand dollars.

"3. August 6th, 1880, five thousand six hundred and forty-four dollars.

"Total amount deposited, thirteen thousand seven hundred and seventy-two dollars, which, as other general deposits, has been used by the bank as other of its funds.

"It is further agreed that this agreement shall stand in lieu of answer to plaintiff's bill of discovery, and answer to same is hereby waived."

The Circuit Court thereupon rendered a decree, providing, among other things, that Hunter & Co. recover of the bank the sum of $12,084.85, together with interest thereon from date of decree at the rate of eight per cent per annum, and the costs after September 30, 1881, the date of the filing of

complainants' amended bill, all prior costs being adjudged against Hunter & Co. The bank then prosecuted an appeal to this court, assigning as error that the Circuit Court included, in the recovery against the bank, interest on complainants' portion of the money, and awarded costs. The contention was that the allowance of the interest was inconsistent with the mandate of this court, and the amount thus questioned was "nearly or quite $4000." When the appeal came to be considered we found ourselves compelled to dismiss it, because the sum in dispute was not sufficient to give us jurisdiction, and no appeal lies from a mere decree for costs. *City Bank* v. *Hunter*, 152 U. S. 512.

Mr. A. H. Garland for the petitioner.

That this remedy is the one and only one the petitioner has, it seems, is beyond question. *In re Washington & Georgetown Railroad*, 140 U. S. 91; *Gaines* v. *Rugg*, 148 U. S. 228; *City Bank* v. *Hunter*, 152 U. S. 512.

Then, is the bank chargeable with interest on the amount of the decree?

This court, when it passed on the case before, (129 U. S. 557,) had the whole matter before it, and disposed of it fully, as far as could then be done, and it was silent as to any interest of this sort, while Rule 23 of this court stood before it, as a permanent and exacting reminder for justice, by way of compensation for all improper delays and withholdings in payment of money. And this rule, differing then in number, in connection with the statute allowing interest, etc., was happily commented on by Mr. Justice Story in *Boyce* v. *Grundy*, 9 Pet. 275. This case denied the allowance of interest by the court below, after the mandate which gives not interest goes down. The argument might stop here.

But is the bank thus liable on general principles of law?

The agreement of the parties in this case shows the character of this deposit as it was found by this court, 129 U. S. 564, 565, "on the Dawson bond account" to remain as a general deposit "to await the result of this suit."

The general law, regardless of the peculiarity of this deposit, would forbid any demand for interest on this more general deposit. *Haswell* v. *Farmers' and Mechanics' Bank*, 26 Vermont, 100; *Duncan* v. *Magette*, 25 Texas, 245.

And this court, in passing upon the question of liability of banks for interest on deposits, rests it on grounds completely negativing the idea of interest in cases like this — a general deposit — the bank being a mere stakeholder or depositary at most. *National Bank* v. *Graham*, 100 U. S. 699; *Commonwealth Bank* v. *Mechanics' Bank*, 94 U. S. 437. And this is in harmony with the general principle of law as to deposits where the depositary is a mere stakeholder, and he is not found to be in default.

But again, section 4507, Tit. 90, Rev. Stat. Texas, (Sayles,) provides, in short, that if the defendant replevy the property he should not be liable for the rents, hire, or revenue thereof; this is applicable here, for the reason that the money is simply the proceeds of the cattle, and if the cattle had been returned in kind there would have been nothing to pay, and certainly it was optional whether the cattle should be returned in kind or the value of the cattle accounted for. This local law of Texas must, in the nature of things, have conclusive weight in this proceeding, as it is upon Texas laws alone, in the absence of congressional legislation, the law as to this question is to be determined. *Massachusetts Benefit Ass'n* v. *Miles*, 137 U. S. 689.

Again, the opinion of this court (129 U. S., *supra*) plainly indicated that the plaintiffs were at fault in suing out a writ of sequestration, in that they had no title or right to the property in question; that the writ of sequestration was wrongfully obtained, and that they were not entitled to interest upon the value of the cattle. And while upon this subject the attention of the court to the strong and emphatic language of the opinion in this line is most earnestly asked. p. 571, et seq. That can leave no doubt at all of the correctness of our view of this transaction. But if the court should hold that interest is recoverable, then it is certain that the opinion should be taken as holding, in effect, that interest was recov-

erable against Dawson, and that it was not intended that the bank should pay this interest, the bank being, as before said, simply a stakeholder, or, at most, a depositary.

As for the judgment against the bank for costs, we think that is palpably erroneous, for the court indicates throughout that plaintiffs below were in default. Indeed, the court in such opinion intimated most clearly that were it not for the fact that the money was shown to be on hand that it would order plaintiff's bill to be dismissed. And as costs are in the nature of damages or punishment for default, and we have shown the bank is not in default, the same reasons that relieve it of interest will also relieve it of costs.

It is obvious, then, the lower court did not proceed upon the mandate in this case, in conformity with the opinion of this court, but flew in the face of it in awarding interest and costs, and therefore this court is respectfully asked to direct that decree to be vacated.

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

Application is now made for mandamus, and this is the proper remedy, if the mandate of this court has been disregarded, but if not, the application for leave to file should be denied.

We are of opinion that whether or not the proceeds of the cattle were received and retained by the bank under such circumstances as to render it liable to Hunter & Co. for interest on their *pro rata* share, was a matter which was necessarily so far left at large by our former decree that we cannot hold that the mandate was disregarded by the decree rendered thereunder by the Circuit Court.

The Dawson note was held in trust for Hunter & Co. and the bank, payment to be worked out from the cattle through the agency of McCulloch, and when the bank terminated McCulloch's agency, took possession of the herd, and received the proceeds of the cattle from Ellis, it received the *pro rata* share of Hunter & Co. in trust for them, as the litigation

turned out, and nothing in the directions we gave prevented the Circuit Court from holding the bank to a liability to pay interest thereon if, in its judgment, it was justified in so doing by the facts disclosed on the hearing. Ellis was the agent of the bank and the money was kept and used by the bank, being carried on the books to the credit of the "Dawson bond account," subject to the determination of this suit. The language of the stipulation that the amount collected was deposited by Ellis as a "general deposit," and used "as other general deposits," "as other of its funds," does not change the legal effect of the transaction so far as Hunter & Co. were concerned, who had nothing to do with the agreement of the bank to indemnify Dawson's sureties on the replevin bond. The use of their part of the money under the circumstances may have induced the Circuit Court to arrive at the result complained of. We are not, however, called on to say whether the allowance of the interest was or was not correct, as the only question is whether that court disobeyed the mandate, which we do not think it did.

As to the costs, we are also clear that the action of the Circuit Court was not precluded by the former decision.

Leave to file the petition must, therefore, be

Denied.

NORTHERN PACIFIC RAILROAD COMPANY *v.* CLARK.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 1045. Argued April 12, 1894. — Decided April 30, 1894.

No one can be permitted to go into a court of equity to enjoin the collection of a tax, until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay.

State Railroad Tax Cases, 92 U. S. 575, and *National Bank* v. *Kimball*, 103 U. S. 732, affirmed and followed on this point.

The Northern Pacific Railroad Company, having accepted the provisions of the act of Dakota of March 7, 1889, c. 107, became liable thereby to pay

Statement of the Case.

the designated percentage of its gross earnings in lieu of taxes for the year 1889, which liability was not discharged by the subsequent repeal of the gross earnings act of 1889; and, having failed to make that payment, or to make a tender of what was due under one or the other modes of taxation, it is not entitled to relief in equity to enjoin the enforcement of a tax upon its property as upon the property of individuals in the counties in which the property is situated.

This case, under the style of the *Northern Pacific Railroad Company* v. *Walker*, 148 U. S. 391, was before this court at October term, 1892, and the jurisdiction of the Circuit Court not appearing upon the face of the record, it was remanded with leave to amend. The appellant accordingly, on June 6, 1893, filed in the Circuit Court of the United States for the District of North Dakota its amended bill of complaint, in which, after setting forth its creation and organization under and by virtue of an act of Congress approved July 2, 1864, c. 217, 13 Stat. 365, 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," and certain acts and joint resolutions of Congress supplementary thereto and amendatory thereof, it was alleged that for the purposes of laying out, locating, constructing, furnishing, and maintaining a railroad and the telegraph line between the points indicated there was granted to it by Congress every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of the railroad line as the company might adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of the railroad line whenever it passed through any State, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, free from preëmption or all other claims at the time the line of the railroad should be definitely fixed, and the plat thereof be filed with the Commissioner of the General Land Office; that the railroad company duly accepted the terms, conditions, and impositions of said act of Congress, and that on the respective dates of May 26, 1873, and July 20, 1880, it definitely fixed the line of its railroad

through certain counties in the Territory of Dakota, (now the State of North Dakota,) and filed plats thereof in the office of the Commissioner of the General Land Office; that the line of railroad so fixed extends opposite to and past the lands set forth and described in the schedules made a part of the bill; that prior to December 20, 1880, it had completed that portion of the railroad and telegraph line extending on, over, and along the line of definite location of the railroad, and that the President of the United States, from time to time, after the same had been examined by commissioners, had accepted the railroad and telegraph line as having been constructed and completed in all respects as required by the act of July 2, 1864, and the acts and joint resolutions supplementary and amendatory thereof.

The bill further alleged that the lands on each side of the railroad, and every portion thereof, were within forty miles of the company's line of road so definitely fixed; that they were public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and no entry or application to make entry for the lands was made or was pending when the lists of definite location were filed in the office of the Commissioner of the General Land Office on May 26, 1873, and July 20, 1880; that the described lands had been surveyed by United States surveyors, and had been reported to be agricultural in their character and non-mineral; and that the lands were not, on July 2, 1864, or May 26, 1873, and July 20, 1880, known as mineral lands, etc.; that the company had prior to the year 1889, in accordance with the direction of the Secretary of the Interior, duly prepared and filed lists in the United States land offices in the land districts in which the lands were situated respectively, describing the lands and claiming them as a portion enuring to it under and by virtue of the act of Congress approved July 2, 1864, which lists were duly allowed and approved by the United States district land officers, to whom the fees prescribed by law were paid by the company, and which were retained by the United States; that the lists of lands so filed were duly transmitted by the district land officers to the Commissioner of the General Land Office

for his approval; that since the lists were filed and transmitted to the Commissioner of the General Land Office, the Commissioner, under the direction of the Secretary of the Interior, had required the company to file in the office of the Commissioner, or in the office of the land office districts in which the lands were respectively situated, an affidavit made by some person acquainted with the character of the lands, setting forth and showing that the same were non-mineral, and that until such affidavits had been filed the Commissioner refused to approve the lists; that the company had not, nor had any one in its behalf, filed affidavits of persons having knowledge of the mineral or non-mineral character of the lands set out in the lists.

The bill then proceeds to state that none of the lands described had ever been certified or patented to the railroad company, and that neither the United States, nor any of its officers or agents, had ever ascertained and determined what specific lands in the State of North Dakota passed to the railroad company by virtue of the act of July 2, 1864, although the railroad company had repeatedly petitioned to have this done; that the United States and its officers had refused to certify to the company the lands described in the schedules of the bill, but held the lists suspended and unapproved upon the claim that the lands may be mineral in character, and as such excepted from the grant to the company, or that the lands may not have been free from claims or rights reserved in the grant, or that the question as to whether title to the lands had passed to the railroad company under and by virtue of the granting act, and acts amendatory thereof; that said matters were still in controversy, and pending before the commissioner of the General Land Office and the Secretary of the Interior.

It is further alleged that the railroad company had no other right, title, claim, interest, property, or possession in or to any of the lands or premises described in the bill except such right, title, claim, interest, property, or possession as it may have obtained under and by virtue of the acts and resolutions of Congress, and its compliance with the conditions thereof.

It is then averred that on March 7, 1889, the legislature of

the Territory of Dakota passed an act, which was duly approved by the governor of the Territory, entitled "An act providing for the levy and collection of taxes upon the property of railroad companies in this Territory," in and by which it was, among other things, enacted and provided: "In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this Territory, or upon the equipment, appurtenances, or appendages thereof, or upon any other property situated within this Territory belonging to the corporation owning or operating such railroads, upon the capital stock, or business transactions of said railroad company, there shall hereafter be paid into the treasury of this Territory an amount equal to a percentage of all the gross earnings of the corporation owning or operating such railroad arising from the operation of such railroad as shall be situated within this Territory, both upon territorial and interstate traffic, in case the railroad company owning or operating such line shall accept and become subject to this act as hereinafter provided," Laws of Dakota, 1889, c. 107, p. 134; that the railroad company did, within thirty days after the passage of this act, by resolution of its board of directors, attested by its secretary, filed with the secretary of the Territory of Dakota, accept and become subject to the provisions of the act of March 7, 1889; that within thirty days of its passage the railroad company, as required by the act, prepared and filed with the treasurer of the Territory, in the manner required by the provisions of chapter 99 of the Session Laws of the Territory for the year 1883, an account of the gross earnings of the company, both territorial and interstate, for the years 1886 and 1887, and paid into the treasury the entire amount of taxes claimed by the Territory on local and interstate earnings remaining unpaid at the time of filing such account for said years, such payment being as follows, to wit: For the last half of the year 1886, $38,095.31; for the year 1887, $65,585.46. Such sums so paid, as provided for in the territorial act of March 7, 1889, were percentages computed entirely upon gross earnings of the company derived from domestic business, the percentage for the same years computed upon the gross earnings derived from

interstate business having been previously paid by the company as required by the provisions of the territorial act of 1883.

It was also alleged that, at the same time, the company paid into the treasury of the Territory one-half of the entire amount due for the year 1888, amounting to $46,937.09, and that before August 15, 1889, it had paid the remainder of the amount due for the year 1888; that the sums so paid into the treasury for the year 1888 were percentages computed upon the gross earnings of the company for that year, derived from both domestic and interstate business, the former amounting to $11,446.78 and the latter to $82,427.40, and it was alleged that all the percentages derived from interstate business so paid into the treasury were not due from the company, except by virtue of the act of March 7, 1889, and the company's acceptance thereof, and that they were paid as a consideration for the exemption from taxation provided for by that act, and for no other reason.

It is then charged that, notwithstanding the premises, in the year 1889 the county auditors for the counties of Kidder, Stutsman, Richland, and McLean, under the authority of the laws of the Territory of Dakota, had assessed the company's lands situate in their respective counties for purposes of county taxation, and that they had advertised the lands as described in the schedules to the bill, for sale, and were about to wrongfully sell the same for the non-payment of taxes so levied, together with penalties and costs, and to issue certificates of sale for the same in the form prescribed by the laws of North Dakota, and unless restrained by the order of the court they would sell the lands, and issue certificates of sale thereafter, whereby the rights of the railroad company in and to the lands would be irreparably injured, and lead to a multiplicity of suits concerning the title thereto.

It was further claimed on the part of the railroad company that the taxes so assessed and levied upon the lands were a cloud upon the title of the railroad company thereto; that if sold and certificates were issued to the purchaser, such certificates would constitute a cloud upon the title of the company in and to the lands so sold; that the counties were bankrupt,

and that if the railroad company should pay the taxes and then bring an action against them to recover the amount thereof, it would require a multiplicity of suits, and such judgments as might be recovered would be worthless.

The bill further averred that the amount of the taxes levied upon the lands, together with the costs and penalties claimed by the county auditors to have accrued thereon, and for which the lands had been advertised for sale, and were about to be sold, were as follows: Upon the lands in Kidder County, $12,820.67; upon the lands in Stutsman County, $8863.39; upon the lands in Richland County, $4094.37; and upon the lands in McLean County, $4048.17 — the amount of such tax, penalty, and cost upon each tract of land being particularly shown in the schedules attached to the bill.

The prayer of the bill was to the effect that the county assessments and taxes so levied upon the lands of the railroad company might be declared illegal and void, and a cloud upon the title of the company, and that the defendants, and each of them, their deputies and successors in office, be restrained from selling or attempting to sell the lands or any portion thereof, or from issuing tax certificates therefor.

The defendants appeared and demurred to the amended bill on the ground that, according to the showing made therein, the plaintiff was not entitled to the relief sought. The Circuit Court sustained the demurrer and dismissed the bill on the ground that the act of 1889 was void, because it violated the organic act, which provided that the legislative assembly of the Territory shall not make any discrimination in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value; secondly, that the bill was without equity in failing to allege payment or tender of the gross earnings tax for the year 1889. 47 Fed. Rep. 681.

From this judgment the railroad company appealed to the United States Circuit Court of Appeals for the Eighth Circuit, and that court, desiring instructions upon certain questions presented by the assignments of error filed in the cause, certified to this court various propositions of law, as to

whether the railroad company acquired such title to the odd-numbered sections of land within the place limits of the grant of July 2, 1864, which were not mineral, and which, at the dates of the grant and of the filing of the map of definite location in the office of the Commissioner of the General Land Office, were not reserved, sold, granted, or otherwise appropriated, as to render them taxable before being patented and certified to the railroad company; whether the company was taxable on such lands by the Territories after the filing of the map of definite location of its railroad, and full compliance with the terms and conditions of the granting act, while the United States refused to patent and certify such lands to the company; whether chapter 107 of the Laws of Dakota for 1889, being an act entitled "An act providing for the levying and collection of taxes upon the properties of railroad companies in this Territory," approved March 7, 1889, was void as a regulation of interstate commerce; whether the act of March 7, 1889, was in conflict with the Fifth and Fourteenth Amendments of the Constitution of the United States, and with the organic law of the Territory, as an attempt to exempt from taxation the lands granted by the act of July 2, 1864; whether the act of March 7, 1889, should be construed as granting an exemption for the year 1889, or to be in force and effect only after the year 1890. The eighth and remaining question certified is as follows: "Is said bill without equity because of the failure to aver that the complainant has tendered or paid the 'gross earnings tax' for the year 1889; and is said complainant entitled to the equitable relief prayed without first tendering or paying such tax?"

Mr. F. M. Dudley, for appellant, with regard to this eighth question said:

Is said bill without equity because of the failure to aver that the complainant has tendered or paid the "gross earnings tax" for the year 1889; and is said complainant entitled to the equitable relief prayed without first tendering or paying such tax?

Argument for Appellant.

I. In the discussion of the propositions arising under this question, the constitutionality of the "gross earnings law" is, necessarily, conceded, but while admitting the constitutionality of the exemption, appellees deny the right of the company to claim the benefit thereof until the gross earnings percentage money is paid. It is an attempt to apply the familiar rule that he who seeks equity must do equity.

The limitation of the rule is that the amount to be paid as a condition precedent to invoking the aid of a court of equity is the amount conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not. The State is not to be tied up as to that of which there is no contest, by lumping it with that which is really contested. *State Railroad Tax Cases*, 92 U. S. 575, 617.

II. The exemption from assessment and levy of taxes in the ordinary manner, made by the "gross earnings law," did not depend upon the payment of the three per centum of the gross earnings in the first instance, but upon the filing with the secretary of the Territory of a resolution adopted by the railroad company and attested by its secretary, accepting the provisions of the act and subjecting the corporation to its terms. Immediately upon such action being taken by a railroad company which had qualified itself to accept the act by filing an account of the earnings under the act of 1883, and paying all percentages then due upon both interstate and territorial earnings as claimed by the Territory, the exemption became effective. The liability of the railroad company to pay the percentage upon its gross earnings, by virtue of its acceptance of the act, rather than the actual payment, was the consideration upon which the exemption became effective.

By the "gross earnings act" the Territory was given a lien upon the railroad of the company, and upon all property, estate, or effects of the company, real or mixed, to secure the payment of the per centum, and such lien took precedence of all demands, decrees, and judgments against said company. By the fourth section of the act, the territorial treasurer was

authorized to distrain and sell sufficient property to pay the amount due from the corporation in case of its failure to pay such amount when due, or within thirty days thereafter. This remedy, given in the "gross earnings act" itself, was an exclusive remedy. And since the exemption by the "gross earnings act" is necessarily perfect upon the acceptance of the act, and nearly a year prior to the time when the first payment of the per centum is required, and is founded, not upon the actual payment, but upon the liability to pay, it is evident that the failure to make such payment cannot be a more material factor in considering appellant's equitable right to an injunction restraining the sale than it would where the ground of exemption is the interest of the government in the lands. The material question is the exemption. If that exist the ground upon which it is founded, so long as it is not the actual payment of the per centum, is immaterial. Conceding the exemption, the right to the equitable relief cannot be questioned.

Since the failure to pay the "gross earnings" per centum would not give the counties the right to tax these lands as other lands are taxed, it is not essential to negative such failure in the bill of complaint; and no inference can be drawn from the absence of an averment, that no such payment has been made; and that portion of the opinion of the Circuit Court, holding that there is no equity in complainant's bill, is founded upon an assumed fact that is not in the record.

III. There was, and is, no "gross earnings" percentage due, and there is no one authorized to receive such money.

Long prior to the time any payments became due under the act for the year 1889, it was repealed. No part of the "gross earnings" percentage for 1889 became payable until 1890, as prior to that time no report of the gross earnings of the company for that year could be made. Prior to that time, and on October 1, 1889, the constitution of the State of North Dakota was adopted. Under this constitution, November 2, 1889, North Dakota was declared admitted to the Union by proclamation of the President. 26 Stat. 1548.

It is apparent from the provisions of this constitution which

are printed in the margin [1] that the power to pass a gross earnings law exempting the lands granted to the company was withheld from the legislature. The gross earnings law of 1889 was therefore repealed by the adoption of the constitution, as repugnant to it.

The law is well settled that when a statute is repealed it must be considered (except as to transactions passed and closed) as if it had never existed. The authority of an officer to act thereunder terminates with the repeal, unless the right so to act is especially saved in the repealing act. Where a statute requires a certain tax to be collected and the act is repealed before the collection is made, or the tax due, the right to make such collection is gone. *Bleidorn* v. *Abel*, 6 Iowa, 5; *Van Inwagen* v. *Chicago*, 61 Illinois, 31; *The Marion Township Road Co.* v. *Sleeth*, 53 Indiana, 35; *Commonwealth* v. *Standard Oil Co.*, 101 Penn. St. 119; *St.*

[1] Section 2 of the schedule of the constitution provides: "All laws now in force in the Territory of Dakota which are not repugnant to this constitution, shall remain in force until they expire by their own limitations or be altered or repealed."

Section 176 of article XI. thereof provides: " . . . But the legislative assembly may, by law, provide for the payment of a per centum of gross earnings of railroad companies to be paid in lieu of all state, county, township and school taxes on property exclusively used in and about the prosecution of the business of such companies as common carriers, but no real estate of such corporation shall be exempted from taxation in the same manner, and on the same basis as other real estate is taxed, except road-bed, right of way, shops and buildings used exclusively in their business as common carriers, and whenever and so long as such law providing for the payment of a per centum on earnings shall be in force, that part of section 179 of this article relating to assessment of railroad property shall cease to be in force."

Section 179 of said article is as follows: "All property, except as hereinafter in this section provided, shall be assessed in the county, city, township, town, village or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails and rolling stock of all railroads operated in this State shall be assessed by the state board of equalization at their actual value, and such assessed valuation shall be apportioned to the counties, cities, towns, townships and districts in which said roads are located, as a basis for taxation of such property in proportion to the number of miles of railway laid in such counties, cities, towns, townships, and districts."

Joseph's County v. *Ruckman*, 57 Indiana, 96; *Bennet* v. *Hargus*, 1 Nebraska, 419; *Butler* v. *Palmer*, 1 Hill. 324.

IV. A valuable consideration for the exemption from taxation was, in fact, given by the railroad company and accepted and retained by the State.

The gross earnings law of 1889 is an offer on the part of the Territory to make a contract with any railroad company by the terms of which the company obligates itself to pay to the Territory a certain percentage of the company's gross earnings, and the Territory, in consideration of such obligation, agrees to exempt from any and all other taxation the property of the company. The tax law of 1883, which was in force prior to that, was accepted by the Northern Pacific Company, and taxes were paid in accordance with it up to 1887. By the second section of the act of Congress of July 2, 1864, incorporating complainant, it is provided that "the right of way shall be exempt from taxation within the Territories of the United States." This exemption from taxation includes all buildings, superstructures, etc., that were attached to the soil of such right of way. *Northern Pacific Railroad* v. *Carland*, 5 Montana, 146. Under the provisions of the act of Congress approved July 15, 1870, 16 Stat. 291, the lands granted to the Northern Pacific Railroad Company could not be taxed until the company had paid "into the treasury of the United States the cost of surveying, selecting and conveying" the lands granted to the company. The railroad company did not, prior to 1887, pay such fees upon lands owned by it, and hence its lands were not taxable. *Northern Pacific Railroad* v. *Traill County*, 115 U. S. 600. In 1887 its lands became taxable, under the operation of the act of July 10, 1886, c. 764, 24 Stat. 143.

Mr. Edgar W. Camp, (with whom was *Mr. S. L. Glaspell* on the brief,) for appellees. *Mr. W. H. Standish* filed a brief for the county auditor of Kidder County, appellee.

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

In the view we take of the case, the answer to the last question will dispose of the suit, and render it unnecessary to enter upon the consideration and determination of the other propositions of law on which instructions are asked.

By an act of the legislature of the Territory, approved March 9, 1883, c. 99, Laws of 1883, it was provided that all railroad companies, except railroads operated by horse power, owned and operated within the Territory, should pay two per centum on the gross earnings of their railroads for a period of five years, and thereafter three per centum on the gross earnings, in lieu of all other taxes upon said railroads and the capital stock and business thereof. The payment of this percentage was to be made at designated dates in each year, and penalties were imposed upon the companies failing to comply with the provisions of the law as to the making of returns of earnings and paying the percentages imposed by the act. The moneys so received and collected were to be apportioned between the Territory and the several counties through which the railroads respectively ran.

This act of 1883 left the railroad companies no choice as to whether they would pay the designated percentage on their gross earnings, or remain subject to taxation upon their property in the ordinary method. It was compulsory upon them. It is not material to the present case to consider whether this act was constitutional or not; it was repealed by the act of the legislature approved January 29, 1889. Now, it is shown by the bill that at the time the act of 1883 was repealed the appellant was in default of the payment of the percentages due upon its gross earnings for the years 1886, 1887, and 1888.

On March 7, 1889, the legislature of the Territory of Dakota passed the act, entitled "An act providing for the levy and collection of taxes upon property of railroad companies in this Territory," [1] which went into force and effect immediately after its passage.

[1] *Be it enacted by the Legislative Assembly of the Territory of Dakota:*

1. *Percentage of gross earnings to be paid in lieu of other taxes.*— In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this Territory, or upon the equipment, appurtenances,

This act is by its terms nothing but a tax law, and while it adopted the same rule of percentages on the gross earnings as

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or appendages thereof, or upon any other property situated in this Territory belonging to the corporation owning or operating such railroads, upon the capital stock or business transactions of said railroad company, there shall hereafter be paid into the treasury of this Territory an amount equal to a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operating of such railroad, as shall be situated within this Territory, both upon territorial and interstate traffic, in case the railroad company owning or operating such line shall accept and become subject to this act as hereinafter provided.

Every such railroad corporation or person owning or operating or that may hereafter own or operate any line of railroad in this Territory which shall have accepted this act shall pay to said treasurer each year "for the first five years" after the approval of this act an amount equal to three per centum of such gross earnings, "and for and in each and every year after the expiration of such five years an amount equal to two per cent of said gross earnings," and the payment of such amount annually as aforesaid shall be and is in full of any and all other taxation and assessment whatever upon the property aforesaid.

Said payments shall be made, except as hereinafter provided, one-half on or before the 15th day of February, and one-half on or before the first day of August in each year. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company. An abstract shall be furnished by said company to the treasurer of this Territory on or before the first day of February in each year, the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of such company, and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts, full power is hereby vested in the governor of this Territory, or any other person appointed by law, to examine under oath the officers, employés of said company, or other persons, and if any person so examined by the governor or other authorized person shall knowingly or wilfully swear falsely, concerning the matter aforesaid, every such person is declared to have committed perjury; and for the purpose of securing to the Territory the payment of the aforesaid per centum it is hereby declared that the Territory shall have a lien upon the railroad of said company, and upon all property, estate, or effects of said company whatsoever, personal, real, or mixed, and the lien hereby secured to the Territory shall have and take precedence of all demands, decrees, and judgments against said company.

2. *When company shall fail to make return.* — If any such railroad company having accepted this act shall fail to make return of its gross earnings as aforesaid, or of any part thereof, at the time and in the manner provided by law, and such default shall continue during the period of thirty days, such company shall be subject to a penalty of an amount equal to ten per

is provided in the act of 1883, it differed from that act in not being compulsory upon the railroad companies, for it left to

cent of the tax imposed upon such company by this act, and the treasurer of the Territory shall forthwith ascertain the amount of such percentage justly due from such company, as near as may be, from such evidence as may be available, and shall thereupon collect such amount so ascertained, together with the said penalty thereon.

The amount so ascertained by the territorial treasurer as in this section provided shall, together with the said penalty thereon, be by him entered in the books of his office, and such entry when so made shall stand in the place of the report required by law to be made by such company, and shall in all courts within this Territory be evidence of the amount of such tax and penalty and of the other facts stated therein in pursuance of this act.

3. *Neglect to pay taxes.* — In case any railroad company which shall have accepted the provisions of this act shall fail or neglect to pay the amount reported at the time and in the manner hereinafter provided, for a period of thirty days after the same shall have become due by the terms thereof, in such case there shall be added to the amount of such tax ten per centum thereof as a penalty for such failure or neglect to pay.

4. *Territorial treasurer to distrain.* — At any time after the expiration of the period of thirty days after the amount as above provided has become due and payable under the provisions of this act, the territorial treasurer or his deputy shall distrain sufficient goods, chattels, or other movable property, if found within this Territory, to pay the said amount due from such corporation, together with the penalty thereon as hereinafter provided, and shall immediately advertise the sale of the same in at least three newspapers published within this Territory, stating the time when and the place where such property shall be sold; such sale shall take place at some point on the railroad of such delinquent company, and at least four weeks' notice of the time and place of such sale shall be given; such delinquent company, its successors or assigns, may pay in such amount and penalty at any time before the sale of the property distrained as herein provided, and thereupon further proceedings in connection with such distress shall cease, and the property distrained shall be delivered to the owner thereof.

5. *Land subject to taxation.* — The lands of any railroad company shall become subject to taxation in the same manner as other similar property as soon as the same are sold, leased, contracted to be sold or leased; and on or before the first day of April of each year each railroad company having lands within this Territory shall return to the county clerk of each county within this Territory full and complete lists, verified by the affidavit of such officers of the company having knowledge of the facts, of all lands of such company situated within such county, sold, or contracted to be sold, or leased, during the year ending the last day of December preceding, and the list furnished on or before the first day of April, A.D. 1889, in compliance with the terms of this section, shall include a complete list of all lands sold or leased, prior to the last day of December, 1888.

them the election as to which of two modes of taxation they should accept or submit to. It practically gave to the rail-

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6. *How taxes apportioned.* — The moneys received and collected by the territorial treasurer in pursuance to this act shall be disposed of by him as follows: In case the railroad company paying such tax owns no land granted in aid of the construction of its railroad, one-third of the same shall be retained in the territorial treasury for the use of the Territory, and the remainder shall be apportioned among the several counties into or through which the railroad or railroads of such companies run, in proportion to the number of miles of main track situated in such counties respectively. In case the railroad company paying such tax owns land granted in aid of the construction of its railroad, then thirty per cent of the tax paid by such company shall be retained in the territorial treasury for the use of the Territory, and forty per cent shall be apportioned among the several counties into or through which the railroad or railroads of such company run, in proportion to the number of miles of main track situated in such counties, respectively, and thirty per cent shall be apportioned among the several counties in which lands forming a part of its land grant are situated, in proportion to the number of acres of surveyed and unsold lands in said counties.

7. *Any railroad company.* — Which, at the date of the passage of this act owns or is engaged in operating any line or lines of railroad in this Territory, may at any time within thirty days after the passage of this act, by resolution of its board of directors, attested by its secretary, and filed with the secretary of the Territory, accept and become subject to the provisions of this act, and provided that any railroad company which is now in arrears in the payment of taxes assessed under chapter 99 of the Laws of 1883 shall, within thirty days after the passage of this act, pay into the territorial treasury the full amount of the taxes and interest due under the assessments under said laws of 1883 before they can avail themselves of the provisions of this act, by accepting its terms, including taxes on both territorial and interstate earnings. It is further expressly provided that any company failing to strictly comply with the provisions of this act within the term herein provided shall be immediately subject to assessment and taxation in the manner provided for the assessment and taxation of the property of individuals of this Territory, and said taxes shall be collected in the same manner as is now provided in cases of the property of individuals. Any company which has not complied with the provisions of chapter 99 of the Session Laws of 1883, by paying all taxes claimed on gross earnings both territorial and interstate, or by filing an account of gross earnings both territorial and interstate, shall prepare and file such account in the manner therein provided within thirty days from the passage hereof, and pay one-half of the entire amount due under the agreement and acceptance herein referred to, for the current year, and also the entire amount of taxes heretofore claimed by the Territory on local and interstate

road companies the choice of having their property taxed as other property in the Territory, by assessment and levy, or of taking the benefits of the act upon the terms and conditions provided therein. It was, by section 7, made a condition of

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earnings of such companies, but remaining unpaid at the time of filing said account and within thirty days after the passage of this act, or the same shall not apply to such company or companies. The balance of said taxes due for the current year shall be paid to the territorial treasurer on or before the 15th day of August, 1889. Any railroad company that may be hereafter organized in this Territory, or that shall hereafter become the owner of or engaged in operating any lines of railroad in this Territory, may accept and become subject to the provisions of this act by filing a resolution of its board of directors in the manner as hereinbefore provided.

In case any such railroad company shall accept and become subject to the provisions of this act, it shall at the time of filing such acceptance render an account of gross earnings both territorial and interstate, in the manner as hereinbefore provided, and shall pay at the time of rendering such account, all amounts claimed by the territorial auditor as taxes due on the local and interstate earnings of such company for the current or any preceding year, and shall thereafter pay an amount equal to 3 per centum of such account, as follows: If such acceptance is filed on or before the fifteenth day of February in any year, such company shall pay one-half of said amount on said fifteenth day of February, and the balance on the fifteenth day of August following. Should such acceptance be filed before the fifteenth day of August and after the fifteenth day of February in any year, then an amount equal to 3 per centum of such account shall be paid in full on or before the fifteenth day of August in each year. Thereafter accounts shall be rendered and payment made in the manner provided in this act; *provided*, that any company failing to promptly and strictly comply with the provisions herein set forth and to pay all sums herein provided to be paid shall be subject to assessment and taxation in the same manner as individuals.

8. *In case of non-acceptance.* — The railroads and property of all railroad companies owning or operating lines of railway in this Territory, which companies shall not accept and become subject to the provisions of this act, shall not be entitled to the exemption in this act contained, but shall be subject to taxation in such manner as shall be provided by law.

9. *Repeal or amendment.* — This act shall be subject to repeal or amendment by any future legislature, and nothing herein contained shall be construed as a repeal of any revenue law now in existence, as applicable to any railroad company which shall not accept the provisions of this act as herein provided.

10. *Effect when.* — This action shall take effect and be in force from and after its passage.

Approved March 7, 1889.

the acceptance of the act that "any railroad company assessed under chapter 99 of the Laws of 1883 shall, within thirty days after the passage of this act, pay into the territorial treasury the full amount of the taxes and interest due under the assessments under said laws of 1883, including taxes on both territorial and interstate earnings," "before they can avail themselves of the provisions of this act." It was further provided that any company failing to strictly comply with the provisions of the act within the time provided should be immediately subject to assessment and taxation upon its property in the same manner as the property of individuals was assessed and taxed.

The companies accepting the benefits of the act were not only to pay arrearages under the law of 1883, but were also to pay a percentage of gross earnings for the current year of 1889, it being provided that "if such acceptance was filed on or before the 15th day of February in any year such companies should pay one-half of said amount on said 15th day of February and the balance on the 15th day of August next following. Should acceptance be filed before the 15th day of August and after the 15th day of February in any year, then an amount equal to three per centum of such account shall be paid in full on or before the 15th day of August in each year."

It is shown by the bill that the appellant accepted the provisions and benefits of the act within thirty days after March 7, 1889, and it thereby became liable to pay the required percentage on its gross earnings on or before the 15th day of August, 1889. It is also shown by the bill that within thirty days after the passage of the act it paid the arrearages of percentages on its gross earnings accruing under the act of 1883, for the years 1886, 1887, and 1888; but it is not alleged that it made payment, or tender of payment, of the percentage on its gross earnings for the year 1889, or any portion thereof, although by the express provisions of the act a percentage on a portion of such gross earnings was due and payable on the 15th day of August, 1889.

The moneys to be received and collected by the territorial

treasurer under this act from the railroad companies which accepted its provisions were to be apportioned between the Territory and the several counties, respectively, through which the railroads run, or in which the companies had lands subject to taxation, in the manner pointed out in section 6 of the act. The several counties, whose auditors are made defendants in the present case, were therefore interested in the gross earnings tax, which the appellant was required to pay for the year 1889 in lieu of all other ordinary taxes upon its property.

The gross earnings act remained in force until November 2, 1889, when it was repealed by the repugnant provisions contained in the constitution of the State of North Dakota, as adopted and approved by Congress, and the claim is now made by the appellant that this repeal relieves it from liability to pay any percentage on its gross earnings for the year 1889, or any part thereof, because the same was not payable until after 1890; and that it was not liable to assessment and taxation on its property because it had accepted the provisions of the gross earnings act of 1889.

This contention, if correct, would relieve the appellant from any burden in the way of taxation for the year 1889, but such a claim as this cannot possibly be sustained. The act of March 7, 1889, clearly intended that the gross earnings tax, therein provided for, as to all companies which would accept its provisions, should supply revenue for the Territory and the counties for the year 1889. It is equally clear from the whole act, as a tax law, that the railroad company had to pay the required percentage on its gross earnings for that year, and that such percentage was payable in part on the 15th day of August in that year. It is not therefore correct to say that no part of the gross earnings were payable until 1890; but, if that were not the case, having accepted the provisions of that act and thus becoming liable to pay the designated percentage of its gross earnings in lieu of taxes for the year 1889, that liability would not be discharged by the subsequent repeal of the gross earnings act of 1889. If the company was released from the gross earnings tax by the repeal of the act its property immediately became subject to assessment

and taxation in the manner provided for the assessment and taxation of property of individuals in the Territory, and it would not vitiate any such assessment made on the part of the counties that happened to be made prior to the repeal of the act of 1889. Such assessment would remain in full force and effect after the repeal of the act, and until satisfied.

It is next contended by the appellant that its payment of arrearages, claimed to be due under the act of 1883, was a consideration for the exemption of its property from taxation for the year 1889. This position cannot be sustained, for, by the terms of the act of 1889, the payment of those arrearages was simply a condition upon which the railroad company was allowed to accept the benefits of that act, which was not an act exempting the property of the railroad company from taxation, but merely substituted one mode of taxation for another upon the terms and conditions specified. One of the terms on which the railroad was allowed to accept the gross earnings tax, in lieu of the ordinary tax upon its property, was that it should pay the arrearages which the Territory claimed under the act of 1883. No exemption from taxation for the year 1889 was contemplated. The railroads accepting the act were required to pay the gross earnings tax for that year in addition to such arrearages. It cannot, therefore, be properly claimed that the payment of these arrearages constituted a consideration for any exemption from taxation, or that such payment raised any equity on the part of the appellant against the payment of taxes for 1889, whether such taxes were imposed in the shape of a percentage on the gross earnings for that year, or in the shape of the ordinary assessment upon its property.

There is nothing in the allegations of the bill showing affirmatively that the company did not possess the equitable title or ownership in the lands described and assessed. Nor do the averments of the bill negative the fact that the appellant was properly chargeable with taxes on the lands coming within the grant of July 2, 1864, and within the limits of the line of definite location of its road. Payment of the gross earnings tax, imposed by the act of 1889, would have dis-

charged all claims for taxes upon the company's lands for that year, but no ground is shown by the bill for releasing the appellant from the payment of either the percentage tax on its gross earnings, or from the payment of the assessments upon its lands made by the county auditors. By section 7 of the act of 1889, its failure to promptly and strictly comply with the provisions thereof, and pay all sums therein provided to be paid, subjected the company to assessment and taxation in the same manner as individuals. It did not comply with the provisions of the act in paying the percentage of gross earnings due on the 15th day of August, 1889, and thereupon its property became liable to assessment and taxation as the property of individuals in the several counties.

Being liable to pay either the percentage on gross earnings in accordance with the provisions of the act of 1889, or the tax upon its lands, as other property of like character was assessed, the appellant was not entitled to any relief in a court of equity by injunction without payment or tender of what was due under one or the other of these modes of taxation.

In *State Railroad Tax Cases*, 92 U. S. 575, 616, 617, the rule is established that before an injunction will be granted in such cases as the present, a party must pay or tender what can be seen to be due on the face of the bill, and, speaking for the court in that case, Mr. Justice Miller said that the duty of making such a tender or payment before any injunction will be allowed is laid down "as a rule to govern the courts of the United States in their action in such cases." This rule was repeated in *National Bank* v. *Kimball*, 103 U. S. 732, 733, where it was treated as a fatal objection to the bill that there was no offer to pay any sum as a tax which the party ought to pay, and, again speaking for this court, Mr. Justice Miller there said: "We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax, until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay," etc.

Applying this rule to the present case, it is clear that the

appellant's bill was properly dismissed for failing to pay, or tender to pay, taxes which he ought to have paid on its property, or, in lieu thereof, a percentage of its gross earnings.

Our response, therefore, to the eighth question certified is, that the bill was without equity, because of the failure to aver that the plaintiff had tendered or paid the gross earnings percentage for the year 1889, (or the tax assessed by the county auditors,) and was not entitled to the equitable relief prayed without first tendering or paying such taxes.

The answer of the court to that question will accordingly be certified to the Circuit Court of Appeals for the Eighth Circuit.

Mr. Justice Brewer dissented.

MANN v. TACOMA LAND COMPANY.

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

No. 375. Argued April 18, 19, 1894.— Decided April 30, 1894.

Scrip or certificates for public land, issued under the act of April 5, 1872, c. 89, 17 Stat. 649, "for the relief of Thomas B. Valentine," cannot be located on tide land in the State of Washington, covered and uncovered by the flow and ebb of the tide.

The general legislation of Congress in respect to public lands does not extend to tide lands.

On July 12, 1890, appellant as plaintiff filed his bill in the Circuit Court of the United States for the District of Washington to restrain the defendant from entering and trespassing upon certain premises. Subsequently, by leave of the court, an amended bill was filed. In that, plaintiff claimed title to three separate tracts. The allegations as to one were as follows:

"2. That on the 29th day of October, 1889, the following-

described premises were unoccupied and unappropriated lands of the United States, not mineral, and unsurveyed, to wit: Commencing at a point which is three thousand nine hundred and sixty feet west of the southeast corner of section 34, in township 21 north, of range 3 east, of the Willamette meridian, running thence north thirteen hundred and twenty feet, thence west thirteen hundred and twenty feet, thence south thirteen hundred and twenty feet, thence east thirteen hundred and twenty feet to place of beginning, and containing forty acres.

"3. That on the said 29th day of October, 1889, your orator, under and by virtue of an act of the Congress of the United States, entitled 'An act for the relief of Thomas B. Valentine,' approved April 5, 1872, selected said tract of land as aforesaid described, at the United States land office at Seattle, Washington Territory, that being the land office for the district in which said lands were situated, and thereupon filed with the register and receiver of said land office certificate of location No. E 222 for forty acres, issued by virtue of a decree rendered by the Supreme Court of the United States upon the 6th day of January, 1874, for the claim of Thomas B. Valentine, or his legal assignee, under said act of Congress aforesaid, together with a description by metes and bounds of said described premises and a map of said tract, and on the 30th day of October, 1889, said selection was allowed, and your orator received from said register and receiver a certificate for said lands, entitling your orator to a patent to said lands when the same should have been surveyed by authority of the government of the United States.

"4. That by virtue of said selection and certificate your orator is the owner of said described premises and entitled to the sole and exclusive possession of the same."

The title to the other two tracts was acquired in a similar way except that plaintiff did not claim to have himself entered them, but only to hold by deed from the locators. The character of the lands and the use to which plaintiff intended to put them were thus stated:

"14. That all the lands described in this amended bill are

lands over which the tide ebbs and flows to a distance of 80 chains, and are what are designated on the plats and surveys of the United States as 'mud flats bare at low water,' and are overflowed at high water at a uniform depth of from 2 to 4 feet by the waters of Commencement Bay, at the head of Puget Sound, in Pierce County, State of Washington, and are situated about three-fourths of a mile from the line of low water of said Commencement Bay and at the mouth of the stream known as 'Puyallup River,' and are valuable and suitable for the construction of wharves, warehouses, commercial purposes, and for agricultural uses."

"19. That your orator intends filling in said lands aforesaid and erecting thereon warehouses and other buildings, over and across which lands general traffic may be carried on to and from the city of Tacoma."

It is upon these lands that the bill alleged that the defendant was trespassing. The certificates of location under which these tracts were entered, being what is known as "Valentine scrip," were issued under the authority of the act of Congress of April 5, 1872, c. 89, 17 Stat. 649, entitled, "An act for the relief of Thomas B. Valentine," which authorized the Circuit Court of the United States for the District of California to hear and decide upon the merits of the claim of Thomas B. Valentine to a certain specified Mexican grant. The third section of the act is as follows:

"SEC. 3. That an appeal shall be taken from the final decision and decree of the said Circuit Court to the Supreme Court of the United States, by either party, in accordance with the provisions of the tenth section of said act of March third, eighteen hundred and fifty-one, within six months after the rendition of such final decision; and a decree under the provisions of this act, in favor of said claim, shall not affect any adverse right or title to the lands described in said decree; but in lieu thereof, the claimant, or his legal representatives, may select, and shall be allowed, patents for, an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and, if

unsurveyed when taken, to conform, when surveyed, to the general system of United States land surveys; and the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, shall be authorized to issue scrip, in legal subdivisions, to the said Valentine, or his legal representatives, in accordance with the provisions of this act: *Provided*, That no decree in favor of said Valentine shall be executed nor be of any force or effect against any person or persons; nor shall land scrip or patents issue as hereinbefore provided, unless the said Valentine shall first execute and deliver to the Commissioner of the General Land Office a deed conveying to the United States all his right, title, and interest to the lands covered by said Miranda grant."

Proceedings were had under this statute in the Circuit Court, and a decree was rendered in favor of the claimant, which afterwards and on January 6, 1874, was affirmed by this court. The facts respecting this grant are thus stated by the Secretary of the Interior in a decision quoted by plaintiff's counsel:

"On investigation of the facts relative to the Miranda grant, I find that on October 8, 1844, Manuel Micheltorena, Mexican governor of California, granted to Juan Miranda the place known as Rancho Arroyo San Antonio, bounded by the laguna and arroyo of the same name and the pass and estero of Petaluma, containing three square leagues, more or less.

"California was acquired from Mexico by the treaty of Guadalupe Hidalgo, and by the eighth article of said treaty the United States stipulated to protect the property rights of all residents within the ceded territory, in the same manner that the property rights of its own citizens were protected.

"This treaty did not, *proprio vigore*, operate as a confirmation of Mexican grants, but, on the contrary, being executory in character, it addressed itself to the political department of the government, and the duty devolved upon Congress of providing means for its enforcement.

"Congress, therefore, by act approved March 3, 1851, established a board of land commissioners, with power to investigate the validity of said grants and titles, with right to appeal to the United States District and Supreme Courts.

Argument for Baer, Plaintiff in Error.

"The Miranda grant was presented for confirmation to the board of land commissioners by Valentine, and also by the grantees of one Ortega, who was Miranda's son-in-law. These parties claimed adversely to each other, and Valentine finally withdrew his claim, intending, it is alleged, to intervene in the District Court. Before the case was reached for trial in said court the Supreme Court had rendered a decision which precluded him from asserting his title by intervention. Ortega's claim was, therefore, prosecuted by his grantees, until finally rejected by the Supreme Court of the United States.

"After the claim of the grantees of Ortega was rejected the lands were disposed of like other public lands, and the proceeds covered into the treasury.

"Subsequently, Valentine produced satisfactory evidence that the land had been lawfully granted to Miranda by the Mexican authorities and conveyed to him by mesne conveyances, and Congress passed the act granting to Valentine an amount of scrip equal to the amount of land contained in said grant." 6 Copp's Land Owner, 28.

To this bill a demurrer was filed, and on October 22, 1890, a decree was entered sustaining the demurrer and dismissing the bill, from which decree of dismissal plaintiff brought his appeal to this court. The case was argued with *Baer* v. *Moran Brothers Company*, *post*, 287.

Mr. Theodore H. N. McPherson for Mann, appellant.

Mr. John H. Mitchell, (with whom were *Mr. Beriah Brown, Jr.*, and *Mr. M. L. Baer* on the brief,) for Baer, plaintiff in error.

It is not our purpose to antagonize the deliberate conclusions of this court as set out in the opinions in the two recent cases of *Illinois Central Railroad* v. *Chicago*, 146 U. S. 387, and *Shively* v. *Bowlby*, 152 U. S. 1, but to endeavor to show that the decisions in those cases are inapplicable to and not controlling in the case involving lands of the character involved in this action, namely, a portion of a tract of overflowed lands, bare at low tide, on the outskirts of a bay on

Puget Sound, including over 3000 acres, and extending for about two and one-half miles in length to three miles in width, as shown by the maps of the official surveys of the United States Coast and Geodetic Survey, copy of which is found attached in our brief.

This court will take judicial knowledge of the tide flats, otherwise designated as "mud flats," lying on and adjacent to the bays and inlets of the waters of Puget Sound. *Peyroux* v. *Howard*, 7 Pet. 324; *The Apollon*, 9 Wheat. 362, 374; *United States* v. *Lawton*, 5 How. 10, 15.

It is respectfully submitted there is nothing whatever in this record from beginning to end to show that the land involved in this action, or any part of it, is what is commonly designated in the laws as "shore" or "tide land" bordering on a navigable water, but on the contrary, this record fairly construed, even in the absence of any consideration of the public surveys of the United States, shows this tract to be just what it is in fact, a part of an immense area of "overflowed lands," "mud flats," or "tide flats" overflowed by high tides and bare at low tides. From the location, in King County, State of Washington, overflowed presumably by the unnavigable waters of some bay or inlet of the waters of Puget Sound. The magnitude of the area included and its shape, being 40 acres and in a solid square, precludes the supposition that it is ordinary "shore" or "tide water lands." Furthermore, the description in the complaint, it must be borne in mind, is not "the shore," or part of "the shore," not "tide lands," but "a portion of the tide flats;" clearly indicating that the land in question is a part of one of the many vast areas located at different points adjacent to the bays and inlets of Puget Sound, and designated on the geodetic surveys of the United States as "mud flats." In other words, the description contained in the complaint, instead of meaning ordinary shore or tide lands, is equivalent to an averment of "overflowed lands."

The terms "shore" or "tide lands" are synonymous. They include in their definition the shore lands lying on a navigable river or arm of the sea, covered and uncovered by the tides,

and in which there is a *jus publicum;* while "swamp" or "overflowed lands," whether made swamp or overflowed by tide or other waters, *Irwin* v. *San Francisco Savings Union*, 136 U. S. 578, are entirely different. The averment in the complaint that these are "tide flats" is equivalent to an averment that they are what are technically known in the law as "overflowed lands," as contradistinguished from "shore" or "tide lands." The averments in the complaint, taken altogether, are equivalent in description to the term "overflowed lands" as used in the swamp land acts.

This court, in the case of *Shively* v. *Bowlby*, 152 U. S. 1, unqualifiedly concedes the power of the Congress of the United States to dispose of what is known as tide lands on the shores of navigable waters in any Territory of the United States, when 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.

It is submitted that the grant under which the plaintiff claims in this case is clearly one which the Congress of the United States (and it is the sole judge, and its decision is not reviewable by the courts) deemed necessary "in order," to use the language of Mr. Justice Gray in the opinion in *Shively* v. *Bowlby*, "to perform international obligations," or, more properly speaking, an international obligation.

By the treaty of Guadalupe Hidalgo between this country and Mexico, the United States obligated themselves to recognize all valid grants of land within the limits of the Territory ceded, before that time, made by the governments of Mexico and Spain. *Botiller* v. *Dominguez*, 130 U. S. 238.

Juan Miranda was the holder of a Mexican grant called the Rancho Aroyo de San Antonio, located in the county of Sonoma and State of California, about 13,000 acres, part of which were tide flats and overflowed lands, in all respects similar to the lands in controversy.

It is submitted the act of April 5, 1872, under which the

Valentine scrip was issued, was clearly the performance, upon the part of the Congress, of an "international obligation." It was a recognition, upon the part of the United States, of the validity of the Miranda grant, and of the rights of Miranda, the grantee thereunder.

Instead, however, of giving Miranda or his grantee, Valentine, the 13,000 acres included in the Mexican grant, part of which were tide flats and overflowed land, an exchange was made, and what was deemed and determined to be, by a judicial court whose decision was affirmed by this court, an equivalent in value of the public lands of the United States was granted. This, therefore, was not only a grant of public lands in any and all of the Territories of the United States within the power of Congress to grant, but it was clearly the *intention* of the Congress to include within its provisions every character of public lands, whether upland, tide lands, tide flats, overflowed or swamp land, not otherwise occupied or appropriated and not mineral, included in the Miranda grant. The grant being, moreover, not a gift or donation, but an exchange of lands, or a grant, in other words, for a full and adequate consideration.

In this view, therefore, we confidently insist that the doctrine enunciated by this court in *Shively* v. *Bowlby*, clearly supports the contention of the plaintiff in error.

This court, in *Shively* v. *Bowlby*, suggests that it has not been the policy of the government to grant lands between high and low water mark to individuals piecemeal, though it is admitted that it has made and confirmed such grants when necessary to carry into effect the obligations which it has assumed by treaty.

If any "policy" has been pursued by the Executive Department of the government on the question of tide lands in the Territory of Washington, that policy, as it appears, was to permit their survey and entry under general land laws whenever of sufficient extent and value to warrant the belief that they could be reclaimed from the sea and cultivated, and whenever so situated that their reclamation would not injure the public right of use of waters navigable in fact.

Argument for Baer, Plaintiff in Error.

The only manner from which it can be determined what the policy of a government has been in relation to any subject is to look for either legislative declarations of that policy, or executive acts from which it could be concluded.

It is notorious that there have been thousands of acres of lands lying below the line of ordinary high tide, and so returned on the government surveys, surveyed and patented under general laws in the Territory of Washington.

The reason why such lands have been so surveyed and patented is owing to the peculiar condition of things there, in the vast extent of such lands, and the further fact that the upland is covered with an enormous growth of very heavy timber, making the work of fitting it for cultivation expensive and slow. In such circumstances, the settlers soon found that it was far cheaper to reclaim tide lands from the sea, even by the erection of extremely high and strong dikes, than to attempt to remove the existing timber on the high land, not to mention that the reclaimed tide lands formed of alluvial deposits were infinitely richer than the high land. The earliest and choicest selections of farming land under the general land laws in western Washington, were made of land lying wholly below ordinary high water mark, and to-day it is possible to pass, in an ordinary high water, on a steamer past farms protected by dikes, where the whole cultivated area of the farm lies many feet lower than the surface of the water.

It is respectfully submitted that Congress, in disposing of the public lands, has not, by any means, acted upon the theory that lands known as ordinary tide lands, between high and low water mark, on navigable waters, in Territories of the United States, were not disposable, and should be held as public highways, unless in case of some international duty or public exigency by the United States in trust for the future States. Upon the contrary, it is respectfully and confidently insisted that the instances in which Congress has acted upon the contrary theory, are so numerous as to constitute the rule and not the exception.

But even admitting that it has not been the customary policy of the Executive Department to permit such lands to

Counsel for Parties.

be entered under the general land laws, what is the case at bar? The plaintiff in error is not claiming land under any general land law, but under a special grant of Congress. He is not restricted by the act to lands subject to entry under general land laws, but the exceptions are expressly enumerated in his grant.

It is to be presumed that Congress knew the law, and knew that it had an unrestricted right to dispose of all the tide lands in the Territory of Washington. The mind of the legislature was upon exceptions when the grant was made, and numerous exceptions were made as to the class of lands which Valentine was not to be permitted to take by virtue of his grant. But tide lands or lands below high water mark were not enumerated among those exceptions, and by every rule of construction of either grants, laws, or contracts — and the act of 1872 partakes of the nature of all — all classes of lands which Congress had the power to grant, and which were not excluded in express terms, were among those of which he was authorized to make selection.

We submit, from the foregoing exposition of the law and facts, that these lands are public lands of the United States and subject to entry under the act of March 5, 1875.

Mr. Joseph H. Parsons filed a brief on behalf of Louis Largie, intervenor, in both cases.

Mr. Samuel Dickson and *Mr. Frederic D. McKenney* for the Tacoma Land Company, appellant.

Mr. Frederic D. McKenney, with whom was *Mr. Samuel Field Phillips*, filed a brief for Dearborn, intervenor in *Baer* v. *Moran Brothers Company*.

Mr. John P. Fay filed a brief on behalf of Dearborn, intervenor in *Baer* v. *Moran Brothers Company*.

Mr. W. C. Jones, Attorney General of the State of Washington, filed a brief on behalf of the State, intervenor in *Baer* v. *Moran Brothers Company*.

Opinion of the Court.

Mr. Edwin B. Smith closed for Mann, appellant.

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

The single question in this case is as to the title of plaintiff to the premises. The lands are tide lands, covered and uncovered by the flow and ebb of the tide, and are situated in Commencement Bay, near to the city of Tacoma. He does not claim by any grant from the State of Washington, nor by any act of Congress specifically granting him these lands, or in terms providing for the location of scrip upon tide lands, but insists that, although the statute under which this scrip was issued, only authorized its location upon "unoccupied and unappropriated public lands," he had a right to locate it upon these tide lands, and acquire full title thereto.

That the title to tide lands is in the State is a proposition which has been again and again affirmed by this court, some of the earlier opinions going so far as to declare that the United States had no power to grant to individuals such lands at any time, even prior to the admission of the State and during the territorial existence. However, in the recent case of *Shively* v. *Bowlby*, 152 U. S. 1, after a careful review of the authorities, it was held that the denial in those opinions of the power of Congress to make such a grant was not strictly correct; but it was also held that, although Congress could, it had never undertaken by general laws to dispose of such lands, and in the summing up at the close of the opinion it was stated: "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."

It is unnecessary, in view of this recent examination of the question, to enter into any discussion respecting the same. It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands. There is nothing in the act authorizing the Valentine scrip, or in the circumstances which gave occasion for its passage, to make an exception to the general rule. It provided that the scrip might be located on the unoccupied and unappropriated public lands, but the term "public lands" does not include tide lands. As said in *Newhall* v. *Sanger*, 92 U. S. 761, 763: "The words 'public lands' are habitually used in our legislation to describe, such as are subject to sale or other disposal under general laws." See also *Leavenworth &c. Railroad* v. *United States*, 92 U. S. 733; *Doolan* v. *Carr*, 125 U. S. 618.

Further, in the act of February 22, 1889, c. 180, providing for the admission of Washington, Montana, and the two Dakotas, into the Union, 25 Stat. 676, 677, among the conditions imposed was this: "That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof." No one can for a moment suppose that it was the thought of Congress to change the whole policy of the government and reserve to the nation the title and control of the soil beneath the tide waters and those of navigable streams. Indeed, in the constitution of Washington, (art. 17, sec. 1,) there is an express assertion of the title of the State to the tide lands within its borders.

That there was no intent in the Valentine scrip act to make any exception to the general rule is evident not merely from the use of a term having such an accepted meaning, but from the further provision that the land, "if unsurveyed when taken, to conform, when surveyed, to the general system of United States land surveys," for under that general system surveys are not extended to tide lands, nor those under navigable rivers above tide water.

In *Barney* v. *Keokuk*, 94 U. S. 324, 338, it was said: "The

United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

But it is claimed that there is a peculiar equity attaching to the Valentine scrip because the Miranda grant in fact embraced tide lands, and was of great value — $2,000,000 as stated in the debate in Congress. It is said by counsel that the intention of Congress, as indicated by this act, under the circumstances, was manifestly to give Valentine the right of selection of lands of the United States belonging to the same classes as were to be found in the Miranda grant, which he relinquished. The import of the language is precisely this, and the contract to be equal requires the construction which the language plainly means. Any other construction would be against the just intentions of the national legislature.

So far as respects the great value of the Miranda grant, it was that which was created by the building up of a city within its borders, and not something which inhered in the land itself. So that when Valentine failed to secure a confirmation of that grant, he was not losing property which was of the value of $2,000,000 when granted by the Mexican government, but only losing the opportunity to appropriate $2,000,000 worth of value created by the labors of others upon lands to which they supposed they had title.

Further, as appears from the statement made by the Secretary of the Interior, he had lost all legal right to this land, for when a commission had been provided for investigating the validity of such claims, he presented his claim for confirmation and then withdrew it. Congress had fulfilled all obligations to him growing out of the treaty with Mexico, and when by his own act he had forfeited his legal claims to the land, it was a mere act of grace by which was given to him the right to select an equal amount of land elsewhere. If Congress had thought that it was necessary in order to do justice that he should be permitted to select an equal quantity of land of like character, it was easy to have expressed that intention. Having failed to do so, and omitted any reference

to tide lands, its donation to him is to be construed as any other grant of the government, and no unexpressed and unsuggested intention should be attributed to Congress — certainly no intention to make the people of the State of Washington, who otherwise would receive these tide lands for their general benefit, suffer by reason of his neglect to properly assert his claim to lands in the State of California. There is, therefore, nothing in this matter of the Valentine scrip to take the case out of the rule laid down in *Shively* v. *Bowlby*.

Reliance is also placed on article 17, section 2, of the constitution of the State of Washington, which reads: "The State of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States; provided, the same is not impeached for fraud." In respect to this it is enough to say that these lands were not patented. It is doubtless true, as said by this court in *Stark* v. *Starrs*, 6 Wall. 402, 418, that "the right to a patent once vested is treated by the government when dealing with the public lands, as equivalent to a patent issued." But here there was no right to a patent. The entry in the local land office, and the receipt issued by the local land officers, were unauthorized acts, and gave no right to a patent; and it cannot be supposed that the State of Washington, when it excluded from its claim of title lands which the government had in the due administration of its land department disposed of by a patent, meant thereby to exclude every tract for which a local land officer might wrongfully issue a receiver's receipt.

These are all the matters involved in this case. We see no error in the ruling of the Circuit Court, and its decree is

Affirmed.

BAER *v.* MORAN BROTHERS COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 683. Argued April 18, 19, 1894. — Decided April 20, 1894.

This court cannot take judicial notice of the nature and extent of tide lands or mud flats.

Land alternately covered and uncovered by the tide is strictly within the description of tide lands, and is covered by the settled rule in respect to such lands.

Mann v. *Tacoma Land Company*, *ante*, 273, followed.

THE case is stated in the opinion. This case was argued with *Mann* v. *Tacoma Land Company*, *ante*, 273, where will be found the argument of *Mr. Mitchell* for the plaintiff in error.

Mr. John H. Mitchell, (with whom were *Mr. Beriah Brown, Jr.*, and *Mr. M. L. Baer* on the brief,) for plaintiff in error.

Mr. W. C. Jones, Attorney General of the State of Washington, filed a brief on behalf of the State, intervenor.

Mr. Frederic D. McKenney for Dearborn, intervenor.

Mr. John P. Fay filed a brief for same.

MR. JUSTICE BREWER delivered the opinion of the court.

This case comes before us on error to the Supreme Court of Washington. The questions are mainly similar to those in the case of *Mann* v. *Tacoma Land Company*, just decided.

The plaintiff described the land in his complaint as "at the time of its selection by said plaintiff unoccupied and unappropriated public land of the United States not mineral, in this, that the said tract of land was situated in the Territory of Washington, was a portion of the tide flats, covered and uncovered by the ebb and flow of the tide, was uncovered at

ordinary low tide and was covered with water at ordinary high tide, and had never been set apart by the United States for any particular use." This shows that the land at the time of its entry was, strictly speaking, tide lands, and, with this as the sole description, there would be nothing to distinguish the case from the one just decided. There is, however, this further description: "Beginning at a point 688 feet south and 660 feet west of the east one-fourth post of sec. 6, t'p 24 N., R. 4 E., W. M., thence west 150 feet, thence south 210 feet, thence east 150 feet, thence north 210 feet to place of beginning, being the premises covered by Moran Brothers Company's foundry and machine shops."

Upon this plaintiff contends that the premises are not to be taken as a part of the shore or tide lands bordering on navigable water, inasmuch as they are shown to be devoted to manufacturing uses; that this court will take judicial knowledge of what are known as "mud flats," lying on and adjacent to the waters of Puget Sound, and that the land in dispute is a part of a large tract of over 3000 acres of such "mud flats," extending for a distance of from two and one-half miles in length to three miles in width, on the outskirts of a bay on Puget Sound, and near the city of Seattle, as shown by the official maps of the United States Coast and Geodetic Survey. But the averment of the complaint is that the land was unoccupied at the time of its selection by the plaintiff, and its condition as a part of the shore or tide lands is not changed by the magnitude of the surrounding tract which, covered and uncovered by the flow and ebb of the tide, exists between the upland and navigable waters, or the use to which it may subsequently be put.

We do not understand that we can take judicial notice of the nature and extent of the tide lands or "mud flats" in the vicinity of this particular tract. Even if we could, or if the area thereof was shown to be as great as is stated by counsel in the brief, it would not change the fact that the land thus alternately covered and uncovered and between the dry upland and the navigable water is land which may be used in facilitating approach to the navigable waters from the upland,

and is strictly within the description of "tide lands," and covered by the rule in respect to such lands.

We see nothing to distinguish this case from the one just decided, and, therefore, the judgment of the Supreme Court of the State of Washington is

Affirmed.

BRENNAN v. TITUSVILLE.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 902. Submitted January 5, 1894. — Decided April 30, 1894.

An ordinance requiring agents soliciting orders on behalf of manufacturers of goods to take out a license and pay a tax therefor, made by a municipal corporation under authority conferred by a statute of the State, granting to such corporations power to levy and collect license taxes on hawkers, peddlers and merchants of all kinds, is an exercise, not of the police power, but of the taxing power; and when it is enforced against an agent, sent by a manufacturer of goods in another State to solicit orders for the products of his manufactory, it imposes a tax upon interstate commerce, in violation of the provisions of the Constitution of the United States.

This court is not bound by the decision of the highest court of the State in which such a tax is authorized and imposed, that its authorization and imposition are an exercise of the police power, and not of the taxing power.

On May 12, 1890, plaintiff in error was convicted in the court of the city recorder of the city of Titusville, Pennsylvania, of a violation of an ordinance, entitled "An ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville," and sentenced to pay a fine of $25 and costs. From that sentence he appealed to the Court of Common Pleas of Crawford County. In that court the case was tried upon the following agreed statement of facts:

"1. J. A. Shephard is a manufacturer of picture frames and maker of portraits, residing in Chicago, in the State of Illinois, of which State he is a citizen and in which city he has his manufactory and place of business.

"2. In the prosecution of said business he employs agents who, under his direction, solicit orders for pictures and picture frames in the State of Pennsylvania and in other States of the Union, by going personally to residents and citizens of said State of Pennsylvania and other States and exhibiting samples of his pictures and frames, going, when necessary, from house to house in said State of Pennsylvania and other States.

"3. The defendant, J. W. Brennan, was an agent of the said J. A. Shephard, employed by him to travel and solicit orders for said pictures and frames in the manner stated, upon a salary and also upon commission upon the amount of his sales, at the time of his arrest, May 25, 1889, upon a warrant issued by the authorities of the city of Titusville, in the State of Pennsylvania.

"4. Upon receiving orders for pictures and picture frames, the agents of the said J. A. Shephard forwarded the same to him at Chicago, in the State of Illinois, where the goods were made, and from there shipped by said J. A. Shephard to the purchasers in Titusville, in the State of Pennsylvania, by railroad freight and express, and the price of said goods was collected and forwarded by the express companies and sometimes by the agents to said Shephard, at Chicago, in the State of Illinois. J. W. Brennan, the agent employed by J. A. Shephard, was engaged in conducting the business in the manner stated at the time of his arrest, May 25, 1889. The said J. W. Brennan, at the time of his arrest and before, had not been otherwise employed than as stated, and was acting solely for the said Shephard.

"5. The city of Titusville had enacted an ordinance, in force at the date of the arrest of said J. W. Brennan, which in the twelfth section thereof provides in words and figures as follows:

"'That all persons canvassing or soliciting within said city orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay to the said treasurer therefor the following sums, according to

the time for which said license shall be granted, viz.: For one day, one dollar and fifty cents; one week, $5.00; three months, $10.00; one year, twenty-five dollars; provided, that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers residing and doing business in said city.'

"And the said ordinance further provides, in the 18th section thereof, as follows:

"'That any person or persons failing to obtain a license as required by this ordinance shall, upon conviction thereof before any magistrate, alderman, or justice of the peace of said city, forfeit and pay a fine not exceeding one hundred dollars, nor less than the amount required for a license to such person or persons, together with twenty per cent added as a penalty, with costs of suit; and in default of payment thereof shall undergo a confinement in the city or county prison for a period not exceeding ninety days, or perform hard labor on the streets or elsewhere in said city not exceeding such period.'

"6. At the time of his arrest the defendant Brennan was not and had not been selling by sample to manufacturers or licensed merchants or dealers residing in said city of Titusville, and was not, within the provision of the 12th section of said ordinance, soliciting to such excepted persons.

"7. The defendant, J. W. Brennan, at the time of his arrest had not obtained a license as required by said ordinance, and had not paid to the treasurer of the city of Titusville the license fee provided by said ordinance.

"8. The defendant was arrested, tried, convicted and sentenced to pay a fine of $25 and costs of suit under said ordinance, on the 29th day of May, 1889, before W. M. Dame, city recorder of the city of Titusville.

"If the court should be of opinion upon the facts stated that the defendant, J. W. Brennan, was liable to take out a license and pay the license fee provided by said ordinance, then judgment to be entered for the plaintiff, the city of Titusville, for $25 and costs of suit. If the court should be of opinion that said Brennan was not so liable, then judgment to be entered for the defendant, with costs of suit."

Argument for Defendant in Error.

Upon these facts, on May 20, that court entered judgment against him for $25 and costs. From that judgment he appealed to the Supreme Court of the State, which court, on October 5, 1891, affirmed the judgment. *Titusville* v. *Brennan*, 143 Penn. St. 642. Thereupon he sued out a writ of error from this court.

Mr. Roger Sherman for plaintiff in error.

Mr. George A. Chase for defendant in error.

The reserve police power of the States — not granted to the Federal government — has been the ground for the enactment of a great variety of state acts, regulating widely different subjects, from the manufacture of oleomargarine in Pennsylvania, or the brewing of beer in Kansas, or the practice of medicine in Washington, to the washing of clothes in New Hampshire, and, as has been remarked by an eminent judge, "the scope of this power has been the subject of much controversy, and the term has been variously defined by the courts and text writers." In *Beer Company* v. *Massachusetts*, 97 U. S. 25, 32, 33, Bradley, J., in delivering the opinion of the court says: "All rights are held subject to the police power of the State." "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*." To the same effect in *Barbier* v. *Connolly*, 113 U. S. 27, 31, Field, J., says, after stating the true scope of the Fourteenth Amendment, "But neither the amendment — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its 'police power,' to

prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

In *Hayes* v. *Missouri*, 120 U. S. 68, 71, "the Fourteenth Amendment," says Field, J., "to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the localities imposed."

In *Powell* v. *Pennsylvania*, 127 U. S. 678, the court says, that the oleomargarine act does not deny to any person the equal protection of the laws, because it places under the same restrictions all who manufacture or sell the articles embraced within its prohibition, thus recognizing and preserving the principles of equality among those engaged in the same business.

In *Munn* v. *Illinois*, 94 U. S. 113, the court declares that a State can require all persons whose business is affected with a public interest (in this instance the storage of grain in elevators) to charge only such rates as shall be reasonable, and can even go farther and declare what rates shall be reasonable. See also the *Granger Cases*, (reported in same volume,) in which above doctrine was applied to the business of a common carrier.

In *Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 18, the court held that a State may tax the cars of a foreign sleeping car company, employed in interstate commerce, which run into, through, and out of such State, and declared that an act imposing such a tax is a valid and constitutional law.

That there is still much uncertainty with respect to the authority of the States over commerce not wholly internal, particularly in respect to the police power, and their power to tax the subjects of interstate commerce is evidenced by the recent decisions of this court in several important cases which qualify the principles laid down by it in prior cases upon

which plaintiff in error relies. Thus, in *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217, it was held that a state statute requiring every railroad within the State to pay an annual tax for its *franchise*, to be determined by the amount of its gross transportation receipts, and further providing that, when applied to a railroad lying partly within and partly without the State, the tax shall be equal to the proportion of the gross receipts in the State, did not conflict with the Constitution of the United States. In this case Mr. Justice Bradley made his last public utterance from the bench in a strong dissent, concurred in by three other justices, taking the position that the laying of a tax upon the gross receipts of a company, including receipts for interstate and international transportation, was substantially a taxation of the revenues derived from interstate commerce, which had been held in many previous decisions to be unconstitutional, citing *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, and several other cases. The majority of the court, however, was of the opinion that this was an *excise tax* upon the corporation for the privilege of *exercising its franchises* within the State, and that the rule of apportioning the charge to the receipts was reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed.

In *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, it was held, Mr. Justice Harlan alone dissenting, that a statute of New York imposing a tax upon the corporate franchise or business of every corporation, organized under a law of any other State, to be computed by a percentage upon its whole capital stock, was not an unconstitutional interference with interstate commerce, when applied to a manufacturing corporation organized under the laws of Utah, and doing a greater part of its business out of the State of New York, but doing a small part of its business within such State.

The principle involved in the case of *Munn* v. *Illinois*, which has given rise to so much controversy, was carefully reconsidered and adhered to in the case of *Budd* v. *New York*, 143 U. S. 517, although in this case, as in the *Munn case*, there was a dissent by three of the justices.

Argument for Defendant in Error.

In *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, a statute of Tennessee, imposing upon brokers a tax measured by the amount of capital invested or used in their business, was held to be proper, although the business done by the broker in question was the purchase of cotton for customers, residing outside of the State. The gist of the decision was, that as the State has the right to tax occupations, where a resident citizen engaged in such business, the fact that the business done, consisted wholly or partly in negotiating sales between resident and non-resident merchants, did not necessarily make the tax one upon interstate commerce.

In the case at bar, there is nothing in the record to show the plaintiff in error was not a citizen and resident of Pennsylvania; the presumption, therefore, is that he was a citizen and resident of Pennsylvania. Therefore, in the light of the recent decisions of this court, we contend that the fine and penalty imposed on the plaintiff in error by the recorder was not a taxing of goods of Shepard & Co., coming from another State as such, or by reason of their so coming, but a license or excise tax upon the vocation of Brennan, as a resident of Pennsylvania, and a restriction upon the manner of selling said goods — a police regulation of an occupation carried on in a manner offensive to the policy of the State, and an excise tax that did not discriminate in favor of residents or against non-residents. The fee required to be paid by the ordinance under which this suit originated is not a tax, in the common acceptance of that term, but a license fee. It is not a tax upon either the business or property of Shephard & Co., but a condition precedent before the plaintiff in error, Brennan, shall pursue the occupation or vocation of a canvasser, hawker, peddler or agent.

If it be a license fee or license tax, it cannot be a regulation of commerce. *License Tax Cases*, 5 Wall. 462, 471; *Osborne* v. *Mobile*, 16 Wall. 479; *Ward* v. *Maryland*, 12 Wall. 418.

It is competent for the legislature to grant a city or town power to require the payment of money as the condition of exercising particular employments. This is not in the nature of a tax, which must be general, but of an excise on special vocations.

It is the manner in which the employment is exercised that is the subject of this police power and regulation, which is a common law power incident to all municipal corporations.

The ordinance in question does not interfere with the privilege of drummers carrying on business in the city of Titusville, with licensed merchants or dealers. Its provisions are directed only against the "intrusive domiciliary visitation" of canvassers, peddlers, who go from house to house "in relentless pursuit of a purchaser, pressing his wares on the attention of those who neither need nor wish for them," and who from inexperience or ignorance are liable to be imposed upon and defrauded by vagrant persons, who under pretence of being canvassers and peddlers, are frequently nothing but advance couriers of burglaries and other felonies and misdemeanors.

In *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, the court evidently had in mind in rendering its opinion, the transaction of business between experienced licensed merchants and drummers. Bradley, J., in delivering the opinion in that case, concedes that commerce between States can be legitimately affected by state laws, when by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health, and comfort of persons and the protection of property.

What can be more annoying to the people or more destructive of their comfort and happiness, than the "intrusive domiciliary visitations" of itinerant peddlers and canvassers, whose name is legion and who assail the privacy of domestic life and have mostly to deal with innocent and unsuspecting women and children, defrauding them of money and property and then fleeing to other States, leaving their victims without redress? Can it, with reason, be said that the enactment of a law or ordinance which has in view the restriction of such practices is not a legitimate exercise of the police power of a State or city, even though it may indirectly affect interstate commerce?

In the able dissenting opinion of Chief Justice Waite (with whom Mr. Justice Field and Mr. Justice Gray concurred) in *Robbins* v. *Shelby Taxing District*, *supra*, he says, p. 501, "I

am unable to see any difference in principle between a tax on a seller by sample and a tax on a peddler, and yet I hardly believe it would be contended that the provisions of the same statute, now in question, which fixes a license fee for all peddlers in the district, would be held to be unconstitutional in its application to peddlers who come with their goods from another State and expected to go back again. As the law is valid so far as the inhabitants of the State are concerned, no inhabitant can engage in this business unless he pays the tax. If citizens of other States cannot be taxed in the same way for the same business, there will be discrimination against the inhabitants of Tennessee, and in favor of those of other States. This could never have been intended by the legislature, and I cannot believe the Constitution of the United States makes such a thing necessary. The Constitution gives the citizens of each State all the privileges and immunities of citizens in the several States, but this certainly does not guarantee to those who are doing business in States other than their own, immunities from taxation on that business to which citizens of the State where the business is carried on are subjected."

To hold that the citizens of a State should be subject to its police power and regulations, but that canvassers, hawkers, and peddlers coming from other States and infesting the homes of its citizens at all seasons and imposing their worthless goods upon gullible or inexperienced housemaids or housewives, should, under the guise of interstate commerce, be permitted without any restraint whatever to go on deceiving and injuring the public, would be, to use the language of Mr. Justice Williams, "a startling and unlooked-for result of the investment of the general government with the power to regulate commerce."

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

The question in this case is whether a manufacturer of goods, which are unquestionably legitimate subjects of commerce, who carries on his business of manufacturing in one

State can send an agent into another State to solicit orders for the products of his manufactory without paying to the latter State a tax for the privilege of thus trying to sell his goods.

It is true, in the present case, the tax is imposed only for selling to persons other than manufacturers and licensed merchants; but if the State can tax for the privilege of selling to one class, it can for selling to another, or to all. In either case it is a restriction on the right to sell, and a burden on lawful commerce between the citizens of two States. It is as much a burden upon commerce to tax for the privilege of selling to a minister as it is for that of selling to a merchant. It is true, also, that the tax imposed is for selling in a particular manner, but a regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling-house, is surely a regulation of commerce. It must be borne in mind that the goods which the defendant was engaged in selling, to wit, pictures and picture frames, are open to no condemnation, and are unchallenged subjects of commerce. There is no charge of dealing in obscene or indecent pictures, or that the pictures, or the frames, were in any manner dangerous to the health, morals, or general welfare of the community. It must also be borne in mind that the ordinance is not one designed to protect from imposition and wrong either minors, habitual drunkards, or persons under any other affliction or disability. There is no discrimination except between manufacturers and licensed merchants on the one hand, and the rest of the community on the other, and unless it be a matter of just police regulation to tax for the privilege of selling to manufacturers and merchants, it cannot be to tax for the privilege of selling to the rest of the community. The same observation may also be made in respect to the places and manner in which the sales were charged to have been made. It is as much within the scope of the police power to restrain parties from going to a store or manufactory as from going to a dwelling-house for the purposes of making a sale. We do not mean to say that none of these matters to which we have referred are

within the reach of the police power; but simply that the conditions on the one side are no more within its reach than those on the other, so that if, under the excuse of an exercise of the police power, this ordinance can be sustained, and sales in the manner therein named be restricted, by an equally legitimate exercise of that power almost any sale could be prevented.

But again, this license does not purport to be exacted in the exercise of the police, but rather of the taxing power. The statute under which the ordinance in question was passed is found in Laws of Pennsylvania, 1874, pages 230 to 271. Clause 4 of section 20, page 239, grants authority "to levy and collect license taxes on . . . hawkers, peddlers, . . . merchants of all kinds, . . . and regulate the same by ordinance."

The ordinance itself is entitled "An ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville," and the special section requires a license for transacting business, the license being graded in amount by the time for which it is obtained. This license, therefore, the failure to take out which is the offence complained of, and for which defendant was sentenced, is a license for "general revenue purposes" within the very declarations of the ordinance. Even if those declarations had been the reverse, and the license in terms been declared to be exacted as a police regulation, that would not conclude this question, for whatever may be the reason given to justify, or the power invoked to sustain the act of the State, if that act is one which trenches directly upon that which is within the exclusive jurisdiction of the national government, it cannot be sustained. Thus, in *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661, this court, by Mr. Justice Harlan, said:

"Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.

"Illustrations of interference with the rightful authority of the general government by state legislation which was de-

fended upon the ground that it was enacted under the police power, are found in cases where enactments concerning the introduction of foreign paupers, convicts, and diseased persons, were held to be unconstitutional, as conflicting, by their necessary operation and effect, with the paramount authority of Congress to regulate commerce with foreign nations, and among the several States. In *Henderson &c.* v. *Mayor of New York*, 92 U. S. 259, the court, speaking by Mr. Justice Miller, while declining to decide whether in the absence of action by Congress, the States can, or how far they may, by appropriate legislation protect themselves against actual paupers, vagrants, criminals, and diseased persons, arriving from foreign countries, said, that no definition of the police power, and 'no urgency for its use can authorize a State to exercise it in regard to a subject matter which has been confided exclusively to the discretion of Congress by the Constitution.' p. 271. *Chy Lung* v. *Freeman*, 92 U. S. 275. And in *Railroad Co.* v. *Husen*, 95 U. S. 465, Mr. Justice Strong, delivering the opinion of the court, said that 'the police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution.' pp. 473, 474."

In *Walling* v. *Michigan*, 116 U. S. 446, 460, in the opinion delivered by Mr. Justice Bradley, it was said: "The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States government created thereby."

In *Leisy* v. *Hardin*, 135 U. S. 100, 108, Mr. Chief Justice Fuller commenced the opinion of the court with this general statement of the law applicable to questions of this kind:

"The power vested in Congress 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes,' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is coextensive with the subject on which it acts and cannot be stopped at the external boun-

dary of a State, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Brown* v. *Maryland*, 12 Wheat. 419.

"And while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health, and comfort of persons and the protection of property so situated, yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by Congressional action."

And, in the still later case of *Crutcher* v. *Kentucky*, 141 U. S. 47, 59, Mr. Justice Bradley referred to the matter in these words:

"But the main argument in support of the decision of the Court of Appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the State. But it does not follow that everything which the legislature of a State may deem essential for the good order of society and the well-being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce."

So in the case of *Minnesota* v. *Barber*, 136 U. S. 313, in which a law of the State of Minnesota, ostensibly a law for inspection of meats, was declared unconstitutional, the court distinguished in the opinion by Mr. Justice Harlan between that which is mere inspection and in the legitimate exercise of the police power, and that which, under the guise of inspection, is a direct burden upon and obstruction to interstate commerce. Very similar to this was the case of *Brimmer* v. *Rebman*, 138 U. S. 78, in which also an inspection statute of the State of Virginia was set aside for the same reason.

Because a license may be required in the exercise of the police power, it does not follow that every license rests for its validity upon such police power. A State may legitimately make a license for the privilege of doing a business one means of taxation, and that such was the purpose of this ordinance is

obvious, not merely from the fact that in the title it is declared to be for "general revenue purposes," but also from the further fact that, so far as we are informed by any quotations from or references to any part of the ordinance, there is no provision for any supervision, control, or regulation of any business for which by the ordinance a license is required. In other words, so far as this record discloses, this ordinance sought simply to make the various classes of business named therein pay a certain tax for the general revenue of the city.

Even if it be that we are concluded by the opinion of the Supreme Court of the State that this ordinance was enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an act held to be a police regulation, but which in fact affects interstate commerce, can be sustained. It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free.

That this license tax is a direct burden on interstate commerce is not open to question. In the early and leading case of *Brown* v. *Maryland*, 12 Wheat. 419, 444, in which a state law requiring an importer to take out a license and pay $50 before he should be permitted to sell a package of imported goods, was adjudged in conflict with the commerce clause in the national Constitution, Chief Justice Marshall said:

"But should it be proved that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more.

"It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a partic-

ular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. . . . So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made."

In *Welton* v. *Missouri*, 91 U. S. 275, 278, Mr. Justice Field said:

"Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves."

In *Leloup* v. *Mobile*, 127 U. S. 640, 645, are these words from Mr. Justice Bradley:

"Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business."

It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent to regulate it.

These questions of interference by state regulations with interstate commerce have been frequently before this court, and it may not be unwise to examine a few of them. *Welton* v. *State of Missouri*, 91 U. S. 275, presented these facts: Welton was indicted and convicted for acting as a peddler under a statute defining a peddler to be one "going from place to place to sell" goods not the growth, produce, or manufacture of the State, and prohibiting any one from peddling without a license. The conviction was set aside by this court.

It is true that the case turned largely upon the fact of discrimination between products of other States and those of Missouri, but nevertheless the decision is an adjudication that the imposition of a license tax on the peddling of goods is a regulation of commerce.

Robbins v. *Shelby Taxing District*, 120 U. S. 489, was a case closely in point. Robbins was engaged in soliciting in the city of Memphis, Tenn., the sales of goods for a Cincinnati firm, exhibiting samples for the purpose of effecting such sales, his employment being that which is usually denominated that of a drummer. This business was declared by a statute of Tennessee to be a privilege for which a license tax was required. Robbins was convicted of a violation of that statute. The statute made no discrimination between those who represented business houses out of the State and those representing like houses within the State. There was, therefore, no element of discrimination in the case, but, nevertheless, the conviction was set aside by this court on the ground that whatever the State might see fit to enact with reference to a license tax upon those who acted as drummers for houses within the State, it could not impose upon those who acted as drummers for business houses outside of the State (and who were, therefore, engaged in interstate commerce) any burden by way of a license tax. The opinion by Mr. Justice Bradley is elaborate and enters fully into a discussion of the question, citing many authorities. It affirms in the strongest language the exclusive power of Congress over interstate commerce; that its failure to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and that whatever may be the extent to which the police power of the State can go, it cannot go so far as to uphold any regulations directly affecting interstate commerce.

In the case of *Leloup* v. *Mobile*, 127 U. S. 640, a license tax sought to be imposed by the State upon a telegraph company engaged in interstate commerce, was declared beyond the powers of the State.

Asher v. *Texas*, 128 U. S. 129. In that case, a statute requiring from "every commercial traveller, drummer, salesman,

or solicitor of trade, by sample or otherwise, an annual occupation tax of $35" was declared inoperative so far as it affected one soliciting orders for a business house in another State, and the case of *Robbins* v. *Shelby Taxing District* was expressly reaffirmed.

The same doctrine was applied in *Stoutenburgh* v. *Hennick*, 129 U. S. 141, to the case of an agent of a Maryland business house soliciting orders in the District of Columbia without having taken out a license there, as required by an act of the legislative assembly of the District of Columbia.

In *Lyng* v. *Michigan*, 135 U. S. 161, 166, it was said: "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In *McCall* v. *California*, 136 U. S. 104, 111, it appeared that McCall was an agent in San Francisco, California, engaged in soliciting business for an Eastern railroad corporation, but not engaged in selling tickets for that company, or receiving, or paying out money on its account, yet it was held that he was engaged in interstate commerce, and the license tax imposed upon him for the privilege of doing such business was unconstitutional. Mr. Justice Lamar, reviewing the prior cases and replying to the objection that this only indirectly affected the commerce of the road, said: "The test is — Was this business a part of the commerce of the road? Did it assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent."

In *Crutcher* v. *Kentucky*, 141 U. S. 47, 61, an act of the State of Kentucky which forbade the agent of an express company, not incorporated by the laws of that State, from carrying on business without first obtaining a license from the

State, and, as preliminary thereto, that he should satisfy the auditor of the State that the company he represented was possessed of an actual capital of at least $150,000, was held to be a regulation of commerce and invalid. Mr. Justice Bradley, speaking for the court, observed: "The character of police regulation, claimed for the requirements of the statute in question, is certainly not such as to give them a controlling force over the regulations of interstate commerce which may have been expressly or impliedly adopted by Congress, or such as to exempt them from nullity when repugnant to the exclusive power given to Congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void."

Within the reasoning of these cases it must be held that the license tax imposed upon the defendant was a direct burden on interstate commerce, and was, therefore, beyond the power of the State.

The case of *Ficklen* v. *Shelby County*, 145 U. S. 1, is no departure from the rule of decision so firmly established by the prior cases. At least, no departure was intended, though as shown by the division in the court, and by the dissenting opinion of Mr. Justice Harlan, the case was near the boundary line of the State's power. In that case the plaintiffs were in a general commission business, not acting for any particular firm within or without the State. Of the power of a State to impose a license tax upon such a general business there can be no question. The license required by the statute was $50 per annum, plus .10 on every $100 of capital invested, or, if no capital was invested, 2½ per cent on the gross yearly commissions; and at the time of taking out the license the licensees were required to give bond to make return and pay such 2½ per cent at the end of the year. The plaintiffs, for the year 1887, paid each the sum of $50, and having no capital, exe-

cuted bonds for the return and payment of the 2½ per cent. At the end of the year 1887 they failed to make such return and payment, and the authorities refused to issue new licenses for the succeeding year until that was done. Plaintiffs' contention was that, as to one of them, all, and as to the others, most, of their commissions were received on sales of goods forwarded by non-resident parties. On that ground they refused to perform the stipulations of their bonds. It was held that the tax was an entirety, and was not affected by the variable and adventitious results of business from year to year. It could hardly be contended that if the license tax exacted in advance for the privilege of engaging in such business was a fixed sum, a party paying the tax could, on a failure to secure and do any business, recover the tax so paid, for the tax is not for the business done, but for the privilege of engaging in business. So, when the plaintiffs in that case applied for their licenses at the beginning of the year, they assumed the whole liability imposed by the State. That all of it was not paid at once did not affect the measure of liability. Suppose the tax, a fixed sum, had been payable one-half at the commencement and the other half at the close of the year, would it be thought that, having paid the first half at the commencement of the year, they could resist payment of the second half on the ground that half of their commissions were received on goods shipped from outside the State? In other words, the tax imposed was for the privilege of doing a general commission business within the State, and whatever were the results pecuniarily to the licensees, or the manner in which they carried on business, the fact remained unchanged that the State had, for a stipulated price, granted them this privilege. It was thought by a majority of the court that to release them from the obligations of their bonds on account of the accidental results of the year's business was refining too much, and that the plaintiffs who had sought the privilege of engaging in a general business should be bound by the contracts which they had made with the State therefor. In the opinion in that case, by the Chief Justice, the authorities which are referred to in this opinion were cited, and the general rule was

announced as is here stated. We only refer thus at length to that case to show the distinction between it and this case, and to notice that in the opinion was reaffirmed the proposition that "no State can levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on."

For these reasons the judgment of the Supreme Court of the State of Pennsylvania is

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

BLITZ *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 1102. Argued April 13, 1894. — Decided April 30, 1894.

B. having been indicted under Rev. Stat. § 5511 for voting more than once at the same election for a Representative in Congress, a special deputy of the marshal swore at the trial that he saw B. vote twice at the poll. On cross-examination he was asked why he did not arrest B. when he saw that he had thus voted. The question, being objected to, was excluded. *Held*, that it was irrelevant and was properly excluded.

The refusal by a Federal court to grant a new trial cannot be reviewed on a writ of error.

An indictment under Rev. Stat. § 5511 for knowingly personating and voting under the name of another at an election at which a Representative in Congress and also state officers were to be elected, is fatally defective if it fails to clearly charge that the accused so voted for a Representative in Congress.

A count in an indictment under that section which charges that the defendant did then and there unlawfully, knowingly, and feloniously vote at said election for a candidate for the same office for Representative in the Congress of the United States, more than once, describes the offence with sufficient certainty, and the election at which it took place sufficiently by such reference to the date of it named in a previous count in the indictment.

Opinion of the Court.

The indictment in this case contained three counts, specifying three separate offences against Rev. Stat. § 5511. The defendant was convicted of all. A motion in arrest of judgment under the second count being entertained, he was sentenced, under the first conviction, to imprisonment for a term commencing on a day named, and under the third conviction to a further term, commencing on the expiration of the first term. This court, holding the first count in the indictment to be fatally defective, and sustaining the arrest of judgment under the second count, directs that the term of imprisonment under the third count shall be held to commence on the day named for the commencement of the first term.

THE case is stated in the opinion.

Mr. John C. Fay for plaintiff in error.

Mr. Assistant Attorney General Conrad for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

By section 5511 of the Revised Statutes of the United States it is provided:

"If, at any election for Representative or Delegate in Congress, any person knowingly personates and votes, or attempts to vote, in the name of any other person, whether living, dead, or fictitious; or votes more than once at the same election for any candidate for the same office; or votes at a place where he may not be lawfully entitled to vote; or votes without having a lawful right to vote; or does any unlawful act to secure an opportunity to vote for himself or any other person; or by force, threat, intimidation, bribery, reward, or offer thereof, unlawfully prevents any qualified voter of any State, or of any Territory, from freely exercising the right of suffrage, or by any such means induces any voter to refuse to exercise such right, or compels, or induces, by any such means, any officer of an election in any such State or Territory to receive a vote from a person not legally qualified or entitled to vote; or interferes in any manner with any officer of such election in the discharge of his duties; or by any such means, or other unlawful means, induces any officer of an election or

officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty or any law regulating the same; or knowingly receives the vote of any person not entitled to vote, or refuses to receive the vote of any person entitled to vote, or aids, counsels, procures, or advises any such voter, person, or officer to do any act hereby made a crime, or omit to do any duty the omission of which is hereby made a crime, or attempt to do so, he shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three years, or by both, and shall pay the costs of the prosecution."

Under this statute an indictment was found against the plaintiff in error in the District Court of the United States for the Western Division of the Western District of Missouri. That indictment was as follows:

"The grand jurors of the United States of America, duly chosen, selected, empanelled, sworn, and charged to inquire of and concerning crimes and offences in the Western District of Missouri and Western Division thereof, on their oaths present that on the 8th day of November, A.D. 1892, at Kansas City, in the county of Jackson and State of Missouri, there was then and there an election duly and in due form of law had and held for choice of Representative in the Congress of the United States, which said place aforesaid was then and there a portion of the Fifth Congressional District of Missouri.

"And the grand jurors aforesaid upon their oaths aforesaid do further find and present that at the said election one Morris Blitz did then and there unlawfully, falsely, knowingly, and feloniously personate and vote and attempt to vote in the name of another person other than his own name to these grand jurors unknown, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

"And the grand jurors upon their oaths aforesaid, in the name and by the authority of the United States, do further find and present that at said election the said Morris Blitz did

then and there, in the Western Division of the Western District of Missouri, unlawfully, falsely, knowingly, and feloniously vote at a place, to wit, at the sixth precinct in the second ward in said city, where he was not then and there lawfully entitled to vote, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

"And the grand jurors aforesaid upon their oaths aforesaid, in the name and by the authority of the United States, do further find and present that at the said election the said Morris Blitz did then and there, in the Western Division of the Western District of Missouri, unlawfully, knowingly, and feloniously vote at said election for a candidate for the same office for Representative in the Congress of the United States more than once, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States."

A verdict of guilty having been returned upon each count of the indictment, the defendant moved for a new trial and in arrest of judgment upon written grounds filed. The motion for a new trial was denied, and the motion in arrest of judgment was sustained as to the second count of the indictment, and overruled as to the first and third counts. Thereupon the defendant was sentenced upon the first count to imprisonment in the penitentiary for the period of one year and a day, such imprisonment to begin on the 28th day of November, 1893, — on which day the sentence was pronounced, — and, upon the third count, to imprisonment for a like period, to begin upon the expiration of the sentence upon the first count.

1. The first assignment of error relates to the refusal of the court below to permit Wachs, a witness for the prosecution, to answer a certain question propounded to him on cross-examination. Upon examination-in-chief the witness stated that he was a special deputy of the United States marshal at the general election in November, 1892; that during the whole of the day of the election he was at the voting place in precinct number six, in Kansas City, Missouri, and that he saw

Blitz, whom he had known by sight for about three years, vote twice at that poll, once in the morning about ten o'clock, and again in the afternoon between three and four o'clock. Upon cross-examination he was asked, "Why did you not arrest Blitz when you saw that he had voted?" The witness was not allowed to answer this question, and to that action of the court the defendant excepted.

The question was clearly irrelevant, and was properly excluded. The reasons, whatever they may have been, that induced the witness not to arrest the defendant when the latter voted the second time at the same election, did not throw any light upon the issue to be determined. If the object was to test the accuracy or credibility of the witness, it is quite sufficient to say that the extent to which a cross-examination may be allowed for such a purpose — especially where, as in this case, the question had no reference to any matter disclosed by the examination-in-chief — is largely subject to the sound discretion of the trial court, and the exercise of that discretion is not reviewable upon writ of error; certainly not where the question, upon its face, suggests nothing material to the inquiry whether the defendant is guilty or not guilty of the specific offence charged in the indictment.

2. The overruling of the motion for new trial is next assigned for error. We had supposed that it was well understood by the bar that the refusal of a court of the United States to grant a new trial cannot be reviewed upon writ of error. *Parsons* v. *Bedford*, 3 Pet. 433, 447; *Railroad Co.* v. *Fraloff*, 100 U. S. 24; *Wabash Railway Co.* v. *McDaniel*, 107 U. S. 454, 456.

3. The third assignment of error relates to the overruling of the motion to arrest the judgment upon the first and third counts of the indictment.

We are of opinion that this motion should have been sustained in respect to the first count. The statute makes it an offence for any person to knowingly personate and vote, or attempt to vote, in the name of another person, whether living, dead, or fictitious, at an election for Representative or Delegate in Congress. It appears in this case — and if it did

not appear, the court would judicially know — that the election referred to in the introductory part of the indictment was a general one at which voters were at liberty to vote at the same poll, by printed ballot, not only for a Representative in Congress, but for state officers, including Presidential electors. It was one election for all such officers, and the exercise of the privilege of voting was manifested by one act upon the part of the voter, namely, depositing in the ballot-box a general ballot showing, upon its face, for what officers he voted.

The first count charged that the defendant knowingly personated and voted, and attempted to vote, in the name of another person to the grand jurors unknown, at an election had and held for choice of Representative in the Congress of the United States. But that was not, except by inference, a charge that the defendant, in fact, voted for Representative in Congress. He may have voted only for state officers, and yet it could be said, not unreasonably, that he voted at an election had and held for Representative in Congress. If, in voting for a state officer at such election, he knowingly personated and voted in the name of another, it was an offence against the State, punishable alone by the State, although the general election at which he voted was one at which a Representative in Congress was chosen. The object of section 5511 was to prevent frauds that would affect the vote for Representatives in Congress, and not to bring elections for state officers under the control of the general government. It was consequently held, in *Coy's case*, that a conspiracy by unlawful means to induce the officers of election, appointed by the State, to omit the duty imposed upon them by the state law, in respect to the custody and safe-keeping of sealed returns showing the results of an election held for both state officers *and* for Representatives in Congress, was an offence against the United States, although the only purpose of the conspirators may have been to obtain the custody of such returns for the purpose of fraudulently changing them so far as they applied to certain state officers. This court, speaking by Mr. Justice Miller, said: "The object to be

attained by these acts of Congress is to guard against the danger and the opportunity of tampering with the election returns, as well as against direct and intentional frauds upon the vote for members of that body. The law is violated whenever the evidences concerning the votes cast for that purpose are exposed or subjected in the hands of improper persons or unauthorized individuals to the opportunity for their falsification, or to the danger of such changes or forgeries as may affect that election, whether they actually do so or not, and whether the purpose of the party guilty of thus wresting them from their proper custody and exposing them to such danger might accomplish this result." Again: "The manifest purpose of both systems of legislation is to remove the ballot-box, as well as the certificates of the votes cast, from all possible opportunity of falsification, forgery, or destruction; and to say that the mere careless omission, or the want of an intention on the part of persons who are alleged to have acted feloniously in the violation of those laws, excuses them because they did not intend to violate their provisions as to all the persons voted for at such an election, although they might have intended to affect the result as regards some of them, is manifestly contrary to common sense, and is not supported by any sound authority." *In re Coy*, 127 U. S. 731, 754, 755.

It is not to be inferred from the decision in that case that section 5511 is applicable to any act or omission of duty upon the part of an officer of election, or of a voter or other person, except such act or omission of duty as affected or might affect the integrity of the election for a Representative in Congress. The conspiracy charged in that case did imperil the integrity of the vote for Representative in Congress, because the returns of the election related to Representative in Congress as well as to state officers, and were liable to be falsified if they passed, before certificates of election were issued, into the hands of unauthorized persons. But this reasoning has no application to the present case. Voting, in the name of another, for a state officer, cannot possibly affect the integrity of an election for Representative in Congress. With frauds of

that character the national government has no concern, and, therefore, an indictment under Rev. Stat. § 5511 for knowingly personating and voting under the name of another, should clearly show that the accused actually voted for a Representative in Congress, and not simply that in voting he falsely personated another at a general election at which such Representative was or could have been chosen. In cases like the present one, it should not be left in doubt, or to mere inference, from the words of the indictment, whether the offence charged was one within Federal cognizance. *United States* v. *Morrissey*, 32 Fed. Rep. 147; *United States* v. *Seaman*, 23 Fed. Rep. 882. The general rule that an indictment for an offence purely statutory is sufficient if it pursues substantially the words of the statute, is subject to the qualification, fundamental in the law of criminal procedure, "that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defence and plead the judgment as a bar to any subsequent prosecution for the same offence." *United States* v. *Simmons*, 96 U. S. 360, 362; *United States* v. *Hess*, 124 U. S. 483, 488. As said in *United States* v. *Carll*, 105 U. S. 611, 612, it is not sufficient to set forth the offence in the words of the statute, "unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished."

The want of care in framing the first count is further shown by the fact that, although voting and attempting to vote, knowingly, in the name of another, for Representative in Congress, may be distinct offences, under the statute, the indictment charges that the defendant did knowingly "personate and vote *and* attempt to vote" in the name of another person. If the attempt to so vote was immediately followed by voting, then the allegation that the accused attempted to vote was unnecessary. The first count leaves it in doubt whether it was intended to charge two distinct offences, or only the offence of voting in the name of another person. This defect alone might not have been sufficient, after verdict, as ground

for arresting the judgment on that count. But it is referred to as supporting or illustrating the rule that enjoins such certainty in an indictment as will inform the accused of the precise nature of the charge against him.

In respect to the third count of the indictment, but little need be said. It is clearly sufficient, for it charges that "at said election" the defendant voted more than once for Representative in Congress. Such double voting is made an offence by the statute. The only question that could arise upon the third count is whether the words of the first count, referring to the election had and held on the 8th day of November, 1892, for Representative in Congress, can be drawn through the second count into the third count by the words, "at the said election." As the election named in the first count is the only one specifically described in the indictment, there can be no doubt that the words "at said election" in the third count refer to the election described in the first count.

In *Commonwealth* v. *Clapp*, 16 Gray, 237, 238, where the question was as to the sufficiency of the description of the prosecutor and the defendant in the second count on which the defendant was convicted, it was held that that count could be supported by reference to the first count upon which the defendant was acquitted, the court observing that in the most approved books of forms, ancient and modern, it is found, almost invariably, when an indictment contains more than one count, that all the counts, after the first, omit the description of the defendant, which is contained and is necessary in the first, and describe him only as "the said A. B." In *Phillips* v. *Fielding*, 2 H. Bl. 123, 131, Gould, J., recalled the case of an indictment for forgery, in which there were three counts for forgery and three for the utterance; in the first count the prisoner was particularly described, and the grand jury having rejected the three first counts, an objection was raised that the remaining counts described him, "the said A. B.," by reference to the first. But all the judges, he said, held the description to be good. So, in 1 Chitty's Cr. Law, 250: "Though every count should appear upon the face of it to charge the defendant with a distinct offence, yet one

count may refer to matter in any other count so as to avoid unnecessary repetitions; as, for instance, to describe the defendant as 'the said, etc.'"; and "though the first count should be defective, or be rejected by the grand jury, this circumstance will not vitiate the residue." See also 2 Gabbett's Cr. Law, 248; *Reg.* v. *Huntley*, 8 Cox's Crim. Cas. 260; *Queen* v. *Waverton*, 17 Q. B. 562.

While repetition may be avoided by referring from one count to another, and, therefore, within the principles of the adjudged cases, a subsequent count of an indictment may be sustained, even if it refers to allegations in a previous count or counts which have been adjudged to be insufficient, the reference should be sufficiently full, in effect, "to incorporate the matter going before with that in the count in which it is made." 1 Bishop Cr. Pro. § 431; Wharton's Cr. Pl. & Pr. § 299.

As judgment was pronounced on both the first and third counts; as the term of imprisonment under the judgment on the third count was to commence from the expiration of the judgment on the first count; and as no judgment should have been pronounced upon the first count, the contention of the plaintiff is that the cause must be remanded with directions for a new trial.

In *Kite* v. *Commonwealth*, 11 Met. (Mass.) 581, 585, it appeared that the accused was sentenced for a named period to confinement at hard labor, to take effect from and after the expiration of three previous sentences specified. The judgment was objected to as erroneous and void, because there were not three former sentences, legal and valid, and, therefore, no fixed time from which the punishment on the last sentence should begin. Chief Justice Shaw, referring to this objection, and delivering the unanimous judgment of the court, said that it was not error in a judgment in a criminal case to make one term of imprisonment commence when another terminates. "It is as certain," he said, "as the nature of the case will admit, and there is no other mode in which a party may be sentenced on several convictions. Though uncertain at the time, depending upon a possible contingency that the

imprisonment on the former sentence will be remitted or shortened, it will be made certain by the event. If the previous sentence is shortened by a reversal of the judgment or a pardon, it then expires; and then, by its terms, the sentence in question takes effect as if the previous one had expired by lapse of time. Nor will it make any difference that the previous judgment is reversed for error. It is voidable only, not void; and until reversed by a judgment, it is to be deemed of full force and effect; and though erroneous and subsequently reversed on error, it is quite sufficient to fix the term at which another sentence shall take effect." See also *Dolan's Case*, 101 Mass. 219, 223.

In these views we concur. A reversal of the judgments on both the first and third counts in this case could only result in another trial upon the third count, the first count being insufficient. But as there has been a trial upon the third count, the sentence, in respect to that count, should stand, and the term of imprisonment under it be held to commence from the 28th day of November, 1893, the date fixed by the judgment below for imprisonment to begin under the sentence on the first count.

The judgment upon the first count must be reversed, and the cause remanded with directions to arrest judgment upon that count. The judgment below, so far as it relates to the third count, is affirmed.

McBROOM *v.* SCOTTISH MORTGAGE AND LAND INVESTMENT COMPANY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 1028. Submitted January 5, 1894. — Decided March 5, 1894.

The statutes of New Mexico, Compiled Laws 1884, §§ 1736–1738, do not permit the receiving of usurious interest by way of, or under the guise of discount, commission, agency, or other subterfuge.

Those statutes make void a contract of loan providing for usurious interest only as to the interest in excess of what the statute allows.

Citations for Defendant in Error.

The limitation of three years, under the statutes of New Mexico, within which the borrower may sue for double the amount of usurious interest collected and received from him does not commence to run, and consequently the right of action therefor does not accrue, until the lender has collected or received more than the original debt with interest.

THE case is stated in the opinion.

Mr. Frank Springer, for plaintiff in error, submitted on his brief, citing: *Fowles* v. *Equitable Trust Co.*, 141 U. S. 384; *Sherwood* v. *Roundtree*, 32 Fed. Rep. 113; *New England Mortgage Co.* v. *Gay*, 33 Fed. Rep. 636; *Loyd* v. *Williams*, 3 Wilson, 250; *S. C. sub nom. Lloyd* v. *Williams*, 2 Wm. Bl. 722; *Fisher* v. *Beasley*, Doug. 235; *Wade* v. *Wilson*, 1 East, 195; *Scurry* v. *Freeman*, 2 Bos. & Pul. 381; *Wood* v. *Grimwood*, 10 B. & C. 689; *Grow* v. *Albee*, 19 Vermont, 540; *Nelson* v. *Cooley*, 20 Vermont, 201; *Davis* v. *Converse*, 35 Vermont, 503; *Harvey* v. *National Ins. Co.*, 60 Vermont, 209; *Commonwealth* v. *Frost*, 5 Mass. 53; *Simpson* v. *Warren*, 15 Mass. 460; *Stevens* v. *Lincoln*, 7 Met. (Mass.) 525; *Smith* v. *Robinson*, 10 Allen, 130; *Bank of Peterborough* v. *Childs*, 130 Mass. 520; *Kirkpatrick* v. *Houston*, 4 W. & S. 115; *Oyster* v. *Longnecker*, 16 Penn. St. 269; *Brown* v. *Bank of Erie*, 72 Penn. St. 209; *Brown* v. *McIntosh*, 39 N. J. Law, 22; *Farmers' & Mechanics' Bank* v. *Dearing*, 91 U. S. 29; *Oates* v. *Nat. Bank*, 100 U. S. 239; *Bank of the United States* v. *Owens*, 2 Pet. 527; *Bank of the United States* v. *Waggener*, 9 Pet. 378; *Fleckner* v. *Bank of the United States*, 8 Wheat. 338.

Mr. Andrieus A. Jones and *Mr. Eugene A. Fiske*, for defendant, submitted on their brief, citing: *Bank of the United States* v. *Waggener*, 9 Pet. 378; *Condit* v. *Baldwin*, 21 N. Y. 222; *Call* v. *Palmer*, 116 U. S. 98; *Grant* v. *Phœnix Life Ins. Co.*, 121 U. S. 271; *Simpson* v. *Warren*, 15 Mass. 460; *Smith* v. *Robinson*, 10 Allen, 130; *Hawkins* v. *Welch*, 8 Missouri, 490; *Kendall* v. *Crouch*, 88 Kentucky, 199; *Peterborough Nat. Bank* v. *Childs*, 130 Mass. 519; *Hintermister* v. *First National Bank*, 64 N. Y. 212; *Johnson* v.

Gloversville Bank, 74 N. Y. 329; *Harvey* v. *National Life Ins. Co.*, 60 Vermont, 209; *Scurry* v. *Freeman*, 2 Bos. & Pul. 381; *Duncan* v. *First National Bank*, Thompson's Nat. Bank Cases, 360; *Pangborne* v. *Westlake*, 36 Iowa, 546; *Miller* v. *Ammon*, 145 U. S. 421; *Lazear* v. *National Bank*, 52 Maryland, 78; *Farmers' & Mechanics' Bank* v. *Harrison*, 57 Missouri, 503; *Stevens* v. *Lincoln*, 7 Met. (Mass.) 525.

Mr. Justice Harlan delivered the opinion of the court.

The defendant in error, the Scottish Mortgage and Land Investment Company of New Mexico, Limited, is a private corporation organized under the laws of Great Britain for the purpose, among others, of lending money in this country on the security "of real or heritable or of leasehold estate," or "of cattle, sheep, or other live stock, and movable goods and chattels."

That company agreed to loan McBroom, the plaintiff in error, the sum of $65,000, payable six years after date with interest at the rate of twelve per cent per annum. As evidence of the loan he executed and delivered his principal note for the above amount and six interest notes, one for $2842.19, payable December 31, 1886, five for $7800 each, payable, respectively, December 31, 1887, 1888, 1889, 1890, 1891, and 1892, and one for $4965, payable August 20, 1892. These notes were secured by a deed of trust upon certain lands and by a chattel mortgage upon cattle, horses, and other personal property.

The amount so borrowed was paid to McBroom by the company in the latter part of September, 1886, and out of the sum received he paid to Dinkel, the company's agent in New Mexico, through whom the loan was negotiated, the sum of $6500.

McBroom's interest note for $2842.19, falling due December 31, 1886, was paid by him at its maturity. Aside from the bonus of $6500 received by the company's agent, no other payment on account of this debt has ever been made.

By the statutes of New Mexico it is provided that "in written contracts for the payment of money it shall not be legal to recover more than twelve per cent interest per an-

num;" that "any person, persons, or corporation who shall hereafter charge, collect, or receive from any person a higher rate of interest than twelve per cent per annum shall be guilty of a misdemeanor, and upon conviction thereof before the district court or a justice of the peace, shall be fined in a sum of not less than twenty-five dollars nor more than one hundred dollars; and such person, persons, or corporation shall forfeit to the person of whom such interest was collected or received, or to his executors, administrators, or assigns, double the amount so collected or received upon any action brought for the recovery of the same within three years after such cause of action accrued;" and that "the provisions of this act shall also apply to any person, persons, corporation, or officer of the same who may charge, receive, or collect a higher rate of interest than twelve per cent per annum by means of discount, commission, agency, or any other subterfuge." Act of April 3, 1884, Sess. Laws, New Mexico, 1884, c. 80; Compiled Laws of New Mexico, 1884, §§ 1736, 1737, 1738.

McBroom brought this action under the above statute to recover from the defendant in error double the amount alleged to have been collected and received by the corporation in excess of the legal rate of interest. The declaration, in one count, charges that the $6500 paid to the company's agent and the $2842.19 paid in discharge of the interest note maturing December 31, 1886, were in excess of what the company was authorized by the statute to charge, collect, or receive, and upon that basis judgment was asked for $18,660.20. At the trial the plaintiff withdrew all claim except for an amount double the sum of $6500 paid to Dinkel, the company's agent.

There was a verdict and judgment against the company for $13,000. The judgment was reversed by the Supreme Court of the Territory, and the cause was remanded with directions to proceed in accordance with the opinion of that court. Subsequently, at the request of McBroom, in order to facilitate an appeal by him to this court, the judgment was so modified that a *venire de novo* was not awarded, and upon the facts in the record, the Supreme Court of the Territory adjudged that the company go hence without day, and recover

its costs in that court as well as in the court of original jurisdiction. The judgment of the court below, therefore, became a final one. 30 Pac. Rep. 859.

The general grounds upon which the court below proceeded were that the contract in question was valid to the extent of the principal sum and the legal interest; that all payments made by the borrower, whether such payments were made on account of usury or as bonus or commission, should be applied in reduction of the debt; and that the borrower was not entitled to recover the statutory penalty while any portion of the amount really loaned, with legal interest, after crediting all payments, remained unsatisfied.

If, when receiving the bonus of $6500 from the borrower, Dinkel, the agent of the defendant in New Mexico, represented his principal, the contract in question was usurious; for that sum and the aggregate amount of the notes given for interest exceeded the highest rate of interest that could be charged, collected, or received, under the laws of New Mexico, on the sum loaned to McBroom. Upon this point the court below said: "In the view that we have taken of the matter it is immaterial to determine whether Dinkel was an agent or whether as an officer he was a part of the corporation, so that a transaction with him was a transaction with the corporation itself; for the fourth article of the agreement between him and the home office, as already shown, provided that all such commissions and bonuses should enure to the benefit of the company. In view of this provision of his contract and of the fact that the company had knowledge of each step taken by him, it is to be presumed that he was acting for the company. The facts in this case bring it clearly within the rule laid down by the Supreme Court of the United States in the case of *Fowler* v. *Equitable Trust Co.*, 141 U. S. 384, where a foreign corporation (whose agent in the State accepted a commission from the borrower on loans procured from such foreign corporation) was held to have received the proceeds of the usurious transaction, the commission paid to the agent being in excess of the highest rate of interest allowed by law." We entirely concur in these views. The

statute of New Mexico does not permit the receiving of usurious interest, by way of, or under the guise of, "discount, commission, agency, or any other subterfuge."

Was the contract between the parties void as to the amount loaned with legal interest thereon, because it provided for, or in its execution involved, the payment of usurious interest? The plaintiff insists that it was, and, consequently, that a cause of action accrued immediately upon the payment of the bonus of $6500 to the company's agent, or at least from the first payment of interest for a fixed period. This question must first receive attention.

Of course, effect must be given to the intention of the legislature as manifested by the words of the statute, interpreted according to their natural signification. And in ascertaining that intention, all of its provisions must be considered together. As said in *Harris* v. *Runnels*, 12 How. 79, 84: "Before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, the statute must be examined as a whole to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice." So, in *Pratt* v. *Short*, 79 N. Y. 437, 445: "A prohibitory statute may itself point out the consequences of its violation, and if, on a consideration of the whole statute, it appears that the legislature intended to define such consequences and to exclude any other penalty or forfeiture than such as is declared in the statute itself, no other will be enforced, and if an action can be maintained on the transaction of which the prohibited transaction was a part, without sanctioning the illegality, such action will be entertained." See also *Pangborn* v. *Westlake*, 36 Iowa, 546, 549, and authorities there cited.

The statute of New Mexico does not declare a contract

providing for usurious interest to be absolutely void in respect to the amount loaned and legal interest thereon, but only imposes a fine upon any person or corporation charging, collecting, *or* receiving a higher rate of interest than twelve per cent per annum, and forfeits to the person, from whom such interest is collected or received, or to his executors, administrators, or assigns, double the amount so collected or received — the action to recover such penalty to be brought within three years after the cause of action accrues. Construing sections 1736, 1737, and 1738 together, the statute does not prohibit the recovery of the amount loaned with legal interest. No such consequence, as the forfeiture of the principal and legal interest, is visited upon the lender. And that seems to be the view expressed by the Supreme Court of the Territory of New Mexico when, construing the local statute, in *Milligan* v. *Cromwell*, 3 New Mexico, 330, it said: "If it should not be legal to recover more than 12 per cent interest per annum upon written contracts, the converse of that proposition would seem to follow as a necessary consequence that it shall be lawful to recover on such contract 12 per cent interest per annum." It is true that, by necessary implication, the contract is void as to any interest stipulated to be paid, in excess of the highest rate allowed by the statute. But as the statute only imposes a fine for charging, collecting, or receiving usurious interest, and gives to the borrower a right to recover double the amount of such interest collected or received from him, the courts ought not to declare the contract void as to principal and legal interest. That would add a penalty not prescribed by the statute.

This question, substantially as now presented, has often arisen in cases under the section of the national banking act, providing that the knowingly taking, receiving, reserving, or charging a rate of interest, in excess of that allowed by the act, shall be adjudged a forfeiture of the entire interest, and, in case a greater rate is paid, gives the person paying it, and his legal representatives, a right, by suit brought within a specified time, to recover back twice the amount so paid. In reference to that act this court has said that "where a statute

prescribes a rate of interest and simply forbids the taking of more, and more is contracted for, the contract is good for what might lawfully be taken. . . . Where a statute creates a new offence and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes." *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, 35. So, in *Oates* v. *National Bank*, 100 U. S. 239, 249, where one of the questions was whether a bank could be deemed a *bona fide* holder of a negotiable note, having received it under a contract which, in its execution, involved a violation of the usury laws of the State, this court said: "The statute under which the bank was organized, known as the National Banking act, does not declare the contract under which the usurious interest is paid to be *void*. It denounces no penalty other than a forfeiture of the interest which the note or bill carries, giving to the debtor the right to sue for and recover twice the amount of interest so paid. If we should declare the contract of indorsement void, and, consequently, that no right of action passed to the bank on the note transferred as collateral security, an additional penalty would thus be added beyond those imposed by the law itself."

These decisions are in harmony with prior and subsequent decisions of this court. In *Fleckner* v. *Bank of the United States*, 8 Wheat. 338, 355, 353, where one of the questions was whether a certain discount was usurious, the court said: "The statutes of usury of the States, as well as of England, contain an express provision that usurious contracts shall be utterly void; and without such an enactment the contract would be valid, at least in respect to persons who were strangers to the usury. The taking of interest by the bank beyond the sum authorized by the charter would doubtless be a violation of its charter, for which a remedy might be applied by the government; but as the act of Congress does not declare that it shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery." Again, in the same case: "The act has not pronounced that such a violation [the dealing in notes]

makes the transaction or contract *ipso facto* void, but has punished it by a specific penalty of treble the value." So in *De Wolf* v. *Johnson*, 10 Wheat. 367, 392, in which was said: "The law of Rhode Island certainly forbids the contract of loan for a greater interest than six per cent, and so far no court would lend its aid to recover such interest. But the law goes no farther. It does not forbid the contract of loan, nor preclude the recovery of the principal under any circumstances. The sanctions of that law are the loss of the interest and a penalty to the amount of the whole interest and one-third of the principal if sued for within a year. On what principle could this court add another to the penalties declared by the law itself?"

In line with the above cases are those in which national banks have been held entitled to recover upon securities taken in the course of business, but in violation of the act of Congress. In *National Bank* v. *Matthews*, 98 U. S. 621, 627, the court said: "The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined." *National Bank* v. *Whitney*, 103 U. S. 99, 103; *Smith* v. *Sheeley*, 12 Wall. 358, 361.

To this general class of cases belongs *Fritts* v. *Palmer*, 132 U. S. 282, 289, where the question was whether a deed for real estate in Colorado, made to a Missouri corporation organized to do business in Colorado, but which had not filed in the office of the Secretary of State of the latter State a copy of its charter of incorporation, etc., was absolutely void, passing no title to the grantee. The statutes of Colorado provided that no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members should purchase or hold real estate in that State, except as provided for in the act; that every company incorporated under the laws of any foreign state or kingdom, or of

any State or Territory of the United States, beyond the limits of Colorado, and then or thereafter doing business within that State, should file in the office of the Secretary of State a copy of its charter of incorporation; and that failure to comply with these provisions should render each and every officer, agent, and stockholder so failing therein, jointly and severally liable on any and all contracts of such company made within that State during the time that such corporation is so in default. This court said: "The constitution and laws of Colorado, it should be observed, do not prohibit foreign corporations altogether from purchasing or holding real estate within its limits. They do not declare absolutely or wholly void, as to all persons, and for every purpose, a conveyance of real estate to a foreign corporation which has not previously done what is required before it can rightfully carry on business in the State. Nor do they declare that the title to such property shall remain in the grantor, despite his conveyance. So far as we are aware, the only penalty imposed by the statutes of Colorado upon a foreign corporation carrying on business in the State before acquiring the right to do so, is found in section 262 of the same chapter. . . . The fair implication is that, in the judgment of the legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that State. It is not for the judiciary, at the instance or for the benefit of private parties, claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting, for the benefit of such parties, the estate thus conveyed to the corporation and by it conveyed to others."

To the cases may be added the following: *Lazear* v. *Union Nat. Bank*, 52 Maryland, 78, 121, in which the court, referring to statutes regulating usury, held that a contract, under which a greater interest is taken than the law allows, is not, for that reason, void, unless the law itself provides that the taking of illegal interest shall be attended by that result; and *Farmers' & Traders' Bank* v. *Harrison*, 57 Missouri, 503,

509, in which the court, referring to the prohibitions of usury by statute, said that the measure of illegality or immorality is the extent of the prohibition, and that applies not to the *loan*, in which there is no moral vice, but only to the forbidden excess of interest.

Our conclusion upon this branch of the case is that, upon principle and authority, the contract of loan in question providing for usurious interest cannot be held void, except as to interest in excess of what the statute allowed to be charged, collected, or received.

The contract of loan not being void, except as to the excess of interest stipulated to be paid, the question arises whether the lender is liable to an action for the penalty prescribed by the statute, so long as the principal debt, with legal interest thereon, after deducting all payments, is unpaid. We are of opinion that this question must be answered in the negative. While, under the statute, the mere *charging* of usurious interest may be a misdemeanor for which the lender can be fined, whether such usurious interest is or is not collected or received, the borrower has no cause of action until usurious interest has been actually collected or received from him. Such is the mandate of the statute. And interest cannot be said to have been collected or received, in excess of what may be lawfully collected and received, until the lender has, in fact,— after giving credit for all payments,— collected or received more than the sum loaned, with legal interest. Such, in our judgment, is the true construction of the statute of New Mexico. In this view, the limitation of three years, within which the borrower may sue for double the amount of usurious interest collected and received from him, does not commence to run, and, therefore, the cause of action does not accrue, until the lender has actually collected or received more than the original debt with legal interest. These conclusions are supported by adjudged cases.

In *Duncan* v. *First Nat. Bank of Mount Pleasant*, in the District Court of the United States for the Western District of Pennsylvania, it was said: "From the origin of the loan, from the retaining of the first discount through all the re-

newals up to the time of final payment of the principal, or up to the time of entering judgment, there is a *locus penitentiæ* for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it and lessen the principal. . . . Up to that time he may make this election. When payment is actually made or judgment entered, the election is made, and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete." Thompson's National Bank Cases, 360, 362.

In *Stevens* v. *Lincoln*, 7 Met. 525, 528, which was an action, under a statute of Massachusetts, authorizing suit to recover threefold the amount of interest paid, it being alleged that interest had been paid at a greater rate than the law allowed, the court said: "In regard to the payment of $1458.91, whether this was a payment of the usurious interest or a part of it, we are of opinion, that while the usurious interest is unpaid, there remains the *locus penitentiæ;* that the party may relinquish it, and recover for the balance of his debt — the contract not being rendered void by the statute. And in the absence of proof as to any appropriation of a partial payment, the law will apply a payment to the valid demand rather than to the illegal one; and the balance which remains unpaid, if it exceeds the usury agreed to be paid, includes the usury; so that, on one side, the debtor shall not recover back any part of that which he honestly owed, by the allegation, on his part, that the payment made by him was the payment of the usury; nor, on the other hand, will the law permit the creditor to secure to himself the avails of his illegal contract, and when he sues for the balance due on the contract, to aver that the usurious interest was contained in the previous payment, and that the residue is justly due." The same rule was affirmed in *Saunders* v. *Lambert*, 7 Gray, 484, 486.

So in *Harvey* v. *National Life Ins. Co.*, 60 Vermont, 209, 211: "As the result of that transaction the plaintiff went away with nine hundred dollars in money — all he had ever

received from the defendant as his own money, and the defendant with the plaintiff's note for $1000. . . . Hence the one hundred dollar usury entered into and became a part of the mortgage note. The payments made by the plaintiff and by Mrs. Hardaker prior to the time of taking up the note, would in law be applied towards the payment of the legal portion of the note. . . . All the payments made by her, as well as those made by the plaintiff, up to the final payment, were in law to be applied towards the liquidation of the legal portion of the note. Hence the plaintiff is entitled to recover what was paid as the final payment of the note, above what was then legally due upon the note after applying the payments made thereon in liquidation of the legal portion of the note with interest." To the same effect are the following authorities: *Kendall* v. *Crouch*, 88 Kentucky, 199, 202; *Smith* v. *Robinson*, 10 Allen, 130, 132; *Hawkins* v. *Welsh*, 8 Missouri, 490, 492; *Hall* v. *Fairfield Bank*, 30 Nebraska, 99, 102; *Jackson* v. *Garner*, 79 Georgia, 415.

In *Wright* v. *Laing*, 3 B. & C. 165, 169, which was an action to recover the penalties of the statute of usury, Abbott, C. J., said: "None of the payments were appropriated by either party at the times of payment. If the law ought now to make such an appropriation as the pleader has supposed in this count, the count will be sustained by the proof, otherwise not. We think the law ought now to make such an appropriation. . . . And such an appropriation works no prejudice to the party; it leaves him only where by his own conduct he placed himself; and in the case I have put of the payment of one bill and non-payment of the other, if an action for the penalties of the statute should be brought, the same principle of law would protect the defendant, by applying the payment of the first bill to the legal demand, and not permitting the then plaintiff to apply it to the illegal demand, that is, to the loan and interest, although it be precisely of the same amount; because, peradventure, the lender might repent the illegal bargain and refuse to receive the full amount of the second bill, and the law will allow him the opportunity of doing so, that he might not be deemed a receiver of usurious

interest, without clear evidence that he had not only bargained to receive, but had actually received, such interest. And if the law will make this appropriation of the payment in the two cases that I have put, in the one instance against the lender, and to prevent him from enforcing an illegal bargain, and in the other instance in favor of the lender, and to protect him from being subject to a penalty for an illegal *bargain only*, it seems very plainly to follow that a similar appropriation ought to be made by law in the case before the court. . . . And this, in effect, is only saying that where a person has two demands, one recognized by law, the other arising on a matter forbidden by law, and an unappropriated payment is made to him, the law will afterwards appropriate it to the demand which it acknowledges, and not to the demand which it prohibits."

For the reasons stated, we are of opinion that this action cannot now be maintained under the statute, and, consequently, the court below properly reversed the judgment of the court of original jurisdiction and entered judgment in favor of the defendant.

It is proper to say that the questions determined in *Barnet* v. *National Bank*, 98 U. S. 555; *Driesbach* v. *National Bank*, 104 U. S. 52; *Stephens* v. *Monongahela Bank*, 111 U. S. 197; and *Carter* v. *Carusi*, 112 U. S. 478, do not arise here. No question is presented in the case before us as to whether the borrower, when sued for the principal debt and legal interest, may, of right, set off the amount of any penalty prescribed by the statute of New Mexico.

The judgment of the Supreme Court of the Territory is therefore

Affirmed.

Syllabus.

GATES IRON WORKS *v.* FRASER.

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

No. 253. Argued March 8, 1894. — Decided May 14, 1894.

The claims covered by letters patent No. 56,793, issued July 31, 1866, to Henry Pearce for "a new and useful machine for crushing and pulverizing quartz-rock, stone, and any description of ores," were not infringed by the machine made by the defendants, and were, in some respects, anticipated by the invention patented to Jonathan F. Ostrander by letters patent No. 4478, dated April 25, 1846; by the invention patented to George H. Wood by letters patent No. 28,031, dated April 24, 1860; and by the invention patented to James W. Rutter by reissued letters patent No. 3633, dated September 7, 1869.

The invention patented to Charles M. Brown by letters patent No. 201,646, dated March 26, 1878, for "a new and useful improvement in ore-crushers," was in its general features a reproduction of the machine patented to James W. Rutter by reissued letters patent No. 3633, dated September 7, 1869; and, in view of the prior patents to Rutter and Tripp, must receive a narrow construction, which frees the defendants from the charge of infringing them.

The invention patented to George Raymond and Albert Raymond by letters patent No. 237,320, dated February 1, 1881, for "improvements in grinding mills," was for a combination which included several features not found in the machines made by the defendants.

The function of the safety pin in letters patent No. 110,397, issued to John H. Rusk, December 20, 1870, and antedated December 9, 1870, is practically the same as that of the pin in the combination patented to George and Albert Raymond.

The claim in letters patent No. 243,343, issued June 21, 1881, to Philetus W. Gates for the segmental cast-bearing for the ball of the socket joint, having a form which gives it a bearing contact upon the ball, was anticipated by machines constructed by Charles M. Brown and in public use more than two years before Gates applied for his patent.

The claim in letters patent No. 243,545, issued June 28, 1881, to Philetus W. Gates for a novel application of a loose collar around the eccentrically gyrating shaft to prevent dirt from getting into the bearing, was anticipated in the Brown machine, as changed in 1878, by a circular washer or collar upon the top of the sleeve that surrounded the breaking head, which fitted around the shaft.

The invention patented to Philetus W. Gates by letters patent No. 246,608, dated September 6, 1881, viz., a device for a depression or groove in the outer bearing surface of the bearing-box, and applying within this de-

Statement of the Case.

pression a removable portion of carbon-bronze metal, so as to correct the wear of the machine at that place, is void for want of patentable invention.

The alleged invention in letters patent No. 250,656, issued December 13, 1881, to Philetus W. Gates, is for a combination of old features, viz., a shaft, a bearing for the shaft, a hard metal plate in the lower end of the shaft, an adjustable sliding step block, an oil step box, and a hard metal plate at the end of the shaft, all of which, except the metal plate, were present in the Brown machine as made and sold more than two years before Gates applied for the patent; and the metal plate was old and in use for the same purpose as in Gates's machine long before his application.

The use of safety pins for saving machinery from the strain of a sudden jar did not involve patentable invention.

A verbal assignment of an interest in letters patent is held to have no force or effect against a subsequent assignee claiming under a formal written transfer, and having no knowledge of the previous verbal transfer.

At the March term, 1890, of the Circuit Court of the United States for the Northern District of Illinois the Gates Iron Works, a corporation organized under the laws of the State of Illinois, filed its bill of complaint against David R. Fraser, Thomas Chalmers, and Hiram H. Scoville, alleging that the said complainant was the sole owner of several letters patent of the United States, namely, No. 56,793, issued to Henry Pearce, July 31, 1866; No. 201,646, issued to Charles M. Brown, March 26, 1878; No. 237,320, issued to George and Albert Raymond, February 1, 1881; No. 110,397, issued to John H. Rusk, December 20, 1870; No. 243,343, issued to P. W. Gates, June 21, 1881; No. 243,545, issued to P. W. Gates, June 28, 1881; No. 246,608, issued to P. W. Gates, September 6, 1881; and No. 250,656, issued to P. W. Gates, December 13, 1881; and which said letters patent, and the inventions and improvements therein described, had, by assignments in writing, prior to the commencement of the suit, become vested in the complainant. The bill further alleged that the defendants were making, using, and vending machines embodying the said inventions, in disregard of the rights of complainant, and prayed for the usual relief.

The defendants filed a joint and several answer, admitting that the letters patent mentioned in the bill had been issued,

but denying that the persons to whom they had been granted were the original and first inventors of the several inventions described and claimed therein, or that the defendants had infringed, or were infringing, the rights of the complainant in the said inventions.

The answer further averred that the defendant Hiram H. Scoville had, prior to the filing of the application by Charles M. Brown for a patent for the improvements described and claimed in said patent No. 201,646, dated March 26, 1878, by and with the consent of the said Brown, made and put into use two machines containing the inventions secured by said patent No. 201,646, and that the defendants had a right to make and sell machines containing said inventions by virtue of an oral license given by Brown to Scoville before the application for said patent was filed.

The answer further alleged that P. W. Gates was not the original and first inventor of the improvements described in the several patents Nos. 243,343, 243,545, 246,608, 250,656; but that substantially those improvements were invented by said Charles M. Brown before the supposed invention thereof by Gates, and were embodied and exemplified in certain full-sized working machines built by the said Hiram H. Scoville, which were publicly used more than two years before Gates made application for any one of the said four patents.

The answer further stated that Henry Pearce was not the original and first inventor of the improvement patented by said patent No. 56,793, dated July 31, 1866, and that substantially the same thing was shown and described in letters patent No. 28,031, issued to one G. H. Wood, dated April 24, 1860.

Subsequently the defendants, with leave of court, filed the following amendment to the answer, to wit:

"Letters patent to J. F. Ostrander, granted and dated April 25, 1846, No. 4478, 'grain mill.'

"And as to the patent mentioned in said bill of complaint as having been granted and issued to J. H. Rusk, Charles M. Brown, G. and A. Raymond, and the four patents to P. W. Gates, numbered respectively 243,343, 243,545, 246,608, and 250,656, they further aver, upon information and belief, that

the said Brown, Raymond, Rusk, and Gates were not the original and first inventors of the things patented by or to them respectively, and that substantially the same things were patented by or shown and described in the following letters patent, to wit:

"As to patent to H. Pearce, No. 56,793.

"Letters patent to J. F. Ostrander, granted and dated April 25, 1846, No. 4478, for improvement in grain mill.

"Letters patent to G. H. Wood, granted and dated April 24, 1860, No. 28,031.

"As to patent to J. H. Rusk, No. 110,397.

"Letters patent to A. C. Ellithorpe and I. Scoville, granted and dated November 23, 1858, for improvements in machine for breaking stones, etc., No. 22,113.

"Letters patent to Hiram H. Scoville, granted and dated May 26, 1868, No. 78,332, for improvement in stone breaker.

"As to patent to C. M. Brown, No. 201,646.

"Letters patent to Charles Tripp, granted and dated November 10, 1857, No. 18,610, for improvement in grinding mill.

"Letters patent to Conrad P. Wagner, granted and dated January 30, 1866, No. 52,347, for improvement in quartz mill.

"Reissue letters patent to James W. Rutter, granted and dated September 7, 1869, No. 3633, for improvement in ore crusher.

"As to chilled iron, V. I. Knight's American Mechanical Dictionary, published in New York, 1874, p. 537. Title 'Chill.'

"As to patent to P. W. Gates, No. 243,343.

"Letters patent to L. Fagin, granted and dated October 30 1866, No. 59,201, for improvement in hanging millstones.

"Letters patent to S. N. Taylor, granted and dated February 27, 1866, No. 52,908, for improvements in knuckle joint.

"As to patent to P. W. Gates, No. 243,545.

"Letters patent to Charles Tripp, granted and dated November 10, 1857, No. 18,610, for improvement in grinding mill.

"Letters patent to Conrad P. Wagner, granted and dated

Names of Counsel.

January 30, 1866, for improvement in quartz mill, No. 52,347.

"Letters patent to Thomas Varney, granted and dated April 9, 1867, No. 63,675, for improvement in quartz mill.

"As to patent to P. W. Gates, No. 246,608.

"Letters patent to H. Pearce, granted and dated July 31, 1866, No. 56,793, for improvement in quartz mill.

"As to patent to P. W. Gates, No. 250,656.

"Letters patent to P. W. Gates, granted and dated June 28, 1881, No. 243,545, for improvement in rock or stone breaker.

"Letters patent to Daniel Hughes, granted and dated February 20, 1866, No. 52,716, for improvement in quartz crusher, etc.

"Letters patent to L. Fagin, granted and dated October 30, 1866, No. 59,201, for improvement in hanging millstones.

"English letters patent to Claude Marie Savoye, No. 6195 of 1831, for improvement in machinery for grinding grain and other substances.

"The defendants, further answering, say upon information and belief that some of the older ones of complainant's said patents show and describe improvements which are claimed in other and later of the complainant's said patents, and they further say that as to the said several patents by them herein and hereintofore mentioned are shown and described devices, parts, or combination of parts that are substantially the same as the devices and combinations set forth in other patents than those to which they are specifically named as relating, and that any and all of said patents will be referred to as containing the substance of any or either of the complainant's said patents as may be deemed appropriate."

The cause was put at issue, a large amount of evidence taken, and after argument on March 31, 1890, the court below dismissed the bill at complainant's costs. From this decree an appeal was taken to this court.

Mr. Lewis L. Coburn for appellant.

Mr. L. L. Bond, (with whom was *Mr. C. E. Pickard* on the brief,) for appellees.

Opinion of the Court.

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

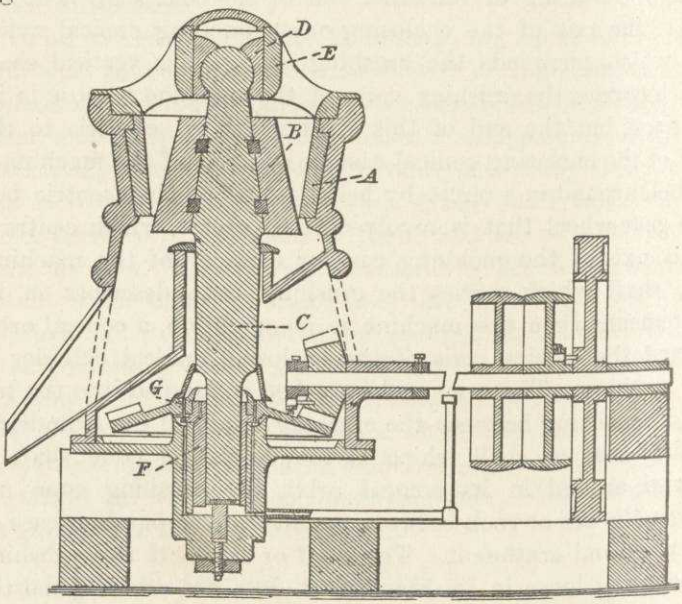
The patents that are before us for consideration are for improvements in stone-crushing machines. We shall preface our discussion of the questions that arise by adopting from the brief of the plaintiff in error the following description of the final and perfected form of the machine, and which is claimed to embody the various inventions and improvements covered by the several patents:

"The inventions of these various patents can be more readily understood by first understanding the construction of this type of stone-crushing machines which has become to be known as the gyratory type of stone crushers. This name comes from the fact that the crushing cone is carried on a vertical shaft which has its bearing at one end in the axis of the conical enclosing case which surrounds the crushing cone, while the bearing of the other end of the cone shaft is eccentric to the axis of the enclosing or surrounding conical cylinder which surrounds the crushing cone. This vertical shaft which carries the crushing cone of the machine is loose in its bearings, but the end of this shaft which is eccentric to the axis of the enclosing conical case or cylinder of the machine is carried around in a circle by being placed in an eccentric box in a gear wheel that is revolved on its centre, which centre is in the axis of the enclosing case or cylinder of the machine. The shaft which carries the crushing cone describes in its movement, when the machine is in operation, a conical orbit around the vertical axis of the enclosing conical cylinder of the machine. The stone to be crushed is dumped into the top of the machine between the crushing cone and the cylindrical conical case or shell which surrounds it, the cone shaft is carried around in its conical orbit, the crushing cone impinges the ore or rock between it and the surrounding case or cylinder, and crushes it. The shaft or arbor of this crushing cone being loose in its bearings, it does not rub or grind the stone, but simply cracks it into finer pieces, and then impinges the next pieces of ore or rock, and so on around the entire

conical orbit, the space between the crushing cone and the enclosing conical case or cylinder opposite of where the ore or rock is being cracked or broken becomes greater by reason of the crushing cone being carried to the opposite side of the enclosing case or cylinder, and the broken rock falls down into a narrower space, and when the crushing cone comes around again, it is again broken, until it is sufficiently fine to pass out at the bottom of the space between the crushing cone and its enclosing case or cylinder.

"This construction of ore crushers, or stone breakers, as they are frequently called, is a continuous feed machine, the stone being constantly fed in at the top of the machine in a coarse state, and continuously passes out at the bottom of the crushing space, broken to a certain definite size, which is fixed by an adjustment of the crushing cone in the enclosing case or cylinder."

This form of machine is illustrated in the following drawing:



Vertical Sectional View of Machine.

Opinion of the Court.

In this cut A represents the conical enclosing case or cylinder which surrounds the crushing cone B, which is rigidly attached to and is carried on the vertical shaft or arbor C. The top or upper end of the arbor C has a bearing in the chilled section box D that is held in an open spider-frame E, this bearing being exactly in line of the axis of the enclosing conical case or cylinder A. The bottom or lower end of the shaft C has its bearing in what is termed an eccentric box, F, which is placed in the gear wheel G. This eccentric box is placed at one side of or eccentric to the vertical axis of the enclosing case or cylinder A. The gear wheel G is supported on the base of the machine, so that the centre of its hub is exactly in line with the vertical axis of the enclosing conical case or cylinder A, and when it is revolved it carries the lower end of the shaft or arbor C, around in a circle, and consequently continually brings the conical crushing cone B in closer proximity to one side of the enclosing case or cylinder to impinge the stone contained in the enclosing case or cylinder, and that impingement is continually changing from one place to another throughout the entire circle, and the space opposite of the place of impingement between the crushing cone and its enclosing case or cylinder is wider than where the impingement of the ore or stone is taking place. This particular motion of the crushing cone and its shaft or arbor has been termed a gyratory motion. The shaft or arbor is never vertical, and one of its bearings is in an eccentric box placed eccentric to the bearing of the other end of the shaft or arbor, and eccentric to the axis of the enclosing case or cylinder. The crushing cone and its shaft or arbor describes at each revolution of the geared wheel in which the eccentric box of the shaft or arbor is placed, a conical orbit.

It is claimed by the plaintiff in error that this form of machine is the composite result of the application of the improvements described in the patents set up in the bill. To test the soundness of this claim it will be necessary for us to look into the condition of the art prior to the issue of the earliest patent owned by the complainant, that is, prior to July 31, 1866, the date of letters patent No. 56,793, granted to Henry Pearce.

The first patent to which our attention has been particularly directed is that issued April 25, 1846, to Jonathan F. Ostrander, and numbered 4478. It is a claim for an improvement in grinding mills, and the nature of the invention is said to consist in "making the surfaces of the stones, or metallic plates, between which the material is ground, the one convex, the other concave, . . . and also in giving the movable plate or stone a compound motion, consisting of, firstly, an oblique gyrating motion of its axis around the axis of the fixed plate; and, secondly, a rotating motion around its own axis." The material to be ground is fed to the mill by being placed in a cup-shaped opening in the top of the shell that encloses the machine, and the ground material is received in a gutter surrounding the base. We here perceive the double motion, that is, "the revolving and rolling motion," which is a feature of the Pearce patent, and the operation of the two machines is similar in that, in both, the pestle alternately closes upon and recedes from the sides of the outer shell, so that any substance or material to be ground is thereby crushed, and passes downward to the lower part of the machine, where the space gradually lessens, and is crushed finer.

The patent No. 28,031, granted April 24, 1860, to George H. Wood, was for a machine for crushing stone, quartz, ores, or any other substance capable of being reduced or pulverized by pressure. The specification describes a machine having an outer shell or case and an interior cone or pestle, which has an eccentric motion. We shall hereafter show that the machine made by the defendants does not contain the distinguishing features of the Pearce patent. But we have briefly described the inventions of Ostrander and of Wood to make it to appear that machines composed of an outer shell or case enclosing an outer cone or pestle, and operating on the material to be crushed by an eccentric motion, were known to the art.

Letters patent No. 88,216, dated March 23, 1869, reissue No. 3633, dated September 7, 1869, were granted to James W. Rutter for an improvement in ore crushers, and in which it is stated that the invention related to that class of crushing

and grinding machines in which a conical grinder or crusher, with concentric and eccentric bearings, is operated within a stationary upright cylinder or chamber, or in which the crushing chamber is made conical and the crusher straight. There are other special features contained in this patent not relevant to our present inquiry, but this patent does provide for grinding ore or other material introduced at the upper or top end of the machine, and subjecting it to a continuous crushing and grinding force till it reaches the bottom, where it is discharged into a gutter or annular space.

With this brief view of the state of the art we shall now examine the letters patent upon which the complainant directly relies. The first is that which was granted to Charles M. Brown, No. 201,646, dated March 26, 1878.

The object of this invention is described as being "to furnish a strong, compact machine, in which large pieces of ore may be broken into smaller fragments by the regular continuous movements of the mechanism, and also in which the power used for crushing the ore shall be applied in a more advantageous manner than has been done heretofore in machines designed for this purpose."

The specification describes a machine composed of an outer shell or case, with an opening on one side for the egress of the crushed ore. Within this outer shell is an upright shaft or spindle, whose upper end is pivoted within a circular cap or cover, which is accurately fitted within the top of the outer shell. The lower end of the shaft is pivoted in a bearing in the hub of a bevel gear, and this bearing is placed in an eccentric position with reference to the centre of the hub. The end of the shaft rests on a loose plate or button, which is raised or lowered by an adjusting screw, which passes through the lower part of the hub in a line with the axis of the shaft. The upper part of the shaft, below the place where it is pivoted in the cap, is contracted into a neck, and below this neck it is enlarged in the form of a pyramidal section, so as to receive a conical breaking head, which is accurately fitted on the shaft. The outer shell or case is lined with a hard or durable material, made in sections so that they may be readily

replaced by similar pieces when they are worn out by use, and their wearing surfaces may be either smooth or corrugated. The ore is fed into the machine through openings in the head, and falls into the space between the outer shell, lined as before mentioned, and the breaking head. When the driving mechanism, which is not claimed as a part of the invention, is set in operation, the breaking head receives an eccentric gyratory motion from the eccentrically-placed bearing in the hub of the gear below, and advances successively towards every portion of the outer shell, crushing the ore that is contained between these two surfaces. As the breaking head advances on one side it recedes on the opposite, thus allowing the partially broken ore to fall still lower in the space between the shell and the breaking head, to be again and again acted upon until it is reduced to fragments sufficiently small to pass through an opening at the bottom of the chamber. Here it falls upon an inclined plate and passes out of the machine through the opening in the side of the shell. The claims of the inventor were substantially for the combination of the gyrating spindle; the conical breaking head with the breaking interior surface of the shell; the sliding socket bearing in which the upper end of the shaft operates; the eccentric bearing at the lower end of the shaft, and the adjusting screw which raises or lowers the shaft. His fourth claim was as follows: "In our ore-breaking machine, a shell or case frame, enclosing at its upper part a concave breaker, and provided with an oblique trough, integral with the frame, the inner edge of which extends upwards and within the concave base of the breaker all around, and having a low-down discharge at one side."

It will be seen that, in its general features, this machine is a reproduction of that of Rutter. In both we find the outer shell; the shaft to which a gyrating motion is given by the eccentric bearing at the lower end, and which shaft works at the upper end in a ball and socket joint, and the crusher or breaking head of a conical form. The operation of the machines is similar in that the material to be crushed is fed into the machine at the top, and passes down between the inner surface of the shell and the breaker, and the gyrating motion

of the shaft causes the breaking head to so operate that, as it approaches the shell on the one side it departs from the other side, thus permitting the partially broken ore to fall further down in the chamber, and thus to be exposed over and again to the crushing operation of the breaking head. It is true, however, that the Rutter machine operates differently from that of Brown's, because its crusher or breaking head does not revolve on its own axis. There are also some minor features in which the machines differ, but such minor features of the Brown machine are not found in the defendant's machine.

The next patent, in chronological order, set up in the bill, is that numbered 237,320, granted February 1, 1881, to George Raymond and Albert Raymond. It claims to cover certain improvements in that class of mills in which vertical metallic grinding disks are employed, and the invention is said to consist in "the combination of the driving shaft, grinding or reducing devices having an exposed hub or bearing, and a safety pin connecting said parts, and in minor details."

As the claims in this patent are for a combination which includes several features not found in the machine as made by the defendants, we need not dwell upon it further than to observe that among the devices described is that of a "safety pin," made of wood, which connects the rotary disk with the shaft, and the object of which is to relieve the strain or wrench which is sometimes given to the machine by some stone or metal of a hardness too great to yield to the crushing operation. The pin, which is strong enough to hold the rotary disk in its connection with its shaft when the material is capable of being crushed, breaks when a refractory substance is suddenly encountered, and thus permits the disk to stop, while the shaft is permitted to continue its motion. The offending substance is then removed, and the broken pin is removed and replaced by a new one. We shall have occasion to revert to this safety pin when we reach the question of infringement. But in this connection we may briefly refer to the patent No. 110,397, issued to John H. Rusk, December 20, 1870, and which is also set up in the bill. The feature of this patent which concerns our inquiry is the use of safety pins, whose

function is the same with that of the Raymond patent, with the difference that the Rusk pins are made of soft metal, strong enough to hold the driving shaft and the spindle together in all ordinary grinding operations, but weak enough to yield when any extraordinary strain is put on the machine by the accidental introduction of a substance too hard to be crushed. Another difference is that, in the Rusk machine, the pins are placed between the two driving gear wheels, which it is necessary to remove in order to get at the safety pins to remove them or replace them, while, in the Raymond machine, the safety pins are placed in an accessible position, so that they can be removed without disturbing other parts of the machine.

Continuing our history of the complainant's machines, we come now to No. 243,343, issued to P. W. Gates, June 21, 1881. It is for an alleged improvement for ball joints of stone breakers and other machines, and consists mainly in constructing bearings in which the ball works so hardened or chilled on the internal surface of the bearing as to offer but slight friction to the ball which fits and works within it. Further reference will be had to this patent when we treat the question of infringement.

We next come to No. 243,545, issued to P. W. Gates, June 28, 1881. The specification, in terms, refers to letters patent No. 201,646, issued March 26, 1878, to Charles M. Brown, and claims for certain improvements to the Brown machine. The machine as a whole is a reproduction of the main features contained in the Brown and Rutter machines, but exhibits some changes and improvements in details, to which we shall hereafter refer.

On September 6, 1881, letters patent No. 246,608 were granted to P. W. Gates, and are now the property of the complainant company. This is a claim for an improvement in eccentric revolving bearing boxes for ore crushers and stone breakers. The inventor, in his specification, says: "My invention relates especially to the revolving eccentric bearing box employed at the lower end of the gyrating shaft of stone breakers and ore crushers, and the nature of my invention

consists in providing the thicker or eccentric portion of said bearing box with a depression or groove in its outer bearing surface, and applying within this depression a removable portion of carbon bronze metal or other suitable durable wearing metal, said removable portion of metal being of a segmental form and extending partly around the circumference of the eccentric bearing box proper, and also extending vertically from or nearly from the upper to the lower ends of said box proper, and being adapted for being secured in position by bevel flanges at the edges of the depression or groove, or by other suitable means provided on the bearing box proper, and on the removable portion of metal or by said flanges, together with screws or dowels. It also consists in the combination of the box proper, having a peculiarly formed depression or groove in its periphery, and a peculiarly formed removable carbon bronze metal or other suitable bearing metal portion whereby greater strength in the parts is secured." The practical necessity for this improvement is said to arise out of the fact that there is a destructive wear on the periphery of the bearing box, especially at the place where the box is made with an increased thickness opposite one side of its eccentric bore. In practice, it is said that this wear operates to change the throw or motion of the eccentric, thus impairing the effective capacity of the machine, and it is claimed that this defect is remedied by the use of the removable bronze metal. When the wear becomes so great as to injure the operation of the machine, the bronze can be removed and another portion of bronze metal put in its place, and thus dispense with procuring a new eccentric box.

Still another improvement was patented by P. W. Gates by letters issued December 13, 1881, and numbered 250,656. This invention relates to alleged improvements in the shaft of ore-crushing machines, and in the method of applying oil to the machinery while in place and in motion, and calls for no special attention at this stage of our inquiry.

The defendants' machine, as described by W. S. Bates, an expert called on behalf of the defendants, has an outer shell or case; a crushing cone within the shell, mounted on a

shaft; a fixed bearing for the upper part of the shaft; an eccentric bearing for the lower part of the shaft, by which it is made to travel in a circular path; a step bearing for the lower end of the shaft to take the thrust due to the weight and the crushing effort, and suitable gearing operating on the eccentric bearing to revolve the same.

The stress of the case is in the effort of the complainant's witnesses to establish an infringement in the defendants' machine of the Pearce patent and of the Rusk patent.

Undoubtedly, the leading features of the Pearce machine are found in that of the defendants. There are the conical shell or case; a conical crusher within the shell; a shaft on which the crusher is secured; a pivotal point at the lower end of the shaft, and an eccentric bearing at the upper end of the shaft, whereby the shaft and the crushing cone are caused to revolve in a conical orbit. But, as we have heretofore seen, these are present in the Wood machine, a prior invention. The Wood patent shows a stone-crushing mill consisting of a conical shell, a conical crusher within the shell, a shaft on which the crusher is mounted, a fixed pivotal point at the lower end of the shaft, and the crusher revolves in a conical orbit. The mode of operation is the same in the two patents — that is, the material to be crushed is fed into the top of the machine, the sides of the crushing cone are caused to approach and recede from the sides of the shell, so as to crush the material, the motion being greatest at the top, where the large lumps are, and least at the bottom, so that the material is finely reduced, and passes out at the bottom. The modes of supporting and adjusting the crushing head and shaft are mechanically different. Some of these principal features are likewise to be seen in the Ostrander machine under a still older patent.

The infringement of the Rusk patent is said to be in the use in the defendants' machine of the safety break pins; and it must be conceded that the defendants do use such a device. Rusk does not claim the invention of the pin. What he does claim is "the combination of soft-metal pins or plugs with the driving gear of a grinding mill."

Hiram H. Scoville, one of the defendants' witnesses, testified that the use of breaking pins was common in large machines; in a brick machine as far back as 1860; in the Blake ore crusher in the form of a breaking link; and in machines used in the shop of the witness in 1875.

Bates, defendants' expert, testified that "there is nothing new in the use of such safety devices for such a purpose. Their use is common in all classes of machines which are liable to sudden or unexpected strains. I have here two examples of safety pins applied to cultivators, to wit: patent No. 11,379 to G. Lichtenthaler, July 25, 1854, and patent No. 75,669 to J. D. De Turk, March 17, 1868. Both of these patents show cultivator teeth, arranged with wooden pins, for the purpose of having the pins break should the teeth strike a root or stone, the object being to prevent the breaking of the machine."

We do not perceive that this testimony was controverted by the complainant's witnesses. The complainant's expert does indeed claim that the patents referred to as showing the prior use of safety pins do not show such use in combination with driving gear. But, assuming that the use of safety pins for saving machinery from the strain of a sudden jar was old, we cannot regard their use, for such a purpose, in connection with the driving gear of a stone-crushing machine, as patentable. It is also to be observed that Rusk expressly limited himself to a soft-metal pin, and thus limited, the use of wooden pins being old, no infringement would be shown by defendants' use of a hard cast-iron pin.

Coming now to the Brown patent, and not regarding, at this stage of the discussion, the defendants' claim of a license, we have to consider the claim of infringement. The claims asserted are the 2d, 3d, and 4th. There is no pretence of infringement of the 1st claim, for the reason that the defendants' machine does not have the adjusting screw, the main feature of that claim.

A comparison of the Brown patent, in the particulars relied on, with the prior Rutter and Tripp patents, satisfies us that, even if some of his additional devices were deemed novel, it is

plain, from the history of such machines, that his claims, to be saved, must receive a very narrow construction. Thus limited, they are not infringed in defendants' machines. We dismiss this part of the case by adopting the views of the court below: "Claims 2, 3, and 4 of the Brown patent are involved in this suit. The fourth claim is limited to a shell enclosing at its upper end a concave breaker, and provided with an oblique trough 'integral with the frame, the inner edge of which extends upwards and within the concave base of the breaker 6 all around.' This claim was allowed on the ground that this feature of the combination was an improvement on anything contained in the prior art. One element in the combination covered by the second claim is the 'breaking head 6, constructed with a concave base as shown.' Both the drawing and the specification show a concave breaking head, into which the shell or trough extends. The trough or shell is cast integral with the case shell. These claims cannot be broadened by eliminating or disregarding any of their language. The breaking head of the defendants' machine is not concave, and it follows that their machine has no trough extending upward and within the concave breaking head. The defendants' machine, therefore, infringes neither the second nor the fourth claim of the Brown patent. The defendants' machine does not contain the spindles with the sliding bearing mentioned in Brown's third claim, or any other sliding bearings, and the adjusting screw or step embraced in the third claim is not found in the defendants' machine."

The defendants, in the fifth paragraph of their answer, aver that, prior to Brown's application for patent No. 201,646, H. H. Scoville, one of the defendants, by and with Brown's consent, made and put into use two machines containing the invention described in that patent, and that by virtue of an oral license thus given by Brown to Scoville the defendants have a right to make and sell machines containing inventions covered by said patent. Scoville testifies that, in consideration of assistance given by him to Brown in bringing out his invention, the latter had verbally agreed that he, Scoville,

was to have a half interest in the exclusive manufacture of the ore breakers, but that Brown had never made an assignment of such interest in a legal form. Brown himself testifies to the same effect. But, as it appears that subsequently Brown assigned these letters patent to the complainant company, and as there is nothing to show that the latter had any notice or knowledge of Scoville's interest, we think that no effect can be given to this alleged verbal license or interest.

In the sixth paragraph of their answer the defendants allege that, before P. W. Gates made application for either one of the four patents issued to him, the same improvements that were described in the Gates patent were known to and used by Brown and Scoville; that said improvements were invented by Brown, and were embodied by Scoville in full-sized working machines, and which machines were publicly used more than two years before Gates' application for his patents.

The history of these two machines is given by Scoville and Brown. The former testifies that in the early part of 1878 he made two machines under the Brown patent. He says that he and Brown loaned them to other parties to test their value as stone breakers. The first was loaned to the Kirby & Howe Stone Company of Iowa, who operated the machine for nine months, when they broke the cast-iron shaft, and then returned the machine. This machine was repaired in the works of the Gates & Scoville Iron Works Company, of which Scoville was then vice-president and superintendent. This machine was then sold to the Chicago City Railway Company, and has since been used by them. He further testifies that the second machine was loaned to General McDowell, in charge of the custom-house, then in course of erection at Chicago, and several thousand tons of concrete and slag for the foundation were broken by this machine. It was then returned to Scoville, who says he made some repairs on it, and also some changes which have since been adopted and claimed by the complainant company. This machine was afterwards sold to Smith Bros., of Marion, Ohio. Brown testifies that one of these two machines was made in 1877,

and sold on trial to Mr. Kirby of Iowa, during the fall of that year; that the second one was in the shop of Scoville during the summer of 1878, and loaned the following winter to be used in breaking stone for the construction of the United States custom-house.

Scoville further testified that these two machines were at first made in the manner described in the Brown patent, but that on their return by the parties to whom they had been loaned they were somewhat changed. Those changes he thus describes: "They were changed by my own order, and under my superintendence, with Mr. Brown's advice, the old breaking heads being worn, and requiring new ones. We made a change in the new heads from the old by cutting off the lips that form the concave for the head, making the head level on the bottom, and also cutting off the top of the annular ring that projects up from the trough, so as to make room for a washer or riding ring, which ring we put on to keep the dust out from the gear. We also took out at that time the wedges in the top of the machine for adjusting a section of bearings around the ball, and put in sections that just fitted. That was all the change that was made. My recollection is that it was in November, 1878, in respect to the breaker sold to the Chicago City Railway Company. The second was somewhat later." He further testified as to a provision that was made by grooves to receive zinc or other metal that might be filled in to form a collar for the purpose of keeping the head from working off.

Brown's testimony is to the same effect, but he goes more into detail. Among other important changes that he alleges were made was that made at the top of the machine by leaving out the adjustable wedges around the socket bearing, and making this bearing to fill the space around the shaft inside of the head at the top of the machine, and that the segments that supported the ball at the upper end of the shaft were introduced in place of the wedges and were made or cast on a round chill, with pieces of sheet iron placed in the mould where the junction of the segments was designed to be, so that after the casting was made it could readily be spread

apart into four pieces. He also states that he put a breaking pin between the driving shaft and the gear, but this was modified by placing the breaking pin between the driving pulley and a hub which was fastened on the countershaft. All these changes were made in 1878, and none of them, according to Brown, were made by the design or suggestion of P. W. Gates.

P. W. Gates, on behalf of the complainant company, testified that two machines were made by Brown, one of which was used by the Kirby-Howe Company of Iowa, and which was returned about September 1, 1878. The other, built by Brown or Scoville, was loaned to the United States government to use at the custom-house, and was returned. He admits that, in repairing these two machines, considerable changes were made, exhibiting features not shown in the original Brown patent, but he claims that these changes were devised by himself.

But whether these improvements were attributable to Brown, as testified by Scoville and Brown, or to Gates, as he testifies, is not specially important. What is important is the fact, that it thus appears that several of the features claimed in the Gates patents were illustrated in these two reformed Brown machines, actually in public use more than two years before Gates applied for his patents.

The claim of Gates No. 1, for the segmental cast bearing for the ball of the socket joint, having a form which gives it a bearing contact upon the ball, is found in the Brown reformed machine. The claim in Gates No. 2, of a novel application of a loose collar around the eccentrically-gyrating shaft, to prevent dirt getting into the bearing, was anticipated in the Brown machine as changed in 1878, by a circular washer or collar upon the top of the sleeve that surrounded the breaking head, which fitted around the shaft, the object being to keep the dust from the machinery below.

We agree with the court below in thinking that the first claim in Gates' patent No. 3, for the device of a depression or groove in the outer bearing surface of the bearing box, and applying within this depression a removable portion of carbon bronze metal, so as to correct the wear of the machine

at that place, can scarcely be deemed an invention, as the use of soft metals for that function is shown to be old. At all events, the defendants' machine uses Babbitt metal over the entire surface; that is, going entirely around, instead of only a portion of the distance. In this respect defendants' machine follows the Brown amended machine. Nor can any force be given to Gates' claim that the use of the Babbitt or carbon bronze metal in the depression or groove is a new article of manufacture. Whether or not such a device, as a merely incidental feature of a compound machine, can be deemed a new article of manufacture, there is no proof of infringement, as it is not pretended that the defendants have ever made any such new article of manufacture. The alleged invention in Gates' patent No. 4 is for a combination of old features, to wit: a shaft, a bearing for the shaft, a hard metal plate in the lower end of the shaft, an adjustable sliding step block, and an oil step box.

All the elements of this combination were shown to be present in the Brown machine as made and sold more than two years before Gates applied for this patent, except the hard-metal plate at the end of the shaft. But the use of hard or steel-wearing plates was shown to be old, and several letters patent, viz., C. M. Savoye, an English patent, 1831; T. Varney, No. 63,675, issued April 9, 1867; Palen & Avery, No. 111,239, issued January 24, 1871, and several others were put in evidence by the defendants, and exhibited the feature of a hard-metal wearing plate at the end of the working shaft.

Our conclusion is that reached by the court below, and its decree dismissing the bill is

Affirmed.

SOUTH CAROLINA *v.* SEYMOUR.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 1140. Submitted April 9, 1894. — Decided May 14, 1894.

On a writ of mandamus in behalf of a State to the Commissioner of Patents to register, under the act of March 3, 1881, c. 138, a trade-mark used by the State on intoxicating liquors in commerce with a foreign nation, and which the Commissioner of Patents has refused to register, on the ground that the State by its own laws had no authorized trade in liquors outside of its limits, the validity of an authority exercised under the United States is not drawn in question; and therefore, in the absence of evidence of the value of the registration, a judgment of the Court of Appeals of the District of Columbia, denying the writ of mandamus, cannot be reviewed by this court on writ of error, under the act of February 9, 1893, c. 74, § 8.

THIS was a motion to dismiss for want of jurisdiction a writ of error to review a judgment of the Court of Appeals of the District of Columbia, denying a writ of mandamus to the Commissioner of Patents to register a trade-mark under the act of March 3, 1881, c. 138. 21 Stat. 502. The case is stated in the opinion.

Mr. John I. Hall and *Mr. Levin H. Campbell* for the motion.

Mr. John Altheus Johnson opposing.

MR. JUSTICE GRAY delivered the opinion of the court.

The earliest legislation of Congress for the registration and protection of trade-marks was contained in the Patent Act of 1870, and substantially reënacted in the Revised Statutes. Act of July 8, 1870, c. 230, §§ 77–84; 16 Stat. 210–212; Rev. Stat. §§ 4937–4947. That legislation, as well as the act of August 14, 1876, c. 274, (19 Stat. 141,) for punishing the counterfeiting of trade-marks, was held by this court at October term, 1879, to be unconstitutional and void, because not lim-

ited to trade-marks used in commerce with foreign nations, or among the several States, or with the Indian tribes. *Trade-Mark Cases*, 100 U. S. 82.

Congress afterwards passed an act limited to the registration and protection of trade-marks "used in commerce with foreign nations or with the Indian tribes," and whose owners were "domiciled in the United States, or located in any foreign country or tribes which by treaty, convention or law, affords similar privileges to citizens of the United States." Act of March 3, 1881, c. 138; 21 Stat. 502.

Sections 1 and 2 of that act provide that such owners may obtain registration of such trade-marks by "causing to be recorded in the Patent Office a statement specifying name, domicil, location and citizenship of the party applying; the class of merchandise and the particular description of goods comprised in such class to which the particular trade-mark has been appropriated; a description of the trade-mark itself, with facsimiles thereof, and a statement of the mode in which the same is applied and affixed to goods, and the length of time during which the trade-mark has been used;" "paying into the Treasury of the United States the sum of twenty-five dollars, and complying with such regulations as may be prescribed by the Commissioner of Patents;" and "accompanied by a written declaration verified by the person, or by a member of a firm, or by an officer of a corporation applying, to the effect that such party has at the time a right to the use of the trade-mark sought to be registered, and that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that such trade-mark is used in commerce with foreign nations or Indian tribes, as above indicated; and that the description and facsimiles presented for registry truly represent the trade-mark sought to be registered."

By section 3, "no alleged trade-mark shall be registered, unless the same appear to be lawfully used as such by the applicant in foreign commerce or commerce with Indian tribes, as above mentioned, or is within the provision of a treaty,

convention or declaration with a foreign power; nor which is merely the name of the applicant; nor which is identical with a registered or known trade-mark of another and appropriate to the same class of merchandise, or which so nearly resembles some other person's lawful trade-mark as to be likely to cause confusion or mistake in the public or to deceive purchasers."

This section further provides that "in an application for registration the Commissioner of Patents shall decide the presumptive lawfulness of claim to the alleged trade-mark; and in any dispute between an applicant and a previous registrant, or between applicants, he shall follow, so far as the same may be applicable, the practice of courts of equity of the United States in analogous cases."

The act provides for no direct judicial review, by appeal or otherwise, of the decision of the Commissioner of Patents upon the question of registration. But section 7 provides that "registration of a trade-mark shall be *prima facie* evidence of ownership;" that any person, reproducing, counterfeiting, copying, or colorably imitating and affixing to similar goods, a registered trade-mark, shall be liable to an action at law for damages, or a suit in equity for an injunction; and that the courts of the United States shall have original and appellate jurisdiction in such cases, without regard to the amount in controversy.

On December 24, 1892, the general assembly of South Carolina passed an act, prohibiting the manufacture or sale of intoxicating liquors within the State, except as therein provided; directing the appointment of a commissioner who should, under the rules and regulations of a state board of control, consisting of the Governor, the comptroller general and the attorney general, "purchase all intoxicating liquors for lawful sale in this State," and sell to county dispensers no liquors unless "tested by the chemist of the South Carolina college and declared to be pure and unadulterated;" that county dispensers should "alone be authorized to sell and dispense intoxicating liquors;" that manufacturers of intoxicating liquors doing business in the State should "be allowed to

sell to no person in this State, except to the state commissioners and to parties outside of the State;" and that every package of intoxicating liquors, sold in the State, or shipped beyond the limits of the State, should have thereon a certificate of the commissioner. South Carolina Acts of 1892, c. 28, pp. 62, 63, 65.

On July 15, 1893, the State of South Carolina, by its Governor, paid into the Treasury of the United States the sum of twenty-five dollars, and filed with the Commissioner of Patents, in conformity with the provisions of the act of Congress of 1881, and with the regulations prescribed by the Commissioner of Patents, a statement and declaration, which began by stating that "the State of South Carolina, one of the Commonwealths composing the United States of America, possessed in this regard of the full rights of a corporation, and doing business at its capital city of Columbia, in the county of Richland, State aforesaid, has adopted for its use a trade-mark for chemically pure distilled liquors," consisting of the word "Palmetto," and particularly described; was accompanied by facsimiles of the trade-mark; and was supported by a declaration on oath of the Governor that he verily believed "that the foregoing statement is true; that the said State at this time has a right to the use of the trade-mark therein described; that no other person or firm or corporation has the right to such use, either in the identical form, or in any such near resemblance thereto as might be calculated to deceive; that the said trade-mark is used by the said State in commerce with foreign nations or Indian tribes, and particularly with Canada; and that the description and facsimiles presented for record truly represent the trade-mark sought to be registered."

At the hearing before the Commissioner of Patents, it appeared that the trade-mark had been adopted by the state board of control, and that the State had sold in Canada a case of liquors with this trade-mark.

The Commissioner of Patents refused registration of the trade-mark, upon the ground that the State of South Carolina, by its own laws, had no authorized trade in distilled liquors

outside of its own limits, was not the owner of any trade-mark, and had not the right to the use of the trade-mark sought to be registered.

The State of South Carolina, by its attorney general, thereupon presented to the Supreme Court of the District of Columbia a petition for a writ of mandamus to the Commissioner of Patents to register the trade-mark. That court held that upon the facts proved the duties of the Commissioner of Patents in regard to registration of trade-marks were merely ministerial, and that the writ of mandamus should issue. The Commissioner of Patents appealed to the Court of Appeals of the District of Columbia, which held that those duties were not ministerial, but required the exercise of judgment and discretion by the Commissioner, and therefore reversed the judgment and dismissed the petition.

The petitioner sued out this writ of error, and the defendant in error now moves to dismiss it for want of jurisdiction.

By section 8 of the act of February 9, 1893, c. 74, establishing a Court of Appeals for the District of Columbia, as in the previous act of March 3, 1885, c. 355, regulating appeals from the Supreme Court of the District and the Supreme Courts of the Territories, no case can be brought to this court by appeal or writ of error, unless either "the matter in dispute, exclusive of costs, shall exceed the sum of $5000," or else, without regard to the sum or value in dispute, it is a case "wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States." 27 Stat. 434; 23 Stat. 443.

In order to bring a case within the first alternative, the matter in dispute, according to the settled construction, must be money, or some right the value of which can be estimated and ascertained in money, and which appears by the record to be of the requisite pecuniary value. *Columbian Ins. Co.* v. *Wheelright*, 7 Wheat. 534; *Kurtz* v. *Moffitt*, 115 U. S. 487; *Street* v. *Ferry*, 119 U. S. 385; *Smith* v. *Adams*, 130 U. S. 167, 176; *Cross* v. *Burke*, 146 U. S. 82, 88; *Washington & Georgetown Railroad* v. *District of Columbia*, 146 U. S. 227; *Cam-*

eron v. *United States*, 146 U. S. 533, 535, and 148 U. S. 301, 303. In *Sparrow* v. *Strong*, 3 Wall. 97, cited by the plaintiff in error, there was an affidavit, uncontradicted by anything in the record, that the mining claim in dispute was of the requisite pecuniary value. In *Columbian Ins. Co.* v. *Wheelright*, above cited, this court quashed a writ of error to review a judgment upon a writ of mandamus to admit to an office, the salary of which was not shown to be of the pecuniary value required to support the jurisdiction of this court. See also *United States* v. *Addison*, 22 How. 174; *Smith* v. *Whitney*, 116 U. S. 167, 173; *United States* v. *Wanamaker*, 147 U. S. 149.

The matter in dispute in this case is not the right to the trade-mark, but the right to have it registered; the registration is only *prima facie* evidence of ownership; and if the value of the registration is susceptible of an estimate in money, there is no evidence whatever in the record tending to show this value.

It is not, and could not be, pretended that in this case there was "involved the validity of any patent or copyright;" and, in the light of previous decisions of this court, it is quite clear that there was not "drawn in question the validity of a treaty or statute of or an authority exercised under the United States."

In order to come within this clause, the validity, and not the construction only, of a treaty or statute of the United States, or of an authority exercised under the United States, must be directly drawn in question.

In *Snow* v. *United States*, 118 U. S. 346, 353, in which it was contended that a court established by act of Congress, and admitted to have a lawful existence, and jurisdiction of the case, misconstrued the act and went beyond the authority which it conferred, it was held that all that was drawn in question was whether there was or was not error in the administration of the statute, and not "the validity of an authority exercised under the United States," within the meaning of the act of March 3, 1885, c. 355.

In *Baltimore & Potomac Railroad* v. *Hopkins*, 130 U. S. 210, which also arose under that act, the question in contro-

versy was whether a railroad corporation authorized by acts of Congress to establish freight stations, and to lay as many tracks "as its president and board of directors might deem necessary," in the District of Columbia, had the right to occupy a public street for the purposes of a freight yard. It was argued that the validity of an authority, exercised under the United States, to so occupy the public streets was drawn in question. But this court held that only the construction of the acts of Congress, and the extent of the authority claimed under them, and not the validity, either of the statutes, or of the authority, was drawn in question; or, in other words, it was "a case which depends only on a judicial construction of an act of Congress, there being no denial of the power of Congress to pass the act, or of the right to enjoy whatever privileges are granted by it." *Clough* v. *Curtis*, 134 U. S. 361, 370.

In *District of Columbia* v. *Gannon*, 130 U. S. 227, it was held that the validity of the authority of the Commissioners of the District was not drawn in question by contesting the liability of the District in damages for the negligence of the Commissioners in failing to keep the streets in repair.

In *United States* v. *Lynch*, 137 U. S. 280, in which the court below had denied a writ of mandamus to compel accounting officers of the Treasury to allow a claim for mileage, it was contended that under the acts of Congress, and the construction given them by a previous decision of this court, the duty of the accounting officers "was merely ministerial, and that by the disallowance of the relator's claim for mileage these officers exercised a discretion which they did not possess; that this was an invalid exercise of an authority under the United States; and that hence the validity of the authority was drawn in question." To which this court, speaking by the Chief Justice, answered: "In order to justify this position, however, the validity of the authority must have been drawn in question directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted; nor is the validity of an authority, every time an act done by such

authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry." The court accordingly held that the authority of the accounting officers of the Treasury was not thus denied, nor the validity of that authority questioned; but that it was only contended that in the exercise of a valid authority those officers erred in respect to the allowance, in view of the decision of this court in another case; that if the judgment should be reversed upon the ground urged, it would not be for want of power in these officers to audit and pass upon the account, but because they had disallowed what they ought to have allowed, and erroneously construed what needed no construction; and that this would not in any degree involve the validity of their authority. 137 U. S. 285, 286.

In the present case, no objection to the validity of the act of Congress under which the Commissioner of Patents acted was made, either at the hearings in the Patent Office and in the courts of the District of Columbia, or in the briefs filed by counsel in this court. Nor was the existence or the lawfulness of the authority conferred by that act upon the Commissioner of Patents drawn in question. But from the beginning to the end of the proceedings the only controversy was as to the construction of the act of Congress, and consequently as to the nature and extent of the Commissioner's authority. Neither the question whether the Commissioner rightly decided upon the presumptive lawfulness of the right of the State of South Carolina to the trade-mark sought to be registered, nor the question whether the Commissioner's duty was of such a character that a writ of mandamus would lie to compel its performance, involved a question of the validity of the authority exercised by him under the United States.

Writ of error dismissed for want of jurisdiction.

MASON v. PEWABIC MINING COMPANY.

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

No. 1041. Argued April 26, 27, 1894. — Decided May 14, 1894.

This court has no jurisdiction over an appeal from a judgment of a Circuit Court denying the application of counsel for a solicitor's allowance out of a fund realized from a sale made under direction of that court in execution of a mandate of this court, the appeal being taken after July 1, 1891, and not being taken under the provisions of section 5 of the Judiciary Act of March 3, 1891, c. 517.

When a mandate of this court has been misconstrued or disregarded by a Circuit Court, the proper remedy now is by mandamus; but in this case the Circuit Court was at liberty to consider the application for an allowance, and its action in that regard was open to review in the Circuit Court of Appeals.

On March 31, 1884, some of the stockholders of the Pewabic Mining Company, on behalf of themselves and all others who might desire to join therein, filed their bill in the Circuit Court of the United States for the Western District of Michigan against that company, its directors, and a new corporation called the Pewabic Copper Company, formed for the purpose of acquiring the property of the Mining Company, seeking to have the property disposed of at public sale, and an accounting by the directors. The Circuit Court decreed a sale but denied the accounting. The case was brought to this court on cross-appeals and the decree affirmed except in respect of the accounting, as to which the decree was reversed and a reference directed. *Mason* v. *Pewabic Mining Co.*, 133 U. S. 50. The case was decided in this court January 13, 1890, and the mandate having gone down, the Circuit Court rendered a decree May 6, 1890, ordering a reference, report, and sale by auction. February 3, 1891, the special master filed his report of sale, which was confirmed. On March 3 one Marcus filed an intervening petition to set aside the confirmation and open the sale, which was denied April 27, 1891, and the petition

dismissed, whereupon Marcus appealed to this court, which affirmed the order. *Marcus* v. *Mason*, 145 U. S. 349.

February 28, 1893, counsel filed a petition for an allowance out of the amount realized on the sale, to which an answer was filed and the petition denied, whereupon an appeal was prosecuted to this court. In the opinion of the Circuit Court, appearing in the record, it is said:

"The other matter which remains to be disposed of is the petition for an allowance out of the fund in favor of the solicitors for the complainants upon the footing of what are known as costs between solicitors and clients.

"A preliminary question arises in regard to the power of the court, proceeding as it is under the mandate of the Supreme Court, which contains the order of that court in regard to costs. This was to the effect that the complainants should recover their costs in the Circuit as well as in the Supreme Court. These, of course, must be understood to be the usual taxable costs.

"It would seem clear that this court has no authority to supplement that order by awarding a sum, to be determined by its discretion, as costs to be taxed as between party and party, but which are really an indemnity for the expense of carrying on the suit against a perverse and unreasonable defence, as was done in *Perrin* v. *Lepper*, 72 Michigan, 454, and *Mackintosh* v. *Flint & Père Marquette Railroad*, a case reported in 34 Fed. Rep. 582, (though not on this point, which latter appears from the record,) cited in support of this petition.

"This court is not now proceeding upon its original authority in regard to any matters which were or might have been dealt with by the Supreme Court on the appeal from the original decree. The subject of costs was included in the mandate, which we are now executing. *Perkins* v. *Fourniquet*, 14 How. 328; *In re Washington & Georgetown Railroad*, 140 U. S. 91; *Gaines* v. *Rugg*, 148 U. S. 228, 239.

"There is some analogy, though it is not complete, between the equity for such costs and costs between solicitor and client, which are paid out of a fund in court. I have some doubt whether this court retains the power to award the latter

Argument against the Motion.

species of costs; but I express no opinion upon this question, as it seems to me clear that this is not a case in which they could properly be allowed."

A motion, on behalf of the appellees, was made to dismiss the appeal for want of jurisdiction.

Mr. Thomas H. Talbot for the motion.

Mr. Russell C. Ostrander and *Mr. Edward Cahill* filed a brief by leave of court on the part of intervening stockholders.

Mr. Don M. Dickinson, (with whom was *Mr. Alfred Russell* on the brief,) opposing.

The question presented is, whether the act of March 3, 1891, creating the Court of Appeals, stands in the way of the present appeal. This act may be found in 138 U. S. 709.

This involves the effect of the proviso in § 6 of that act.

Section 6 declares that in all cases other than those enumerated in section 5 (and this is not enumerated) the appeal shall be to the new court, "unless otherwise provided by law."

We submit this case falls within the last named proviso, precisely as the Marcus appeal (taken three months after the new act) did. Nobody suggested that that appeal should have been to the new court; yet every reason put forward why the present appeal should be to the new court, would apply to the appeal of Marcus. *Marcus* v. *Mason*, 145 U. S. 349.

The Court of Appeals act of March 3, 1891, went into immediate operation three months before the Marcus appeal. As to its immediate effect, see *In re Claasen*, 140 U. S. 200, 204 (near bottom); *McLish* v. *Roff*, 141 U. S. 661, 664. So that if counsel, now moving dismissal, is right, there was no jurisdiction here in the Marcus appeal.

The present case concerns the distribution of a fund created under the mandate of the Supreme Court, and (in the view of the court below) involves the construction of the language of the mandate of this court as to costs. Surely it is not for the Court of Appeals to give a construction and final operation to

the mandate of the Supreme Court. *Perkins* v. *Fourniquet*, 14 How. 328.

Moreover, by the joint resolution of March 3, 1891, the jurisdiction of the Supreme Court is not impaired where an appeal was taken prior to the act concerning appeals. It may well be held that the original appeal in the *Pewabic case* vested this court with all future jurisdiction in the case, within the meaning of that resolution.

This case concerns the administration of a fund in court, and this court having itself created that fund by its mandate before the Court of Appeals statute was enacted, and being engaged in the exercise of such administration when that statute was enacted, it is the "law" that this court will dispose of that fund, and that no other court can. The framer of the Court of Appeals act saw that there would be cases like this, and inserted the proviso above referred to. Analogies of the application of the principle involved may be seen in *French* v. *Hay*, 22 Wall. 250; *Hudson* v. *Detroit Superior Court*, 42 Michigan, 239; and *Dietzsch* v. *Huidekooper*, 103 U. S. 494.

The doctrine laid down in *French* v. *Hay* is directly in point. See also the recent case of *City Bank of Fort Worth* v. *Hunter*, 152 U. S. 512, where the court says, referring to *Perkins* v. *Fourniquet*, 14 How. 328: "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."

The converse of this is, that an appeal does lie when a sufficient amount is involved.

"Provided by law," in section 6 of the Judiciary Act of

1891, does not mean provided by statute law only. It means, also, provided by the course and practice of the courts. See *In re Neagle*, 135 U. S. 1, 59.

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

By section 4 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, 827, it was provided that the review, by appeal, by writ of error, or otherwise, from the existing Circuit Courts, shall be had only in the Supreme Court of the United States, or in the Circuit Court of Appeals hereby established, according to the provisions of this act regulating the same. Section 5 enumerated the classes of cases in which appeals or writs of error might be taken from the Circuit Courts direct to this court; and section 6 provided that the Circuit Courts of Appeals should exercise appellate jurisdiction to review by appeal or by writ of error final decisions of the Circuit Courts "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law." By section 14, "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections 5 and 6 of this act" were repealed.

In *Lau Ow Bew* v. *United States*, 144 U. S. 47, 56, it was held that "the words 'unless otherwise provided by law' were manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away except when expressly so provided. Implied repeals were thereby intended to be guarded against. To hold that the words referred to prior laws would defeat the purpose of the act and be inconsistent with its context and its repealing clause."

By joint resolution of March 3, 1891, it was provided "that nothing in said act shall be held or construed in anywise to impair the jurisdiction of the Supreme Court or any Circuit Court of the United States in any case now pending before it," and it was added, "or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken

to any of said courts before the first day of July, *anno Domini* eighteen hundred and ninety-one."

The act of March 3, 1891, went into immediate operation. *In re Claasen*, 140 U. S. 200. But the jurisdiction of this court having been preserved in respect of writs of error or appeals sued out or taken before July 1, 1891, by the joint resolution, we had jurisdiction of the appeal of Marcus which was taken June 12 of that year. This case does not come within either of the classes of cases specified in section 5, and the appeal was not prayed until August 20, 1893. It must therefore be dismissed. *National Exchange Bank* v. *Peters*, 144 U. S. 570; *Wauton* v. *De Wolf*, 142 U. S. 138; *Ogden* v. *United States*, 148 U. S. 390; *Aspen Co.* v. *Billings*, 150 U. S. 31; *Voorhees* v. *Noyes Manf'g Co.*, 151 U. S. 135; *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 5 U. S. App. 97. It is said, however, that the disposition of the case involved the construction and application of the mandate of this court as to costs. If it could be contended that our mandate had been misconstrued or disregarded, this would not give complainants the right of appeal after July 1, 1891, but the remedy would be by mandamus. *City Bank* v. *Hunter*, 152 U. S. 512. Lest, however, appellants might unnecessarily seek a review of the matter in that form of procedure, we deem it proper to say that the Circuit Court was right in the view taken of the mandate. The remedy of appellants lay in an appeal to the Circuit Court of Appeals for the Sixth Circuit.

In *Texas & Pacific Railway* v. *Anderson*, 149 U. S. 237, the action of the Circuit Court conformed to the mandate, and there were no proceedings subsequent thereto not settled by the terms of the mandate itself, and we therefore held, upon the authorities cited and for the reasons given, that, on the facts appearing in that record, the Circuit Court of Appeals could not review by writ of error the judgment of the Circuit Court. But in this case the Circuit Court was at liberty to consider, as it did, the application for an allowance out of the fund on the footing of costs between solicitors and clients, and its action in that regard was open to review in the Circuit Court of Appeals. *Appeal dismissed.*

ROBERTS *v.* LEWIS.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 1044. Submitted April 23, 1894. — Decided May 14, 1894.

Under a will, by which the testator devises and bequeathes to his wife "all my estate, real and personal, of which I may die seized, the same to be and remain hers, with full power, right and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, however, that if she should marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike," the widow has power during widowhood to convey to third persons an estate in fee simple in his lands.

Giles v. *Little*, 104 U. S. 291, overruled; and *Little* v. *Giles*, 25 Nebraska, 313, followed.

This was an action of ejectment, brought June 11, 1887, by Walter F. Lewis against Artemas Roberts, in the Circuit Court of the United States for the District of Nebraska, to recover possession of six lots in the town of South Lincoln, in the county of Lancaster and State of Nebraska. The Circuit Court gave judgment for the plaintiff, and the case was taken by writ of error to the Circuit Court of Appeals for the Eighth Circuit, which certified to this court the following facts:

On May 10, 1869, Jacob Dawson duly made his last will, which was duly admitted to probate in 1869 after his death, and which, omitting the formal parts, was as follows:

"After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give and bequeath and dispose of as follows, to wit: To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to be and remain hers, with full power, right and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, how-

ever, that if she should marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike, and in case any of my children should have deceased leaving issue, then the issue so left to receive the share to which said child would be entitled. I likewise make, constitute and appoint my said wife, Editha J., to be executrix of this my last will and testament, hereby revoking all former wills made by me."

At the time of his death, he had a perfect title to the lots in controversy in this suit. On March 15, 1870, Editha J. Dawson conveyed these lots by warranty deed to Paran England, who, on December 15, 1871, conveyed them by warranty deed to Roberts, the plaintiff in error. On December 14, 1879, Editha J. Dawson married Henry M. Pickering. On September 15, 1879, the children of Jacob Dawson made a warranty deed of these lots to Hiland H. Wheeler and Lionel C. Burr; and Wheeler and Burr afterwards made a warranty deed thereof to Ezekiel Giles, who, in May, 1887, conveyed them by warranty deed to Lewis, the defendant in error.

While the title in these lots was vested in Giles as aforesaid, he brought an action claiming under that title to recover another lot in the same county, which had belonged to Jacob Dawson at the time of his death, against one Little, who claimed under a deed executed by Editha J. Dawson during her widowhood. That case was brought by writ of error to this court, which held at October term, 1881, that under the will of Jacob Dawson his widow only took "an estate for life in the testator's lands, subject to be divested on her ceasing to be his widow, with power to convey her qualified life estate only," and that "her estate in the land and that of her grantees determined on her marriage with Pickering." *Giles* v. *Little*, 104 U. S. 291.

After that decision, but whether before or after the aforesaid deed from Giles to Lewis did not appear, a suit was brought in the district court of Lancaster county by various grantees of the widow against Giles to quiet their title against the title claimed by Giles under the aforesaid deed from the

children of Jacob Dawson; and was taken by appeal to the Supreme Court of Nebraska, which held that the will of Jacob Dawson, under the statutes of the State of Nebraska, enabled his widow, prior to her remarriage, to convey an estate in fee simple in any of the lands whereof her deceased husband had died seized. *Little* v. *Giles*, 25 Nebraska, 313.

Upon these facts, the Circuit Court of Appeals duly certified to this court the following questions or propositions of law:

"First. In determining the nature of the estate that became vested in said Editha J. Dawson under said will of her deceased husband, Jacob Dawson, in and to lands situated in the State of Nebraska, whereof said Jacob Dawson died seized and possessed, should the Circuit Court of Appeals be governed by the decision of the Supreme Court of the United States in *Giles* v. *Little*, 104 U. S. 291, 300, or by the subsequent decision of the Supreme Court of the State of Nebraska in *Little* v. *Giles*, 25 Nebraska, 313, 334?

"Second. Did the aforesaid will of Jacob Dawson vest his widow with such an estate in lands whereof the testator died seized, situated in the State of Nebraska, that during her widowhood she could convey to third parties an estate in fee simple therein?

"Third. Should the construction of the will of Jacob Dawson, deceased, which was adopted by the Supreme Court of the United States in *Giles* v. *Little*, 104 U. S. 291, be adhered to by the United States Circuit Court of Appeals for the Eighth Circuit in determining the right of Walter F. Lewis in and to the property heretofore described, in view of the fact that said Walter F. Lewis purchased said property subsequently to the promulgation of said decision in *Giles* v. *Little*, and prior to the decision of the Supreme Court of the State of Nebraska in the case of *Little* v. *Giles*, 25 Nebraska, 313?"

Mr. N. S. Harwood and *Mr. John H. Ames* for plaintiff in error.

Mr. J. M. Woolworth and *Mr. L. C. Burr* for defendant in error.

Argument for Defendant in Error.

The general rule is that the laws of the several States shall be regarded as rules of decision in the Federal courts in cases to which they apply, except where the Constitution, treaties, or statutes of the United States otherwise require or provide. In trials at common law this is prescribed by statute. In suits in equity and admiralty, it has been established by a long course of decisions. It is of equal force and application in all the jurisdictions of the Federal courts.

But stated in these general terms, the rule leaves many interesting questions. One, and a radical one, is what are the laws of the several States which shall be rules of decision in the Federal courts. The cases do not show that this court has ever yielded its judgment to that of a state court when it has deliberately spoken first. The question always being what is the local law, this court always, in obedience to the spirit of the general rule, accepts the exposition of it by the local court, if such exposition has been given. But if this court is, by the exigencies of an orderly litigation, first called on to determine the local law and it does so, it does not yield its judgment to that of a local court afterwards pronounced, save only when, as in all other cases, it becomes satisfied upon its own independent examination that it has fallen into error. *Groves* v. *Slaughter*, 15 Pet. 449; *Rowan* v. *Runnels*, 5 How. 134. In the latter case Chief Justice Taney, after examining the decision in the former case, said: "It now appears, however, that the question has since been brought before the courts of the State, and it has been settled by its highest tribunals that the clause in the constitution above referred to did of itself, and without any legislative enactment, prohibit the introduction of slaves as merchandise and for sale, and render all contracts for the sale of such slaves made after May 1, 1833, illegal and void. And it is argued that inasmuch as this court adopts the construction given by the state courts to their own constitution and laws, we ought to follow the decisions in Mississippi, and declare the case before us to be void, notwithstanding the case of *Groves* v. *Slaughter*. But we are not aware of any decision in this court which presses the rule so far, or that would justify this court in declaring

contracts to be void upon this ground, which, upon the fullest consideration, it has so recently held to be good."

In *Pease* v. *Peck*, 18 How. 595, Mr. Justice Grier, delivering the opinion of the court, discussed somewhat at large this question, and at pages 598, 599, said: "But when this court has first decided a question arising under state laws, we do not feel bound to surrender our convictions, on account of a contrary subsequent decision of a state court, as in the case of *Rowan* v. *Runnels*, 5 How. 139." See also *Morgan* v. *Curtenius*, 20 How. 1.

The case which must always be considered as concluding this question is *Burgess* v. *Seligman*, 107 U. S. 20, 35. It has been cited with approval in every case which has since been before the Federal Supreme Court, and in which, in any of its phases, the question has been presented. The opinion delivered by Mr. Justice Bradley was the unanimous judgment of the court. That great judge brought his best powers to the subject. His examination of the decisions was exhaustive, as is shown by the citation in the margin of almost every previous case; his discrimination was characteristic, and his expressions were as exact and pregnant and strong as in any of his judicial writings.

Upon the point now under discussion the opinion is familiar to the court, and need not be quoted at length. The explication of it concludes with these words: "In the present case, as already observed, when the transaction in question took place, and when the decision of the Circuit Court was rendered, not only was there no settled construction of the statute on the point under consideration, but the Missouri cases referred to arose upon the identical transaction which the Circuit Court was called upon and which we are now called upon to consider. It can hardly be contended that the Federal court was to wait for the state courts to decide the merits of the controversy and then simply register their decision; or that the Circuit Court should be reversed merely because the state court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view, we should gladly do so; but in the exercise of that inde-

pendent judgment which it is our duty to apply to the case, we are enforced to a different conclusion. *Pease* v. *Peck*, 18 How. 595, and *Morgan* v. *Curtenius*, 20 How. 1, in which the opinions of the court were delivered by Mr. Justice Grier, are precisely in point."

It would serve no useful purpose to cite other cases to the same effect, or to seek to support by any reasoning what may be now considered one of the institutes of the law. There are cases which are sometimes cited as holding another doctrine, but an examination of their facts will show that they are entirely consistent with the judgments cited above.

The controversy in the case of *Williamson* v. *Suydam*, 20 How. 427, was before the Federal court several times, and an account of it will be useful. In 1802 Mary Clark died seized of the lands in dispute, leaving a will devising the same to Benjamin Moore and his wife, who was the daughter of the testatrix, and Mrs. Maunsell in trust to receive the rents and pay them to Thomas B. Clark, a grandson of the testatrix, during his lifetime, and at his death to his issue then living in fee; and if he died without issue, then to Clement C. Moore in fee. In 1814 the legislature of New York by an act discharged the trustees, on account of their inability to act from infirmity of health and other causes, and empowered the court of chancery to appoint others in their places, who should divide the land into two equal parts, one of which they should hold upon the trusts declared in the will, and to sell the other and invest the proceeds, holding the principal for the same uses and paying the interest to Thomas B. Clark. This measure proving ineffectual for the purposes for which that act was passed, in 1815 another was enacted authorizing him to act as trustee and providing that no sale by him should be effectual without the Chancellor's approval. Afterwards, in that year, Chancellor Kent authorized Clark to sell the eastern moiety. In 1816 another act was passed authorizing Clark, under the Chancellor's order, to mortgage or sell the southern moiety, applying the proceeds for the purposes required by the Chancellor under the former acts. In 1817 the Chancellor made an order accordingly authorizing Clark to convey any

part of the southern moiety in satisfaction of debts, upon a valuation to be made as therein provided. In 1818 Clark conveyed the premises to McIntyre, under whom Suydam held. During this time Clark had infant children. The legislation and orders mentioned were obtained at his instance, with the consent of all concerned except these infants. In 1826 Clark died, leaving these children. They sought to recover these premises, claiming among other things that the act was unconstitutional, and the Chancellor's orders were void for that reason, and because the orders were unauthorized by these acts. This controversy was first raised in the state courts. The action was ejectment. The lessor of the plaintiff, Moses Field, claimed upon a mortgage made by Clark, and a decree of foreclosure sale and master's deed; the defendant claimed under a lease made by the original trustees. The validity of the acts of the legislature and the orders of the Chancellor was thus drawn in question, and the judgment was for the plaintiff. The case was then taken to the court of errors and is reported under the name of *Sinclair* v. *Jackson*, in 8 Cowen, 543. The court declined to express an opinion upon the validity of the legislation and the judicial proceedings, deciding the case on other grounds. This was in December, 1826.

The next case was *Clark* v. *VanSurlay*, 15 Wend. 436 (1836). This was also an ejectment brought by one of the children of Thomas B. Clark. The defendant claimed under the latter, acting under the acts and orders above mentioned. The Supreme Court held the acts constitutional and valid, and that the children could not question the validity of the Chancellor's orders in ejectment on the ground of excess of authority; and that they not being void, the remedy was in equity or a court of review. The case was then carried to the court of errors, where it is reported under the style of *Cochran* v. *VanSurlay*, in 20 Wend. 365; *S. C.* 32 Am. Dec. 570; (1838,) the original plaintiff having married Cochran. Chancellor Walworth delivered an opinion in favor of affirmance, and Senator Verplanck against the same. Upon the vote seven voted to reverse and twelve to affirm the judgment.

An action in ejectment was then brought in the New York

circuit by Mrs. Williamson, one of the children of Thomas B. Clark, against Barry, who claimed under the legislation and orders and proceedings above mentioned and Clark's action thereunder. The judges were divided in opinion, and the case came to the Supreme Court on certificate made in 1846. Because of the difference between the members of the Court of Errors, that court did not think itself concluded by opinion of the latter, examined the question as an original one, and found that the orders of the Chancellor were without jurisdiction, and that what was done under them was void. The opinion of the court was delivered by Mr. Justice Wayne, in the course of which he said that Judge Bronson, delivering the opinion of the Supreme Court of the State in 15 Wend., said that the acts of the legislature did not give the Chancellor power to make the order; and that this may be gathered from the opinion of Chancellor Walworth in the Court of Error in 20 Wend., and is intimated by Senator Verplanck as his strong impression. And then the learned judge states a point of difference between this court and the state court, and says: "Our conclusion, however, contrary to theirs, will be put upon grounds not suggested when they acted upon this case." The state court had held that a decree in chancery could not be looked into in a collateral way for the purpose of setting aside rights growing out of it. Admitting the rule, it was held that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court.

Afterwards an action was brought in the Superior Court of New York, presenting the same questions, and was carried to the Court of Appeals. *Towle* v. *Forney*, 14 N. Y. 423 (1856). The court, speaking by Denio, C. J., reviewed the judgments reported in 15 Wend. and 20 Wend., and found that they settled the rule and refused to follow the judgment of the Federal court.

The case reported in 8 How. went back for a new trial, which resulted in a judgment for the plaintiff. It was again brought to the Supreme Court, and is reported under the title of *Suydam* v. *Williamson*, 24 How. 427 (1860). Mr. Justice Campbell delivered the opinion. He showed that the state

court held that the rule was settled by the judgments reported in 15 and 20 Wend., and it was bound to follow them instead of that of this court. Because the state court had thus settled the question, he held that under the circumstances this court was bound to follow it.

The case came there again, and is reported in 6 Wall., but what was then ruled is not material here.

In a long series of cases of various circumstances, this court, in a jealous care of rights derived from contracts, has uniformly held that if the state courts have held a certain view of the law upon which contracts have been made and rights have been acquired, and afterwards they have changed their decisions, they will not be followed in the Federal courts, in cases to enforce those contracts, but the law of the State at the time those rights were acquired will be rigidly applied. *Mercer County* v. *Hacket*, 1 Wall. 83; *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Havemeyer* v. *Iowa County*, 3 Wall. 294; *Thomson* v. *Lee County*, 3 Wall. 327; *Mitchell* v. *Burlington*, 4 Wall. 270; *Lee County* v. *Rogers*, 7 Wall. 181; *City* v. *Lamson*, 9 Wall. 477; *Olcott* v. *The Supervisors*, 16 Wall. 678; *Douglass* v. *County of Pike*, 101 U. S. 677; *Thompson* v. *Perrine*, 103 U. S. 806; *S. C.* 106 U. S. 589; *Pleasant Township* v. *Ætna Ins. Co.*, 138 U. S. 67; *Clark* v. *Bever*, 139 U. S. 96.

Counsel then contended that the construction given to the will by this court in *Giles* v. *Little*, 104 U. S. 291, was correct; citing, among other cases, *Smith* v. *Bell*, 6 Pet. 68; *Brant* v. *Virginia Coal Co.*, 93 U. S. 326.

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

This certificate distinctly presents for decision the question (argued, but not decided, when this case was before this court at a former term, reported in 144 U. S. 653) of the construction of the will of Jacob Dawson, the material part of which was as follows:

"To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal, of which I may die

seized, the same to be and remain hers, with full power, right and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, however, that if she should marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike."

By the statutes of Nebraska, "every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate;" and "the term 'heirs,' or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple." Nebraska Comp. Stat. c. 23, § 124; c. 73, § 49.

In the opinion delivered by this court in a former case between different parties, and concerning other land, the second of those sections was not referred to, and the first was imperfectly quoted (omitting the word "clearly" before "appear") and was treated as of no weight; and it was held, reversing the decision of Judge McCrary in 2 McCrary, 370, that by the true construction of the will the widow "took under it an estate for life in the testator's lands, subject to be divested on her ceasing to be his widow, with power to convey her qualified life estate only;" and that "her estate in the land and that of her grantees determined on her marriage with Pickering." *Giles* v. *Little*, 104 U. S. 299, 300.

The Supreme Court of Nebraska, in a subsequent case, considered those sections of the statute as controlling the construction of the will, and making it clear that the widow took an estate in fee. *Little* v. *Giles*, 25 Nebraska, 321, 322. That court was also of opinion that the gift over to the children passed only that portion of the estate, real or personal, not disposed of by the widow during her widowhood; and upon the whole case concluded "that the intention of the testator was to empower his widow to convey all of his real and personal estate, if she saw fit to do so, and, as she had exercised this right and power before her remarriage, the

grantees under her deeds acquired all the title of the testator to such lands." 25 Nebraska, 327, 328, 334.

The opinion of the Supreme Court of the State appears to have been formed upon full consideration of the difficulties of the case; and is entitled to great weight, especially upon the construction of the statute of the State. *Suydam* v. *Williamson*, 24 How. 427. And this court, on reconsideration of the whole matter, with the aid of the various judicial opinions upon the subject, and of the learned briefs of counsel, is of opinion that the sound construction of this will, as to the extent of the power conferred on the widow, is in accordance with the conclusion of the state court, and not with the former decision of this court, which must, therefore, be considered as overruled.

The testator's primary object manifestly was to provide for his widow. He begins by giving her "all my estate, real and personal," which of itself would carry a fee, unless restricted by other words. *Lambert* v. *Paine*, 3 Cranch, 97. He then says "to be and remain hers," which, upon any possible construction, secures to her the full use and enjoyment of the estate, while she holds it. She is also vested, in the most comprehensive terms, "with full power, right and authority to dispose of the same" (which, as no less title has yet been mentioned, naturally means the whole estate) "as to her shall seem most meet and proper, so long as she shall remain my widow." This last clause, so far as it controls the previous words, has full effect if construed as limiting the time during which the widow may have the use and enjoyment of the estate, and the power to dispose of it, and not restricting the subject to be disposed of. The power thus conferred, therefore, in its own terms, as well as by the general intent of the testator, gives her during widowhood the right to sell and convey an absolute title in any part of the estate; for it would be difficult, if not impossible, to obtain an adequate price for a title liable to be defeated in the hands of the purchaser by the widow's marrying again.

That the power was intended to be unlimited in this respect appears, even more distinctly, by the terms of the next clause,

by which, if she should marry again, the testator declares it to be his will that "all of the estate herein bequeathed, or whatever may remain, should go" to his surviving children. By not using the technical word "remainder," or making the devise over include the entire estate at all events, but carefully adding, after the words "all the estate herein bequeathed," the alternative "or whatever may remain" (which would otherwise have no meaning) he clearly manifests his intention to restrict the estate given to the children to whatever has not been disposed of by the widow; and there is nothing upon the face of the will, nor are there any extrinsic facts in this record, having any tendency to show that the power of the widow is less absolute over the real estate than over the personal property.

The cases of *Smith* v. *Bell*, 6 Pet. 68, and *Brant* v. *Virginia Coal Co.*, 93 U. S. 326, relied on in support of the opposite conclusion, involved the construction of wills expressed in different language from that now before the court.

In *Smith* v. *Bell*, the testator bequeathed "all his personal estate," consisting principally of slaves, to his wife, "to and for her own use and benefit and disposal absolutely, the remainder of said estate, after her decease, to be for the use of" his son; and the decision was that the wife took a life estate only, and the son a vested remainder. The wife had made no conveyance of the property; the words of the gift over were the technical ones "the remainder of my estate," appropriately designating the whole estate after the wife's death; and the court distinctly intimated that, if the will were construed as giving the wife "the power to sell or consume the whole personal estate during her life," a gift over of "what remains at her death" would be "totally incompatible" and "void for uncertainty." 6 Pet. 78. But in the case at bar, the gift over is in express terms of "whatever may remain." If the intent expressed by these words can be carried out, the children take only what has not been disposed of. If the clause containing them is repugnant and void, the view of the Supreme Court of Nebraska that the widow took an estate in fee is fortified. See *Howard* v. *Carusi*, 109 U. S. 725; *Potter* v. *Couch*, 141 U. S. 296, 315, 316.

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In *Brant* v. *Virginia Coal Co.*, the bequest which was held to give a life estate, and no power to convey a fee, was only of the testator's estate, real and personal, to his wife, "to have and to hold during her life, and to do with as she sees proper before her death." 93 U. S. 327.

The numerous cases cited in the briefs have been examined, and show that the general current of authority in other courts is in favor of our present conclusion; but, as they largely depend upon the phraseology of particular wills, it would serve no useful purpose to discuss them in detail.

It is unnecessary to express a positive opinion upon the question whether, under this will, the widow took an estate in fee; for if she took a less estate with power to convey in fee, the result of the case, and the answers to the questions certified, must be the same as if she took an estate in fee herself.

For the reasons above stated, this court is of opinion that the will of Jacob Dawson did give his widow such an estate in lands in Nebraska of which he died seized, that she could during her widowhood convey to third persons an estate in fee simple therein; and that the Circuit Court of Appeals, in determining the nature of the estate vested in her by the will in such lands, should be governed, not by the former decision of this court in *Giles* v. *Little*, 104 U. S. 291, but by the decision of the Supreme Court of Nebraska in *Little* v. *Giles*, 25 Nebraska, 313.

The result is, that the first question certified must be answered accordingly; that the second question must be answered in the affirmative; and that the third question must be answered in the negative; and that these answers be

Certified to the Circuit Court of Appeals.

MARCHANT *v.* PENNSYLVANIA RAILROAD COMPANY.

ERROR TO THE COURT OF COMMON PLEAS, NO. 3, FOR THE COUNTY OF PHILADELPHIA, STATE OF PENNSYLVANIA.

No. 221. Argued January 18, 19, 1894. — Decided May 14, 1894.

When a plaintiff below has the benefit of a full and fair trial in the several courts of his own State, whose jurisdiction he invokes, and where his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all in like condition, even if he can be regarded as deprived of his property by an adverse result, the proceedings that so resulted were in "due process of law," as that phrase is used in the Fifth and the Fourteenth Amendments to the Constitution of the United States.

The leading cases touching the construction of that phrase in the Amendments reviewed.

The fact that a railroad company is held liable for damages suffered by a person by reason of the occupation of a public street in a city in front of his premises by an elevated track furnishes no ground for holding it liable to an owner on the other side of the same street but in a different part of it, by reason of the construction of a similar elevated track opposite to him but not on the public street.

The construction of an elevated railroad, under laws of the State, on private land abutting on a public street in a city, gives to the owner of land on the opposite side of the street no claim to recover consequential damages for injury inflicted upon him thereby.

EDWARD D. MARCHANT brought an action in the Court of Common Pleas, No. 3, for the county of Philadelphia, State of Pennsylvania, at September term, 1884, against the Pennsylvania Railroad Company, a corporation of Pennsylvania, for the recovery of the damages occasioned to him in the erection by the defendant company of its elevated road on property belonging to the railroad company and abutting on the south side of Filbert Street, in the city of Philadelphia, in front of plaintiff's property, which was situated on the north side of Filbert Street, a public highway fifty-one feet in width. No portion of the plaintiff's property was actually taken or occupied by the railroad company, nor was Filbert

Argument for Plaintiff in Error.

Street, where it extends in front of the plaintiff's lot, occupied by the structure of the railroad company. But at another portion of Filbert Street, not far from plaintiff's lot, the bed of the street was and is occupied by the railroad. The plaintiff alleged in his declaration that by the erection and maintenance of the elevated railroad, and the continuous passage of passenger and freight cars thereon, driven by steam locomotives, he was injured in the possession, use, and enjoyment of his property, and that his dwelling and business house on said lot was rendered unfit for habitation, and was greatly depreciated in value. The trial resulted in a verdict and judgment for the plaintiff in the sum of $4980. The cause was taken on error to the Supreme Court of Pennsylvania, where the judgment was reversed, the majority of the court holding that the plaintiff had no legal cause of action. The plaintiff having died, pending the litigation, his administratrix was substituted, and thereupon sued out a writ of error to this court.

Mr. M. Hampton Todd for plaintiff in error.

I. The Supreme Court of Pennsylvania, in reversing the judgment which plaintiff had recovered as compensation for the damage done to his property by the construction of defendant's elevated railroad in front thereof, and holding that he had no cause of action for the recovery of such damages, deprived him of his property without due process of law. *Case of Phil. & Trenton Railroad*, 6 Wharton, 25; *S. C.* 36 Am. Dec. 202; *O'Connor* v. *Pittsburgh*, 18 Penn. St. 187; *Monongahela Navigation Co.* v. *Coons*, 6 W. & S. 101; *Schuylkill Navigation Co.* v. *Thoburn*, 7 S. & R. 411; *Pusey* v. *Allegheny*, 98 Penn. St. 522; *Reading* v. *Althouse*, 93 Penn. St. 400; *New Brighton* v. *United Presbyterian Church*, 96 Penn. St. 331; *Pennsylvania Railroad* v. *Duncan*, 111 Penn. St. 352; *Pennsylvania Ins. Co.* v. *Schuylkill Valley Railroad*, 151 Penn. St. 334; *Jones* v. *Erie & Wyoming Railroad*, 151 Penn. St. 30; *Pottstown Gas Co.* v. *Murphy*, 39 Penn. St. 257; *Pittsburgh, Fort Wayne &c. Railway* v. *Gilleland*, 56 Penn. St. 445; *Western Pennsylvania Railroad* v. *Hill*, 56 Penn.

St. 460; *Columbia Bridge Co.* v. *Geisse*, 35 N. J. Law, 562; *Radcliff* v. *Brooklyn*, 4 N. Y. 195; *S. C.* 53 Am. Dec. 357; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166; *Baltimore & Potomac Railroad* v. *Fifth Baptist Church*, 108 U. S. 317; *Struthers* v. *Dunkirk &c. Railway*, 87 Penn. St. 282.

II. The Supreme Court of Pennsylvania denied to the plaintiff the equal protection of the laws given by the Fourteenth Amendment by holding that the defendant is liable to make compensation for the damage done to abutting owners on Filbert Street by the occupation of the bed of the street for its railroad, and is not liable to the owners of property abutting on the north side of Filbert Street, including plaintiff, where its railroad is on property abutting on the *south* side of Filbert Street, there being no difference in principle between the two classes of cases.

This clause is intended, we think, to be supplemental to the clause providing for due process of law. If we construe it correctly, it is intended that after one has appeared in a duly constituted court such person shall have no unjust and arbitrary discrimination made against him in the administration of law, but that he shall be entitled to have the law ruled in his case as it is in that of other citizens similarly situated.

In *Caldwell* v. *Texas*, 137 U. S. 692, it is ruled:

"No State can deprive particular persons or classes of persons of equal and impartial justice under the law without violating the provisions of the Fourteenth Amendment to the Constitution.

"Due process of law within the meaning of the Constitution is secured where the laws operate on all alike, and no one is subject to partial or arbitrary exercise of the powers of government."

We submit that in this case it is an unjust and arbitrary exercise of the powers of government for the Supreme Court of Pennsylvania under the same constitutional guarantees to allow compensation to be recovered by Mr. Duncan and that class of abutting owners and denied to the plaintiff, when there is, as we think we have heretofore shown, no difference in principle between the two classes of cases.

That is, while the Supreme Court of Pennsylvania have endeavored to set up a distinction between the cases, there is no real distinction in law between them. The rules of law that give one class a right to compensation for the injuries sustained, apply with equal force to the other. The attempted distinction founded on the occupancy of the bed of Filbert Street is a distinction which affects alone the *quantum* of damage and not the *right* of action.

Mr. Wayne Mac Veagh, (with whom was *Mr. A. H. Wintersteen* on the brief,) for defendant in error.

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

The Pennsylvania Railroad Company, a corporation under the laws of the State of Pennsylvania, and invested with the privilege of taking private property for its corporate use, erected in May, 1881, and has since maintained a viaduct or elevated roadway and railroad thereon, along the south side of Filbert Street in the city of Philadelphia. On the opposite or north side of Filbert Street the plaintiff below was the owner of a lot or parcel of land, whereon was erected a large four-story building, at that time occupied as a dwelling and business house. The elevated railroad did not occupy any portion of the plaintiff's land, nor did it trench upon Filbert Street where it extends in front of the plaintiff's property, which is situated on Filbert between Seventeenth and Eighteenth streets, but where the elevated road, in its course westward, reaches Twentieth Street, it trends to the north and is supported over the cartway of Filbert Street by iron pillars having their foundations in that street inside the curb line, and thus extends westwardly to the Schuylkill River. Opposite the plaintiff's lot the railroad structure occupies land owned by the company.

The plaintiff, by his action in the Court of Common Pleas, sought to recover for injuries caused to his property by the smoke, dust, noise, and vibration arising from the use of the

engines and cars, the necessary consequence and incidents of the operations of a steam railway.

The trial court refused the defendant's prayer that "the jury should be instructed that the defendant, under its charter and supplements in evidence, had full lawful authority to create and operate the Filbert Street extension or branch described in the declaration without incurring any liability by reason thereof for consequential damages to the property of the plaintiff, the uncontradicted evidence being that none of the said property was taken by the defendant, but that the entire width of Filbert Street intervenes between the railroad of the defendant and the nearest point thereto of the property of the plaintiff," and instructed the jury that the only question for them to determine was the amount of depreciation in value of the plaintiff's property caused by the operation of the railroad, and that in estimating the damages they should consider the value of the property before and its value after the injury was inflicted, and allow the difference. The plaintiff recovered a verdict and judgment. This judgment was reversed by the Supreme Court of Pennsylvania, because of the action of the trial court in refusing to grant the defendant's prayer for instruction, and, in effect, because the plaintiff had no cause of action. By the specifications of error contained in this record we are asked to reverse the judgment of the Supreme Court of Pennsylvania because the plaintiff in error was thereby deprived of her property without compensation; because she was thereby deprived of the equal protection of the laws; and because she was thereby deprived of her property without due process of law.

In reaching the conclusion that the plaintiff, under the admitted facts in the case, had no legal cause of action, the Supreme Court of Pennsylvania was called upon to construe the laws and constitution of the State. The plaintiff pointed to the 10th section of article 1 of the constitution, which provided that "private property shall not be taken or applied to public use, without authority of law, and without just compensation being first made or secured;" and to the 8th section of article 16, which contains the following terms: "Municipal

and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction."

The first proposition asserted by the plaintiff, that her private property has been taken from her without just compensation having been first made or secured, involves certain questions of fact. Was the plaintiff the owner of private property, and was such property taken, injured, or destroyed by a corporation invested with the privilege of taking private property for public use? The title of the plaintiff to the property affected was not disputed, nor that the railroad company was a corporation invested with the privilege of taking private property for public use. But it was adjudged by the Supreme Court of Pennsylvania that the acts of the defendant which were complained of did not, under the laws and constitution of that State, constitute a taking, an injury, or a destruction of the plaintiff's property.

We are not authorized to inquire into the grounds and reasons upon which the Supreme Court of Pennsylvania proceeded in its construction of the statutes and constitution of that State, and if this record presented no other question except errors alleged to have been committed by that court in its construction of its domestic laws, we should be obliged to hold, as has been often held in like cases, that we have no jurisdiction to review the judgment of the state court, and we should have to dismiss this writ of error for that reason.

But we are urged to sustain and exercise our jurisdiction in this case because it is said that the plaintiff's property was taken "without due process of law," and because the plaintiff was denied "the equal protection of the laws," and these propositions are said to present Federal questions arising under the Fourteenth Amendment of the Constitution of the United States, to which our jurisdiction extends.

It is sufficient for us in the present case to say that, even if the plaintiff could be regarded as having been deprived of

her property, the proceedings that so resulted were in "due process of law."

The plaintiff below had the benefit of a full and fair trial in the several courts of her own State, whose jurisdiction was invoked by herself. In those courts her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like condition.

To justify this position it is not necessary to enter into an examination of the origin, meaning, and scope of the phrase "due process of law," as found in the Fifth and Fourteenth Amendments. That has been done so often and so thoroughly in previous cases that all we need do is to cite a few of them.

Davidson v. *New Orleans*, 96 U. S. 97, came to this court on a writ of error to the Supreme Court of the State of Louisiana. There was state legislation, under which an assessment had been laid on real estate belonging to Davidson, for draining swamp lands in the parish of Orleans. Objections were raised in the state courts, including alleged departures from the requirements of the statute under which the proceedings were had, and objections based on the claim that Davidson was, by the proceedings, deprived of his property without due process of law. This court briefly disposed of the objections based on questions of method and detail and disregard of statutory directions by saying that such questions were not regulated or controlled by the Constitution of the United States. In respect to the contention that the assessment in question deprived the plaintiff in error of his property without due process of law, the court said, after deprecating any attempt to define what it is for a State to deprive a person of life, liberty, or property without process of law, in terms which would cover every exercise of power thus forbidden to the State, "whenever by the laws of a State, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in

regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. . . . It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding in such a case. . . . The party complaining here appeared and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution."

In *Hager* v. *Reclamation District*, 111 U. S. 701, 708, is found the following definition of a phrase: "It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question, therefore, means that there can be no proceeding against life, liberty, or property, which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Missouri Pacific Railway Co. v. *Humes*, 115 U. S. 520, was a case where it was contended that, by an act of the State of Missouri requiring railroad companies to erect and maintain fences and affixing penalties for disobedience, a railroad company previously chartered was deprived of property without due process of law, and it was said: "If the laws enacted by a State be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will

not invalidate them as affecting life, liberty, or property without due process of law." Without encumbering this opinion with citations of the language used, we refer to the following cases: *The Case of Kemmler*, 136 U. S. 436; *Kaukauna Co.* v. *Green Bay Canal*, 142 U. S. 254; *Hallinger* v. *Davis*, 146 U. S. 314; *Yesler* v. *Harbor Commissioners*, 146 U. S. 646.

The plaintiff in error further contends that, by the proceedings in the courts of Pennsylvania, she was denied the equal protection of the laws. We understand this proposition to be based on the allegation that those suitors whose property abutted on Filbert Street between the Schuylkill River and Twentieth Street, where the elevated road actually occupies the territory of Filbert Street, were allowed by the Pennsylvania courts to recover damages for the injury thus occasioned to their property, while the plaintiff, and those in like case, whose property abutted on Filbert Street where it was not occupied by the railroad structure, which was erected on the opposite side of the street on land belonging to the railroad company, were not permitted to recover. The diversity of result in the two classes of cases is supposed to show that equal protection of the laws was not afforded to the unsuccessful litigants. It is not clear that the facts are so presented as to authorize us to consider this question. Neither in the plaintiff's declaration, in the instructions prayed for, nor in the charge of the trial court, do we perceive any finding or admission that there were suitors, holding property abutting on Filbert Street, who were held entitled to recover for damages occasioned by the elevated railroad. However, the third assignment of error is as follows: "The Supreme Court of Pennsylvania erred in deciding that the present cause was different in principle from the case of *Pennsylvania Railroad Company* v. *Duncan*, 111 Penn. St. 352, and 132 U. S. 75. The effect of said decision is that, under the same constitutional guarantees, it gives to one person a right to compensation for property damaged by the defendant in the exercise of its power of eminent domain, and denies it to another; and as in this instance the decision is

against the plaintiff's right to compensation for the injury to her property by the defendant, she is thereby deprived of the equal protection of the laws." The counsel of defendant in error, in their printed brief, make no point that the facts are not shown by this record, but discuss the question on its merits. We are referred in the printed briefs to our own case of *Pennsylvania Railroad Co.* v. *Miller*, 132 U. S. 76, in the report of which it appears that one Duncan, whose property abutted on Filbert Street, where that street was occupied by the elevated railroad in question, was permitted by the state courts to recover for damages suffered by having been deprived of access to and the free use of Filbert Street.

Conceding, for the sake of the argument, that the facts are as alleged by the plaintiff in error, we are unable to see any merit in the contention that the Supreme Court of Pennsylvania, in distinguishing between the case of those who, like Duncan, were shut off from access to and use of the street by the construction thereon of the elevated railroad, and the case of those who suffered, not from the construction of the railroad on the street on which their property abutted, but from the injuries consequential on the operation of the railroad, as situated on defendant's own property, thereby deprived the plaintiff of the equal protection of the laws. The two classes of complainants differed in the critical particular that one class suffered direct and immediate damage from the construction of the railroad in such a way as to exclude them from the use of their accustomed highway, and the other class suffered damages which were consequential on the use by the defendant company of their franchise on their own property. The question thus raised is within the case of *Missouri* v. *Lewis*, 101 U. S. 22, where it was said that "the clause in question means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances." So in *Hayes* v. *Missouri*, 120 U. S. 68, where by a statute of the State of Missouri it was provided that, in capital cases, in cities having a population of over 100,000 inhabitants, the State shall be allowed fifteen peremptory challenges, while

elsewhere in the State it is allowed only eight peremptory challenges, it was held that such a distinction did not deny to a person accused and tried for murder in a city containing over 100,000 inhabitants the equal protection of the laws enjoined by the Fourteenth Amendment, and in the course of the discussion it was said: "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in *Barbier* v. *Connolly*, 113 U. S. 27, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.'"

It should also be observed that the plaintiff does not complain that, by any legislative enactment, she has been denied rights granted to others, but she attributes error to the judgment of the Supreme Court of Pennsylvania in construing that provision of the constitution of the State which gives a remedy for property injured by the construction of a railroad, as not extending the remedy to embrace property injured by the lawful operation of the railroad. It is not pretended that, by such a construction of the law, the plaintiff has been deprived of any right previously enjoyed. The scope of the remedy added by the constitution of 1874 to those previously possessed by persons whose property is affected by the erection of a public work is declared by the court not to embrace the case of damages purely consequential.

In so holding, it does not appear to us that the Supreme Court of Pennsylvania has either deprived the plaintiff of property without due process of law, or denied her the equal protection of the law, and its judgment is accordingly

Affirmed.

BRASS v. NORTH DAKOTA, *ex rel.* STOESER.

ERROR TO THE SECOND JUDICIAL DISTRICT COURT OF RAMSEY COUNTY, STATE OF NORTH DAKOTA.

No. 768. Argued April 26, 1894. — Decided May 14, 1894.

The act of March 7, 1891, c. 126, of North Dakota, "regulating grain warehouses and weighing and handling of grain," declaring elevators, etc., to be public warehouses, and their owners to be public warehousemen, and requiring them to give bond conditioned for the faithful performance of their duty as such, fixing rates of storage, and requiring them to keep insured for the benefit of the owners all grain stored with them, does not apply to elevators built by a person only for the purpose of storing his own grain, and not to receive and store the grain of others, and being so construed it does not deny the equal protection of the laws to the owner of an elevator made a public warehouse by it, does not deprive him of his property without due process of law, does not amount to a regulation of commerce between the States, and is not in conflict with the Constitution of the United States.

This case differs in no substantial respect from *Munn* v. *Illinois*, 94 U. S. 113, and *Budd* v. *New York*, 143 U. S. 517, and an adherence to the rulings in those cases requires the affirmance of the judgment of the court below.

This case was submitted on the 15th day of December, 1892. On the 16th of October, 1893, the court ordered it to be restored to the docket, for argument before a full bench, and argument was had accordingly April 26, 1894. The case then made is stated by the court as follows:

Norman Brass, the plaintiff in error, owns and operates a grain elevator in the village of Grand Harbor, in the State of North Dakota. The defendant in error, Louis W. Stoeser, owns a farm adjoining the village, on which in the year 1891 he raised about four thousand bushels of wheat. On September 30, 1891, Stoeser applied to store a part of his wheat-crop for the compensation fixed by section eleven of chapter 126 of the Laws of North Dakota for the year 1891, which Brass refused to do unless paid therefor at a rate in excess of that fixed by the statute. On this refusal Stoeser filed in the

District Court of Ramsey County, North Dakota, a petition for an alternative writ of mandamus. The District Court granted an alternative writ of mandamus as follows:

"The State of North Dakota to Norman Brass, respondent: Whereas the following facts have been made to appear to this court by the verified petition of the above-named relator, to wit: 1. That he is the relator in the above-entitled matter; that he owns and operates a farm containing 540 acres in the vicinity of the railroad station of Grand Harbor, in the county and State aforesaid, and during the year 1891 has raised on said farm about 4000 bushels of grain, principally wheat. 2. That the relator has not sufficient storage capacity on his farm or elsewhere for said grain so raised as aforesaid, but is dependent almost wholly upon the grain elevators and warehouses in the vicinity of said farm for storage capacity. 3. That fully fifty per cent of the grain raised in said Ramsey County, North Dakota, is dependent for storage capacity upon the grain elevators and warehouses at the various towns, villages, and railroad stations in said Ramsey County. 4. That the respondent, Norman Brass, is now and at all the time herein stated has owned and operated a grain elevator at the railroad station of Grand Harbor aforesaid for the purpose of buying, selling, storing, and shipping grain for profit. 5. That the relator on the 30th day of September, 1891, hauled fifty-eight bushels of wheat to the grain elevator of respondent, Norman Brass, at Grand Harbor aforesaid, and tendered the same at said elevator of said Norman Brass for storage, and requested said Norman Brass to receive, elevate, insure, and store said grain for twenty days, and at the time tendered to said Brass two cents per bushel for compensation for receiving, elevating, insuring, and storing said grain for twenty days; that said grain when so tendered as aforesaid was dry and in a suitable condition for storage, and there was in said grain elevator of said Brass at Grand Harbor aforesaid at said time storage capacity for over twenty-five thousand bushels of grain not in use and wholly unoccupied. 6. That said Brass then and there refused to receive said grain for the purpose aforesaid and wholly refused to store said grain at said price.

Statement of the Case.

7. That the relator endeavored to secure storage for said grain at the only other elevator in operation at said railroad station of Grand Harbor aforesaid, but said elevator refused to receive relator's grain upon the same ground as respondent. 8. That the relator is informed and believes that the owners of grain elevators and warehouses within a radius of fifty miles of Grand Harbor aforesaid refuse to receive grain for storage at said price: Now, therefore, this court, in order that justice may be done in this behalf to him, Louis W. Stoeser, relator, does hereby command and enjoin you that immediately upon receipt of this writ you do receive from relator, while your storage capacity at your elevator herein mentioned is sufficient for that purpose, all grain that may be tendered you by the relator in a dry and suitable condition for storage at a rate of compensation not exceeding the following schedule, viz., for receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel; storage rates after the first twenty days, one-half cent per bushel for each fifteen days or fraction thereof, and shall not exceed five cents for six months, or that you show cause to the contrary before this court at the court-house, in the city of Devil's Lake, Ramsey County, North Dakota, on the 5th day of October, 1891, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard; and how you have executed this writ make known to this court at the time and place aforesaid, and have you then and there this writ.

"Dated Sept. 30th, 1891."

To which writ appellant made return by answer as follows:

"The return of the respondent to the alternate writ of mandamus issued in the above-entitled proceeding shows to the court —

"1. That the respondent admits the truth of the facts pleaded in said alternative writ.

"2. For a further return to the said alternative writ the respondent alleges that he owns and operates only one grain elevator in North Dakota or elsewhere; that the said elevator is the elevator mentioned in said alternative writ, and is situated at Grand Harbor, a small way station on the line of

the Great Northern Railroad, containing a population of less than one hundred people; that there are two other elevators owned and operated by different owners independently of and in competition with each other; that there are about six hundred grain elevators, flat-houses, and warehouses in said State of North Dakota at which grain is bought and shipped for profit, which said elevators, warehouses, and flat-houses are owned and operated by over one hundred and twenty-five different owners independent of and in competition with each other; that the owners of said elevators, warehouses, and flat-houses are individuals engaged in buying and shipping grain, millers who use their elevators to supply their mills with grain, farmers' shipping associations, elevator corporations, and individual farmers; that said elevators, flat-houses, and warehouses vary in cost of construction from five hundred dollars to five thousand dollars, and vary in capacity from five thousand to fifty thousand bushels; that there are from two to ten elevators, warehouses, and flat-houses operated and owned each by different owners and operators at every station in North Dakota at which grain is marketed; that land upon which it is practicable to erect other elevators at every station in North Dakota at which grain is marketed is unlimited in area and can be readily purchased at prices varying from one dollar and twenty-five cents per acre to forty dollars per acre; that respondent's said elevator cost, when constructed and fully equipped, about three thousand dollars; that the capacity of the same is about 30,000 bushels.

"That respondent's principal business is that of buying wheat at Grand Harbor, North Dakota, and shipping the same to and selling it at Minneapolis and Duluth, Minnesota, to which business that of storing grain for third persons has been a mere incident.

"That all grain purchased by respondent at his said elevator is purchased for the sole purpose of being shipped to and sold at and is shipped to and sold at Minneapolis and Duluth, Minnesota.

"That respondent in the conduct of his said business contracts with millers and other purchasers of grain at said

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Minneapolis and Duluth to sell and deliver to said persons at a future and fixed date certain quantities of wheat, and operates and maintains his said elevator for the exclusive purpose of purchasing grain to fill said contract.

"That in seasons when the grain yield is light and railroad facilities are such as to enable grain to be moved rapidly there is space and storage capacity in respondent's elevator in excess of that used by respondent's grain, and particularly when respondent's contracts for the sale of grain are small, while at other times, when the yield is enormous, as in the present year, respondent's contracts are large, and the quantities of grain presented for shipment are beyond the capacity of the railroads to move, there is not sufficient storage capacity in respondent's elevator to hold and store the grain purchased by respondent in the conduct of his said business.

"That there are located in Minneapolis and Duluth, Minnesota, a great many corporations, persons, and copartnerships engaged in a business known as the 'grain commission' business.

"That those grain commission houses have swarms of agents travelling throughout the State of North Dakota, going from town to town and farm to farm, purchasing grain from farmers in some instances and in others soliciting farmers to ship their grain to said houses at Minneapolis or Duluth, Minnesota, to be by the latter sold on commission.

"That none of said grain commission houses have or own any storage capacity in North Dakota.

"That if chapter 126 of the Laws of 1891 is valid and its effect is to compel respondent to receive all grain that may be tendered to him for storage by grain commission men, farmers, grain speculators, and others, without reference to the necessities or condition of respondent's business at any particular time, the entire storage capacity of respondent's elevator will be exhausted in storing grain for third persons, and the principal business of the respondent, to conduct which his capital was invested in said elevator, will be utterly ruined and annihilated for want of storage capacity to contain wheat purchased by him to fill contracts made by him in the conduct

of his said business, and respondent subjected to suits for damages for non-fulfilment of his said contracts.

"That the relator only offered to pay respondent for the service which he requested him to perform at the rate fixed by chapter 126 of the Laws of 1891 — that is, two cents per bushel; that respondent refused to perform the service for less than two and one-half cents per bushel.

"That respondent refuses to comply with the provisions of said chapter 126 on the ground that it abridges his privileges and immunities as a citizen of the United States; that it deprives him of his liberty and property without due process of law, and denies to him the equal protection of the laws, and amounts to a regulation of commerce among the States.

"That for thirteen years last past the rate charged for the storage of grain has been uniform at all elevators, flat-houses, and warehouses in North Dakota, and during that time did not exceed the following schedule: For receiving, elevating, insuring, delivering, and fifteen days' storage, two and one-half cents per bushel; after the first fifteen days, one-half cent per bushel for each fifteen days or part thereof, but not to exceed five cents per bushel for six months.

"That the average farm in North Dakota does not exceed in area 160 acres; that the average yield in grain of a quarter section of land in North Dakota does not exceed twenty-five hundred bushels; that a granary sufficient in size to safely and securely store twenty-five hundred bushels of grain can be erected on any farm in North Dakota at a cost not exceeding one hundred and fifty dollars.

"That the business of respondent and all other persons, firms, and corporations engaged in the business of operating grain elevators, warehouses, and flat-houses in North Dakota, and the manner in which said business is conducted is not in any manner unwholesome or deleterious to the health, morals, welfare, or safety of the community or society.

"That the railroad and warehouse commissioners of North Dakota, on page 33 of their annual report to the governor for 1890, said: 'In view of the fact that after thorough investigation the board deem the charges allowed by section 22, chap-

ter 187, (Laws 1890,) and also section 10 of said chapter, as unreasonable, the following rules of storage are recommended: 1, for receiving, elevating, insuring, delivering, and fifteen days' storage, two and one-half cents per bushel; 2, after fifteen days, one-half cent per bushel for each fifteen days or part thereof, but not to exceed five cents for six months.'

"That the rates referred to by said commissioners as unreasonable were less than the rate recommended by said board.

"That the respondent denies that the legislature has any power whatever to say whether he shall rent the bins in his elevator or not, and wholly denies the power of the legislature to say what he shall charge for the use of his said elevator or the bins therein.

"That since the enactment of section 9 of chapter 126 of the Laws of 1885 the amount of grain shipped directly by farmers without the intervention of elevators, warehouses, or flat-houses has been increasing, and in 1890, as respondent is informed, and believes, nearly fifty per cent of the entire grain product of North Dakota was shipped to Minneapolis and Duluth, Minnesota, by farmers; that the amount of grain shipped in that manner is steadily increasing from year to year.

"That pursuant to section 7 of chapter 122, Laws of 1890, the railroad commissioners adopted and published the following rules to govern the distribution of cars and other freight, which rules are now in operation in said State of North Dakota, to wit:

"'STATE OF NORTH DAKOTA,

"'OFFICE OF COMMISSIONERS OF RAILROADS.

"'Rules for the distribution of cars between stations and shippers.

"'1. In distributing cars to stations for grain loading they shall be distributed according to the daily average shipments from such stations.

"'2. In distributing cars to shippers for grain loading at stations agents shall first fill each shipper's order for one car to each. After this is done the balance of the cars shall be distributed among shippers according to the amount of grain in sight offered for shipment by each shipper.

"'3. Parties desiring to load grain on track shall be furnished cars and shall be allowed for loading time twenty-four hours from the time the car is set on the side track to complete loading and furnish shipping directions. In case shipper fails to complete loading or furnish shipping directions within twenty-four hours, then, in such case, the railway company may collect upon such cars $3.00 rental for each and every day or part of a day which such cars are delayed after twenty-four hours.

"'The above rule as to time and rental charges shall also apply to grain delayed in unloading on track.'

"In connection with said rules in said report said commissioners said: 'We believe that the railroads have labored faithfully to supply cars to shippers, in accordance with these rules, and, so far as their ability to supply the demand permitted, cars have been distributed in conformity therewith. From September 15 to December 15 the demand for cars is double the ability of the roads to supply, and as a necessary consequence delay in supplying cars must ensue. In all cases of complaint as to failure to get cars investigated this year this has been the case, and cars have been supplied as soon as possible by the railroad companies.

"'The liberal policy of the railroads in the distribution of cars adopted this year has been of great benefit to the farmers of North Dakota.'

"Wherefore respondent demands judgment quashing the alternative writ of mandamus, dismissing this proceeding, and for his costs and disbursements laid out and expended in this action."

To this return Stoeser interposed a general demurrer, which was sustained, and Brass electing in open court to stand on his return, a peremptory writ of mandamus was allowed. From this judgment an appeal was taken to the Supreme Court of Dakota, which court affirmed the order and judgment of the District Court, and remitted the record to that court. On May 28, 1892, final judgment was entered in the District Court, making the judgment of the Supreme Court the judgment of the District Court, and awarding a peremptory writ

of mandamus to execute that judgment. Whereupon Brass sued out a writ of error to this court.

Mr. A. B. Browne, (with whom was *Mr. A. T. Britton* and *Mr. J. F. McGee* on the brief,) for plaintiff in error.

Mr. Halbert E. Paine for defendant in error.

Mr. C. D. O'Brien filed a brief for defendant in error.

Mr. Justice Shiras delivered the opinion of the court.

In the 13th article of the constitution of the State of Illinois, adopted in 1870, all elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, were declared to be public warehouses, and it was made the duty of the general assembly to pass all necessary laws to give full effect to that article of the constitution. 1 Const. & Char. 490. By an act approved April 25, 1871, and entitled "An act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to article 13 of the constitution of the State," the legislature of Illinois provided that those who conducted such public warehouses located in cities containing not less than one hundred thousand inhabitants should procure licenses and should give bond conditioned for compliance with the law; prescribed maximum rates for storing and handling grain; and declared certain penalties for the failure to procure licenses.

The validity of this law was upheld by the Supreme Court of Illinois, *Munn* v. *People*, 68 Illinois, 80; and that judgment was affirmed by this court. *Munn* v. *Illinois*, 94 U. S. 113.

In June, 1888, the legislature of the State of New York passed an act entitled "An act to regulate the fees and charges for elevating, trimming, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this State," Act of June 9, 1888, c. 581, whereby maximum charges were fixed for elevating, receiving,

weighing, and discharging grain, when the business was carried on in a city containing 130,000 inhabitants or upwards, and penalties imposed for disregard of the provisions of the statute. The owner of an elevator in the city of Buffalo was indicted, found guilty, and sentenced, in the Superior Court of Buffalo, for exacting charges for elevating grain in excess of the statutory rates. An appeal was taken to the Court of Appeals of the State of New York, which affirmed the judgment of the Superior Court of Buffalo. *Budd* v. *New York*, 117 N. Y. 1. A writ of error brought the case to this court, where the judgment of the Court of Appeals was affirmed. *Budd* v. *New York*, 143 U. S. 517.

The legislature of the State of North Dakota, by an act approved March 7, 1891, c. 126, Laws of 1891, p. 321, and entitled "An act to regulate grain warehouses and the weighing and handling of grain, and defining the duties of the railroad commissioners in relation thereto," enacted, in the fourth section thereof, that "all buildings, elevators, or warehouses in this State, erected and operated, or which may hereafter be erected and operated by any person or persons, association, copartnership, corporation, or trust, for the purpose of buying, selling, storing, shipping, or handling grain for profit, are hereby declared public warehouses, and the person or persons, association, copartnership, or trust owning or operating said building or buildings, elevator or elevators, warehouse or warehouses, which are now or may hereafter be located or doing business within this State, as above described, whether said owners or operators reside within this State or not, are public warehousemen within the meaning of this act, and none of the provisions of this act shall be construed so as to permit discrimination with reference to the buying, receiving, and handling of grain of standard grades, or in regard to parties offering such grain for sale, storage, or handling at such public warehouses, while the same are in operation;" and in the fifth section, "that the proprietor, lessee, or manager of any public warehouse or elevator in this State shall file with the railroad commissioners of the State a bond to the State of North Dakota, with good and sufficient sureties,

to be approved by said commissioners of railroads, in the penal sum of not less than $5000 nor more than $75,000, in the discretion of said commissioners, conditioned for the faithful performance of duty as public warehousemen, and a compliance with all the laws of the State in relation thereto;" and in the eleventh section thereof, "the charges for storing and handling of grain shall not be greater than the following schedule: For receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel. Storage rates, after the first twenty days, one-half cent for each fifteen days or fraction thereof, and shall not exceed five cents for six months. The grain shall be kept insured at the expense of the warehousemen for the benefit of the owner;" and by the twelfth section it is provided that "any person, firm, or association, or any representative thereof, who shall fail to do and keep the requirements as herein provided, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than two hundred dollars nor more than one thousand dollars, and be liable in addition thereto to imprisonment for not more than one year in the state penitentiary, at the discretion of the court."

In October, 1891, in the District Court of the Second Judicial District of the State of North Dakota, in proceedings the nature of which sufficiently appears in the previous statement of facts, the validity of this statute was sustained, and the judgment of that court was, on error, duly affirmed by the Supreme Court of the State. *Brass* v. *North Dakota*, 52 N. W. Rep. 408.

In the cases thus brought to this court from the States of Illinois and New York, we were asked to declare void statutes regulating the affairs of grain warehouses and elevators within those States, and held valid by their highest courts, because it was claimed that such legislation was repugnant to that clause of the eighth section of article 1 of the Constitution of the United States, which confers upon Congress power to regulate commerce with foreign nations and among the several States, and to the Fourteenth Amendment, which ordains that no State shall deprive any person of life, liberty, or property

without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

In the case now before us the same contentions are made, but we are not asked to review our decisions made in the previous cases. Indeed, their soundness is tacitly admitted in the briefs and argument of the counsel of the plaintiff in error. But it is said that those cases arose out of facts so peculiar and exceptional, and so different from those of the present case, as to render the reasoning there used, and the conclusions reached, now inapplicable.

The concession, then, is that, upon the facts found to exist by the legislatures of Illinois and New York, their enactments were by the courts properly declared valid, and the contention is that the facts upon which the legislature of North Dakota proceeded, and of which we can take notice in the present case, are so different as to call for the application of other principles, and to render an opposite conclusion necessary.

The differences in the facts of the respective cases, to which we are pointed, are mainly as follows: In the first place, what may be called a geographical difference is suggested, in that the operation of the Illinois and New York statutes is said to be restricted to the city of Chicago in the one case, and to the cities of Buffalo, New York, and Brooklyn in the other, while the North Dakota statute is applicable to the territory of the entire State.

It is, indeed, true that while the terms of the Illinois and New York statutes embrace in both cases the entire State, yet their behests are restricted to cities having not less than a prescribed number of inhabitants, and that there is no such restriction in the North Dakota law.

Upon this it is argued that the statutes of Illinois and New York are intended to operate in great trade centres, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the State of North Dakota and the small population of its country towns and villages are said to present no such opportunities.

The considerations mentioned are obviously addressed to the legislative discretion. It can scarcely be meant to contend that the statutes of Illinois and New York, valid in their present form, would become illegal if the law makers thought fit to repeal the clauses limiting their operation to cities of a certain size, or that the statute of North Dakota would at once be validated if one or more of her towns were to reach a population of one hundred thousand, and her legislature were to restrict the operation of the statute to such cities.

Again, it is said that the modes of carrying on the business of elevating and storing grain in North Dakota are not similar to those pursued in the Eastern cities; that the great elevators used in transshipping grain from the Lakes to the railroads are essential; and that those who own them, if uncontrolled by law, could extort such charges as they pleased; and great stress is laid upon expressions used in our previous opinions, in which this business, as carried on at Chicago and Buffalo, is spoken of as a practical monopoly, to which shippers and owners of grain are compelled to resort. The surroundings in an agricultural State, where land is cheap in price and limitless in quantity, are thought to be widely different, and to demand different regulations.

These arguments are disposed of, as we think, by the simple observation, already made, that the facts rehearsed are matters for those who make, not for those who interpret, the laws. When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances. It may be conceded that that would not be wise legislation which provided the same regulations in every case, and overlooked differences in the facts that called for regulations. But, as we have no right to revise the wisdom or expediency of the law in question, so we would not be justified in imputing an improper exercise of discretion to the legislature of North Dakota. It may be true that, in the

cases cited, the judges who expressed the conclusions of the court entered, at some length, into a defence of the propriety of the laws which they were considering, and that some of the reasons given for sustaining them went rather to their expediency than to their validity. Such efforts, on the part of judges, to justify to citizens the ways of legislatures are not without value, though they are liable to be met by the assertion of opposite views as to the practical wisdom of the law, and thus the real question at issue, namely, the power of the legislature to act at all, is obscured. Still, in the present instance, the obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law, and did not interfere with Federal jurisdiction over interstate commerce.

Another argument advanced is based on the admitted allegation that the principal business of the plaintiff in error, in connection with his warehouse, is in storing his own grain, and that the storage of the grain of other persons is and always has been a mere incident, and it is said that the effect of this law will be to compel him to renounce his principal business and become a mere warehouseman for others. We do not understand this law to require the owner of a warehouse, built and used by him only to store his own grain, to receive and store the grain of others. Such a duty only arises when he chooses to enter upon the business of elevating and storing the grain of other persons for profit. Then he becomes subject to the statutory regulations, and he cannot escape them by asserting that he also elevates and stores his own grain in the same warehouse. As well might a person accused of selling liquor without a license urge that the larger part of his liquors were designed for his own consumption, and that he only sold the surplus as a mere incident.

Another objection to the law is found in its provision that the warehouseman shall insure the grain of others at his own expense. This may be burdensome, but it affects alike all

engaged in the business, and, if it be regarded as contrary to sound public policy, those affected must instruct their representatives in general assembly met to provide a remedy.

The plaintiff in error, in his answer to the writ of mandamus, based his defence wholly upon grounds arising under the constitution of the State and of the United States. We are limited by this record to the questions whether the legislature of North Dakota, in regulating by a general law the business and charges of public warehousemen engaged in elevating and storing grain for profit, denies to the plaintiff in error the equal protection of the laws or deprives him of his property without due process of law, and whether such statutory regulations amount to a regulation of commerce between the States. The allegations and arguments of the plaintiff in error have failed to satisfy us that any solid distinction can be found between the cases in which those questions have been heretofore determined by this court and the present one. The judgment of the court below is accordingly

Affirmed.

MR. JUSTICE BREWER, with whom concurred MR. JUSTICE FIELD, MR. JUSTICE JACKSON, and MR. JUSTICE WHITE, dissenting.

I dissent from the opinion and judgment of the court in this case. Reliance is placed in that opinion on *Munn* v. *Illinois*, 94 U. S. 113, and *Budd* v. *New York*, 143 U. S. 517. In the dissenting opinion I filed in the latter case, I expressed, so far as was necessary, my views in reference to the general propositions laid down in the two cases, and I do not desire to repeat what I there said. It is a significant fact that in *Sinking Fund Cases*, 99 U. S. 700, 747, and in *Wabash, St. Louis & Pacific Railway* v. *Illinois*, 118 U. S. 557, 569, Mr. Justice Bradley and Mr. Justice Miller, who concurred in the judgment in *Munn* v. *Illinois*, each sought to limit and qualify the scope of the language used by the Chief Justice in that case. These are the words of Mr. Justice Bradley:

"The inquiry there was as to the extent of the police power

in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."

And this is the language of Mr. Justice Miller, delivering the opinion of the court:

"And in that case the court was presented with the question, which it decided, whether any one engaged in a public business, in which all the public had a right to require his service, could be regulated by acts of the legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

I desire, however, specially to notice the facts disclosed by this record, and to point out to what extent the decision of this court now goes. The case, coming from the Supreme Court of the State of North Dakota, must be determined upon the record as it is presented. Nothing can be added to or taken from the facts as established by that record. The case was heard and determined upon a demurrer to the return made by the defendant to the petition and writ of mandamus, and of course upon such demurrer the facts stated in the return are to be taken as true. From that return it appears that along the line of the Great Northern Railroad in the State of North Dakota there are about six hundred grain elevators; that at Grand Harbor, a small way station on the line of that road, there are three elevators, one of them being that owned by the defendant; that defendant's elevator is a small one, with a capacity of 30,000 bushels, and costing about $3000. For aught that appears, the elevator was on the private property of the defendant, though contiguous to the railroad, and at the railroad station. It is further admitted:

"That respondent's principal business is that of buying wheat at Grand Harbor, North Dakota, and shipping the

same to and selling it at Minneapolis and Duluth, Minnesota, to which the business of storing grain for third persons is and always has been a mere incident.

"That all grain purchased by respondent at his said elevator is purchased for the sole purpose of being shipped to and sold at and is shipped to and sold at Minneapolis and Duluth, Minnesota.

"That respondent in the conduct of his said business contracts with millers and other purchasers of grain at said Minneapolis and Duluth to sell and deliver to said persons at a future and fixed date certain quantities of wheat, and operates and maintains his said elevator for the exclusive purpose of purchasing grain to fill said contracts.

"That in seasons when the grain yield is light and railroad facilities are such as to enable grain to be moved rapidly there is space and storage capacity in respondent's elevator in excess of that used by respondent's grain, and particularly when respondent's contracts for the sale of grain are small, while at other times, when the yield is enormous, as in the present year, respondent's contracts large, and the quantities of grain presented for shipment are beyond the capacity of the railroads to move, there is not sufficient storage capacity in respondent's elevator to hold and store the grain purchased by respondent in the conduct of his said business.

"That if chapter 126 of the Laws of 1891 is valid, and its effect is to compel respondent to receive all grain that may be tendered to him for storage by grain commission men, farmers, grain speculators, and others, without reference to the necessities or condition of respondent's business at any particular time, the entire storage capacity of respondent's elevator will be exhausted in storing grain for third persons, and the principal business of respondent, to conduct which his capital was invested in said elevator, will be utterly ruined and annihilated for want of storage capacity to contain wheat purchased by him to fill contracts made by him in the conduct of his said business, and respondent subjected to suits for damages for non-fulfilment of his said contracts."

The rates which were established by law were as follows:

"1. For receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel.

"2. After twenty days, one-half cent per bushel for each fifteen days or part thereof, but not to exceed five cents for six months."

It appears from these admissions that the principal business of defendant was that of buying wheat and shipping it to Minneapolis and Duluth for sale, and that he operated and maintained his elevator for the exclusive purpose of purchasing grain to fill his contracts; and while at the time the elevator was not full and there was room for the storage of the grain tendered by the petitioner, and the defendant had at times used vacant space in his elevator for the storage of grain of others, yet such use was a mere incident to and subordinate to his principal business of buying and selling grain, for which principal business he exclusively maintained and operated his elevator.

Now, my first objection is that by this decision a party is compelled by the mandate of the court to engage in a business which he never intended to engage in, and which he does not desire to engage in, to wit, the business of maintaining a public elevator. His business is that of buying and selling grain, and he operates and maintains the elevator, which he owns, for the exclusive purpose of carrying on that business. That he may have sometimes accommodated his neighbors by the use of his elevator for the storage of their grain, and thus to a limited extent engaged in that business, does not change the fact, as admitted, that his principal business was that of buying and selling, and that he operated and maintained that elevator exclusively for the carrying on of that business, or the other admitted fact that, if he is compelled, as he is compelled by this mandate, to receive grain as tendered so long as he has storage capacity unoccupied in his elevator, his principal business and that for which he built the elevator will be utterly ruined and destroyed.

The question is not whether, if he should receive and store in his elevator grain for others, he might not so far bring himself within the scope of the law as to be deemed for that

transaction engaged in the business of maintaining a public elevator, and thus bound by the charges fixed by statute; but whether, when he maintains an elevator exclusively for his own business, the fact that at times he has used vacant room in it for the storage of the grain of other persons, compels him to receive grain when tendered irrespective of the injury which it does to his own business. And it is admitted that, at the time of this tender, there was not sufficient storage capacity in his elevator to hold and store the grain purchased by him in the conduct of his business. And this is a matter of no trifling moment to one engaged in the business of buying and selling grain. He cannot know in advance when grain will be tendered at a price which will justify his purchase with a view to profit. The fact that to-day there may be storage capacity does not prove that to-morrow he may not need the entire capacity of his elevator. And yet, if, because to-day there is room in his elevator, he is bound to receive any grain that shall be tendered, he may to-morrow be unable to make purchase of the offered grain. It is a matter of common knowledge that grain is not put into and taken out of an elevator in an instant. And if once deposited the owner cannot be compelled to remove it, merely for the accommodation of the warehouseman, but may leave it there indefinitely so long as he pays the legal charges. The petition was for a writ of mandamus commanding the defendant "so long as the capacity of his said elevator is sufficient for the purpose, to store such grain as may be tendered to him by the relator," and the decree of the court was that the "writ issue as prayed for," and that is the decision which is affirmed by this court.

I dissent in the second place because the facts show, in the words of Mr. Justice Bradley, no "practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community." Along the line of this single road within the limits of this State there are about six hundred of these elevators, owned and operated by over one hundred and twenty-five different persons, varying in cost of construction from $500 to $5000; at every station there is land purchasable by any one at prices varying

from $1.25 to $40 per acre, and a granary sufficient to store the average product of an ordinary Dakota farm can be erected at a cost of not exceeding $150. So it is that when any farmer or other individual can at a cost of less than $200 provide himself with all the facilities for storing and shipping the entire product of an ordinary farm, when along the line of a single railroad there are six hundred elevators already constructed, owned, and operated by one hundred and twenty-five different persons, when at every station at which grain is marketed there are from two to ten such elevators, it is held that there exists a monopoly such as justifies control by the public of the prices at which grain shall be stored in any one of these many elevators. If this be a monopoly, justifying public control of prices for service, I am at a loss to perceive at what point the fact of monopoly will cease and freedom of business commence. For obviously elevators along the line of that road were as plentiful as other institutions of industry, and as easily and cheaply constructed, and therefore savoring no more of monopoly.

I dissent in the third place because by this law the elevator man is bound not merely to receive, store, and discharge the grain which is tendered to him, but also to insure and pay the cost of insurance, it matters not what that cost may be, whether more or less than he receives for the whole service. I do not care to enlarge upon this matter. If the legislature can compel a party, though confessedly to the disadvantage, injury, and even destruction of his own special business of buying and selling grain, to receive and store grain for whoever may demand it in an elevator which he is maintaining and operating for the exclusive carrying on of his own business at any price which it sees fit to allow, and at the same time compel him to advance the money to insure the property thus forced upon him, I can only say that it seems to me that the country is rapidly travelling the road which leads to that point where all freedom of contract and conduct will be lost. For these reasons, thus briefly stated, I am constrained to dissent from this opinion and judgment.

I am authorized to say that MR. JUSTICE FIELD, MR. JUSTICE JACKSON, and MR. JUSTICE WHITE concur in this dissent.

NEW ORLEANS *v.* BENJAMIN.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 981. Submitted January 12, 1894. — Decided May 14, 1894.

When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution of the United States, upon the determination of which the result depends, then it is not a suit arising under the Constitution.

Upon the bill and answer in this case no such dispute or controversy arose as would give original jurisdiction to the Circuit Court of the United States without regard to the diverse citizenship of the parties.

The act of the legislature of Louisiana repealing the act creating the Board of Metropolitan Police and other acts in relation thereto, was, in itself, a mere change of an instrumentality of municipal government, and as, upon the record, it must be assumed that the assets of that board and the remedies in respect thereof of those who held evidences of indebtedness issued by the board remained unaffected by the repealing act, the act could not be attacked in this way as unconstitutional because it made no specific provision for the payment of such indebtedness, on the liquidation of the affairs of the board.

Whether this suit be regarded as seeking a decree against defendants as on a creditors' bill, or as by analogy to garnishee process, it was, under the pleadings, a suit to recover the contents of choses in action within the meaning of the Judiciary Act of 1887 and 1888, and, as the bill contained no averment that the suit could have been maintained by the assignors, the jurisdiction of the Circuit Court cannot be sustained on the ground of diverse citizenship.

THIS is a certificate from the United States Circuit Court of Appeals for the Fifth Circuit, under section six of the Judiciary Act of March 3, 1891, the statement and questions of law so certified being as follows:

"The complainant, an alien, filed his bill of complaint in the Circuit Court against the city of New Orleans and other municipal corporations, citizens of the State of Louisiana, alleging, among other things, as follows, viz.:

"'That by an act of the legislature of Louisiana (No. 74) approved September 14, 1868, the parishes of Orleans, (includ-

ing the city of New Orleans,) Jefferson, and St. Bernard were territorially united in one district for the purpose of police government therein, called the "Metropolitan police district of New Orleans, State of Louisiana;" that the government of said district for police purposes was vested in a board of commissioners styled "the board of Metropolitan police."

"'That said board was required to appoint all the officers and employés of the police force required in said district, and their salaries, which were prescribed by the act, were required to be paid monthly; that by said act and acts of said legislature supplementary to and amendatory thereof said board was required to make annually an estimate of the expenses of maintaining a police force in said district and to apportion the same to the several cities and parishes within said district, and said cities and parishes were required by said acts to promptly pay and to provide the means for promptly paying the amounts thus apportioned to them,' and they were authorized and required to raise the amount by levying taxes for that purpose.

"That said board of Metropolitan police, in obedience to the laws creating and governing the same, organized a Metropolitan police force in said district and appointed and employed the officers and members thereof, who entered upon their duties and rendered services under contracts therewith to be paid the salaries fixed by law for such employment, such contracts being made upon the faith of its revenues applicable to their payment being unimpaired.

"That said board annually made the estimates of the expenses of maintaining such police force and apportioned the same to the several cities and parishes in the district, and that large sums are due and unpaid on account thereof by the city of New Orleans and other corporations made defendants in the bill.

"That by the provisions of an act of said legislature approved February 27th, 1869, and subsequent acts, all warrants issued in payment of salaries of officers, employés, and members of the Metropolitan police and for the expenses of said board were made receivable for all parish and municipal

taxes and licenses within the limits of the Metropolitan police district and for all debts due or to become due to the parishes and cities within said district, not exceeding in any one year the amount of their respective apportionments for that year.

"'That by an act of said legislature (No. 35) approved March 31st, 1877, said act No. 74, of September 14th, 1868, establishing said Metropolitan police district; said act No. 44, of February 27th, 1869, making all warrants issued in payment of Metropolitan police salaries and expenses receivable for all municipal and parish taxes within the district; said act No. 94, of March 30th, 1870, requiring the several cities and parishes within the district to pay and to provide the means for the payment of their apportionments of the expenses of the board of Metropolitan police; said act No. 16, of March 24th, 1875, entitled "An act to enforce the payment by the city of New Orleans and the several cities and parishes of the Metropolitan police district of the apportionment made upon them by the board of Metropolitan police, and for other purposes," as well as all other acts amendatory of said above-enumerated acts or upon the same subject-matter, were repealed, and said board of Metropolitan police was abolished and no provision was made for the liquidation of its affairs or the payment of its debts.

"'That said repealing act was in violation of section 10, article 1, of the Constitution of the United States, in that it impaired the obligation of the contracts made by said board of Metropolitan police with its officers and employés and others to whom it was indebted, and who had contracted with and rendered services to said board upon the faith of said provisions of law for the enforced payment and collection of the sums due to it as aforesaid from the several cities and parishes within said district, out of which funds only they could be paid, and to that extent said act was and is null and void.'

"The bill further avers that complainant is the holder and owner of Metropolitan police warrants, certificates, and claims against said board of Metropolitan police, said warrants and certificates having been issued by said board for services rendered and supplies furnished, and said claims being for services

rendered and supplies furnished thereto under contracts therewith, said warrants, certificates, and claims amounting to $5032.90, and that other due and unpaid warrants and certificates issued by said board are outstanding, and sums are due and owing by it for services rendered and supplies furnished to it exceeding $200,000.

"And it is also averred —

"'That the only assets of said board of Metropolitan police at the time it was abolished were the amounts due to it by said city of New Orleans, and by the other defendants as herein stated; that the aggregate amount of said indebtedness to said board largely exceeds the total amount of its debts and liabilities; that law and equity require that the amount of said assets should be ascertained, and the just proportion due by each of the defendants adjusted, and that the liabilities of said board of police be fixed and determined and paid out of said assets, and if the same exceed the liabilities of the board, that said defendants be required to pay their *pro rata* shares thereof.'

"'That said board of Metropolitan police was a body corporate under the laws of its creation, and by the repeal of said laws ceased to be, and had and has no representative or successor against whom suit might have been or may now be brought for the establishment of the demands of the complainant herein, and he is remediless except in this honorable court, where matters of this nature are cognizable and relievable; wherefore he brings this his bill in behalf of himself and all other creditors of said board similarly situated who may come in and contribute to the expenses of this suit.'

"The prayer of the bill in substance is that an account be taken 'of all the debts, liabilities, and unpaid dues of every kind of said board of Metropolitan police, including the warrants, certificates, and claims of your orator and of all others who may come in and avail themselves of the decree to be made herein and contribute to the expense of this suit; that a like account may be taken of the amount due by each of said defendants to said board of Metropolitan police for the balances of their unpaid apportionments of police expenses, as

well as of all police taxes collected by them and withheld from said board, and that said defendants be decreed to pay into the hands of some discreet person, to be appointed receiver by this honorable court, their several *pro rata* shares of the amount so found to be due to creditors of said board of Metropolitan police, including all costs of the administration thereof, and that the funds thus realized be applied to the payment of your orator's said warrants, certificates, and claims, and of such other persons as may be creditors of said board and who shall come in and establish their claims, and also to the payment of interest thereon and all expenses of administration and costs.'

"The defendant, the city of New Orleans, demurred to the bill, assigning, among other causes of demurrer, the following:

"'That the complainant's said bill of complaint, in case the same were true, which this defendant does in nowise admit, contains not any matter of equity whereon this court can ground any decree or give the complainant any relief or assistance as against this defendant.

"'That the bill complains of the repeal by the legislature of Louisiana of the aforesaid acts organizing and relating to the Metropolitan police force and the Metropolitan police board, and by reason of said repeal the bill alleges the Metropolitan police board was abolished and no provision was made or now exists for the liquidation of the affairs or for the payment of the alleged debts of said board, and the bill calls upon this court to grant relief for the payment of said alleged debts of said Metropolitan police board; but this defendant shows that the only mode of payment of said alleged debts, if any, of the late Metropolitan police board, a political body for the administration of the police of the city, is by taxes to be levied for that purpose, and, if it be true, as asserted by said bill, that no provision now exists for the payment of said debts, this court has no power to direct the levy of taxes for said asserted debts or any power whatever to grant any relief in respect to the matters of which the bill complains.'

"The demurrer was overruled.

"Said defendant then filed an answer and, among other

things, averred as follows: 'Further answering, defendant admits that by the act of the legislature of Louisiana No. 35, of 1877, the various acts organizing the Metropolitan police board were repealed; but all the provision for the payment of said Metropolitan police was the levy of the Metropolitan police taxes authorized by law, and said taxes had already been levied far in excess of taxes that should have been imposed, and the repealing legislation did not interfere in any manner with the levy and application of said taxes, to the extent that they could be collected, to the payment of the legal obligations of said Metropolitan police board, and with this statement and a reference to said repealing act this defendant denies the allegation in the bill that, by such repealing legislation, no provision was made for the liquidation of the affairs of said board or payment of its debts.'

"'This defendant again affirms that said repealing act did not interfere in any manner with the means of payment of all lawful obligations of said board nor with the right of those who had made lawful contracts — that is, to the extent authorized by law with said board; and this defendant again refers to the illegal and void apportionments of said board, and to the alleged contracts made by it, far in excess of the means applicable to the support of the Metropolitan police, and far in excess of their power, and denies to be true that said repealing act was in violation of the Constitution of the United States or "impaired the obligation of the contracts of said board with its officers and employés, who had contracted with and rendered services to said board upon the faith of said provisions of law for the enforced payment and collection of the sums due to it from the several cities and parishes within said district," and denies that said act was null and void in any respect or to any extent.'

"Said answer also averred that the city was liable to said board only for such police taxes as she collected, and that she had fully accounted for all such collections, and denies that she is now making any such collections and that any such taxes are collectible.

"Issue being joined, the case was referred to a master to

take an account of the amounts due by the defendants to said board, and of its outstanding liabilities. He reported as due by the city of New Orleans on account of its apportionments a balance of $241,106.54 and an indebtedness of the board incurred on account of said city and still unpaid amounting to $123,963.06, besides interest thereon. Small amounts were found due by the other defendants and also by the board on their account.

"Prior to the decree a number of creditors of the board, some of whom were citizens of Louisiana, with leave of court intervened in the suit, made proof of their claims before the master, claimed the benefit of the decree, and prayed to be permitted to share in the distribution.

"Of the amount of claims proved before the master and covered by the decree the complainant, an alien, holds $5777.78; an alien intervenor holds $815.78; intervenors who are citizens of Louisiana hold $81,100.51, and intervenors whose citizenship does not appear hold $30,302.16. Other claims, amounting to $13,363.21, were proved before the master by persons whose citizenship does not appear and who have not intervened.

"And it appearing that complainant and intervenors were assignees of the certificates, warrants, and claims, of which they made proof before the master, and that their assignors were citizens of Louisiana, and there being no averment in the bill that the assignors might have sued thereon in the Circuit Court if no transfer thereof had been made, the city of New Orleans moved to dismiss the suit for want of jurisdiction in said court.

"The motion was denied and a final decree made requiring the defendants to pay their virile shares of the indebtedness of the board as reported by the master. From such decree an appeal was taken to this court, and the case came on to be heard upon the errors assigned; whereupon, the court desiring the instruction of the honorable the Supreme Court of the United States for the proper decision of the questions arising herein touching the jurisdiction of the Circuit Court, it is hereby ordered that the following questions and propositions

of law be certified to said Supreme Court in accordance with the provisions of section 6 of the act entitled 'An act to establish Circuit Courts of Appeals and define and regulate in certain cases the jurisdiction of the Circuit Court of the United States and for other purposes,' approved March 3, 1891, to wit:

"First. Does the case made by the bill alleging that the board of police has been abolished and left without successor or legal representative and no provision has been made for the application of its assets to the payment of its debts and the answer herein, constitute a suit in equity arising under the Constitution of the United States and within the jurisdiction of the Circuit Court of the United States for the Eastern District of Louisiana without regard to the diverse citizenship of the parties?

"Second. The warrants and the certificates held by the complainant having been issued for services rendered and supplies furnished under contract with the board of Metropolitan police when the laws required said warrants and certificates to be received by the defendants in payment of all licenses, taxes, and other dues, and all such laws having been repealed by the legislature of Louisiana without making other provision for the redemption of said warrants and certificates, was this an impairment of the obligation of the contract in relation to such warrants and certificates within the meaning of article 1, section 10, of the Constitution of the United States?

"Third. Do the pleadings show a suit to recover the contents of choses in action within the meaning of the Judiciary Act of 1887 and 1888, so as to preclude the complainant, as assignee, from suing in the Circuit Court of the United States to establish a fund out of which he, in common with other creditors of the late Metropolitan police board, may be paid *pro rata* upon their claims?

"Fourth. Considering all the allegations in the bill of complaint and the provisions in the constitution and laws of Louisiana respecting the Metropolitan police board and the Metropolitan police warrants and certificates and the redemp-

tion and payment of said certificates, does the case show a liability on the part of the city of New Orleans to contribute to a fund for the payment of said warrants and certificates beyond its liability for taxes assessed and collected in pursuance of the apportionments made?"

The Circuit Court of Appeals "further ordered that the bill of complaint and the demurrer and answer of the city of New Orleans thereto be made a part of the transcript certifying the aforesaid questions, together with the following sample copies of the warrants, certificates, pay-rolls and assignments forming the basis of complainant's demand, to wit:

"*Warrant Filed with and Part of Assignment.*

"(Copy.)

"Central department, Metropolitan police.

"(No. 10,253.)

"NEW ORLEANS, *May 18th*, 1874.

"Treasurer of the board Metropolitan police:

"Pay to the order of James Reilly, fifty $\frac{00}{100}$ dollars.

"By order of the board.

"$50.00. (Signed) E. PARKER, *Chief Clerk.*"

"*Certificate Filed with and Part of Assignment.*

"(Copy.)

"Central department, Metropolitan police.

"No. 4748. $73.97.

"NEW ORLEANS, *Jan.* 13, 1876.

"This is to certify that the board of Metropolitan police is indebted to P. Moran, No. 22, first precinct, in the sum of seventy-three $\frac{97}{100}$ dollars, for salary for account of the month of December, 1875.

"(Signed) L. T. MURDOCK,

"*Treasurer Board Metropolitan Police.*

"The amount due as per this certificate will not be paid unless the certificate is delivered to the treasurer of the board."

Then followed form of pay-rolls, the one given being ap-

proved January 5, 1877, for forty-nine hundred and seventy-six $\frac{4}{100}$ dollars, and the bill, demurrer, and answer, which were set forth at length.

Mr. William A. Maury, *Mr. Henry C. Miller*, and *Mr. E. A. O'Sullivan* for the city of New Orleans.

Mr. J. D. Rouse and *Mr. William Grant* for appellees.

I. As to the first question

It seems to us that the bill and demurrer fully and fairly submitted to the Circuit Court whether the repealing statute and said act 49 of 1880 had not relieved the city of all liability to pay the balance of the apportionments due the police board, except as provided in said act 49. The issue was decisive of the case, and the court was bound to decide it one way or the other at the outset.

Whether a suit in the Circuit Court is one arising under the Constitution or laws of the United States for the purpose of original jurisdiction is determined by the questions involved. "If from them it appears that some right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or laws of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States." *Cooke* v. *Avery*, 147 U. S. 375.

The bill in this case sets forth the claims of complainant and the enactment of the state laws impairing his rights, and the reason for coming into the Circuit Court for the relief prayed. The response of the defendant admits all the facts alleged, but asserts as matter of law that the assets of the debtor corporation have been withdrawn from his reach by the repealing act, and that his right of relief is now limited to the remedy provided for in act 49 of 1880. These issues are to be tested and decided by the Constitution of the United States.

Whether the repealing law and the act 49 of 1880 did or did not impair complainant's contract, is the question presented for decision. It is a Federal question which gave jurisdiction to the Circuit Court, no matter how it might be

determined. But if the jurisdiction depends upon a correct solution of the question, we submit that if the repealing act has the effect claimed for it by the demurrer and in argument here, it must be held to impair the contract rights of complainant. *Planters' Bank* v. *Sharp*, 6 How. 301; *Edwards* v. *Kearzey*, 96 U. S. 595; *Curran* v. *Arkansas*, 15 How. 304; *Hawthorne* v. *Calef*, 2 Wall. 10; *Fisk* v. *Jefferson Parish*, 116 U. S. 131; *Mumma* v. *Potomac Co.*, 8 Pet. 281.

A summary of the laws relating to the Metropolitan police board shows:

1. That all statutes on the subject were mandatory in their character and required the city of New Orleans and other municipalities composing the police district to pay the amount apportioned against them, and to levy and collect a sufficient tax to discharge that obligation.

2. That these statutes, up to 1874, made scrip issued by the board receivable for all taxes due to the municipalities, without any limitation, except that the municipalities should not be required to receive scrip for any one year in excess of the annual apportionment.

3. That act 33 of 1874 required taxes levied for these apportionments to be paid in cash; providing, however, that scrip issued prior to January 1, 1874, should be receivable for taxes due prior to that year, except for the interest, school, park taxes, etc., and in this respect depriving the scrip holders of the right to use them in payment of all taxes, as permitted by prior laws.

4. Act No. 35 of 1877 repealed all these laws, relieving the municipalities of the duty and obligation of paying the apportionments, and withdrawing the power of levying taxes to pay them, and leaving the creditors of the police board without a debtor whom they could sue, and providing no remedy for the application of the assets of the board to the payment of its debts.

5. Three years later act No. 49 of 1880 was passed, pursuant to a constitutional ordinance of the State, which made the scrip receivable only for the taxes levied for the police fund in the years 1874, 1875, 1876.

The defendant claims by demurrer, answer, and argument

that it was competent for the legislature to enact these laws, and that if they impaired the remedy of the scrip holders, said act 49 gave them a new and ample remedy.

On the other hand, complainant asserts that the statute of 1877 was in contravention of the Constitution of the United States, and that act 49 of 1880, so far as it is claimed by defendant to be an adequate remedy in lieu of those previously taken away, is itself an impairment of his contract.

As these contentions must be determined by a resort to the provisions of the Constitution of the United States, and are decisive of the rights of the parties, they clearly make a case arising under that Constitution, of which the Circuit Court had original jurisdiction.

II. As to the third question, this involves a further consideration of the jurisdiction of the Circuit Court. Its jurisdiction of this case is assailed on the ground that the complainant, although an alien, is assignee of the claims he holds, the assignors thereof being citizens of Louisiana, of which State the defendants are also citizens. Also on the ground that some of the intervenors are citizens of Louisiana, and that complainant's suit is really for their benefit.

The objection is founded upon the theory that the warrants and certificates held by complainant are choses in action, his title to which is derived through assignment by citizens of Louisiana; that he is suing to recover their contents, and that the exercise of jurisdiction is therefore prohibited by the act of March 3, 1887, which provides that the Circuit Court shall not "have cognizance of any suit except upon foreign bills of exchange to recover the contents of any promissory note or other chose in action in favor of any assignee . . . unless such suit might have been prosecuted in such court to recover said contents if no assignment or transfer had been made."

The contents of a contract, as a chose in action, are the rights created by it in favor of a party in whose behalf stipulations are made in it, which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents. *Corbin* v. *County of Black Hawk*, 105 U. S. 659.

Opinion of the Court.

Necessarily a suit to recover the contents must be brought against the party who made the stipulation, as in the case of a promissory note against the maker, or upon a bond against the obligor. In such case the assignee of the contract, note, or other chose in action, cannot sue in the Circuit Court, unless his assignor might have done so, because the suit is one to recover contents, and so within the exception of the statute. But this exception has never been extended to a case not clearly within it.

Thus it has been held not to apply to a suit by an assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention. *Deshler* v. *Dodge*, 16 How. 622; *Ambler* v. *Eppinger*, 137 U. S. 480; *Bushnell* v. *Kennedy*, 9 Wall. 387.

The complainant's bill was brought not only in behalf of himself but of all other creditors similarly situated, not to recover contents, but to establish a fund out of which all should be paid *pro rata*. A suit to recover the contents of a chose in action is one to enforce the obligation thereof *in toto*. In this case complainant could have no decree for the deficiency, if the fund prove insufficient to pay him and all other creditors in full. The bill shows the necessity as well as propriety of proceeding as it does against the debtors of the board; the amounts owing by them constituting its sole assets, and the complainant being an alien, he was competent to sue in the Circuit Court.

The case of *Bean* v. *Smith*, 2 Mason, 252, decided by Judge Story, establishes his right to sue in that court, notwithstanding he is a creditor by assignment.

This case is quoted with approval in *Ober* v. *Gallagher*, 93 U. S. 206.

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

The first and third questions propounded relate to the jurisdiction of the Circuit Court, which was invoked on two grounds: (1) that the case was one arising under the

Constitution of the United States; and (2) on diverse citizenship.

1. When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, then it is not a suit arising under the Constitution. *Shreveport* v. *Cole*, 129 U. S. 36; *Starin* v. *New York*, 115 U. S. 248, 257; *Gold Washing and Water Co.* v. *Keyes*, 96 U. S. 199.

The judicial power extends to all cases in law and equity arising under the Constitution, but these are cases actually and not potentially arising, and jurisdiction cannot be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the Circuit Court that the cause of action should depend upon the construction and application of the Constitution, and it is readily seen that cases in that predicament must be rare. Ordinarily the question of the repugnancy of a state statute to the impairment clause of the Constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require, *Chicago & Alton Railroad Co.* v. *Wiggins Ferry Co.*, 108 U. S. 18; and if there be ground for complaint of their decision, the remedy is by writ of error under section 709 of the Revised Statutes. Congress gave its construction to that part of the Constitution by the twenty-fifth section of the Judiciary Act of 1789, and has adhered to it in subsequent legislation.

But assuming that such repugnancy might be so set up as to form an independent ground of jurisdiction in the Circuit Court, it becomes necessary, in order to dispose of the inquiry whether such a dispute or controversy was really involved here, to refer to certain legislation of the State of Louisiana.

By act No. 74 of 1868, (Acts La. 1868, 85,) the parishes of Orleans, Jefferson, and St. Bernard were united into a district, called "the Metropolitan Police District of New Orleans, State of Louisiana," and a board created, styled the "Board of Metropolitan Police," upon which were conferred the

powers and duties pertaining to police government and discipline in that district, with power to issue warrants and certificates for the payment of the police and other expenses. These expenses were to be borne by the cities, towns, and parishes of the district, and apportionments or estimates thereof were to be made annually by the board against each of the cities and parishes, which were to be "binding upon the respective cities and towns interested therein," and the cities, towns, and parishes were empowered and directed to annually levy and collect taxes to raise the sums of money so estimated and apportioned, to be paid over to the state treasurer and constitute a fund to be paid out on warrants as provided.

By act No. 44 of 1869, (Acts La. 1869, 42,) and act No. 92 of 1869, amending and reënacting the original act, (Acts La. 1869, 92,) warrants issued in payment of the salaries of officers, employés, and members of the Metropolitan police in accordance with act No. 74 of 1868 were made receivable for all parish and municipal licenses and taxes within the limits of the Metropolitan police district, provided the aggregate so received in each current year should not exceed the amount of the apportionment for that year.

By act No. 41 of 1870, (Acts La. 1870, 74,) all warrants, checks, and orders issued in payment of the salaries of Metropolitan police, and all warrants, checks, and orders issued, or that might thereafter be issued, for the supplies and expenses of the board, were made receivable for all police and municipal taxes and debts to become due for the police of New Orleans, Jefferson, and Carrollton, provided that the aggregate of such warrants, checks, or orders so received in each current year should not exceed the apportionment.

By act No. 33 of 1874, (Laws La. 1874, sec. 4, pp. 68, 70,) it was enacted, among other things, that all Metropolitan police taxes should be collected in cash, and that it should be unlawful to receive in payment for said taxes any warrants of indebtedness of any kind whatever, provided that warrants and certificates issued prior to January 1, 1874, should still be received for taxes due for the years prior to that date.

In 1875, (Laws La. 1875, 35, No. 16,) an act was passed, to

the effect that the total amount of apportionments should be divided into twelve equal parts, and that weekly settlements of taxes collected should be made, and that, whenever the city of New Orleans or any city or parish making part of the police district should fail to pay the full amount of its *pro rata* share for any month, the tax bills should be transferred to the Metropolitan police board for collection.

By act No. 35, passed at an extra session of the legislature in 1877, and approved March 31, (Acts La. Ex. Sess. 1877, p. 57,) the acts of 1868, 1869, 1870, and 1875, above referred to, and other acts upon the subject, were repealed, and the police system transferred to the city.

It was ordained by the constitutional convention of 1879 "that all taxes and licenses due any parish or municipal corporation prior to January 1, 1879, may be payable in any valid warrants, scrip or floating indebtedness of said parish or municipal corporation, except judgments." (Acts La. 1880, Constitution, etc., 68.) And by act number 49 of 1880, (Laws La. 1880, 48,) it was enacted that all parish or municipal corporations should "receive for all taxes and licenses due said parish or municipal corporations prior to January 1, 1879, all valid warrants, scrip or evidence of indebtedness of said parish or municipal corporations, except judgments, without any discrimination as to what year said warrants, scrip or evidence of indebtedness shall have been issued, *provided*, that all valid Metropolitan police warrants or scrip for the years 1874, 1875, and 1876 shall be receivable only for that portion of the tax levied for the Metropolitan police fund and no other, without any discrimination as to the year in which said warrants were issued or said taxes levied."

This bill was framed upon the theory that the city of New Orleans, the city of Kenner, and certain parishes were debtors for the amount of the apportionments as to each of them made by the police board during the eight years of its existence, (from 1869 to 1876 inclusive,) and that there was a large balance due on said apportionments which constituted a fund for distribution among the creditors of that board. The bill stated that the assets of the board at the time it was abolished "were

the amounts due to it by said city of New Orleans and by the other defendants as herein stated," and that "the aggregate amount of such indebtedness to said board largely exceeds the total amount of its debts and liabilities." It was also, however, averred that the city of New Orleans, "annually, during the whole period of the existence of said board, included in her budget of expenditures the amount thus apportioned to her, and in pursuance of said authority, levied taxes for the purpose of paying the same;" and "has from day to day and from year to year, ever since the passage of the repealing act of March 31, 1877, aforesaid, continued to collect the taxes levied as aforesaid, for the purpose of paying the apportionments of said city for police expenses, as aforesaid made, and notified thereto; and is now making such collections and enforcing the payment of taxes levied for that purpose, and now has a large sum of money thus realized, which is applicable to the payment of said city's indebtedness to said board of police, and ought to be distributed among the creditors of said board in reduction of their claims, including those of your orator."

The prayer of the bill was that an account be taken of the debts, liabilities, and unpaid dues of every kind of said board of Metropolitan police; that an account be taken of the amount due by each of the defendants to the board "for the balances of their unpaid apportionments of police expenses, as well as of all police taxes collected by them and withheld from said board;" that a receiver be appointed, to whom the defendants be decreed to pay their several *pro rata* shares of the amount found to be due to creditors of the board, including costs; and that the funds thus realized be applied to the payment of complainant's warrants, certificates, and claims, and of such other persons as may be creditors of the board, and who should come in and establish their claims; and also to the payment of interest, expenses, and costs. The bill averred that, by act No. 35 of 1877, acts No. 74 of 1868; No. 44 of 1869; No. 94 of 1870; and No. 16 of 1875, and other acts not enumerated were repealed, and the eleventh paragraph of the bill contained the allegation upon which the contention rested that the suit was one arising under the Constitution of the United States, it

being averred: "That said repealing act was in violation of section 10, article 1, of the Constitution of the United States, in that it impaired the obligation of the contracts made by said board of Metropolitan police, with its officers and employés and others, to whom it was indebted, and who had contracted with and rendered services to said board, upon the faith of said provisions of law for the enforced payment and collection of the sums due to it as aforesaid, from the several cities and parishes within said district, out of which funds only they could be paid, and to that extent said act was and is null and void."

The city of New Orleans demurred to the bill for want of equity; because the city had never been liable as a debtor directly upon the apportionments; and, because, so far as the payment of the warrants and certificates was enforceable through the levy of taxes, such levy, if needed, could not be directed in this proceeding. The demurrer was overruled and the city answered. The answer denied that the act of 1877 either changed or attempted to change or affect in any manner or degree the rights or remedies of the holders of the warrants and certificates; denied that the apportionments had ever been debts of the city, and averred that they were designed simply as the basis on which the city was to levy the Metropolitan police taxes; denied that tax levies already made or the means of collection were interfered with, and maintained that under the Metropolitan police acts its only liability was for taxes collected, of which it had then none in its hands.

The jurisdiction in equity in this case is found in the inadequacy of the remedy at law, either because the rights claimed could not be enforced at law or because they could not be administered in that forum. The bill was manifestly framed to bring the case within the class in which receivers are appointed to collect the assets and pay the creditors of a dissolved corporation. *Broughton* v. *Pensacola*, 93 U. S. 266, 268; *Meriwether* v. *Garrett*, 102 U. S. 472, 527. Indeed, it was expressly averred that the state courts had proceeded upon that principle in respect of similar warrants and certificates, and reference was made in terms to a decision of the Supreme Court of Louisiana in that behalf. *Harrison* v. *City of New*

Orleans, 40 La. Ann. 509. The contention was that the holders of these warrants had a right to bring an action at law against the board of police to recover thereon, and that the dissolution of the board left the complainants without remedy except in a court of equity, judgment and execution at law not being required because impossible by reason of the dissolution of the board. Therefore the court in chancery was appealed to to lay hold of the assets of the board as in the nature of a trust fund and apply them to the payment of the claims. Those assets, as shown by the bill, were the apportionments, the tax levies, and the taxes collected. These were the means provided by law for the payment of debts created by the board, and if they were left unaffected by the repealing act the alleged impairment had no basis to rest on. That act was essentially a mere change of an instrumentality of municipal government. It abolished the police organization established in 1868, and vested in the city the function of maintaining its own police. This legislation was not in contravention of the Constitution of the United States, and was enacted in the exercise of the undisputed power of the State in that regard. In making the change no obligation rested on the State to create an independent and corporate successor of the board or to provide for the application of its assets to the payment of its debts if existing laws were ample to effect that purpose. In that view the city of New Orleans remained for all purposes, so far as creditors were concerned, the representative of the board, and if the city were under a liability to pay the apportionments in cash, it was not absolved from that liability by the dissolution of the board. Although the creditors could not avail themselves of the instrumentality of the board to sue for the apportionments, (if that could ever have been done,) still, as those apportionments had all been made and taxes had been levied and were in course of collection to pay them, or so much thereof as was needed to pay the warrants and certificates, the act of 1877 left the city of New Orleans to respond as before to the creditors in reference thereto, and the remedies to which they could resort were quite as efficient as they ever had been.

In *New Orleans* v. *Gaines' Administrator*, 131 U. S. 191, it was held that under the jurisprudence prevailing in Louisiana a creditor might exercise the right of action of his debtor, a right analogous to the garnishee or trustee process in some States, and that this right could be enforced in a Federal court by a suit in equity on the principle of subrogation. But if this bill could be maintained on the doctrine therein recognized, or if the equitable principle of apportionment as between parties charged with a common burden were applicable as justifying equity interposition, the result on the point under consideration would be the same. Jurisdiction could not be obtained upon the bare averment of an anticipation that the city might rely on the repealing act as wiping out apportionments, tax levies and tax collections, and that the state courts would so decide. And the bill made no such specific averment, with which, indeed, many of its allegations were wholly inconsistent; while the defence of the city not only rested on no such ground, but the answer denied that the repealing act was susceptible of that construction or could be given that effect.

This would be equally true if, as suggested by counsel for the city, the board could never have been treated as a debtor, (unless it had collected taxes under act No. 16 of 1875, and retained them,) inasmuch as it had nothing to do with raising the sums apportioned to the local authorities, upon whom alone the duty was devolved to accomplish that through the exercise of the power of taxation, and the holders of warrants and certificates could from the first only have resorted to the police fund created through the medium of the annual apportionments.

In any aspect, the decision of the questions involved did not depend on the Federal Constitution. The construction or application of that instrument in one way would not defeat complainants, nor in another sustain them.

We are not dealing with a writ of error to review the final judgment of the highest court of a State in a suit wherein the validity of a statute of the State was drawn in question on the ground of repugnancy to the Constitution of the United States

and the decision was in favor of its validity, but with the original jurisdiction of the Circuit Court, sought to be sustained on the ground that the cause of action arose under and was dependent upon the Constitution.

We are of opinion that the case made upon bill and answer did not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result of the suit depended. Reference is made in the argument to the fact that the city filed a demurrer which was overruled, but the first question is confined to the case on bill and answer, and, moreover, the filing of the demurrer could not, under the circumstances, give jurisdiction to the Circuit Court, if it did not otherwise exist.

This conclusion covers the second question, which specifically inquires whether there was an impairment of the obligations of the contract arising upon the warrants and certificates by reason of the repeal of laws making them receivable in payment of licenses, taxes, and other debts. Of course there was no such impairment by the act of 1877, if that act left in force substantially the mode of payment of warrants provided by existing laws, and the bill did not attack act No. 33 of 1874, which suspended the tender of warrants and certificates for taxes except for the years prior to January 1, 1874, while under the ordinance of 1879, by act No. 49 of 1880, the police warrants or scrip for 1874, 1875, and 1876 were made receivable for police taxes without discrimination as to the year in which the warrants were issued or the taxes levied.

The bill did not claim the right assumed by the second question to have been taken away; but it was insisted that the warrants and certificates were payable "in cash," and it is argued that the act of 1880 was itself an impairment in making them receivable for taxes, which might restrict their payment in money. The difficulty with this second question is that the bill does not seek to compel the city to receive the warrants and certificates for taxes; but on the other hand, demands that they be paid in cash under the theory that the

city owes the amount of the apportionments, or has taxes collected on hand, so that no dispute or controversy as to the receivability of the warrants and certificates, determinative of the case, was involved.

The Circuit Court cannot be given jurisdiction by the suggestion of the impairment of a contract in respect of which the complainant seeks no relief, and there is here no averment raising such an issue.

2. We have seen that the ground of equitable cognizance relied on is that the holders of these warrants and certificates had the right to bring an action at law against the board of police to recover thereon, and that the dissolution of the board left the complainants without remedy, except in a court of equity, judgment and execution at law not being required because impossible by reason of the dissolution of the board. It is insisted that the city stands in the position of a debtor for taxes collected on police board apportionments and for the amount of the apportionments themselves, so far as outstanding. If this were so, and the police board were still in existence and liable to suit, then complainants would be obliged to recover judgment against the board and proceed against the city by way of creditor's bill to enforce the collection. Granting that this could be done without judgment after and because the board had ceased to exist, nevertheless the claims of complainants must be established under the bill precisely as they would have to be in an action at law. Although it is ingeniously said that the suit is one to "establish a fund," this does not change the fact that it is a suit to recover on the warrants and certificates, and then enforce their payment by a decree over against the city. The establishment of a fund is, in this instance, only another name for the ascertainment of an indebtedness of the city to the board, available to the creditors of the board, after their claims as such are judicially determined.

By the first section of the act of March 3, 1887, c. 373, 24 Stat. 552, amendatory of the act determining the jurisdiction of Circuit Courts of the United States, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 433, no Circuit or District

Court has cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.

This provision was taken from the eleventh section of the Judiciary Act of 1789, and carried forward into section 629 of the Revised Statutes, and was designed to prevent the evasion of the discrimination in respect of suits between citizens of the same State and suits between citizens of different States, established by the Constitution and laws of the United States.

It appears in the act of March 3, 1875, c. 137, 18 Stat. 470, in somewhat different phraseology, and the restriction as to suits on promissory notes was removed; but it was restored by the act of 1887.

In *Sheldon* v. *Sill*, 8 How. 441, it was held under the act of 1789 that the endorsee of a negotiable promissory note, secured to the payee by a mortgage, could not sue in the courts of the United States to foreclose the mortgage, unless the mortgagee could; but this was necessarily ruled otherwise under the act of 1875. *Tredway* v. *Sanger*, 107 U. S. 323.

As remarked by Mr. Justice Blatchford in *Corbin* v. *County of Black Hawk*, 105 U. S. 659, 665, "the contents of a contract, as a chose in action, in the sense of section 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents." In that case it was held that a suit to compel the specific performance of a contract, or to enforce its other stipulations, is a suit to recover the contents of a chose in action, and not maintainable in the Circuit Court by an assignee, if it could not have been prosecuted there by the assignor, had no assignment been made.

In *Shoecraft* v. *Bloxam*, 124 U. S. 730, 735, it was said by Mr. Justice Field that the terms used in the statute "were designed to embrace the rights the instrument conferred which were capable of enforcement by suit." And see *Plant Investment Co.* v. *Key West Railway Co.*, 152 U. S. 71.

In *Walker* v. *Powers*, 104 U. S. 245, it was held that the assignee of a judgment founded on contract could not maintain a suit thereon in a court of the United States unless such a suit might have been prosecuted there if an assignment had not been made. *Mississippi Mills* v. *Cohn*, 150 U. S. 202.

The facts in *Ober* v. *Gallagher*, 93 U. S. 199, were these: Thompson, a citizen of Louisiana, purchased from Fleming, a citizen of Arkansas, a plantation situated in Arkansas and gave his notes for the purchase price, secured by a lien reserved in the conveyance, which notes Fleming transferred to Gallagher, a citizen of Louisiana. Gallagher afterwards sued Thompson in a court of Louisiana and recovered judgment. At the time of the purchase there was a judgment in Arkansas against Fleming upon which the lands were sold and conveyed to Ober, to whom Thompson also conveyed them. Gallagher afterwards filed his bill against Ober, a citizen of Arkansas, and Thompson, who had become a citizen of Tennessee, praying that the land might be subjected, under the lien reserved in the deed of Fleming to Thompson, to the payment of his judgment. Fleming at the time of the commencement of the suit had also become a citizen of Tennessee, and it was objected that, as Fleming and Thompson had both become citizens of Tennessee and therefore Fleming could not sue Thompson in the courts of the United States, Gallagher could not maintain the suit; but this court held that Gallagher, a citizen of Louisiana, was entitled to enforce the lien on the land, in Arkansas, against Ober, a citizen of Arkansas, and Thompson, a citizen of Tennessee, in collection of the judgment in which the note had become merged.

Mr. Justice Story in *Bean* v. *Smith*, 2 Mason, 252, held that the Circuit Court had jurisdiction on the ground of diverse citizenship in a suit in equity brought by a judgment creditor to set aside conveyances made after suit commenced, and a few days before the term at which judgment was expected to be obtained, in fraud of such creditor, although the judgment was recovered in the state court on a negotiable chose in action on which before judgment a suit could not have been maintained in the Circuit Court. But there, as Mr. Justice Story

observed, the right to sue the fraudulent grantees was not a right which had vested in another person and passed to complainant by assignment; and as to the fraudulent grantor the right was a new right growing out of a direct judgment between the parties and a fraud injurious to complainant, which had been devised to avoid the satisfaction of that judgment.

The case before us is not of that character. If the board had not been abolished, judgment could not have been recovered against it by complainants in the Circuit Court; and if a judgment had been recovered by them in the state court, a creditor's bill would have been merely ancillary to the judgment, and could not have been entertained in the Circuit Court as an original bill. Upon the facts appearing in this record, the assignees would have acquired no new and independent right of recovery, by reason of the judgment, not possessed by the assignors. The board being abolished, recovery of a judgment was dispensed with, but the establishment of the claims was still required as the basis for further relief, and that relief involved nothing more than recovery over, or a direct decree within the principles of *New Orleans* v. *Gaines' Admr.*, *supra*, analogous to judgment on garnishee process. The suit must, therefore, be regarded as a suit to enforce the payments of the warrants and certificates, and as such, a suit to recover their contents, and this is so on any other ground of equity jurisdiction which has been suggested.

In our judgment the pleadings show a suit to recover the contents of choses in action, and, as the bill contained no averment that it could have been maintained by the assignors, if no assignments had been made, (from the statement accompanying the certificate it appears affirmatively that it could not,) the jurisdiction of the Circuit Court cannot be sustained on the ground of diverse citizenship.

The first question is answered in the negative, and the third in the affirmative, and it will be so certified.

Mr. Justice White took no part in the consideration and decision of this case.

ASHLEY *v.* RYAN.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 888. Argued and submitted April 26, 1894. — Decided May 14, 1894.

If several railroad corporations, each existing under the laws of separate States, consolidate into one corporation, a statute of one of the States, imposing a charge upon the new consolidated company of a percentage on its entire authorized stock as the fee to the State for the filing of the articles of consolidation in the office of the Secretary of State of the State, without which filing it could not possess the powers, immunities, and privileges which appertain to a corporation in that State, is not a tax on interstate commerce, or the right to carry on the same, or the instruments thereof; and its enforcement involves no attempt on the part of the State to extend its taxing power beyond its territorial limits.

A State, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation, organized under its laws, may impose such conditions as it deems proper, and the acceptance of the franchise implies a submission to the conditions without which the franchise could not have been obtained.

THE Wabash, St. Louis and Pacific Railroad Company, which owned and operated lines running through the States of Ohio, Indiana, Illinois, Missouri, and Michigan, having defaulted in the payment of interest on its bonds, foreclosure proceedings were commenced in the Federal courts for the sale of its property. Subsequently a committee was entrusted with the duty of buying in the property. After purchase by the committee the property in the several States was transferred to companies incorporated in those States. The following were the companies thus organized, and to whom the necessary transfers were respectively made:

In Ohio: The Toledo and Western; capital stock, $700,000.

In Michigan: The Detroit and State Line Wabash; capital stock, $300,000.

In Indiana: The Wabash Eastern, of Indiana; capital stock, $9,000,000.

Statement of the Case.

In Illinois: The Wabash Eastern, of Illinois; capital stock, $12,000,000.

In Missouri: The Wabash Western; capital stock, $30,000,000.

Thereafter these several companies were consolidated into one. Section 148*a* of the Revised Statutes of Ohio contains, among other provisions, the following:

"The Secretary of State shall hereafter charge and collect the following fees for official services:

"1. For filing the articles of incorporation of any corporation whose capital stock is ten thousand dollars or under, ten dollars; of a corporation whose capital stock is over ten thousand dollars, one-tenth of one per cent upon the authorized capital stock of such corporation.

"2. For filing a certificate of increase of the capital stock of any corporation having a capital stock where the amount of the increase is ten thousand dollars or under, ten dollars; where the amount of increase is over ten thousand dollars, one-tenth of one per cent upon the proposed amount of increased capital.

"3. For filing articles of agreements of consolidation of corporations having a capital stock, the following fees shall be collected by the Secretary of State: Said articles or agreements of consolidation shall be treated as the articles of incorporation of the new consolidated corporations created by such articles or agreements of consolidation, and the fees for filing such articles or agreements of consolidation shall be the same in each case as is hereinbefore set forth for the filing of articles of incorporation of a corporation having the same amount of capital stock, as is provided for by the articles or agreements of consolidation for the new consolidated corporation, created by any such articles or agreement of consolidation; and in fixing the amount of such fees, no credit shall be allowed for fees previously paid by any of the constituent corporations, parties to such consolidation, but the same shall be determined solely by the amount of capital stock of the new corporation created by such articles or agreements of consolidation."

By another provision of the Revised Statutes of Ohio, the

fees to be collected under the foregoing law were required to be paid by the Secretary of State into the Treasury.

The plaintiffs in error presented their articles of consolidation, for filing, to the Secretary of State, and tendered $700, that being one-tenth of one per cent on the capital stock of the Toledo and Western Railroad, the only Ohio corporation which had entered into the consolidation. The secretary refused to file the proffered articles for that amount, and demanded $52,000, or one-tenth of one per cent of the par value of the entire stock of the consolidated corporation. This amount was paid under protest, and suit was at once brought to recover all the excess paid over and above the $700 originally tendered, upon the ground that such excess had been collected without warrant of law; that it constituted a tax for the general purposes of revenue, and, therefore, its exaction was contrary to the constitution and laws of the State of Ohio; and, moreover, that its enforcement would violate the Constitution of the United States, because it would be an attempt on the part of the State of Ohio to lay a burden on interstate commerce, or the instruments of such commerce, and to give an extra-territorial force to its taxing power.

Pending the controversy, an injunction issued restraining the Secretary of State from covering into the state Treasury the sum which had been paid him under protest. The cause was ultimately taken to the Supreme Court of the State of Ohio, and by that court the judgment which maintained the validity of the charge was affirmed. The plaintiffs in error thereupon brought the cause here for review.

Mr. Henry Crawford for plaintiffs in error submitted on his brief.

I. No technical objections prevent recovery.

II. The law under which the charge was exacted is not a police regulation, but an attempted exercise of the taxing power of the State, and its construction and validity must be adjudged exclusively on that theory.

III. This court should limit the scope of the law and con-

strue it not to authorize the imposition of a unit franchise or organization tax, rated upon the aggregate capital stocks of combined domestic and foreign corporations.

When local courts interpret state laws so as to injuriously affect interests lying outside its boundaries, the courts of the United States are not compelled to accept such construction, but are at liberty to fix their own interpretation on the statute. *Pennoyer* v. *Neff*, 95 U. S. 714; *Pana* v. *Bowler*, 107 U. S. 529; *Gormley* v. *Clark*, 134 U. S. 338; *Wilson* v. *Seligman*, 144 U. S. 41.

In considering the true meaning of a Virginia statute taxing railways, this court held: "The terms of the act, indeed, include every railroad and canal company not exempt from taxation by virtue of its charter, but that language, according to a general rule of interpretation, must be confined to corporations deriving their authority from the laws of Virginia." *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117.

IV. Under the law as construed by the state court the tax under challenge is in part illegal because it is a unit charge mainly laid upon incorporations and franchises not created or granted by Ohio, or upon business operations carried on outside its boundaries.

"If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislation as to valid judicial action." *St. Louis* v. *Ferry Co.*, 11 Wall. 423, 430.

Recognizing that in such cases the taxing jurisdiction of a State is not exclusive, but concurrent with other States, the assessment of public charges against this class of corporations has always been levied only upon the State's proportional share of the whole property, franchise, stock, or earnings. *Delaware Railroad Tax Case*, 18 Wall. 206; *Erie Railway* v. *Pennsylvania*, 21 Wall. 492; *State Railroad Tax Cases*, 92 U. S. 575, 610; *Telegraph Co.* v. *Texas*, 105 U. S. 460;

West. Un. Tel. Co. v. *Massachusetts*, 125 U. S. 530; *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305; *Maine* v. *Grand Trunk Railway*, 142 U. S. 217.

V. Upon the theory that the entire organization tax of $52,000 was assessed only upon the Ohio constituent of the interstate copartnership, the exaction plainly imposes an unequal and discriminating burden in violation of the Fourteenth Amendment.

Mr. J. K. Richards, Attorney General of the State of Ohio, for defendant in error.

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

With the question whether the sum paid was authorized by the Ohio statutes, or constituted a fee, a license, or a tax, under the Ohio laws and constitution, we are not concerned. The writ of error brings before us only the Federal question. *Watson* v. *Mercer*, 8 Pet. 88; *Barbier* v. *Connolly*, 113 U. S. 27. Nor does the determination of the Federal question render it necessary to define the nature of the charge imposed; for, whether this charge be viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause of the Constitution of the United States, or involved the assertion of the right of a State to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction.

The purpose of the tender of the articles of consolidation to the Secretary of State was to secure to the consolidated company certain powers, immunities, and privileges which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that State's consent they could not have been procured. Revised Statutes of Ohio, sections 3239, 3382, and 3384 *b*, amended by act of April 11, 1890, 87 Ohio

Laws, 183, 184. Hence, in seeking to file its articles of incorporation, the company was applying for privileges, immunities, and powers which it could by no means possess, save by the grace and favor of the constitution of the State of Ohio and the statutory provisions passed in accordance therewith. At the time the articles were presented for filing, the statute law of the State charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the sum which the Secretary of State exacted. As it was within the discretion of the State to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the state law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. We say *voluntary* assumption, because, as the claim to the franchise was voluntary, the assumption of the privilege which resulted from it partook necessarily of the nature of the claim for corporate existence. Having thus accepted the act of grace of the State and taken the advantages which sprang from it, the company cannot be permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought.

That the right to be a state corporation depends solely upon the grace of the State, and is not a right inherent in the parties is settled. Thus, in *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 40, speaking through Mr. Justice Bradley, the court said: "A franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration. . . . Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority.

. . . No private person can take another's property, even for public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

In *Home Insurance Co.* v. *New York*, 134 U. S. 594, 599, through Mr. Justice Field, we said: "The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name, and act as a single person with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State."

These citations only reiterate principles established beyond controversy by a series of decisions. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Lafayette Insurance Co.* v. *French*, 18 How. 404; *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410.

Nor is the question at issue affected by the fact that some of the constituent elements which entered into the consolidated company were corporations owning and operating property in another State. The power of corporations of other States to become corporations, or to constitute themselves a consolidated corporation under the Ohio statutes, and thus avail of the rights given thereby, is as completely dependent on the will of that State as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws. *Bank of Augusta* v. *Earle*, *supra*; *Lafayette Insurance Co.* v. *French*, *supra*; *Paul* v. *Virginia*, 8 Wall. 168, 181.

In the latter case, speaking through Mr. Justice Field, we observed: "Now a grant of a corporate existence is a grant of special privileges to the corporators, enabling them to act

for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta* v. *Earle*, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence, even, by other States, and the enforcement of its contracts made therein depend purely upon the comity of these States — a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. . . . At the present day corporations are multipled to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States."

It follows from these principles that a State, in granting a corporate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained. In *Paul* v. *Virginia*, *supra*, the court said, p. 181: "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper

to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest."

In the case of the *Railroad Co.* v. *Maryland*, 21 Wall. 456, 472, considering a grant by the State of Maryland to a railroad company of a right to build a branch from Baltimore to Washington, upon condition that the company should pay semi-annually to the State one-fifth of the amount received from the transportation of passengers over the road authorized, the court spoke as follows: "The State could have built the road itself and charged any rate it chose, and could thus have filled the coffers of its treasury without being questioned therefor. How does the case differ, in a constitutional point of view, when it authorizes its private citizens to build the road and reserves for its own use a portion of the earnings? We are unable to see any distinction between the two cases. In our judgment there is no solid distinction. If the State, as a consideration of the franchise, had stipulated that it should have all the passenger-money, and the corporation should have only the freight for the transportation of merchandise, and the corporation had agreed to those terms, it would have been the same thing. It was simply the exercise by the State of absolute control over its own property and prerogatives." And the contention that the charge imposed a burden upon interstate commerce was thus answered: "It may, incidentally, affect transportation, it is true; but so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *diverso intuitu*, and in the exercise of an undoubted power. The State is conceded to possess the power to tax its corporations, and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers. So, the State has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro;* and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will

be obliged to impose. The stipulated payment in this case, indeed, is nothing more or less than a bonus."

In *Ducat* v. *Chicago*, *supra*, the court said: "The only difference between the statute of Virginia and that of Illinois is that the latter is more onerous to the companies than the former. The difference is in degree, not in principle." That was a case in which an insurance company was not only required to comply with the general law of the State of Illinois, but also to pay a portion of its premium to the city of Chicago as a condition of doing business therein.

The case of *Philadelphia Fire Association* v. *New York*, 119 U. S. 110, 119, involved the validity of a tax imposed by the State of New York on an insurance company which had been incorporated in Pennsylvania. Mr. Justice Blatchford, in delivering the opinion of the court, said: "This Pennsylvania corporation came into the State of New York to do business by the consent of the State under this act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the State for any given year under such license, and subject to the conditions prescribed by statute. The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax or a further tax as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given."

Indeed, the cases illustrating this doctrine are too numerous for review, and need only be referred to. *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632; *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Railroad Co.* v. *Peniston*, 18 Wall. 5; *Delaware Railroad Tax Case*, 18 Wall. 206; *State Railroad Tax Cases*, 92 U. S. 575; *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *California* v. *Pacific Railroad Co.*, 127 U. S. 1; *Home*

Insurance Co. v. *New York*, 134 U. S. 594; *Maine* v. *Grand Trunk Railway*, 142 U. S. 217.

The question here is not the power of the State of Ohio to lay a charge on interstate commerce, or to prevent a foreign corporation from engaging in interstate commerce within its confines, but simply the right of the State to determine upon what conditions its laws as to the consolidation of corporations may be availed of.

Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio upon the taking of corporate being or the exercise of corporate franchises, the right to which depended solely on the will of that State, and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits.

Judgment affirmed.

EAGLE INSURANCE COMPANY *v.* OHIO.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 1051. Argued April 20, 1894. — Decided May 14, 1894.

A state statute, requiring insurance companies to make full and specified returns to the proper state officers of their business condition, liabilities, losses, premiums, taxes, dividends, expenses, etc., is an exercise of the police power of the State, and may be enforced against a company organized under a special charter from the legislature of the State, which does not in terms require it to make such return, without thereby depriving it of any of its rights under the Constitution of the United States.

The Insurance Company, plaintiff in error, was incorporated on March 22, 1850, by an act of the General Assembly of Ohio,[1] 48 Ohio Laws, 498. Sections 3654 and 3655 of the Revised Statutes of Ohio read as follows:

"[1] AN ACT TO INCORPORATE THE EAGLE INSURANCE COMPANY OF CINCINNATI.

"SEC. 1. *Be it enacted by the General Assembly of the State of Ohio*, That George Crawford, Timothy Griffith, Isaac C. Copelen, William Wood, Henry

"SEC. 3654. The president or vice-president and secretary of each insurance company organized under any law of this

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Kessler, Henry Brachman, George M. Herincourt, and the subscribers of the stock of this association and their successors, shall be and are hereby declared to be a body politic and corporate, by the name and style of the Eagle Insurance Company of Cincinnati, and in that name shall be capable, in law, to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all courts of law and equity and elsewhere, with full authority to acquire, hold, possess, occupy, and enjoy, and the same to sell, convey, and dispose of all such real estate as shall be necessary and convenient for the transaction of its business, or which may be conveyed in said company for the security or in payment of any debt which may become due and owing to the same, or in satisfaction of any judgment of a court of law, or any order or decree of a court of equity in their favor, and to make and use a common seal, and the same to alter and renew at pleasure, and generally to do and perform all things relative to the object of this association.

"SEC. 2. That the capital stock of this company shall be one hundred thousand dollars, which may be increased at the pleasure of the majority of the stockholders to two hundred thousand dollars, divided into shares of one hundred dollars each; at the time of subscribing there shall be paid on each share, twenty-five dollars, and the balance on each share shall be subject to the call of the directors, and shall be secured by endorsed notes payable on demand, or other property or stocks, to be approved by the board of directors. Moreover, if at any time the directors shall deem any such security insufficient, it shall be their duty to require additional security on such notes or obligations by them held for the payment of stocks as they shall deem best; and any stockholder failing to pay at the time and in the manner prescribed by the board, any portion of their stock remaining unpaid, or shall fail, neglect or refuse to give such additional securities as may be required of them, it shall be the duty of the directors to sell such delinquent share or shares at auction for cash to the highest bidder, after having given ten days' public notice of the time and place of sale, and the proceeds to be applied in payment of said shares; and, moreover, such delinquent stockholder shall be held liable in his individual capacity for any balance remaining unpaid on said shares, and in case any excess shall arise from such sale after having paid up the delinquency and expenses of such sale, such excess shall be paid to said stockholder.

"SEC. 3. That so soon as four hundred shares are subscribed for and paid, or secured to be paid, as required in the second section of this act, the company shall be competent to transact all kinds of business for which it was established.

"SEC. 4. That the affairs of the company shall be managed by seven directors, all of whom shall be stockholders, to be elected as follows: A

State shall, annually, on the first day of January, or within thirty days thereafter, prepare, under oath, and deposit in the

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majority of the stockholders composing this association, shall hold a meeting for the first election of directors within one month after the amount of four hundred shares of stock shall be subscribed, and on the first Monday in May in each and every year thereafter, and choose by ballot seven directors, who shall be stockholders, and each share of stock shall entitle the holder thereof to one vote, and the directors so chosen shall serve to the first Monday in May, 1851, and until others are chosen. At their first meeting after every election, they shall choose by ballot a president from their own number, and in case of the death or disability of the president thus chosen, the directors shall fill the vacancy by ballot as before, and in case of a vacancy in the board of directors, it shall be filled by the remaining directors from the stockholders for the remainder of the year, and the board of directors thus constituted, or a majority of them, when convened at the office of the company, shall be competent to exercise all the powers vested in the board by this act.

"SEC. 5. That it shall be lawful for said company to insure all kinds of property against loss or damage by fire or any other cause or risk, in and out of the State; to make all kinds of insurance on goods, merchandise, or other property in the course of transportation, whether on land or water, or any vessel or boats wherever they may be, to lend money upon bottomry or respondentia to cause themselves to be insured against any loss or risk they may have incurred in the course of their business, and against any maritime or other risks, upon the interest which they may have in any vessel, boat, goods, or merchandise, or other property, by means of any loan or loans which they may make on mortgage, bottomry, or respondentia, and generally to do and perform all other matters and things connected with and proper to promote these objects.

"SEC. 6. It shall be lawful for said company to invest all or any part of their capital stock, money, funds, or other property, in such a way as the directors shall deem best for the safety of the capital and interest of the stockholders, and may transfer, sell, and dispose of any or all interest which the said company may have acquired by said investment, provided that it shall not be lawful for said corporation to use or employ any part of their capital stock, money, or other funds in buying or selling goods, wares, or merchandise, nor in the purchase of real estate, except as provided in the first section of this act, nor shall the said company trade in the business of exchange brokerage, nor issue or emit any bills of credit as a circulating medium of trade or exchange, or in any manner engage in the business or operation of banking.

"SEC. 7. That the president and directors shall declare such dividends of the profits of the business of the company as shall not impair nor in anywise lessen the capital stock of the same. The dividends shall be made half yearly, on the first Monday in January and July, and shall be paid to

office of the superintendent of insurance, a statement of the condition of such company on the thirty-first day of Decem-

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the stockholders ten days thereafter, but no dividends shall be paid to any stockholder whose stock is delinquent.

"SEC. 8. The transfers of stock may be made by any stockholder or his legal representative, subject to such restrictions as the board of directors shall from time to time make and establish.

"SEC. 9. That all policies or contracts of insurance that may be made or entered into by the said company, may be made either under or without the seal thereof, and shall be subscribed by the president or by such other officer as may be designated for that purpose by the board of directors, and attested by the secretary, and being so subscribed and attested shall be obligatory upon the said company according to the tenor, intent, and meaning of this act, and of such policies or contracts, and all such policies or contracts so made, subscribed, attested, and executed, and the loans and other business of the company may be made, conducted, and carried on without the presence of the whole of the directors, but by such committee or otherwise as the board may authorize, and the same shall be binding on the company.

"SEC. 10. That the individuals named in the first section of this act, or such committee as they shall appoint, shall receive the subscriptions to the capital stock of this company, and open books for that purpose at the city of Cincinnati aforesaid, upon two weeks' notice published in at least two daily papers of said city, which books shall continue open from day to day for ten days, unless the whole amount of the capital stock shall sooner be subscribed, and shall receive all moneys paid at the time of subscribing to said stock, and hold the same until the election of the first board of directors, when they shall dispose of it as said board may direct.

"SEC. 11. That the president and directors shall have power and authority to appoint a secretary, and such other officers under them as shall be necessary for transacting the business of said institution, and may allow them such salaries as they shall judge reasonable; — to ordain and establish such by-laws and regulations as shall appear to them necessary for regulating and conducting the concerns of said institution, not being contrary to or inconsistent with this act, the constitution or laws of this State, and of the United States; they shall keep full, fair, and correct entries of their transactions, which shall be at all times open to the inspection of the stockholders.

"SEC. 12. That should it so happen from any cause whatsoever that the annual election of directors should not take place in any year on the day hereinbefore mentioned for that purpose, this corporation shall not be for that reason dissolved, but such election may be lawfully held on such other convenient day, within six months thereafter, as may for that purpose be fixed by the president and directors, they causing ten days' notice thereof to be given in one or more of the newspapers printed in the city of Cincinnati.

ber, then next preceding, exhibiting the following facts and items, and in the following form, namely:

"*First* — The amount of the capital stock of the company, specifying the amount paid and unpaid.

"*Second* — The property or assets held by the company, specifying:

"1. The value of the real estate owned by such company, where it is situated, and the value of buildings thereon.

"2. The amount of cash on hand and deposited in banks to the credit of the company, specifying in what banks the same is deposited.

"3. The amount of cash in the hands of agents and in course of transmission.

"4. The amount of loans secured by bonds and mortgages, which are the first lien on real estate, and on which there is less than one year's interest due.

"5. The amount of loans on which interest has not been paid within one year.

"6. The amount due the company on which judgments have been obtained, and the cash value thereof.

"7. The amount of stocks in this State, the United States, of any city of this State, and of any other stocks owned by the company, specifying the amount, number of shares, and the par and market value of each kind of stock.

"8. The amount of stock held as collateral security for loans, with the amount loaned on, and the par and market value of each kind of stock.

"9. The amount of unpaid assessments on stock, premium notes, or contingent liabilities.

"10. The amount of interest due and unpaid, and the amount of interest accrued, but not due.

"SEC. 13. That the president and directors may call a general meeting of the stockholders for any purpose relative to the affairs of the company, giving at least ten days' notice thereof in some newspaper printed in Cincinnati.

"BENJAMIN F. LEITER,
"*Speaker of the House of Representatives.*
"CHARLES C. CONVERS,
"*Speaker of the Senate.*"

"MARCH 22, 1850.

Statement of the Case.

"11. The amount of premium notes or contingent liabilities on which policies are issued.

"12. The number of policies in force.

"13. The amount insured under all policies in force.

"14. The amount of premiums received thereon.

"15. The amount and a description of all other assets.

"*Third* — The liabilities of the company, specifying:

"1. The amount of losses due and unpaid.

"2. The amount of claims for losses resisted by the company.

"3. The amount of losses incurred during the year, including those claimed and not due, and those reported to the company upon which no action has been taken.

"4. The amount of dividends declared and due, and remaining unpaid.

"5. The amount of dividends, either cash or scrip, declared but not due.

"6. The amount of money borrowed, and the security given for the payment thereof.

"7. The amount required for re-insurance, being in stock companies a sum equal to fifty per cent of the whole amount of premiums on unexpired risks and policies, and in mutual companies a sum equal to fifty per cent of the cash premiums received on unexpired risks and policies.

"8. The amount of all other existing claims against the company.

"*Fourth* — The income of the company during the preceding year, specifying:

"1. The amount of cash premiums received.

"2. The amount of notes or contingent assets received for premiums.

"3. The amount of interest money received.

"4. The amount of income received from other sources.

"*Fifth* — The expenditure during the preceding year, specifying:

"1. The amount of losses paid during the year, stating how much of the same accrued prior, and how much subsequent to the date of the preceding statement, and the amount at which losses were estimated in each preceding statement.

Counsel for Plaintiffs in Error.

"2. The amount of dividends paid during the year.

"3. The amount of expenses paid during the year, including commissions and fees to agents and officers of the company.

"4. The amount paid for taxes.

"5. The amount of all payments and expenditures.

"6. Amount of scrip dividend declared.

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"SEC. 3655. The statement of any such company, the capital of which is composed in whole or in part of notes, shall, in addition to the foregoing, exhibit the amount of notes which originally formed the capital, and also what proportion of such notes is still held by the company and considered capital; and every company organized under any law of this State which fails to make and deposit such statement, or to reply to any inquiry of the superintendent with respect to such statement, shall be subject to a penalty of five hundred dollars, and an additional five hundred dollars for every month that it continues thereafter to transact any business of insurance, to be recovered by action in the name of the State, and, on collection, paid into the state treasury for the benefit of the State Common School fund; and the Attorney General, on the request of the Superintendent of Insurance, shall institute such action against any company so delinquent, in the court of appropriate jurisdiction in Franklin county, or in the court of appropriate jurisdiction of the county in which said company is located or has its principal place of business, as he prefers."

Under these sections proper blanks were furnished to the company by the State Superintendent of Insurance, and on its refusal to make the returns required by law, proceedings by mandamus were begun against it. The defence was that the above provisions impaired the obligation of the contract which grew out of its charter. Upon the decision of the Supreme Court of the State making the writ peremptory, the case was brought here by error.

Mr. Thomas H. Kelly, (with whom was *Mr. John F. Follett* on the brief,) for plaintiffs in error.

Mr. J. K. Richards, Attorney General of the State of Ohio, filed a brief for defendant in error, but the court declined to hear him.

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

The only question presented is whether or not the charter of the plaintiff in error exempted it from obligation to comply with the subsequently established police regulations of the State, contained in sections 3654 and 3655 of the Revised Statutes of Ohio. This subject was fully considered by this court in the case of *The Chicago Life Insurance Company* v. *Needles*, 113 U. S. 574. There the company had been chartered by the State of Illinois to carry on a life insurance business, and the question was whether subsequently enacted police regulations of that State for the inspection of such business, and for the liquidation thereof, in the event of insolvency, could be enforced against a corporation working under a prior charter without impairing the obligation of the contract. The statute considered in the *Needles case* authorized the Auditor, whenever the actual funds of any life insurance company doing business in the State were not of a net value equal to the net value of its policies, according to the "combined experience" or "actuaries'" rate of mortality, with interest at four per cent, to give notice to such company and its agent to discontinue issuing policies in the State until such time as its funds should become equal to its liabilities, valuing its policies as aforesaid. The law, in addition, required every life insurance company incorporated in Illinois to transmit to the Auditor on or before the 1st day of March in each year a sworn statement of its business, standing, and affairs, in the form prescribed and authorized by law. It also empowered the officer to address inquiries to any company in relation to its "doings and condition," and any other matter connected with its transactions, which inquiries, it provided, should be "promptly answered;" and it imposed upon him the duty of making an examination of the condi-

tion and affairs of any company, whenever he deemed it expedient to do so, and had reason to suspect the correctness of any annual statement, or that the company was in an unsound condition. By another statute it was provided that if, upon examination of the affairs of any insurance company, the Auditor should conclude that it was insolvent, or that its further continuance in business would be hazardous to the insured or the public, he should apply by petition to the judge of any Circuit Court for an injunction restraining the company from proceeding with its business until further hearing, etc. Upon the case as thus presented the court said:

"The case upon the merits, so far as they involve any question of which this court may take cognizance, is within a very narrow compass. The main proposition of the counsel is that the obligation of the contract which the company had with the State, in its original and amended charter, will be impaired, if that company be held subject to the operation of subsequent statutes regulating the business of life insurance and authorizing the courts, in certain contingencies, to suspend, restrain, or prohibit insurance companies incorporated in Illinois from further continuance in business. This position cannot be sustained consistently with the power which the State has, and, upon every ground of public policy, must always have over corporations of her own creation. Nor is it justified by any reasonable interpretation of the language of the company's charter. The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the State in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. *Terrett* v. *Taylor*, 9 Cranch, 43, 51; Angell & Ames on Corporations, 9th ed. paragraph 774, note.

"Equally implied, in our judgment, is the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may from time to time prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created. *Sinking Fund Cases*, 99 U. S. 68, 70; *Commonwealth* v. *Farmers' & Mechanics' Bank*, 21 Pick. 542; *Commercial Bank* v. *Mississippi*, 4 Sm. & Marsh. 497, 503. If this condition be not necessarily implied, then the creation of corporations, with rights and franchises which do not belong to individual citizens, may become dangerous to the public welfare through the ignorance, or misconduct, or fraud of those to whose management their affairs are entrusted. It would be extraordinary if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all."

These views are decisive of the issue here. An attempt is made to distinguish that case from this upon the ground that, in the former, the proceedings were for the purpose of compelling the company to cease from business because of insolvency; while, in this case, the question is as to the obligation of the company to make the statements required by the statute. This distinction is without foundation. In the *Needles case*, the duty was expressly imposed upon the corporation to make statements identical in form and substance with those which insurance companies are required to make under the Ohio statute we are here considering. Many additional police powers were conferred by the Illinois law, among them being the authority which, as stated above, was given to the State Auditor to apply for an injunction restraining a company from continuing its business, whenever, by its statement, it appeared to him to be insolvent. It is, indeed,

true that the relief there invoked was the restraint of the corporation from doing business on the ground of insolvency. But that case substantially involved not only the right to compel the statement, but the greater right to prevent, in case of insolvency, the continuance of the business of the corporation. Hence, as the greater includes the less, the *Needles case* necessarily embraces every issue presented here.

Another contention is that compliance with the provisions in regard to statements of its business would bring the company under the operation of the general law of the State relating to corporations, and thus place it in the position of voluntarily subjecting itself to many provisions which would, if applied, impair the obligations of the charter. In March, 1892, (89 Ohio Laws, 73,) the General Assembly of Ohio specifically enacted that any fire insurance company which should comply with the requirements of sections 3654 and 3655, or any other police regulations contained in Chapter XI of the title relating to corporations, and Chapter VIII, Title 3, Part 1, of the Revised Statutes of Ohio, relating to the insurance department of the State, "shall not be deemed to have consented to and shall not be affected by the provisions" of the title relating to corporations.

The judgment of the Supreme Court of Ohio in the case before us expressly finds that, under the operation of this last provision, the plaintiff in error would not subject its charter to any conditions or modifications by making the statement which it now refuses to submit.

Judgment affirmed.

STEWART *v.* BARNES.

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

No. 316. Submitted March 22, 1894. — Decided May 14, 1894.

When a person from whom an internal revenue tax has been illegally exacted accepts from the government, without objection, the payment of the sum thus illegally exacted, he thereby gives up his right to sue for interest as incidental damages.

Opinion of the Court.

THE case is stated in the opinion.

Mr. T. W. Neill and *Mr. James W. M. Newlin* for plaintiff in error.

Mr. Assistant Attorney General Conrad for defendant in error.

MR. JUSTICE SHIRAS delivered the opinion of the court.

This was an action of assumpsit brought by John Stewart against Benjamin H. Barnes, executor of William H. Barnes, deceased, late collector of internal revenue, to recover the sum of $250.40, alleged to have been unlawfully collected from the plaintiff as internal revenue taxes on distilled spirits, with interest from June 26, 1869. The action was commenced in the Court of Common Pleas of Bucks County, Pennsylvania, on April 25, 1887, and was thence removed by the defendant, by *certiorari*, into the Circuit Court of the United States for the Eastern District of Pennsylvania, where the declaration was filed and proceedings were had which resulted in a verdict and judgment for the defendant. From that judgment the plaintiff sued out a writ of error.

In his bill of particulars the plaintiff alleged that on June 26, 1869, he drew out certain distilled spirits which had been placed in a United States bonded warehouse prior to July 20, 1868, and that upon the withdrawal thereof he was required by the collector to pay taxes on fractions of gallons as though they were whole gallons, amounting to $8.62, and also the sum of $241.78, as taxes on spirits which had been lost by leakage, evaporation, etc.; that those amounts were unlawfully exacted, and that he paid the same under protest.

The defence made by the defendant is set out in the record, as follows:

"And now, to wit, the fourth day of April, 1889, the court, on motion of John R. Read, Esq., United States attorney, grant leave to amend the plea filed in the above case by filing an additional plea as follows, to wit:

"And the defendant says that to entitle the above plaintiff to maintain the above suit appeal was not duly made to the Commissioner of Internal Revenue according to the provisions of law, and the above suit was not brought within the period of time allowed thereby; and this the defendant is ready to verify, etc."

Although the language quoted seems to indicate that there was another plea filed, no other plea appears in the record; neither does it appear that there was a replication. The record shows that a jury was sworn "to try the issue joined."

The purpose of this plea was evidently to invoke the operation of those acts of Congress which relate to the presentation of claims for alleged illegal exaction of taxes to the Commissioner of Internal Revenue, and which lay down the conditions upon which alone the government permits a recovery by suit of amounts so exacted.

The provisions of the statutory law which bear directly upon the present case are section 19 of the act of July 15, 1866, c. 184, 14 Stat. 93, 152, and section 44 of the act of June 6, 1872, c. 315, which appears in the Revised Statutes as section 3227. Under either of those acts before an action could be maintained in any court an appeal must first have been made to the Commissioner. In the act of 1866 there was no limitation of the time within which such an appeal was to be made. The act of 1872 required that it should be made within two years from the time the cause of action accrued. Under the earlier act, if such appeal had been made, still no action could be maintained in any court unless a decision should have been made upon the claim by the Commissioner, in which event the suit must have been brought within six months from the time of the decision, or within the same period after the act took effect. Under the later act, if the Commissioner delayed his decision for more than six months, the claimant was not compelled to await it, but might have sued within six months next following the six months of the Commissioner's delay, or one year from the time of appeal; but if the claimant had allowed that period to terminate without instituting

suit, he must then have waited, as before, until the claim should have been passed upon, and have sued within one year thereafter.

It was shown on the trial that, as to the sum of $241.78, the defendant had duly appealed to the Commissioner of Internal Revenue, that the claim was rejected, and that the suit was brought within the required time after such decision; but nothing appears in the bill of exceptions to show that an appeal was made concerning the amount of $8.62 of the claim.

Though the effect of the plea was to confess the plaintiff's cause of action, as to the exaction of the alleged amounts of money from him and as to the payment of the same under protest, see *Gale* v. *Capern*, 1 Ad. & El. 102, nevertheless, to prove the exaction the plaintiff introduced as a witness in his behalf a deputy collector, John F. Cline, who testified that the sums of money mentioned in the bill of particulars had been paid by the plaintiff to the collector of internal revenue for the first district of Pennsylvania; that the spirits were bonded prior to July 20, 1868, and that the sum of $8.62 had been paid upon fractions of gallons taxed as whole gallons, and the sum of $241.78 upon spirits lost by leakage, etc. The defendant admitted that certain official regulations promulgated by the Commissioner of Internal Revenue prior to and upon April 22, 1869, which were offered in evidence by the plaintiff, provided that the taxes on distilled spirits placed in bonded warehouses before July 20, 1868, should be exacted, upon the withdrawal of the spirits, only upon the actual quantity thereof so withdrawn. No evidence was introduced to show the nature of the protest made, but it was unnecessary to prove more than that the payment was made "under protest," which was admitted by the plea. *Wright* v. *Blakeslee*, 101 U. S. 174.

The defence made on the trial consisted of the introduction of evidence tending to show that the plaintiff had received from the government under the provisions of an act of Congress approved July 26, 1886, c. 783, 24 Stat. 853, the sum of $241.78, for which his attorney, T. W. Neill, gave a receipt to the Commissioner of Internal Revenue. The act is enti-

tled "An act for the relief of Richard C. Ridgway and others," and is as follows:

"Whereas from the time bonded warehouses were first established until April fourteenth, eighteen hundred and sixty-nine, the law has been uniformly construed and administered to allow for loss by leakage on spirits distilled prior to July twentieth, eighteen hundred and sixty-eight, while in warehouse; and whereas it was the uniform practice and in accordance with the rules and regulations of the Commissioner of Internal Revenue, approved by the secretary, to collect internal revenue taxes upon only so much of the spirits distilled prior to July twentieth, eighteen hundred and sixty-eight, as were actually withdrawn from warehouse, under which established regulations large quantities of spirits were bought and sold while in bond; and whereas in a few exceptional cases taxes were also collected on that portion of such spirits which were lost by leakage while remaining in warehouse: therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Treasury be, and he is hereby, required to pay, out of any money in the treasury not otherwise appropriated, to the following-named persons in the city of Philadelphia, Pennsylvania, or their legal representatives, such amounts as shall be shown to the satisfaction of the Commissioner of Internal Revenue to have been paid by them as tax on distilled spirits in excess of the quantity withdrawn from warehouse: *Provided*, That the amount paid to each shall not exceed the sum herein stated — that is to say:" [Here follows a list in which appears the sum of $241.78 opposite the name of John Stewart.]

The receipt was as follows:

"Original receipt for draft in payment of claims for refunding:

"*August* 17, 1886.

"Received of the honorable Commissioner of Internal Revenue the sum of two hundred and forty-one dollars and seventy-eight cents ($241.78) on account of my claim, No. 10,073, for taxes improperly paid by me.

"(Signed) JOHN STEWART,

"By T. W. NEILL, *Attorney*."

Opinion of the Court.

Whether or not this evidence of the acceptance of payment was relevant to the issue, no objection was made to its introduction. On the contrary, the plaintiff admitted on the trial that he had received the money, and also embodied, in a request for instructions to the jury, a statement that the amount of his claim, with interest, was subject to a credit of the amount so received.

As nothing else of present importance appears in the record, the position of the plaintiff, after all the evidence had been offered, seems to have been this: The merit of his claim was established, as was also his right to prosecute the suit for $241.78 of his claim. No evidence had been introduced, nor admissions made, with regard to his right to sue for $8.62 of his demand, and as to that sum he was not entitled to seek relief. He had admitted the receipt by him from the Commissioner of Internal Revenue of $241.78 on account of his claim. The plaintiff's position being thus, the court directed a verdict in favor of the defendant. This action of the court was excepted to by the plaintiff, and is assigned by him as error.

The plaintiff now contends that, although he has accepted from the government the sum named, this fact should not affect his right to recover in the action, since he had a right to apply the money, and did apply it, so far as it was adequate, to the payment of interest on his claim, and was entitled to maintain an action for the principal and the balance of the interest. These views, however, of the purpose of the payment and the character in which it was received, are not sustained by the facts shown on the trial. The plaintiff admitted that he had received the sum of $241.78 on account of his claim for taxes improperly paid by him; the amount received was the same as the amount of the claim; the manner of the exaction indicated in the act of Congress is the same as that set out in the bill of particulars, and there is nothing upon which to base an inference that this payment from the government was related to any other transaction than the one in question. The act of Congress, then, furnishes the best evidence of the purpose and the character of the payment, and from it we are to learn whether the payment was of the prin-

cipal or of interest. The act provided for the payment to the plaintiff and others of such amounts as should be shown to the satisfaction of the Commissioner of Internal Revenue "to have been paid by them as tax on distilled spirits in excess of the quantity withdrawn by them from warehouse." It is presumed that the terms of the act were known to the plaintiff, and by his acceptance of the money it must be understood that he agreed to take it as a payment of the amount shown to have been paid by him, or, in other words, as a refunding of the money exacted.

It is apparent, therefore, that the principal, as such, has been received by the plaintiff, and hence, to treat the action as having any object at all, we must regard it as an action for interest alone. Whether, in the circumstances of this case, an action for interest can be maintained, is the only question to be determined. In deciding this we shall not find it necessary to consider in what respect these suits against collectors may differ from other actions, but shall assume, for the purposes of this opinion, that they are governed by the same rules.

Where money is retained by one man against the declared will of another who is entitled to receive it, and who is thus deprived of its use, the rule of courts in ordinary cases is, in suits brought for the recovery of the money, to allow interest as compensation to the creditors for such loss. Interest in such cases is considered as damages, and does not form the basis of the action, but is an incident to the recovery of the principal debt. The right of action is the right to compel the payment of the money which is being retained. When he who has this right commences an action for its enforcement, he at the same time acquires a subordinate right, incident to the relief which he may obtain, to demand and receive interest. If, however, the principal sum has been paid, so that, as to it, an action brought cannot be maintained, the opportunity to acquire a right to damages is lost.

This principle is well illustrated by an early case, *Moore* v. *Fuller*, 2 Jones (Law,) 205, decided by the Supreme Court of North Carolina. That was an action of debt on a bond. The

principal of the debt had been paid, and at the time of payment the parties had agreed to refer the question of interest, the payment of which was refused, to arbitration. Upon an award made in favor of the plaintiff, the defendant still refused to pay the interest, and it was sought to be recovered in an action, not upon the award, but on the bond. The Supreme Court said: "The general principle is, that when the principal subject of a claim is extinguished by the act of the plaintiff, or of the parties, all its incidents go with it. Thus, in an action of ejectment, if the plaintiff, pending the suit, takes possession of the premises, upon the plea of the defendant or upon its being shown, the plaintiff will be non-suited. *Johnston* v. *Swain*, Busby 335. So, in an action of detinue, if the plaintiff takes possession of the property claimed, he can recover no damages, for they are consequential upon the recovery of the thing sued for. *Morgan* v. *Cone*, 1 Dev. & Bat. 234. This is an action of debt on a bond to recover the interest, the principal having been paid by the defendant before the bringing of the action: by that payment, the bond was discharged, and by analogy to the cases referred to, the plaintiff cannot recover the interest, which is but an incident to the principal — the bond."

To the same effect is the case of *Tillotson* v. *Preston*, 3 Johns. 229. This was an action of assumpsit for money had and received. In addition to the general issue, there was a plea of payment of the sums mentioned in the declaration. To this plea of payment the plaintiff demurred especially, alleging for one ground of demurrer that the plea did not allege that the defendant had paid to the plaintiff the interest. The court said: "The demurrer is not well taken. If the plaintiff has accepted the principal, he cannot afterwards bring an action for the interest."

Other cases announcing the same principle are to be found in the books, but the rule seems to be founded in reason, and hardly to need the support of precedent.

In a case where a demand of damages constitutes the very ground of the action, it would seem that the rule would be different. If, for instance, in covenant on the part of the

lessee to repair a building, the lessee should prove performance, the plaintiff might still be entitled to have the jury pass upon the question of his damages, however small they might be, because in such a case the right to damages constitutes the right of action. It might then be said that, since the present case is an action of assumpsit, of which damages constitute, in theory, at least, the basis, the rule we have stated would not be applicable. But, without considering how far, in an inquiry like this, we would be prevented by the form of an action from ascertaining its purpose, and without adverting to the fact that one of the cases just cited was an action of assumpsit, it is to be noticed that in Pennsylvania, where the suit was brought, the form of the action of assumpsit is employed not only in cases where, at the common law, it would have been appropriate, but also in cases in which the action would formerly have been in debt or covenant.

Treating the action of assumpsit as of such extensive scope, the object sought would not only be permitted, but required to be considered if it were desired to ascertain the real nature of a case. In this case the bill of particulars shows that the object sought is a liquidated sum of money, with interest. The evidence introduced with the acquiescence of the plaintiff, and his own admission, furnished proof that the liquidated sum has been paid. It thus appears that the action is not one sounding in damages, but that the damages, or interest, is demanded simply in respect of the detention of the principal.

Perhaps it might not unreasonably be argued that the payment by the government, and the acceptance of the money by the plaintiff, without a demand of interest, constituted a complete settlement of his claim, irrespective of the operation of the principle which we have been examining. But however this may be, it is evident from what has been said that the plaintiff has parted with his right of action by accepting the money which was withheld from him, and has at the same time given up his right to sue for the incidental damages. Therefore the court below was right in directing a verdict for the defendant, and the judgment of that court is

Affirmed.

GROVES *v.* SENTELL.

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

No. 278. Argued and submitted March 13, 1894. — Decided May 14, 1894.

The Stephen Morgan, 94 U. S. 599, affirmed to the point that a party who does not appeal from the final decree of a Circuit Court cannot be heard in opposition thereto, when the case is properly brought here by the appeal of the adverse party.

A note by which three parties, signing it, promise to pay to the order of the payee at a bank in New Orleans the sum named therein with interest, not negotiable, is a joint obligation under the law of Louisiana, and binds the several parties thereto only for their proportion of the debt; since, to make it a solidary obligation, binding each of the promisors for the whole debt, the solidarity must, under the law of that State, be expressly stipulated, and is never presumed.

The promisors on that note, in order to secure it, mortgaged real estate in Louisiana, which they then held in common, undivided. They thereby severally declared that they were indebted to the mortgagee, etc., and that they did thereby mortgage to the mortgagee the property described in the deed. There was no stipulation showing an intention to mortgage separately an undivided part of the property for an undivided part of the debt. *Held*, that it was the intention of the parties that the security for the purchase money should rest upon the entire entity.

A mortgagor has the power, under the laws of Louisiana, to exclude indivisibility in contracting the mortgage, and, if he fails to do so, indivisibility applies, not alone as a result of his silence, but also because, being the general rule and of the nature of the contract, it exists unless excluded by its express terms or by a plain implication deducible from it.

The divisibility of a debt secured by a mortgage does not necessarily import the divisibility of the mortgage securing it.

The voluntary partition by the mortgagees of the property covered by the mortgage did not operate to prevent the mortgage creditor from enforcing his security against either part.

A subsequent mortgage creditor, who became such after the division of the property, and only as to one undivided part, is entitled to be subrogated to the rights of the first mortgage creditor, as they existed at the time of the subrogation.

If a party interested in the result of the suit, claiming under the subsequent mortgage, files a bill in the nature of a bill of interpleader, he cannot be allowed a solicitor's fee, to be paid from the fund dedicated to the payment of the mortgage.

Statement of the Case.

FANNY B. Lambeth and Dora Lambeth, as heirs to their deceased father, were the owners, in equal undivided proportions, of certain parcels of real estate situated in the parish of Avoyelles in Louisiana. Two of these parcels were known, respectively, as the "Leinster Plantation" and the "Lucky Hit Plantation." Fanny B. Lambeth was married in April, 1865, to Christopher M. Randolph. The Leinster plantation was leased during 1865, '66, and '67 to John Rhea, who died in October, 1867, pending the lease.

On the 15th day of January, 1868, Fanny B. Lambeth, wife of Christopher M. Randolph, (whom we shall hereafter refer to as Mrs. Randolph,) and Miss Dora Lambeth appeared before Generes, a notary in the parish of Avoyelles, and acknowledged themselves indebted to Mrs. Rosetta Rhea, widow of John Rhea, of Madison County, Indiana, in the sum of $8970.12, which they declared was a balance due by them for the purchase price of certain movable property — mules, cane, implements, etc. — which belonged to Rhea at the time of his death, and which had been placed on the Leinster plantation by him, for use in its cultivation. The act declared that the movable property which they bought belonged to Mrs. Rhea, who was the widow of John Rhea, and as such was, under the laws of Indiana, where Rhea was domiciled, his sole heir, as he died intestate and left no ascendants or descendants. To evidence the indebtedness, Mrs. Randolph, authorized by her husband, and Miss Lambeth drew their joint note, as follows:

"AVOYELLES, LA.,

"$8970.12. "LEINSTER PLANTATION, *January 1st*, 1868.

"Two years after date we promise to pay to the order of Mistress Rosetta Rhea, at the Citizens' Bank of Louisiana, in the city of New Orleans, eight thousand nine hundred and seventy and $\frac{12}{100}$ dollars, for value received, with interest at the rate of eight per cent per annum from date until paid. Not negotiable.

"FANNY B. RANDOLPH.
"C. M. RANDOLPH.
"DORA LAMBETH."

Statement of the Case.

Mrs. Rhea bound herself to obtain a judicial recognition from the courts of Indiana of her right of inheritance to her husband's estate before enforcing payment of the note.

To secure this note, Mrs. Randolph and Miss Lambeth, by the same act, mortgaged, 1st, the Leinster plantation; 2d, a tract of land adjoining the Leinster plantation, known as the "Faulkland tract." This act of mortgage was duly inscribed.

In September, 1868, Christopher M. Randolph, the husband of Fanny B. Lambeth, died. In December, 1868, Dora Lambeth married T. O. Stark. We refer to her hereafter as Mrs. Stark.

In December, 1868, "In the matter of the estate of John Rhea, deceased, in the Court of Common Pleas of Jefferson County, Indiana," Rosetta Rhea was recognized as his sole heir, and as such was decreed to be entitled to the promissory note set forth above, and all the rights securing the same.

On the 9th of January, 1873, Mrs. Randolph and Mrs. Stark made between them, by voluntary and private agreement, a partial partition of their father's estate. Mrs. Randolph took a portion of the Leinster plantation and other lands, and Mrs. Stark took the remaining portion of that plantation, also with other lands. Thus, by the terms of the partition, a portion of the land which had been mortgaged to secure the debt due to Mrs. Rhea was allotted to Mrs. Randolph and a portion to Mrs. Stark. Nothing was said in the partition as to the then existing mortgage in favor of Mrs. Rhea.

On the 23d of April, 1873, Mrs. Randolph and Mrs. Stark constituted T. O. Stark their "true and lawful attorney in fact, for us and in our names, to settle and establish the payments made and amounts still due by them on a mortgage note of eight thousand nine hundred and seventy $\frac{12}{100}$ dollars, ($8970.12), dated January 1, 1868, held by Mrs. Rosetta Rhea; to endorse on said note the amount paid thereon; to interrupt prescription; to consent to any subrogation in favor of any person or persons or commercial firm who may pay a portion of their said indebtedness on said note, and thus divide their said indebtedness, and to appear and sign, in *their* name, any

agreement, document, or notarial act carrying out said subrogation, with any clauses or conditions which said attorney may, in his discretion, deem fit; to enter into said arrangements with said Mrs. Rhea, her agents or attorneys, to obtain an extension of time for the payment of the balance due on said promissory note, said extension of time to be granted and accepted upon such terms and conditions as to our said attorney may seem fit; to sign a notarial act for that purpose and to acknowledge therein, in *their* name, that they recognize said Mrs. Rosetta Rhea as the rightful owner of said note, in her quality of sole heir of her deceased husband, the late John Rhea, of Madison County, Indiana, recognized as such by the court of Jefferson County, Indiana, in the matter of the estate of John Rhea, deceased, and alone entitled to claim payment of said note, with full power of substitution, and generally to do everything necessary to carry out the premises as fully as if done by us in person, hereby ratifying all and whatsoever our said attorney may lawfully do or cause to be done by virtue hereof."

On the 28th day of April, 1873, by act before Trist, a notary public in New Orleans, Stark, as agent of Mrs. Randolph and of his wife, and Victor Olivier, Esq., as agent of Mrs. Rhea, declared that the note which had been given Mrs. Rhea, and secured by the mortgage as aforesaid, had been reduced by partial payments, all arrears in interest having been paid, to the sum of $7577.34, and the time for the payment of this balance was extended by Olivier, as agent for Mrs. Rhea, to the 1st day of March, 1874, interest thereon to be paid at the rate of eight per cent from the 28th day of April, 1873. Both Stark and Olivier, on behalf of their respective principals, declared that "after a careful computation of interest and deduction of partial payments made at different times to Mrs. Rosetta Rhea by the drawers of said note," the aforesaid sum was due.

In May, 1875, Mrs. Randolph acknowledged herself indebted to Johnson & Goodrich, a commercial firm of the city of New Orleans, in the sum of $8000, evidencing her debt by her notes, secured by a mortgage of the portion of the Leinster plantation which had been allotted to her in the partition, and also

of her interest in an undivided tract of land which she had inherited from her father's estate, and which had not been included in the partition. In June, 1875, Johnson & Goodrich transferred this note to G. W. Sentell & Co., in liquidation.

In October, 1883, G. W. Sentell and W. B. McLean as executor of B. Conyers, a deceased partner of the former firm of G. W. Sentell & Co., both representing the interest of the firm in liquidation, sued in the District Court of the parish of Avoyelles to foreclose the mortgage which the firm in liquidation had, as stated, acquired by subrogation from Johnson & Goodrich. On the 24th of December, 1883, judgment was rendered in favor of Sentell & Co. in liquidation and against Mrs. Randolph, accompanied by a decree for a sale of the mortgaged property. Under this decree, on the 1st of March, 1884, the sheriff of the parish of Avoyelles sold the portion of the Leinster plantation which had been allotted to Mrs. Randolph, and the undivided interest in the tract of land, both of which had been included in her mortgage to Johnson & Goodrich. The property had been adjudicated to G. W. Sentell for $12,002. The mortgage in favor of Mrs. Rhea, being on record and ranking the Johnson & Goodrich mortgage, Sentell, the purchaser, retained in his hands from the amount of his bid, to pay the same —

For principal	$4873 00
For interest up to date of sale	1164 12
Total	$6037 12

The sum thus retained by Sentell to pay the principal of the note was the actual amount due. At the time of the sale the principal had been reduced from $7577.34, as stated in the notarial act of 1873, to $4873, as mentioned in a writing on the reverse of the note. The payments which brought about this reduction were numerous, and made at brief intervals. Some of them were evidenced by notarial acknowledgments between Stark and Olivier, agents; some merely by endorse-

ments upon the back of the note. Some had been made by Sentell, who took subrogations; these last, however, being made subordinate in rank of mortgage to the amounts due on the original note.

All of these payments were made on the entire note, without any indication that they were imputed particularly to any portion of the debt due by either of the parties. Hence, all the payments were credited at the times they were made on the entire debt. The last credit on the principal of the note is as follows:

"The principal of the within note has been reduced by payment on the same to $4873.00, with interest thereon to March 5, 1881, to which date the payment of said sum has been postponed.

"New Orleans, April 28, 1880. VICTOR OLIVIER, JR.,
"*Agent for Mrs. Rosetta Rhea.*
"T. O. STARK,
"*Agent for Mrs. Randolph and Mrs. Stark.*"

There are two additional credits of payments of interest, the first up to March, 1882, and the second up to March 5, 1884, one of these interest credits being accompanied by a repetition of the statement that the principal of the note was at the time $4873.00.

In April, 1886, Martha Groves, of Indiana, and William J. Groves, of Ohio, sister and brother of Mrs. Rosetta Rhea, were duly recognized by the Circuit Court of Jefferson County, Indiana, as her sole heirs and distributees, and, as such, entitled to all the rights of Rosetta Rhea in and to the note to which we have referred.

In April, 1886, Martha Groves, and William J. Groves, and Pogue, administrator of Rhea, sued in the United States Circuit Court G. W. Sentell for $4873, with interest thereon at eight per cent from March 5, 1884, until paid. The object of this suit was to compel Sentell to pay the balance thus stated to be due on the note out of the sum which he had retained. Sentell thereupon filed in the Circuit Court of the

Statement of the Case.

United States a bill of interpleader, in which he averred the fact of his purchase, and his retaining the amount in his hands, and that there were conflicting claims to the fund. He alleged, 1st, that he had been notified by Mrs. Randolph not to pay over the amount apparently remaining due on the note, as the same was not due; 2d, that he had also been notified by W. B. McLean, as liquidator of G. W. Sentell & Co., and also as executor of B. Conyers, a deceased member of the firm of G. W. Sentell & Co., that such firm in liquidation was entitled to the fund retained. He averred that he had always been ready and willing to pay over the fund, and prayed that the defendants might be decreed to interplead and adjust between themselves their rights and interests in the money due and payable under the mortgage. He made defendants to the bill Mrs. Martha Groves, William J. Groves, Fanny B. Randolph, and William B. McLean, as liquidator of the firm of G. W. Sentell & Co., and as testamentary executor of B. Conyers. Upon this bill an injunction was issued, restraining Martha Groves and William J. Groves from prosecuting their suit. Sentell deposited in the registry of the court $5743.46, to abide the result of the litigation. Mrs. Randolph answered and charged the nullity of the note on the ground, (1st,) that it had been given for a debt of her husband, for which she was incompetent to bind herself; and, (2d,) that the note, if it was originally binding, which she denied, represented nothing due by her, since it had been extinguished, so far as she was concerned, by payment. She charged that this extinction would result from the proper credit to her of the amounts which had been paid; and that many payments had been erroneously credited to the note generally which should have been imputed to her portion of the debt. McLean, liquidator and executor, practically joined in the claim set up by Mrs. Randolph. He charged the nullity of the note because it was given by Mrs. Randolph for a debt of her husband. He further alleged that, as the second mortgage creditor on the property sold, the firm of G. W. Sentell & Co. in liquidation was entitled to the entire balance of the fund, to be applied to the payment of their junior mortgage. He, in addition,

averred that, if any portion of the note was payable out of the proceeds of the property allotted in the partition to Mrs. Randolph, the holders of the note could not exercise their right against such proceeds, without previously exhausting their remedy against that portion of the mortgaged property which had been allotted to Mrs. Stark; that, as junior mortgage creditor on the portion of the property allotted to Mrs. Randolph, he had a right to compel the creditor to exhaust Mrs. Stark's property, before proceeding against the proceeds of Mrs. Randolph's property; and, finally, that the holder of the note was not entitled to be paid the amount due on Mrs. Randolph's half of the debt from the proceeds of her property, unless the holder gave to the second mortgage creditor a subrogation to the rights of the holder against Mrs. Stark's share of the property — which subrogation, he averred, the note holder was unable to give because the proportion of the debt due by Mrs. Stark had become prescribed. During the course of the proceedings below, Mrs. Stark was, by order of the court, made a party defendant to the bill. She demurred, on the ground that she was not a necessary party to the cause.

On these issues the case was tried. The court below held that Mrs. Randolph, having frequently ratified the debt after the death of her husband, was estopped from claiming that she was not bound therefor, and hence rejected the claim of Mrs. Randolph and Sentell & Co. in liquidation as to the nullity of the note. After reference to a master, to examine and report as to the payments, it appeared that the full amount of the payments had been applied and that the application of them all did not reduce the amount due on the note below the sum of $4873, with interest from March 5, 1884, as stated in the last credit on the note. The court, however, concluded that, as many of the payments had been in fact made from Mrs. Randolph's individual funds, they should have been imputed to her share of the obligation, instead of to the debt as a whole. It held that the correction of the imputations of payments in accordance with this finding reduced the sum remaining due by Mrs. Randolph, on her share of the note, to $601, and this amount is decreed to be paid

from the proceeds deposited by Sentell. Deducting this $601 from the total amount due on the note — $4873 — left $4273 due by Mrs. Stark, as her portion of the original obligation. Treating this sum due by Mrs. Stark as not secured by mortgage on that portion of the property which had been allotted to Mrs. Randolph by the partition, the court decreed the payment of the entire remaining proceeds to Sentell & Co. in liquidation, as the junior mortgage creditor. It allowed to the solicitor of the complainant a fee of $250, to be paid from the fund deposited. It dismissed the bill as to Mrs. Stark on the ground that, as she had been made a party solely for the purpose of charging her with notice of the accounting and distribution, and this purpose had been subserved by her appearance, her demurrer must be sustained.

From the decree of the lower court Martha Groves, William J. Groves, and Pogue, administrator of Rosetta Rhea, appealed, citing on the appeal G. W. Sentell, Mrs. Fanny B. Randolph, Mrs. Dora Stark, and W. B. McLean, executor of Benjamin Conyers, deceased, and liquidator of the firm of G. W. Sentell & Co.

Mr. George A. King, (with whom were *Mr. Charles W. Hornor* and *Mr. William S. Benedict* on the brief,) for appellants.

Mr. E. T. Merrick, Senr., for Mrs. Randolph, appellee, submitted on his brief.

Mr. E. M. Hudson, for Sentell, complainant in the bill of interpleader and appellee, submitted on his brief.

Mr. Edgar H. Farrar, *Mr. Benjamin F. Jonas*, and *Mr. Ernest B. Kruttschnitt*, for McLean, liquidator and appellee, submitted on their brief in which they contended:

I. There was nothing in the circumstances under which the note of January 1, 1868, to Mrs. Rhea was given, to create anything but a joint liability. The note on its face, by the principles of commercial law as applied in Louisiana, is not a

joint and several note but a joint one. *Mayor of New Orleans* v. *Ripley*, 5 La. 120; *S. C.* 25 Am. Dec. 175. The terms of the mortgage given to secure this note do not extend the obligation from a joint to a joint and several one. A mortgage being a mere accessory to the debt, each person mortgaged his interest in the plantation to cover his liability, and no more. There is nothing in the mortgage, or in the circumstances under which it was given, from which any suretyship for each other could be presumed, and nothing by which Mrs. Randolph bound herself or her property for Mrs. Stark's share of the debt, or Mrs. Stark bound herself and her property for Mrs. Randolph's share of the debt. Therefore, the mortgage given by Mrs. Randolph, though stipulated in the same act as the mortgage given by Mrs. Stark, bears, only so far as her share of the indebtedness is concerned, upon her share of the property.

On this point the cases of *Walton & Kemp* v. *Lizardi*, 15 La. 588, and *Erwin* v. *Greene*, 5 Rob. (La.) 70, are absolutely conclusive.

II. By the effect of the partition made between Mrs. Randolph and Mrs. Stark, of the plantation, to secure the Rhea note, Mrs. Randolph's mortgage was confined to her half of the property, and Mrs. Stark's note was confined to her half of the property, and all payments made by Mrs. Randolph upon the note reduced, *pro tanto*, her liability thereon.

The master, in his report, has given in detail the payments made by Mrs. Randolph on this note, showing that there remained, at the date when the bill of interpleader was filed and the fund was deposited in court, the sum of six hundred and two $\frac{14}{100}$ dollars, and for this sum the court below entered a decree in favor of the appellants. There was not any attempt made in the court below to attack the computation of the master, and none can successfully be made, as every item of payment, stated in his report, is confirmed by the evidence, and the evidence on that subject is not in any manner conflicting.

III. The claim of the appellant that G. W. Sentell, who filed the bill of interpleader, had assumed the plaintiff's debt

to the extent of the amount retained in his hand, is utterly without any foundation in law, or in fact. He was obliged to pay the amount which he retained in his hand to whoever was entitled. Article No. 207 of the Code of Practice required him, as the purchaser at a public sale, to retain in his hands the price bid by him at the sale to recover all liens, privileges, and mortgages upon the property which were prior in rank of registry to the claim under which the property was sold; that is all Sentell did. He and the sheriff were required to go by the record in the Mortgage Office, showing what liens were recorded against the property. None of those lien-holders were a party to the suit of Sentell & Co. against Mrs. Randolph, or to the execution under which the property of Mrs. Randolph was sold. The fund in Sentell's hands was retained by him as purchaser to hold him harmless from such claim of lien; and by the payment into court of the sum so retained by him, he was relieved of any obligation whatever by virtue of his purchase; and the lien-holders and the debtor of the claims secured by lien, together with other creditors of that debtor, who had a right to contest the amount and validity of liens which were claimed to be prior to theirs, had a right to come in and be heard as to whom the fund should go to. This was the theory upon which the bill of interpleader was filed and allowed, and upon which the court below entered a decree. It would be inequitable to hold that Sentell had bound himself to pay the full amount of the Rhea debt, when that debt had already been paid, except a small balance, so far as Mrs. Randolph was concerned. Sentell knew nothing of what was due on the debt, and could not make Mrs. Randolph owe more than she did owe, and could not consent to pay her money to an alleged creditor of hers to whom she really owed a very small sum. The decree is entirely in accordance with equity, the law, and the facts, and should be affirmed.

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

As Martha Groves and W. J. Groves and Pogue, adminis-

trator, are the only appellants, the correctness of the decree in their favor and against Mrs. Randolph and Sentell is not before us. In this regard that decree is final. *The Stephen Morgan*, 94 U. S. 599.

The first apparent question is the correctness of the decree, holding that certain payments which were made on the note should have been imputed to Mrs. Randolph's portion, instead of to the note as a whole. The payments which were thus imputed by the lower court were those made subsequent to the notarial act of 1873, in which the parties fixed the principal of the note at $7577.34. As to the payments made prior to this date there is no dispute in the record, as they are all admitted to have been made in equal proportions from the funds belonging to Mrs. Stark and to Mrs. Randolph.

The first question necessary to be determined is, was the note, under the Louisiana law, a joint or a solidary obligation. A joint obligation under the law of Louisiana binds the parties thereto only for their proportion of the debt, (Civil Code, Arts. 2080, 2086,) whilst a solidary obligation, on the contrary, binds each of the obligors for the whole debt. The note was clearly a joint note, and not a solidary one. Solidarity, under the law of Louisiana, must be expressly stipulated, and is never presumed. La. Civil Code, Art. 2093. We consider it unnecessary, however, to pass upon the question of imputation of payments, because of our conclusions upon another branch of the case. The issue between the parties is not as to the amount of the payments, but as to the manner in which the payments should be applied. It follows, therefore, that the controversy involves, not the sum due, but the person by whom it is due. As we conclude that the whole debt, irrespective of the question of whether it is due by Mrs. Randolph or by Mrs. Stark, is payable out of the fund, it is useless to determine how much is due by one or by the other.

Whether the whole debt was payable out of the whole property, or any part thereof, depends on whether the mortgage was divisible or indivisible under the law of Louisiana. Says the Louisiana Civil Code: "The mortgage is a real

charge on the property bound for the discharge of the obligation. It is in its nature indivisible, and prevails over all the immovables subjected to it, and over each and every portion. It follows them into whatever hands they pass." Art. 3282.

This provision of the Louisiana Code was derived from the Code Napoleon, where its identical language is found, Code Napoleon, Art. 2114. The mortgage in this case contains nothing on its face which takes it out of the general rule. The parties "severally declare" that they are indebted, etc., and that they do "hereby mortgage to and in favor of the said Rosetta Rhea, represented herein by her attorney in fact, the property described in the deed." There is no stipulation in the act showing in the remotest degree an intention to mortgage separately an undivided half of the property for an undivided half of the debt. Thus, on the face of the act, it is a mortgage of the whole property for the whole debt. It was in the power of the contracting parties to have stipulated against indivisibility, and that they failed to do so is self-evident. The provision of the Code is that indivisibility is "in the nature of a mortgage," therefore not of its essence. The commentators on the Code Napoleon agree that indivisibility can be avoided, even where the parties join in a common act of mortgage by stipulating that the mortgage is to be divisible. Laurent, in his Principes de Droit Civil Français, thus states the rule: "All the authorities teach the doctrine that the law, in saying that a mortgage is indivisible by its nature, intends simply thereby to declare that it is not so indivisible in its essence. From this it is concluded that parties may by their conventions stipulate to the contrary. The right of the parties to make such agreements in relation to the divisibility of the mortgage as they deem proper cannot be denied, because indivisibility rests upon intention." (Vol. 30, page 159; see also Rodière On Indivisibility, paragraph 466.) Paul Pont, in his treatise On Privileges and Mortgages, thus states it: "The words 'in the nature of' have a significance which is applied to them sometimes in other provisions of the law. Thus, the law says that indivisibility

is in the nature of a mortgage, in the same way that it is provided that warranty is in the nature, not in the essence, of contract of sale. And because indivisibility is purely a matter of intention, it can be controlled by the will of the parties." (Vol. 1, page 321, paragraphs 331 and 332.)

These expositions of the civil law writers are persuasive as to the proper construction of the Louisiana Code. *Virterbo* v. *Friedlander*, 120 U. S. 707, 728. Indeed, by the strongest possible analogy, they have been adopted by the Louisiana courts. Thus, a vendor's privilege, under the law of Louisiana, is "in the nature" of the contract of sale. The rule there as to this privilege is that, where a sale is made and the privilege is not excluded by express agreement or by implications clearly deducible from the language of the parties, it is implied to exist, as it is of the "nature of the contract." *Boner* v. *Mahle*, 3 La. Ann. 600.

The parties, then, having had the power, in contracting the mortgage, to exclude indivisibility, and not having done so, indivisibility applies, not alone as a result of their silence, but also because, being the general rule and of the nature of the contract, it exists unless excluded by the express terms or by plain "implication deducible from the contract." It is urged, however, that, as the obligation secured by the mortgage was joint, therefore the mortgage itself must necessarily have been joint. The proposition confounds the nature of the principal obligation with that of the accessory contract of mortgage. That the divisibility of a debt does not necessarily import the divisibility of the mortgage securing it, is unanimously held by the civil law writers. "Under the theory of the law the indivisibility of the mortgage has no reference to the nature of the principal obligation. Thus, there may be a division of the obligation either between joint creditors or joint debtors, or between the heirs of joint creditors and joint debtors." (Paul Pont, vol. 1, page 33.) Laurent, in speaking on the same subject, says: "Thus, if the debt is discharged in part, or is divisible, it has no influence whatever upon the mortgage. This will subsist in its entirety, although the debt may be extinguished in part, and although a third

possessor of the immovable mortgage may be liable only personally for a portion of the debt. We thus see that the indivisibility of the mortgage does not render the obligation itself indivisible. Where the obligations are joint they may be divided, actively or passively, between the heirs of the creditor and the heirs of the debtor." (Laurent, vol. 30, page 151; same page, paragraph 177.) (See also Rodière, page 167 *et seq.*)

The whole subject was at an early date considered by the French Court of Cassation. Certain persons gave a power of attorney to an agent, authorizing him to contract a debt and consent a mortgage. The agent borrowed the money and gave the mortgage. When the mortgage came to be enforced the debtors defended on the ground that the agent had consented a solidary debt when he had only the power to consent a joint one; that, therefore, not only was the debt joint, but the mortgage securing it divisible. The court found that the power only authorized the contracting of a joint debt; but it held that as the power authorized the agent to consent a mortgage, and the mortgage was in its nature indivisible, the debt was joint; but the indivisible mortgage securing it remained and was in force. (Cassation, May 6, 1818, referred to and quoted in Paul Pont, vol. 1, p. 328.)

It has been contended that a different rule has been established in Louisiana. We are referred, in support of this proposition, to *Walton & Kemp* v. *Lizardi*, 15 La. 292, and *Erwin v. Greene*, 5 Rob. (La.) 70. These cases, instead of supporting the contention, we think refute it. In the *Walton case* several persons had bought separate undivided portions of a square of ground. To evidence their obligations to pay the purchase price, they issued their separate notes for their respective shares, and secured them by one act of mortgage upon the property. Some of the purchasers paid their notes, and others did not. Foreclosure proceedings were commenced upon the unpaid notes, against the whole property, and the issue presented was whether the mortgage was divisible or indivisible. The court held, after a critical examination of the contract, that upon its face it stipulated that the mortgage

should be divisible, and not indivisible. It said that each of the parties had given his separate notes for his separate obligation, and that the agreement between them and the vendor was that the notes should be secured by a special mortgage on "each of the lots for which the same should be given in payment." The language of the mortgage in that case was as follows: "We, in order to secure the following described notes, *jointly effect, mortgage, and hypothecate;*" again, "and the said purchasers, each in proportion of their respective shares and interest in said property, do hereby confess judgment in favor of said parties;" again, "now the said parties do hereby agree that a sale of said ground shall be made in favor of . . . and in the following proportions." The facts clearly justified the court in saying "from the particular care which the parties appear to have taken to distinguish their proportionate interest in the property, as well as in the payments for which they respectively gave their separate obligations," their intention was clear to create a divisible and not an indivisible mortgage.

The facts in *Erwin* v. *Greene* were very similar to those just referred to. There the court said: "Each of the obligors promised to pay his portion of the price for which he gave his separate notes, and each took care to distinguish and designate the proportion of their respective interests in the property."

These cases, by converse reasoning, confirm the rule of indivisibility as applied to the contract with which we are dealing. Indeed, we think this contract is controlled not by the foregoing cases but by *Potts* v. *Blanchard*, 19 La. Ann. 167, 168, and *Stewart, Hyde & Co.* v. *Buard*, 23 La. Ann. 411, 415.

In the first case, certain heirs sold their undivided interests in land and the vendees gave their notes as evidence of their obligation to pay the purchase price, and secured the same by mortgage upon the property. The question was whether the mortgage thus given covered the whole of the property or a part. The court said: "The question presented is one of the construction of the act of mortgage given by the purchasing

heirs to the vendors. It is, whether or not the whole property described in the act of sale and mortgage is covered by the mortgage or only the proportion of interest sold. We think there can be no doubt that the mortgage was intended to actually cover the whole property subject to the mortgage." Referring to the act of mortgage, it further said: "The property was fully described in the act; . . . it does not say *proportion sold*, but the property is described and the description is of the *whole property*."

In the latter case, (23 La. Ann.,) separate notes were given to evidence the price of undivided interests. These notes were secured by mortgage upon the whole property, and the court held the mortgage to be indivisible. It is contended that even although indivisibility of mortgage is the rule, as the parties have the power to stipulate for divisibility, therefore we must not confine our view to the act of mortgage, but must look beyond its terms to ascertain the intention of the parties. If in so doing we find their intention was to make a divisible mortgage, such intention should be enforced. Whether intention can be arrived at beyond the act of mortgage itself, where the party seeking to enforce the mortgage is the innocent third holder of negotiable paper, is a question upon which we express no opinion. The paper here is in the hands of the original holder. If we resort to the intention of the parties as derived from their situation in order to interpret the mortgage, we could reach no different conclusion. We have seen that the joint nature of the obligation does not negative the indivisibility of the mortgage by which the obligation is secured. The very purpose for which the mortgage was given in this case furnishes a cogent reason why the mortgage should have been indivisible. The consideration of the debt which it secured was the purchase price of movable property — mules, cane, and agricultural implements — situated, at the time of sale, on the Leinster plantation. By the very fact of the purchase of these things by the owners of the plantation they became incorporated with the plantation and constituted an integral part thereof. The Louisiana Code declares that "things which the owner of a

tract of land has placed upon it for its service and improvement are immovable by destination," . . . and among the things enumerated are "cattle intended for cultivation, implements of husbandry, seeds, plants, etc." La. Civil Code, Art. 468. It follows, then, from the nature of the things purchased, they became incorporated with the whole plantation upon which they were situated. Being thus indivisibly united with the whole thing, it is reasonable to draw the conclusion that the intention of the parties was that the security given for the purchase price would rest upon the entire entity, of which the things sold became a part by operation of law. If the parties to the contract did not intend such contingency, it could have been readily provided against by a stipulation in the act of mortgage. All the conduct of the parties subsequent to the granting of the mortgage during the long term of years over which its payment was extended indicate that they considered the mortgage covered the whole property indivisibly.

Concluding that the mortgage was indivisible, the only remaining question is, did the fact of the voluntary partition of the property covered by the mortgage operate to prevent the mortgage creditor from enforcing his mortgage against either part thereof. The negative of this proposition necessarily results from the doctrine of indivisibility. The writers on the French Code, which is in this regard identical with the Louisiana Code, are unanimous on the subject. Says Laurent (vol. 30, p. 157): "Our code and our law of mortgages have borrowed from Dumoulin the formula which characterizes the effects of indivisibility. 'The mortgage subsists in its entirety upon all the properties affected, upon each of them and upon each portion of them.'" Pont says: "It is, then, admitted that a creditor, having a mortgage upon several pieces of immovable property, can, in consequence of indivisibility, exercise the whole sum of his rights against any particular piece thereof without giving rise to a right on the part of a special mortgage creditor subsequently inscribed to compel him to do otherwise." (Vol. 1, p. 330.) These principles taught by the civil law commentators are settled in the jurisprudence of

France. See Cassation, March 4, 1833; Dalloz, 1833, vol. 1, p. 35; Cassation, December 24, 1844; Journal du Palais, 1844, vol. 1, p. 98; idem, 1846, vol. 2, p. 427. See also authorities quoted by Paul Pont in his treatise on mortgages, vol. 1, p. 330, in footnote. A like rule is the settled law of Louisiana. *Pepper* v. *Dunlap*, 16 La. 163; *Adams* v. *Lear*, 3 La. Ann. 144; *Freret* v. *Freret*, 31 La. Ann. 506; *Bagley* v. *Tate*, 10 Rob. (La.) 45; *Powell* v. *Hayes*, 31 La. Ann. 789, 793, 794. In *Powell* v. *Hayes*, the issue involved not only the right on the part of the second mortgage creditor or third possessor to compel the holder of the first mortgage to proceed against the whole property, but also the question of subrogation. The first mortgage creditor had released a portion of the property, and sought to hold the remainder for the entire amount of his claim. To this the third possessor objected, not alone upon the ground that the proceeding must be against the whole property, but also on the ground that he was entitled to subrogation to all the rights of the first mortgage creditor, which he could not have by reason of the partial release of the first mortgage. Both these positions were held to be unsound. As to the first, the court said: "In *Bagley* v. *Tate*, (10 Rob. 45,) it was held that the plea of discussion cannot be opposed to a creditor holding a special mortgage (C. P. 73, C. C. 3367); nor can a third possessor of property specially mortgaged for a debt for which other property is also bound require that it shall be liable only for a *pro rata* portion of the debt. Each and every part of the property mortgaged is liable for each and every portion of the debt." Considering the claim of subrogation, the court said: "It may be that the third possessor, having an interest in discharging the debt will, upon payment thereof, be entitled to subrogation to *the then existing rights* of the mortgage creditor. . . . He" (the third possessor) "is under no obligation to pay the creditor, and when he does pay, he must be satisfied with a subrogation *to these rights as they exist.* We cannot see how the rights of a mortgagee may be affected, or put *in duriori casu* by the circumstance of there being a second mortgage or a sale of the mortgaged premises," etc.

Applying these principles, it is evident that the entire proceeds of the sale of the mortgaged property or a part thereof were stricken with the entire mortgage, and that the creditor could not be compelled to divide his security in consequence of the voluntary partition of the property made after the mortgage was inscribed. Nor does it affect this question that Sentell & Co. in liquidation were junior mortgage creditors on that part of the mortgaged property which belonged to Mrs. Randolph. As the second mortgage creditor, or third possessor, of the property, Sentell could not lawfully complain of the exercise by the first mortgage creditor of his rights against a part of the property mortgaged, and was only entitled by subrogation to the rights of the first mortgage creditor as they existed at the time of the foreclosure proceedings.

The Louisiana Code provides that subrogation takes place of right —

"1st. For the benefit of him, who, being himself a creditor, pays another creditor whose claim is preferable to his by reason of his privileges and mortgage.

"2d. For the benefit of the purchaser of any immovable property who employs the price of his purchase in paying the creditor to whom this property was mortgaged.

"3d. For the benefit of him, who, being bound with others or for others for the payment of the debt, had an interest in discharging it." (Article 2161.)

Of course, nothing in this opinion affects any rights of subrogation to which either Sentell & Co. or Mrs. Randolph may be entitled under the laws of Louisiana, as a consequence of the payment of the amount due on the mortgage note out of the fund.

It is true, as the junior mortgage creditor interested in the fund, Sentell & Co. had the right to plead prescription as to the principal obligation, in order thereby to defeat the rights of the first mortgage creditor. "Creditors and also other persons who may have an interest in the acquiring of an estate or the extinguishment of an obligation by prescription, shall have the right to plead it, even in case the person claiming such estate or bound by such obligation renounces such right of

prescription." (La. Civil Code, article 3466.) The same code, however, (article 3463,) provides that courts shall not supply the plea of prescription. There is no plea of prescription in the record, unless we hold that such a plea results from the general answer of Sentell & Co. in liquidation that they were entitled to a subrogation, which they could not obtain because the portion of the debt due by Mrs. Stark was prescribed. If this be treated as a technical plea, the record contains abundant evidence showing such interruptions of prescription as prevent the operation of the statute of limitations. It is immaterial whether the payments made by Stark, as the agent of Mrs. Stark and of Mrs. Randolph, were made with the money of Mrs. Randolph or with the money of Mrs. Stark. At the time these payments took place such acknowledgments were made as conclusively interrupted prescription. "Prescription," says the Louisiana Code, article 5320, "ceases likewise to run whenever a possessor makes an acknowledgment of the right of a person whose title they prescribe."

We conclude by considering the decree of the court below allowing the solicitor of Sentell & Co. in liquidation a fee from the fund. The general rule is that a party who has an interest in the subject-matter of the suit cannot file a bill of interpleader, strictly so called. In fact, the assertion of perfect disinterestedness is an essential ingredient of such a bill. *Killian* v. *Ebbinghaus*, 110 U. S. 568, 572; *Mitchell* v. *Hayn*, 2 Sim. & Stn. 63; *Bedell* v. *Hoffman*, 2 Paige, 199; *Atkinson* v. *Manks*, 1 Cowen, 691.

Sentell was a member of the firm of Sentell & Co. in liquidation. That firm was practically the real claimant of the fund, and would necessarily be a beneficiary from the successful issue of the controversy in favor of Mrs. Randolph. True, in Louisiana, the civil law regards a partnership as a different juridical entity from the members who compose it. There is, however, no averment in the bill or proof in the record that the firm in liquidation was insolvent or that Sentell had no residuary interest in its assets. The presumption of interest resulting from the partnership remains until rebutted by averment or proof. Sentell was therefore in the

position where he must be presumed to have a substantial, although not direct interest in the result of the litigation. Though it was allowable when so situated to file a bill in the nature of a bill of interpleader, (*Bedell* v. *Hoffman*, *supra*,) we think it clear that his ultimate interest prevents him from being allowed his solicitor's fee from the fund dedicated to the payment of the mortgage, thereby diminishing the security of the mortgage creditor.

The decree is reversed, and a decree is rendered in favor of Martha Groves and William J. Groves, directing the payment out of the fund of $4873, with interest at eight per cent from March 5, 1884, until paid, and costs of this and the court below. *Reversed.*

MR. JUSTICE JACKSON, not having been present at the argument, took no part in the decision of this case.

MOBILE AND OHIO RAILROAD COMPANY *v.* TENNESSEE.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 1004. Argued April 24, 1894. — Decided May 14, 1894.

This court has jurisdiction to revise the judgment of the Supreme Court of Tennessee in this case, deciding that the provision in the eleventh section of the Tennessee charter of the Mobile and Ohio Railroad Company that no tax shall ever be laid on said road or its fixtures which shall reduce the dividends below eight per cent does not forbid the assessment and collection of taxes under the acts of the legislature of Tennessee referred to in the opinion of that court; that "the said eight per cent clause is invalid," "null and void," and that the said legislation "does not violate or impair the obligation of any contract with the Mobile and Ohio Company."

In 1848 the legislature of Tennessee had, under the constitution of the State of 1834, then in force, power to grant to the Mobile and Ohio Railroad Company the exemption from taxation which was granted to it by the eleventh section of the act of January 28, 1848, incorporating it in Tennessee, in the following terms: "That the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures

and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent."

Under the provisions of that section the capital stock of the company is forever exempt from taxation during the existence of the corporation; the road, fixtures, etc., were exempt for twenty-five years after the completion of the road, which term has now expired; and now they can be taxed only when the net earnings of the road are more than sufficient to pay to the stockholders, on the present basis of its capital, a dividend of eight per cent a year.

Dividends can rightfully be paid only out of profits; profits are measured by the amount of net earnings; and net earnings are what remain after maintaining the property and paying the interest upon its debts.

In sustaining the validity of the exemption, the court must not be understood as holding that the railroad company has the right, in its discretion, to issue hereafter additional capital stock, or to increase its bonded indebtedness, even for legitimate purposes, and have the same taken into consideration upon the question of its liability for taxation under the eight per cent dividend clause of its charter.

THE case is stated in the opinion.

Mr. E. J. Phelps and *Mr. F. W. Whitridge*, (with whom was *Mr. E. L. Russell* on the brief,) for plaintiff in error.

Mr. G. W. Pickle, Attorney General of Tennessee, *Mr. M. M. Neil*, and *Mr. J. M. Troutt* for defendants in error. *Mr. F. W. Moore*, *Mr. John E. Wells*, *Mr. S. A. Champion*, *Mr. J. R. Deason*, *Mr. E. L. Bullock*, *Mr. A. W. Stovall*, and *Mr. James M. Head* were with them on their briefs.

MR. JUSTICE JACKSON delivered the opinion of the court.

The Federal question presented by the writ of error in this case is whether state statutes, subjecting the property of a railroad corporation to taxation, impair the obligation of the contract contained in an exemption clause of the company's charter?

It arises in this way: The State of Tennessee and certain counties therein in February, 1891, filed their bill against the

Mobile and Ohio Railroad Company, (hereafter styled the railroad company,) and its mortgagee, the Farmers' Loan and Trust Company, to enforce the collection of state and county taxes, assessed upon the property, roadbed, and fixtures of the railroad company for the years 1885 to 1889 inclusive. The defence specially interposed, and which raises the Federal question in the case, was that the revenue statutes of the State, enacted subsequent to the granting of the charter, and under which the taxes sought to be collected were levied, impaired the obligation of the contract contained in the railroad company's charter, and were therefore unconstitutional and void.

The railroad company was chartered by an act of the legislature of the State of Tennessee, approved January 28, 1848. The State in granting the charter reserved no right to amend or repeal the same; nor was there any provision either in the constitution or the general laws of the State — in existence at the time — which reserved to the State the right to alter, modify, or repeal the charter. By section 11 of the act of incorporation it was provided: "That the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent."

Various grounds were alleged in the bill on which the effect of section 11 was sought to be avoided, or to show that the railroad company had waived or forfeited the benefits of the exemption contained in the last clause thereof. These allegations need not, however, be noticed, as they were found and adjudged by the Supreme Court of Tennessee against the complainants, and in favor of the railroad company. The pleadings admitted and the proofs established that since the completion of the road to its original northern terminus on the Mississippi River, in April, 1861, the railroad company had neither earned nor declared any dividend, either on its whole

line or upon any portion of its road lying in the State of Tennessee. It is also shown that its earnings for the years 1885 to 1889, inclusive, were insufficient to pay any dividend to its stockholders.

The period of twenty-five years from the completion of the road, referred to in the section, having expired on April 22, 1886, the Supreme Court of the State disallowed the taxes assessed and claimed for the years 1885 and 1886, on the ground that they were covered by the twenty-five year exemption, but adjudged and decreed that the railroad company was liable to the respective complainants for the taxes of 1887, 1888, and 1889, in the following amounts: to the State of Tennessee, $24,117.73; to McNairy County, $16,365.52; to Madison County, $13,769.69; to Chester County, $4210.25; to Obion County, $10,554.61; to Gibson County, $19,182.06; which sums were declared liens upon the property of the railroad company.

The grounds upon which its decree was based, and which are assigned for error, are as follows:

"And the court, construing said 11th section of said Tennessee charter, is further of opinion, and doth so adjudge and decree, that the true intent and meaning of the said 11th section of the Tennessee charter of the Mobile and Ohio Railroad Company, passed January 28th, 1848, is that on and after the 22d day of April, 1886, being twenty-five years from the completion of said road, the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, all the property, franchise, etc., of the said Mobile and Ohio Railroad Company, became liable to taxation; and the court is further of opinion, and doth accordingly so adjudge and decree, that from and after said 22d day of April, 1886, all of said properties of every description of the said Mobile and Ohio Railroad Company — that is to say, its roadbed and fixtures and appurtenances, including workshops, warehouses, vehicles of transportation, and all of its property of every kind and description and franchises, become liable to taxation under the rule of equality and uniformity prescribed in article 2, section 28, of the constitution of 1834 of the

State of Tennessee; and it further appearing to the court that the complainants have in their bill in this cause attacked the eight per cent clause in the said section (11) eleven of the said charter of the said Mobile and Ohio Railroad Company, passed by the legislature of Tennessee on January 28th, 1848, which eight per cent clause reads as follows: 'And no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent,' and that they have charged in their said bill, among other things, that said eight per cent clause is in violation of the rule of equality and uniformity of taxation prescribed by said article 2, section 28, of said constitution of 1834, and the court being of opinion that said property became taxable as aforesaid on and after April 22, 1886, therefore the court doth adjudge and decree that the said eight per cent clause is in violation of said article 2, section 28, of said constitution of 1834, as aforesaid, and that the same is unconstitutional and void, which said article 2, section 28, of the said constitution of 1834 provides, among other things, 'that all property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that the same shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value;' and the court is also of opinion, and doth accordingly so adjudge and decree, that said eight per cent clause is likewise void because it is so vague, indefinite, and uncertain in its terms as to be non-enforceable in this, to wit, that it does not appear from said clause or anywhere in said charter upon what dividends were expected to be declared, there being no amount or limit of capital stock fixed in said charter, and no means for fixing the same being provided, and no directions being given or means provided as to how said dividends should be ascertained, with a view to taxation or otherwise, and the court is of opinion, and doth accordingly so adjudge and decree, that said eight per cent clause is arbitrary, insensate, and absurd, and is void and unenforceable, and furnishes no obstacle whatever to the taxation of said properties.

"It is therefore adjudged and decreed by the court that the road of the said the Mobile and Ohio Railroad Company, together with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, and all its properties and franchises, are subject and liable to taxation for state and county purposes in said counties of Obion, Gibson, Madison, Chester, and McNairy, (counties in said State of Tennessee,) and have so been liable since the 22d day of April, 1886, according to and by the several general statutes of assessment and taxation in force in the State of Tennessee during the years 1887, 1888, and 1889, and forever thereafter, under the equal and uniform laws of the State of Tennessee; and it is further adjudged and decreed by the court that the acts of the general assembly of the State of Tennessee, as set forth in the pleadings, to wit, the acts of 1875, chapter 78, page 103; acts 1877, ch. 19, p. 31; acts 1881, chapter 104, p. 133; acts of 1882, (extra session,) chapter 16, all of which are set out in Milliken and Vertrees' compilation of the acts of the legislature of Tennessee, and known as 'Milliken and Vertrees' Code of Tennessee,' chapter 5, pages 140, 141, 142, 143, 144, 145, being section 669 to section 708, inclusive, and the general revenue laws of the State covering the years 1887 to 1889, inclusive, being acts of 1885, chap. 1, p. 1, and acts of 1887, chaps. 1 and 2, and acts of 1889, chaps. 96 and 130, under and by which statutes the complainants have caused to be assessed for taxes the property of the defendant, the Mobile and Ohio Railroad Company, and are seeking to collect and force the payment of the taxes so assessed, are not in violation of section 10, article 1, of the Constitution of the United States of America, which provides, among other things, 'that no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility,' but that said acts are valid and constitutional, and said properties of said the Mobile and Ohio Railroad Company are under said acts liable for taxes from and including the year 1887, and that the provision of the eleventh section of the Tennessee charter of the Mobile and Ohio Railroad Company, which provides that 'no tax shall ever be laid on said road or its fixtures which

shall reduce the dividends below eight per cent,' does not prevent the assessment and collection of said taxes under said statutes enacted for assessing, collecting, and enforcing payment of taxes on said railroad property, for that the court is of opinion and doth adjudge and decree that said eight per cent clause just quoted above is invalid, and that the provision set forth therein that 'no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent' is null and void and doth not, therefore, interfere with or prevent the assessment and collection of taxes against said road under the said several revenue acts of the State of Tennessee, and that said several revenue acts are valid and constitutional and not in violation of said article I, section 10, of the Constitution of the United States of America, for that the same as applied to the taxes of 1887, 1888, and 1889, and future taxes, do not violate or impair the obligation of any contract with the Mobile and Ohio Company, the said eight per cent clause being null and void, all of which is accordingly so adjudged and decreed by the court."

It is contended by counsel for defendants in error that this court is without jurisdiction to review the judgment of the Supreme Court of Tennessee, because it was based, or proceeded, upon the ground that there was no contract in existence between the railroad company and the State to be impaired, and that the supposed contract was in violation of the state constitution of 1834, and hence not within the power of the legislature to make. In support of this proposition there are cited *Railroad Company* v. *McClure*, 10 Wall. 511, 515; *Boyd* v. *Alabama*, 94 U. S. 645; *Yazoo and Miss. Valley Railroad* v. *Thomas*, 132 U. S. 174; and *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79.

These decisions need not be specially reviewed, for they clearly do not apply to the case under consideration. It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will

determine for itself, the established rule being that where the judgment of the highest court of a State, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation. A brief reference to some of the authorities is sufficient to show this:

In *Jefferson Bank* v. *Skelly*, 1 Black, 436, 443, it was said by this court: "Its (the Supreme Court) rule of interpretation has invariably been that the constructions given by the courts of the States to state legislation and to state constitutions have been conclusive upon this court *with a single exception*, and that is when it has been called upon to interpret the contracts of States, 'though they had been made in the forms of law,' or by the instrumentality of a State's authorized functionaries, in conformity with state legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one within the meaning of that clause of the Constitution of the United States which inhibits the States from passing laws impairing the obligation of contracts. Of what use would the appellate power be to a litigant who feels himself aggrieved by some particular state legislation, if this court could not decide independently of all adjudication by the Supreme Court of a State whether or not the phraseology of an instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced notwithstanding a contrary conclusion by a Supreme Court of a State?"

In *New Orleans Water Co.* v. *Louisiana Sugar Co.*, 125 U. S. 18, 38, it was said by Mr. Justice Gray, speaking for the court: (1) "When the state court decides against a right claimed under a contract, and there was no law subsequent

to the contract, this court clearly has no jurisdiction." (2) "When the existence and construction of a contract are undisputed, and the state court upholds a subsequent law on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction." (3) "When the state court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract, and, if it is of opinion that it did not confer the right affirmed by the state court, and therefore its obligation was not impaired by the subsequent law, may, on that ground, affirm the judgment." (4) "So, when the state court upholds the subsequent law on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld."

In *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 293, it was said: "The jurisdiction of this court is questioned upon the ground that the decision of the Supreme Court of North Carolina conceded the validity of the contract of exemption contained in the act of 1834, but denied that particular property was embraced by its terms; and that, therefore, such decision did not involve a Federal question. In arriving at its conclusion, however, the state court gave effect to the revenue law of 1891, and held that the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by the subsequent law, and as the inquiry whether it did or not was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed."

Also, in *Huntington* v. *Attrill*, 146 U. S. 657, 684, the court said: "The case in this regard is analogous to one arising under the clause of the Constitution which forbids a State to pass any law impairing the obligations of contracts, in which, if the highest court of the State decide nothing but the original construction and obligation of a contract, this court has no jurisdiction to review the decision; but if the

state court gives effect to a subsequent law which is impugned as impairing the obligations of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is."

The same general proposition is clearly laid down in the following cases: *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511, 531; *Ohio Life Ins. and Trust Co.* v. *Debolt*, 16 How. 416, 431; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 144; *Delmas* v. *Ins. Co.*, 14 Wall. 661; *University* v. *People*, 99 U. S. 309, 321; *Louisville and Nashville Railroad* v. *Palmes*, 109 U. S. 244, 256; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697; *Vicksburg &c. Railroad* v. *Dennis*, 116 U. S. 665; *Yazoo &c. Railroad* v. *Thomas*, 132 U. S. 174; and in *Bryan* v. *Board of Education*, 151 U. S. 639, 650, it is said: "So that it is necessary to inquire as to the existence and effect of the alleged contract. And that question must be determined by this court upon its own judgment independently of any adjudication by the state court."

The rule announced in these decisions leaves no room to doubt the jurisdiction of this court in the present case. Aside from the certificate of the acting chief justice of the state Supreme Court that the constitutionality of the statutes, under which the taxes sought to be enforced were levied, was drawn in question by the plaintiffs in error, and was decided by that court in favor of the validity and constitutionality of such acts, the pleadings in the case, as well as the decree complained of, establish beyond doubt that the question presented was one clearly Federal in its character, such as this court has a right to review. The grounds upon which the Supreme Court of the State held that the contract, claimed by the railroad company under the eleventh section of its charter, was invalid, in no way affects the jurisdiction of this court. The legal existence of the contract itself, and its proper construction, is necessarily involved in the question of the alleged impairment of the obligation thereof.

It appears from the decree of the Supreme Court of the

State that the exemption clause relied on by the plaintiffs in error was held to be invalid on two grounds: First, that it was in conflict with section 28, article 2, of the state constitution of 1834; and, second, it was invalid and unenforceable for vagueness and uncertainty, because it did not appear from the clause, or otherwise in the charter, upon what the dividends were to be declared, inasmuch as there was no amount or limit of capital stock fixed in the charter, and no means provided for either fixing the same or for ascertaining the dividends thereon.

This last ground on which the court rested its judgment is manifestly unsound, for the clause in question, that "no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent," is clearly not so incapable of any reasonable construction as to be void. On the contrary, its terms are plain and unambiguous. The only matter involving construction or interpretation is the meaning to be attached to the term "dividend." It admits of no question that the word "dividend" mentioned therein has reference to dividends on the capital stock of the company held and owned by its shareholders. The term "dividend" in its technical as well as in its ordinary acceptation means that portion of its profits which the corporation, by its directory, sets apart for ratable division among its shareholders. *Lockhart* v. *Van Alstyne*, 31 Michigan, 76; Boone on Corporations, sec. 125.

In the present case it appears that the maximum capital stock authorized by the charter was $10,000,000, and that the stock actually issued by the company, at various times during the construction of the road, and outstanding, amounted to the sum of $5,320,600, which, together with the company's bonded indebtedness, fairly represented the cost of building and completing the road. The amount of stock being fixed, it was a matter of mere calculation as to when the profits from net earnings would be sufficient to meet the designated dividend.

Again, dividends can be rightfully paid only out of profits. Corporations are liable to be enjoined by shareholders or cred-

itors from making a distribution, in dividends, of capital. Taylor on Corporations, section 565, and authorities cited.

The term "profits," out of which dividends alone can properly be declared, denotes what remains after defraying every expense, including loans falling due, as well as the interest on such loans. *Correy* v. *Londonderry Railway Co.*, 29 Beav. 263.

The net earnings of corporations out of which profits are distributable in dividends are thus defined in *St. John* v. *Erie Railway Co.*, 10 Blatchford, 279: "Net earnings are properly the gross receipts less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains — that is, out of the net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders, to go toward dividends, which, in that way, are paid out of the net earnings." This case was affirmed by this court, 22 Wall. 136.

In *New York, Lake Erie & Western Railroad* v. *Nickals*, 119 U. S. 296, 308, the same general rule that shareholders are entitled only to dividends out of the net earnings derived from the operations of the company is reaffirmed.

It must be assumed that the legislature of Tennessee used the term "dividends," in the exemption clause under consideration, in the general sense indicated, and had reference to that portion of the net earnings of the company which legitimately constituted profits and could be rightfully apportioned or distributed among shareholders. There is no difficulty in ascertaining the amount of such profits in any year, and the stock actually issued being fixed, it is hard to understand how it could be held that the exemption clause was void and unenforceable for want of certainty. The law regards that as certain which is capable of being ascertained and definitely fixed. The State cannot complain that no method has been provided for ascertaining the amount of profits applicable to the payment of the designated dividends. That is a matter purely of administration, which does not touch in any way the validity of the contract embodied in the exemption clause.

It is stated on behalf of the defendants in error that the company earned for the years in question profits more than sufficient to pay eight per cent dividends, if the interest on its bonded indebtedness was not chargeable against the earnings. This point was not passed upon by the court below, and, if the fact be as stated, it could not avail the defendants in error, for the payment of the annually accruing interest on the bonded debt of the railroad company was a proper charge against the net earnings, to be paid before dividends could be declared thereon. Mr. Justice Bradley, in *Union Pacific Railroad* v. *United States*, 99 U. S. 402, 422, declared that interest on the bonded indebtedness of the company, like other current expenses, was payable out of the net earnings before dividends could be distributed to the stockholders.

In *Belfast & Moosehead Lake Railway* v. *Belfast*, 77 Maine, 445, it was directly adjudged that the interest on the bonded debt is payable out of the net earnings before dividends can properly be declared.

In *Correy* v. *Londonderry & Enniskillen Railway*, 29 Beav. 263, 272, 274, Sir John Romilly, Master of the Rolls, in discussing this subject, while admitting that the funded indebtedness of a corporation was not properly payable out of profits before there could be a division thereof, held that any and all debts which had been incurred, and which were due from the company and ought to have been paid, and would have been paid at the time had the corporation possessed the necessary funds for that purpose, constituted proper deductions from the earnings before the profits properly distributable could be ascertained.

The further claim is made in the brief, although not insisted upon in argument, that if the earnings of the company were insufficient upon which to declare a dividend, the exemption clause had no operation, because there would be no reduction of dividends. In other words, that the property of the company was taxable during all the years that it could not declare any dividend. This suggestion is wanting in plausibility and needs no further consideration, for if the exemption clause has any meaning, purpose, or validity what-

ever this theory would utterly destroy it, as the company would be taxable when it made no profits, and get the benefit of the exemption only when profits to a certain amount were realized.

We come next to the consideration of the other ground on which the Supreme Court based its decree. In reaching its conclusion that the eight per cent dividend clause of the company's charter violated that portion of section 28, article 2, of the state constitution of 1834, which provides: "All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that the same shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value," the Supreme Court of Tennessee gave no effect to that clause of the charter as an exemption, either fixed, conditional, or contingent, but proceeded upon the theory that the property of the railroad company became absolutely liable to taxation on and after April 22, 1886, at the expiration of the twenty-five years from the completion of the road, without regard to the state of the company's earnings, or its capacity to pay dividends in any amount. The construction thus placed upon section 11 of the charter practically assumed the main question of controversy involved in the case.

It is conceded by counsel for defendants in error, as is well settled by the decisions of the Supreme Court of Tennessee and of this court, that the legislature of Tennessee had the power and authority under the state constitution of 1834, to grant to corporations, created by it, exemption from taxation; that such exemption might confer either total or partial immunity from taxation, and extend for any length of time the legislature might deem proper. Amongst the authorities establishing this general proposition are the following: *Knoxville &c. Railroad* v. *Hicks*, 9 Baxter, 445; *State* v. *Butler*, 13 Lea, 400; *S. C.* 2 Pickle, (86 Tenn.,) 614; *University of the South* v. *Skidmore*, 3 Pickle, (87 Tenn.,) 156; *Memphis* v. *Bank and Ins. Co.*, 7 Pickle, (91 Tenn.,) 546; *Memphis* v. *Memphis*

City Bank, 7 Pickle, (91 Tenn.,) 577 ; *Farrington* v. *Tennessee*, 95 U. S. 679 ; *County of Tipton* v. *Locomotive Works*, 103 U. S. 523 ; *Bank* v. *Tennessee*, 104 U. S. 493.

It is also established by the decisions of Tennessee, as counsel for defendants in error properly admit, that there was no imperative constitutional requirement upon the legislature to tax all property. The first paragraph of section 28, article 2, of the constitution of 1834 provided that "all lands liable to taxation, held by deed, grant, or entry, town lots, bank stock, slaves between the ages of twelve and fifty years, and such other property as the legislature may from time to time deem expedient, shall be taxable." This provision, as held in *Railroad* v. *Hicks*, 9 Baxter, 448, 449, did not make it the duty of the legislature to tax all property, but left it discretionary with that body to tax, or to omit to tax, that is to exempt, as it might deem expedient. This provision meant only that when a tax was imposed it must be upon the value of the property, ascertained by some uniform rule.

It being settled that there was no requirement of the constitution that all property should be taxed, and that the legislature of Tennessee, under the constitution of 1834, had the power to grant exemption from taxation in charters of incorporations, and that such charters, after acceptance, became binding and irrevocable contracts, the real controversy in the present case, while extremely important in its consequences to both the State and the railroad company, lies within a very narrow compass, and turns upon the proper construction of the last clause of section 11 of the charter, which provides that "no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent."

Does this clause constitute an immunity, fixed, special, conditional, or contingent, from taxation?

It is undoubtedly a part of the contract of exemption from taxation contained in the eleventh section of the charter, and as such the corporation is entitled to the benefit thereof. The meaning and intent of the provision was clearly a stipulation on the part of the legislature to forego the exertion of its taxing power to the extent of allowing the corporation to

pay its shareholders eight per cent dividends from the net earnings of the company. The manifest object of the clause was to invite and encourage the investment of private capital in the enterprise of building the road. By the previous clauses of the section the capital stock was exempt from taxation forever, and the road, with all its fixtures and franchises, was exempt for the period of twenty-five years from its completion. These exemptions were primarily for the benefit of the corporation. The shares of stock were subject to taxation against the owners or holders thereof, and this last clause was clearly intended for their benefit to the extent of securing, as far as an immunity from taxation would do so, any reduction of dividends on their stock below eight per cent per annum.

The constitutional power to grant exemption, wholly or partially, and for fixed or indefinite periods, necessarily includes the power to exempt upon conditions or contingencies which are to happen in the future. To hold that an exemption is good for a term of years, and is not good if made to depend upon a plain contingency by which it may take effect in some years and not in others, is, as counsel for the plaintiffs in error justly insist, a distinction neither sound in principle nor supported by authority.

The intent and purpose of the clause in question are clear, not only from its language, but from the history and circumstances preceding and surrounding the grant of the charter. The state constitution of 1834 declared that a well regulated system of internal improvement should be encouraged. The incorporating act recited that "it is deemed a matter of vital importance to this State that a direct communication by railroad to the Gulf of Mexico be established." The State was practically without railroad facilities and needed a line of transportation extending through the interior of its western division, and connecting it with the Gulf of Mexico on the south and the Mississippi River and its tributaries on the north. Its special interest in the road in question was manifested by the third section of the charter, which "required the company to open books for the subscription of shares in the capital stock of the company in the State of Tennessee,

so as to afford citizens of the State an opportunity to take stock to the amount of one-fourth of the capital of the company;" and to induce its own citizens, as well as outside capitalists, to invest and risk their money in the enterprise, more or less hazardous, was the manifest object of the exemption contained in section 11 of the railroad company's charter, the latter clause of which was especially designed to secure or to give an assurance of a reasonable return to the parties taking the stock of the company by postponing the taxing power of the State to the payment of the designated dividends.

In *Preston* v. *Browder*, 1 Wheat. 115, 120, it was said that in the construction of the statutory laws of a State it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason, as well as the meaning, of many of the provisions in them. The same general rule is stated in *United States* v. *Union Pacific Railroad*, 91 U. S. 72, 80, 81, and in *Platt* v. *Union Pacific Railroad*, 99 U. S. 48, 64, where it was applied in construing certain sections of the act of Congress, approved July 1, 1862, incorporating and granting lands to the Union Pacific Railroad Company. So in *Winona & St. Peter Railroad* v. *Barney*, 113 U. S. 618.

Legislative contracts, especially, should be read in the light of the public policy entertained, and the purposes sought to be accomplished at the time they were made, rather than at a later period when different ideas and theories may prevail. In *Platt* v. *Union Pacific Railroad*, Mr. Justice Strong expresses this proposition as follows: "There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. . . . But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed; look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances."

In the present case we are clearly of opinion, both from the surrounding circumstances and the language of the charter

contract, that an exemption from taxation was intended to be granted by the clause under consideration, to the extent and for the purposes stated.

Counsel for the State contend that this clause, although it fixes no valuation or rate of taxation, is yet a special and discriminating rule for the taxation of the company's property, and it is sought by this designation to escape the legal effect and operation of the provision; but the difficulty in the way of this contention is that the power of exemption would embrace a charter contract which made a special and discriminating rate of taxation. The State, under the power of absolute exemption, could include in a charter contract a provision that the property of the corporation should be only liable for one-half the current rate of taxation levied by the State during any year, or it could constitutionally provide by the charter that the corporate property should be assessed at only one-half of its value. The legislative power to make such terms, especially in charters of corporations, cannot be doubted. They would be clearly included in the general power to grant absolute exemptions.

Again, the distinction sought to be made between an exemption or immunity, and a special and discriminating rule of taxation, as applied to charters, is wholly unsupported by the authorities. On the contrary, the decisions of the Supreme Court of Tennessee and of this court have ignored any such distinction, and have uniformly given effect to charter provisions which made special and discriminating rates of taxation.

Thus, in *Raleigh & Gaston Railroad* v. *Reid*, 13 Wall. 269, the property of the company was exempted for a term of years, after the expiration of which the legislature was at liberty to tax individual shares of the stockholders whenever their annual profit exceeded eight per cent, provided that the tax did not exceed twenty-five cents per share per annum. The pleadings in the case showed that the annual profits on the shares never reached eight per cent, and it was held that they were not subject to any tax.

In *Farrington* v. *Tennessee*, 95 U. S. 679, 681, the charter of the company contained this provision: "That the said

company shall pay to the State an annual tax of one-half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes."

In *Knoxville &c. Railroad* v. *Hicks*, 9 Baxter, 442, 445, the charter granted in 1856 contained the following exemption: "Sec. 33. Be it enacted, that the capital stock of the said company, the dividends thereon, and the road and fixtures, depots, workshops, warehouses, and vehicles of transportation belonging to the said company, shall be forever exempt from taxation; and it shall not be lawful for the State or any corporate or municipal police or other authority thereof, or of any town, city, or district thereof, to impose any tax upon such stock or dividends, property or estate: Provided, the stock or dividends, when the said dividends shall exceed the legal interest of the State, shall be subject to taxation by the State in common with and at the same rate as money and interest, but no tax shall be imposed so as to reduce the part of the dividends to be received by the stockholders below the legal interest of the State."

In *State* v. *Butler*, 13 Lea, (Tenn.,) 400, the provision was that "the said company shall pay an annual tax of one-half of one per cent on each share of capital stock subscribed, which shall be in lieu of all other taxes." In *State* v. *Butler*, 2 Pickle, (Tenn.,) 614, 617, there was the same exemption as in the former case.

So in *Memphis* v. *Bank and Ins. Cos.*, 7 Pickle, 546, 548, the exemption clause was "that said company should pay to the State 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 in *Memphis* v. *Memphis City Bank*, 7 Pickle, 574, 577, decided in 1892, the exemption in the charter was as follows: "Be it further enacted, there shall be levied a state tax of one-half of one per cent upon the amount of the capital stock actually paid in, to be collected in the same way and at the same time as other taxes are by law collected, and which shall be in lieu of all other taxes and assessments."

In each of the foregoing cases there was a special and discriminating rate of taxation fixed by the respective charters.

That fact, however, did not in any way affect the result or impair the legislative power to grant the exemption. In the last of the above cases the exemption clause provides in express terms that there should be *levied* a state tax of a certain per cent upon the capital stock paid in, which was to be collected in the same way and at the same time as other taxes are by law collected. This was a special and discriminating rule of taxation for this company; yet it was held by the Supreme Court of Tennessee to be "a contract whose obligation may not be violated by subsequent revenue laws or otherwise."

These cases meet the distinction which is attempted to be made between an exemption and a special and discriminating rule of taxation. There is no foundation for the position that they were exemptions or immunities from taxation, while the provision in the present case is something different, which counsel for defendants in error choose to designate as a special or discriminating rule of taxation. Names and designations do not change the character of the provision in question.

The charter granted the Mobile and Ohio Railroad Company in the State of Mississippi, almost concurrently with its Tennessee and Alabama charters, extended the period of exemption until the company was paying an interest of eight per cent per annum on its cost. The attempt to tax it before it had paid any interest on its cost was held to be invalid, the Supreme Court saying, in *Mobile and Ohio Railroad Co.* v. *Mosley*, 52 Miss. 129: "We think the language of the section susceptible of no other construction than that the corporation is to be exempted from all taxation until by its earnings it shall pay an annual interest of eight per cent upon that portion of its road sought to be taxed, after which period its road shall be subject to taxation at the rate per cent that lands are taxed by the general revenue laws of the State then in force. If the language employed seems awkward, it is not for us, by verbal refinement, to strip it of its manifest meaning and intention. . . . The claim of exemption can only be successfully met in this case, so far as the point now under

consideration is concerned, by answer and proof showing that, in point of fact, the earnings of that portion of the road located in Mississippi have been sufficient to pay an annual interest of eight per cent upon the capital expended in the construction thereof."

We do not deem it necessary to consider the further point urged by counsel for defendants in error that the exemption clause in question is in conflict with the Fourteenth Amendment of the Constitution of the United States. That amendment conferred no new and additional rights, but only extended the protection of the Federal Constitution over rights of life, liberty, and property that previously existed under all state constitutions. The general object and purpose of the amendment is set out in *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232, 237, and *Home Ins. Co.* v. *New York*, 134 U. S. 594, 607, and need not be again gone over.

In dealing with an exemption from taxation, like that under consideration, good faith is required on the part of both parties to the contract. While the State may not impair or restrict its operation, neither may the railroad company enlarge it at will and without limitation. It is not shown that the railroad company has made any improper or fictitious increase, either of its capital stock or of its bonded indebtedness. On the contrary, the proof establishes that the par value of the 53,206 shares of capital stock outstanding was realized therefor, dollar for dollar, and this amount of capital stock, together with the existing bonded indebtedness of the company, represents the *cost* of constructing and equipping the railroad. The legislature, in granting the exemption in question, doubtless had in contemplation the cost of the enterprise, and may have intended the immunity from taxation to be estimated on that basis, as in the Mississippi charter.

But however this may be, in sustaining the validity of the exemption in the present case we do not mean to be understood as holding that the railroad company has the right in its discretion, hereafter, to issue additional capital stock, or to increase its bonded indebtedness, even for legitimate pur-

poses, and have the same taken into consideration upon the question of its liability for taxation under the eight per cent dividend clause of the charter.

Our conclusion upon the whole case, which has received careful consideration, is that the decree of the Supreme Court of the State declaring the exemption clause of the company's charter void, and holding the statutes of the State, under which the taxes sought to be collected were levied, to be valid and constitutional, was erroneous.

Judgment reversed and cause remanded to the Supreme Court of the State of Tennessee for further proceedings not inconsistent with this opinion.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE GRAY, MR. JUSTICE BREWER, and MR. JUSTICE SHIRAS, dissenting.

In my opinion, the judgment of the Supreme Court of Tennessee should be affirmed. It is well settled that the taxing power of a State cannot properly be held to have been relinquished in any instance, unless the deliberate purpose of the State to that effect clearly appears. Exemption therefrom is in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the grant, construed *strictissimi juris*. An exemption is claimed in this case under the eleventh section of the company's charter from the State of Tennessee, which reads: "That the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including shops, warehouses and vehicles of transportation, shall be exempt from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent." The reasonable meaning of this section seems to me plainly to be that the capital stock is exempted forever, and the road, its fixtures, etc., for twenty-five years from the completion of the road, after which the exemption

has spent its force, and the road, fixtures, etc., become taxable, but the taxation must be so laid as not to reduce the dividends below eight per cent. The closing words prescribe a rule of taxation, and do not operate to continue an exemption which has expired by the express terms of the grant. What is forbidden is the laying of a tax in such manner as will produce a particular result. If this be not clear, as I think it is, yet any other construction is certainly not so, and doubt is fatal to the claim.

If the exemption exists as insisted, then the capital stock is free from taxation forever, and the road and its property is likewise free until, after deducting from its earnings all expenses, fixed charges, (which include interest on all its bonded debt,) and eight per cent upon its capital stock, there remains a surplus sufficient to pay all the taxes on its property according to the current rate. By the company's Alabama charter it was provided that the capital stock should not exceed ten millions; the Mississippi act set forth that act in full; the Tennessee act provided that the citizens of that State might subscribe to the amount of one-fourth of the capital. So far as the eleventh section is concerned, the amount of capital stock at any particular time, or what the taxes on the company's property in any particular year might be, is left undefined. The view contended for practically leaves it to the company to say when it may be taxed and when not; and while a State must be held to the bargains it makes, however improvident, it ought not to be held to have made such a contract as it is argued this is, unless its terms are so plain as not to be open to construction.

The difference between this provision and that in the company's charter in Mississippi, referring to the same subject, is significant. The latter reads: "That whenever any portion of said railroad shall be completed through this State, and is paying an interest of eight per cent per annum on its cost, *and not before*, such portion may be taxed the same percentage, and no more, upon the capital expended in the construction thereof, as lands in this State shall be taxed." That differ-

ence explains why the Supreme Courts of Mississippi and Tennessee arrived at different conclusions.

In a certain line of cases, absolute exemptions from taxation have been recognized as secured in consideration of certain amounts to be paid, sometimes called taxes, although really merely the consideration paid as under contract; but the principle of commutation has no application here.

I concur with the Supreme Court of Tennessee in regarding the last part of the eleventh section as prescribing a special and discriminative rule of taxation; and as that court held it void as such, because in conflict with the equality and uniformity clause of the Constitution of 1834, that conclusion should be accepted.

I am constrained, therefore, to dissent from the opinion and judgment just announced, and am authorized to say that Mr. Justice Gray, Mr. Justice Brewer, and Mr. Justice Shiras concur in this dissent.

SLIDE AND SPUR GOLD MINES *v.* SEYMOUR.

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

No. 284. Argued March 15, 1894. — Decided May 14, 1894.

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

It being conceded that a vendor's lien is recognized in Colorado, such a lien will be recognized and enforced in a Federal court in that District.

On the contracts in this case, set forth in the opinion of the court, and the circumstances attending the making of them as therein detailed, this court holds that the plaintiffs below retained a vendor's lien upon their mining property in Colorado which they conveyed to the defendants below, and affirm the decree of the court below to that effect.

THE facts in this case are as follows: In and prior to the month of October, 1886, the plaintiffs below, Ellen R. Seymour and William G. Pell, were the owners of certain mining prop-

erty in the Gold Hill mining district, Boulder County, Colorado, known as the "Slide and Spur lodes." There had been some negotiations with one John Haldeman, with the view to a sale of this property, and on October 19, 1886, the plaintiffs, by their agents, made the following proposition to him:

"DEAR SIR: I agree that in case you cannot raise the required sum within the specified time in your contract, dated about the 9th day of October, between W. F. Bruff, acting under our authority, and yourself, to change the conditions as follows, viz.: To sell you the Slide mine for $750,000; 25 (M) thousand dollars to be paid one week after the receipt in London of Foster's report, this to be the first payment on the property, the balance of the purchase price, $725,000, to be paid within two months from the date of the payment of $25 M; one ½ in cash and one-half in fully-paid common shares of the company to be formed. In case the second and last payment is not made when due, the agreement cancels itself, and the $25 M is forfeited. No ore to be taken from the mine after first payment. I further agree to give you a call at par for two months from date of issue upon the shares received as part payment for the property.

"(Signed) J. F. SEYMOUR.
"A. B. DAVIS."

Thereafter said Haldeman, in accordance with the understanding at the time of giving this option, went to England and secured the organization, under the laws of Great Britain, of the defendant corporation. The purpose for which this corporation was organized was, as expressly stated, to purchase and develop the "Slide and Spur mines," though the articles of incorporation gave authority for the purchase and development of other properties. So far, however, as appears from the testimony in this case it was simply an organization on paper, with a view of acquiring title to and subsequently working these mines.

The provision in its charter as to capital stock was as follows:

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"The capital of the company is 400,000 pounds, divided into four hundred thousand shares of 1 pound each, the whole or any portion of which and any future capital of the company may be issued as full or partly paid shares and at a discount or premium and with the benefit of any preference or priority in the distribution of assets or payment of dividends, and with power also to increase or decrease such capital stock and to issue any part or parts of the increased or decreased capital as consolidated stock or any shares at such times, in such manner, and on such terms as the company shall determine."

The organization of this corporation was completed on the 24th of May, 1887. On August 18, 1887, Haldeman having theretofore made partial payments to the plaintiffs, an agreement was entered into between himself and J. Fenton Seymour, as their agent, which agreement was as follows:

"Memorandum of agreement made this 18th day of August, 1887, between John Haldeman, of 38 Old Jewry, in the city of London, and J. Fenton Seymour, of Denver, Colorado, in the United States of America, acting for himself and partners, the owners of the Slide and Spur gold mines, situate in Boulder County, Colorado, United States of America:

"The said John Haldeman agrees to pay forthwith the sum of ten thousand pounds sterling in addition to twelve thousand five hundred pounds already paid on account of the purchase money of the said mines, such sum of ten thousand pounds to be paid through Messrs. Wells, Fargo & Co., (who now hold the deeds of the said property in escrow,) and to be held by them and paid over to the said J. Fenton Seymour upon the titles of the said mines being registered in the name of the 'Slide and Spur gold mines,' limited, free from all charges and encumbrances; and the said J. Fenton Seymour hereby undertakes and agrees to register the titles as above upon the said ten thousand pounds being deposited with Messrs. Wells, Fargo & Co.

"The said J. Fenton Seymour hereby undertakes and agrees to have the 'Slide mine' worked to its full capacity, and after the due and legal registration of the title to the

said company he further agrees that the returns from the said mine shall be cabled weekly to the said company in the form of cables sent herewith, it being understood and agreed that the money value of the first weekly returns so cabled shall not be less than the sum of two hundred pounds sterling, and that each successive weekly return shall show a moderate increase over that sum.

"The said J. Fenton Seymour hereby undertakes and agrees to take the control of the management of the said property until the payments hereinafter mentioned are completed, and it is understood and agreed that he shall retain such control until the said payments are completed. The said John Haldeman agrees that three hundred and seventy-five thousand shares of one pound each in the above company shall be transferred to Mr. Clarence Preston Elder as trustee and deposited with Messrs. Wells, Fargo & Co. in London, to the intent that the said shares shall be held as security for the due performance of the following conditions, viz.:

"1st. The payment of ten thousand pounds, in addition to the above-mentioned twenty-two thousand (J. F. S.) five hundred pounds within three days (J. F. S.) after the receipt of the third successive weekly return from the mine, as hereinbefore mentioned; and,

"2d. The balance of forty-five thousand pounds at the expiration of ten days after the receipt of eight successive weekly returns of the nature and value above specified. Upon the completion of the above-mentioned payments the said J. Fenton Seymour hereby undertakes and agrees to release the above-mentioned three hundred and seventy-five thousand shares, less seventy-seven thousand five hundred, to which he is entitled, and also less the number of shares sold with the consent and under the supervision of the aforesaid Clarence Preston Elder, acting for the said J. Fenton Seymour.

"In case the weekly returns cabled from the mine shall from any cause fall below the sum of two hundred pounds sterling per week, then, in that case, such returns shall not count, but the time for paying the second ten thousand pounds and the balance of forty-five thousand pounds shall

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be extended *pro rata;* but should the successive weekly returns amount to two hundred pounds sterling per week, (J F. S.,) with a moderate increase weekly, as hereinbefore mentioned, and the said John Haldeman shall make default in the payment of the balance of forty-five thousand pounds, then in that case, the said J. Fenton Seymour shall have the right to forfeit the amounts already paid and to claim the above-mentioned three hundred and seventy-five thousand shares.

"As witness the hands of the said parties the day and date first above written.

"(Signed) J. Fenton Seymour.
"Jno. Haldeman."

Subsequently there were some further payments. On October 5, 1888, the larger portion of the purchase money still remaining unpaid, the plaintiffs, through their agent, J. Fenton Seymour, made to the company this proposition:

"1st. On payment of 3500 pounds to Wells, Fargo & Co., we agree to start the mine at work in name of Co., said sum to cr. of Col. Seymour.

"2d. Company to send cashier and engineer (if they think fit) & Col. Seymour to be resident manager and director for the period of one year.

"3d. All proceeds to be transmitted to company bankers.

"4th. Mr. Elder to deliver 75,000 shares to the Scotch subscribers and 45,000 to Mr. Rust on payment of said sum.

"5th. The balance of shares to remain in Mr. Elder's hands, as trustee, until a final settlement can be made, inside of three months after acceptance of this proposition.

"6th. Col. Wilson, or whoever pays the £3500, to receive 15,000 shares from Mr. Elder on the final settlement, (not later than three months,) and meantime receive a legal obligation from Mr. Elder as trustee.

"7th. On resignation of Mr. Elder as a director, Mr. Allen to be elected.

"8th. £3500 to be paid so soon as the company can register the transfer of the 75,000 shares.

"(Signed) J. F. Seymour."

This proposition was accepted and the thirty-five hundred pounds mentioned in the first clause were paid on December 15, 1888. In pursuance of the agreement of August 18, 1887, the plaintiffs delivered to the defendant a deed for the property, which deed was duly recorded in the office of the recorder of Boulder County on September 16, 1887. A large portion of the purchase money still remaining unpaid, on February 16, 1889, the plaintiffs filed their bill in the Circuit Court of the United States for the District of Colorado, in which bill they prayed for an accounting, that the amount of purchase money found due be adjudged a lien upon the property, and that such lien be foreclosed and a sale ordered.

The defendants answered, proofs were taken, and on July 8, 1890, a decree was entered finding the amount of the unpaid purchase money to be $250,800, decreeing it a lien upon the property, and ordering a foreclosure and sale. From such decree the defendant appealed to this court.

Mr. Harvey Riddell for appellant.

The circumstances surrounding this transaction and sale show that the appellees waived or abandoned any right to a vendor's lien.

I. The objects, purposes and ends for which the sale was made are inconsistent with the intention to retain such lien. *Gilman* v. *Brown*, 1 Mason, 191, 204, 218. When lands are conveyed to enable the purchaser to raise money thereon by mortgage for the purpose of paying the purchase money, the lien is abandoned. *Clower* v. *Rawlings*, 9 Sm. & Marsh. 122; *S. C.* 47 Am. Dec. 108; *Strong* v. *Strong*, 126 Illinois, 301; *Springfield &c. Railroad* v. *Stewart*, 51 Arkansas, 285. See also *Fisk* v. *Potter*, 2 Abb. (N. Y.) App. 138; *S. C.* 2 Keyes, 64; *McGonigal* v. *Plummer*, 30 Maryland, 422; *Cordova* v. *Hood*, 17 Wall. 1; *Fisher* v. *Shropshire*, 147 U. S. 133; *In re Brentwood Brick & Coal Co.*, 4 Ch. D. 562; *Kettlewell* v. *Watson*, 21 Ch. D. 685, 703; *S. C.* on appeal, 26 Ch. D. 501.

II. The contract of August 18 and 19 expressly says that the stock was taken and held in trust "to the intent that the said shares shall be held as security for the due performance" of

the conditions of the contract as to making deferred payments; that said shares were to be issued by the company to Haldeman "in payment in full for said mines against a clean transfer of the property to the company, free of all encumbrances and liabilities whatsoever, and the due registration of said transfer, and which shares are immediately, upon the same being so issued to be transferred to the said Clarence Preston Elder, . . . as trustee for behoof of all concerned, and the said shares are to be then deposited with Wells, Fargo & Co. . . . in the name of . . . Elder, as a guaranty for the fulfilment by the said John Haldeman of the terms of said agreement so far as incumbent upon him, as fully set forth in the said agreement."

The bill itself virtually contains the same allegations, but seeks to escape the effect thereof by alleging that the sale was made to the company.

But, leaving out of consideration the deductions to be drawn from the subsequent forfeiture of the pledged stock, or, if such forfeiture be denied, the subsequent dealings of Seymour with such stock, the evidence is very clear that it was taken as security.

Taking collateral security, unless the merely personal obligation of the vendee, which is construed as a means of payment, is a waiver of a vendor's lien. *Brown* v. *Gilman*, 4 Wheat. 255; *S. C.* 1 Mason 191; *Cordova* v. *Hood*, 17 Wall. 1; *Chilton* v. *Braiden*, 2 Black, 458; *Fisher* v. *Shropshire*, 147 U. S. 133; *Marshall* v. *Christmas*, 3 Humph. 616; *S. C.* 39 Am. Dec. 99; *Kauffelt* v. *Bower*, 7 S. & R. 64; *Clower* v. *Rawlings*, 9 Sm. & Marsh. 122; *S. C.* 47 Am. Dec. 108; *Coos Bay Wagon Co.* v. *Crocker*, 4 Fed. Rep. 577; *Dudley* v. *Dickson*, 14 N. J. Eq. 252; *Selby* v. *Stanley*, 4 Minnesota, 65; *Young* v. *Wood*, 11 B. Mon. 123; *Stuart* v. *Harrison*, 52 Iowa, 511; *Kyle* v. *Bellenger*, 79 Alabama, 516; *Strong* v. *Strong*, 126 Illinois, 301; *Crans* v. *Hamilton County*, 87 Indiana, 162; *Fish* v. *Howland*, 1 Paige, 20; *Ilett* v. *Collins*, 103 Illinois, 74; *Nairn* v. *Prowse*, 6 Ves. Jr. 752; *McGonigal* v. *Plummer*, 30 Maryland, 422; *Francis* v. *Wells*, 2 Colorado, 660; *Richards* v. *McPherson*, 75 Indiana, 158.

III. We contend, also, that appellees are estopped from asserting a vendor's lien. The following cases, heretofore cited, are in point: *Strong* v. *Strong*, 126 Illinois, 301; *Fisk* v. *Potter*, 2 Abb. (N. Y.) App. 138 (*S. C.* 2 Keyes, 64); *McGonigal* v. *Plummer*, 30 Maryland, 422, where it was said that since the lien is "the mere creation of a court of equity, existing in the nature of a secret trust, it should not, for that reason, be implied and maintained, where it would operate as a means of deception, or in prejudice of good faith."

Appellees certainly agreed that a deed should be delivered and the title conveyed free and clear of all incumbrance whatsoever — free and clear to the full extent that the stock might be put upon the market without any latent liens whatsoever, and that the company might issue 375,000 shares of fully paid up stock in full payment therefor, and they would look to the stock for payment under a pledge thereof.

It is certain that the company, as well as all other parties in interest, so understood it. It would be to allow appellees to entrap the directors into the commission of a fraud, as well as to a subjection to a penal statute, to hold that the stock might be issued under the circumstances disclosed in this case, and then that appellees might still assert a vendor's lien.

Mr. Willard Teller for appellees.

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

It is conceded that a vendor's lien is recognized in Colorado, *Francis* v. *Wells*, 2 Colorado, 660, and such a lien, therefore, will be recognized and enforced in a Federal court. As said in *Fisher* v. *Shropshire*, 147 U. S. 133, 139: "The courts of the United States enforce grantor's and vendor's liens if in harmony with the jurisprudence of the State in which the action is brought, and the principle upon which such a lien rests has been held to be that one who gets the estate of another ought not in conscience to be allowed to keep it without paying the consideration. *Chilton* v. *Braiden's Administratrix*, 2 Black, 458; Story's Eq. Jur. § 1219."

Such a lien is one which appeals strongly to the favorable consideration of a court of equity. In *Baum* v. *Grigsby*, 21 California, 172, 176, it was declared to be a right not arising from any agreement of the parties, but a creature of equity, "founded upon the natural justice of allowing a party to reach the property which he has transferred to satisfy the debt which constitutes the consideration of the transfer." So, in *Refeld* v. *Woodfolk*, 22 How. 318, 327, this court said: "A court of chancery regards the transfer of real property in a contract of sale and the payment of the price as correlative obligations. The one is the consideration of the other; and, the one failing, leaves the other without a cause." An intent to abandon it is not to be presumed, and while, of course, like any other right, it may be abandoned or waived, the evidence of an intent to so abandon or waive should be clear and satisfactory. 2 Story's Eq. Jur. § 1226, and cases cited in notes. In *Cordova* v. *Hood*, 17 Wall. 1, it was held that while the taking of security may raise a presumption of a waiver of the lien, it is a presumption which is open to rebuttal. In 2 Story's Eq. Jur. § 1224, the author says that "if, under all the circumstances, it (the waiver) remains in doubt, then the lien attaches." And in the case of *Fisher* v. *Shropshire*, *supra*, the Chief Justice observed: "Undoubtedly, a lien of the character we are considering may be defeated if the grantor or vendor do any act manifesting an intention not to rely on the land for security; but this must be an act substantially inconsistent with the continued existence of the lien, and cannot be inferred from the mere fact that the parties may not have contemplated the assertion of the lien in the first instance."

There is nothing in the cases cited from the English courts inconsistent with the authorities heretofore cited, or questioning the general rule therein laid down in respect to a waiver of vendor's lien. The case *In re Brentwood Brick and Coal Company*, 4 Ch. D. 562, 565, was one in which the property was transferred to a corporation, not for a fixed sum to be paid absolutely, but, as stated, thus: "Fifty per cent of all sum or sums of money received, or to be received, by the

company on the sale of its shares, and the like sum of fifty per cent upon all money by way of capital to be at any time borrowed by the company until the payments so made" should amount to the sum of 6000 pounds. It was held that the vendor had waived his lien. James, L. J., saying: "I am of opinion that the order of the Vice Chancellor must be affirmed. The case of the appellant may be a hard one, but the nature of the transaction excludes vendor's lien. This is not the case of a simple agreement to sell for £6000. No doubt the vendor got a higher price by agreeing to accept payment in the way he did, and taking his chance of capital being subscribed or capital being borrowed to an amount sufficient to pay him. He says in fact, 'half of the first capital moneys that come in to the extent of £6000 is to be my purchase money.' No day for payment was named; he agreed to receive his purchase money if and when capital should come in. He got for his property a charge upon and a right to the capital of the company to the extent of £6000 when it came in. To my mind it is clear that he intended to rely on that fund for payment, and intended that the company should have the means of borrowing. This is quite inconsistent with a lien which would probably make the company unable to pledge their property. I am, therefore, of opinion that the Vice Chancellor came to a correct conclusion." And Baggallay, J. A., adding: "I think it is evident that the party selling did not intend to rely on the security of the estate but on the funds of the company." In *Kettlewell* v. *Watson*, 21 Ch. D. 685; on appeal, 26 Ch. D. 501, 510; the appellate court held, while recognizing the general rule that the vendor has a lien for his purchase money, that the circumstances disclosed a knowledge on the part of the vendors or their agent that the vendees sought a registry of the deed of conveyance for the purpose of subdividing the property and selling it in lots, and with that knowledge assented to such registry, and also knowledge that the vendees were selling lots, and hence that they should not be permitted to assert a lien as against the *bona fide* purchasers of such lots, who had paid full price therefor to the vendees. The decision was rested on the doctrine

of estoppel, the court saying: "In our opinion the conduct of Dibb (plaintiffs' agent) induced purchasers of the portions of the estate sold reasonably to believe that Richardson & Watson [the vendees] had power to deal with the estate as absolute owners free from the lien now insisted on; and as he so acted, the plaintiffs, who left everything to him, cannot, in our opinion, assert their lien against lots purchased without notice that the trustees desired to insist on their lien even though such purchasers have an equitable title only."

It is not questioned in this case that a large part of the money consideration for the sale of these mines remains still unpaid, and the defendant is in the attitude of one who, admitting that the vendors have not received the money for which he sold the land, nevertheless insists upon retaining the property discharged of any obligation for its payment. Its contention is that the plaintiffs sold to Haldeman and that Haldeman sold to it, and that inasmuch as the terms of the original proposition of October 19, 1886, were not complied with, a new agreement was made on August 18, 1887, by which the plaintiffs were to pass a title "free from all charges and incumbrances," and to rely for their security upon a portion of the stock of the grantee deposited with one of its directors. But the provision that the property should be free from charges and incumbrances obviously refers to prior charges and incumbrances, and does not exclude any which arise out of the conveyance itself. It means simply that the grantors shall have removed all burdens which rested upon the property prior to the time of making their deed, and that that deed shall pass the title perfect and unencumbered, but not that the grantee shall take it free from all obligation of payment or discharged from the lien for the purchase price which rests upon real estate until such price is paid. The language of the covenants in the deed is in harmony with this thought; for, after the covenant of seizin and of the right to sell, follows one that the premises "are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances of whatever kind or nature soever." It will be noticed that this agreement was not be-

tween the grantors and grantee, but between the grantors and a third party who was seeking to accomplish, with profit to himself, a sale from the plaintiffs to the defendant at the price they demanded, and who was seeking to utilize the stock of the defendant in securing money for the cash part of the consideration. There is no presumption from the delivery of the deed that the plaintiffs intended to waive their lien for the purchase money. Indeed, it is characteristic of a vendor's lien, as distinguished from a contract lien, that it arises upon a transfer of title. It is a doctrine of equitable jurisprudence which says that land, which is immovable, is the best security for its own price, and that title thereto should therefore pass subject to the equitable burden of such security. The actual conveyance of the title to the company was not for the interest or the benefit of the plaintiffs. They were not thereby placed in any better position or given any new advantage. It is said that the agreement in terms provides that 375,000 out of 400,000 shares of stock in the defendant company shall be transferred to one of its directors, as trustee for the plaintiffs, and held as security for the payment to them of the unpaid purchase money; but the obligation of the company, its duty to pay, an obligation and a duty resting upon it as the representative of all its shares of stock, are clearly of more value than the security obtained by the deposit of a portion of its shares. For, in the one case, even if there were no personal liability of the stockholders, the promise of the company could be enforced to the extent of the appropriation of all of its property, and thus the exhaustion of the value of all its shares, while in the other the transfer of a portion of its shares of stock would enable the vendor in case of a failure of payment to obtain relief, not to the full extent of the property owned by the corporation, but only to that fractional portion thereof, represented by the number of such shares. It must be borne in mind that this corporation had no other properties than these mines. It had a nominal capital stock of 400,000 pounds, with authority, apparently, to increase it without limit; yet this thing of paper contends that it bought of Haldeman

these valuable mining properties upon the sole consideration of $\frac{15}{16}$ths of its shares of stock, and that the plaintiffs sold to Haldeman, and intended by their agreement and conveyance to part absolutely with the title, to abandon every lien, and trust for the payment of the purchase money entirely to the security of these shares, transferred to one of the directors of the corporation. It will be perceived that at first there was not even this security, for the agreement provides for the registry of the title not upon the issue, transfer, and deposit of the shares, but upon the deposit with Wells, Fargo & Co. of 10,000 pounds. Is it to be supposed that they delivered the deed upon the deposit of that money to their credit, and, waiving all lien upon the property, were relying alone upon the promise of Haldeman to obtain from the company (their vendee) the issue of 375,000 shares, and to then make transfer to Elder and deposit with Wells, Fargo & Co.? If there had been no stipulation in respect to the control of the property it would be difficult to sustain the contention that the provision for the transfer and deposit of a portion of the shares of the company was sufficient evidence of an intent to abandon the vendor's lien. But the agreement furnishes direct evidence to the contrary. It is made by J. Fenton Seymour, "acting for himself and partners, the owners" of the property, (the plaintiffs in this case,) and contains this clause: "The said J. Fenton Seymour hereby undertakes and agrees to take the control of the management of the said property until the payments hereinafter mentioned are completed, and it is understood and agreed that he shall retain such control until the said payments are completed." This negatives the idea that the plaintiffs were relying for the payment of the unpaid purchase money solely upon the security of these shares of stock. It is an express affirmation that their dominion over the property is not to cease until the purchase money is all paid. It thus makes the property itself the security for the price. In the face of this stipulation it would require very cogent testimony to convince any one that the plaintiffs had abandoned all lien upon the property itself, and were resting alone upon the security of the shares.

There is no such testimony; nothing which makes against this express purpose of the plaintiffs to retain control of the property until the purchase price was paid.

The transaction with what is called in the record the Scotch syndicate does not seem to us to have the significance which counsel contends, and this notwithstanding the recitals in the agreement respecting it. That transaction was this: The 10,000 pounds which, by the agreement of August 18, 1887, Haldeman was to pay immediately, were advanced by that syndicate, and on the 19th of August, the day after the contract between Haldeman and Seymour, Seymour entered into an agreement with the representatives of the syndicate that 75,000 of the 375,000 shares should be held for its benefit. This, instead of supporting defendant's contention, tends to show that the plaintiffs were not relying upon these shares as their security, but, having a lien upon the property itself, were willing that Haldeman, or the corporation, should use the shares for the purpose of securing money with which to make payment. And while there is in the agreement signed by J. Fenton Seymour a recital which, to some extent, makes against the claim of the plaintiffs in that it states that by the agreement of August 18 the company was to issue to John Haldeman 375,000 fully paid up shares "in payment in full for the said mines against a clean transfer of the property to the company free of all incumbrances and liabilities whatsoever," yet that recital is qualified by that which follows immediately thereafter, to the effect that the shares are "to be transferred to the said Clarence P. Elder, a director of the company, as trustee for behoof of all concerned," and also to be deposited with Wells, Fargo & Co. "as a guarantee for the fulfilment by the said John Haldeman of the terms of said agreement so far as incumbent upon him, all as fully set forth in the said agreement."

These last words refer to the agreement of August 18 as disclosing fully the agreement between the plaintiffs, Haldeman, and the defendant. Evidently there was no thought in this of enlarging the scope or adding to the significance of that agreement. If it be said that here is an interpretation by the

parties of its meaning, it will be seen that all that it asserts is that the corporation transfers to Haldeman the shares in full payment for the property. Or, in other words, that it leaves to him the perfecting of the title free from incumbrances, and in consideration therefor issues the 375,000 shares. It contains no assertion, directly or by implication, that the plaintiffs either take these shares in payment or accept them as the only security for payment. It recites that they are transferred to the trustee, not for the plaintiffs, but for behoof of all concerned, thus plainly implying that they are to be used by Haldeman with the assent of the plaintiffs as a means of obtaining money for the purpose of completing the payment to them; but there is in none of these recitals, either in terms or by fair implication, an agreement or a statement on the part of the plaintiffs that they forego their vendor's lien, and that they intend to look thereafter simply to those shares and to the good faith of the trustee and the depositary for the payment of the purchase price. There surely is in all this nothing to convince that the plaintiffs intended to abandon the lien upon the property which existed when they executed the deed to the company and which the agreement for a retention of control by their agent directly asserted.

We see, therefore, no reason to question the conclusions reached by the Circuit Court, and its decree is

Affirmed.

SEYMOUR *v.* SLIDE AND SPUR GOLD MINES.

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

No. 263. Argued March 15, 1894. — Decided May 14, 1894.

One who holds possession of real estate as manager for or under another cannot, when sued in ejectment by his principal, dispute the principal's title.

When such agent admits the relation and the title of his principal, there is no impropriety in the court's directing a verdict for the plaintiff.

The State only can challenge the right of a foreign corporation to take and hold real estate within its limits.

Opinion of the Court.

THIS was an action in the nature of an action of ejectment, commenced October 18, 1889, by the Slide and Spur Gold Mines, (Limited,) in the Circuit Court of the United States for the District of Colorado, to recover the possession of the mining properties which were the subject of the controversy in the case just decided, wherein said company was appellant, and Ellen R. Seymour, the wife of defendant, and William G. Pell, were appellees. The complaint was in the ordinary form, alleging that the plaintiff was seized in fee of the premises, and that the possession was wrongfully detained by the defendant. The answer, besides a general denial of the allegations of the complaint, set forth at length the transactions between Mrs. Seymour and Mr. Pell, the prior owners of the properties, and the plaintiff, which were noted in the opinion in the former case. A reply having been filed, the case, on June 28, 1890, went to trial before a jury. Under direct instructions from the court, the jury returned a verdict for the plaintiff. Judgment having been entered thereon, defendant sued out this writ of error.

Mr. Willard Teller, (with whom was *Mr. Harper M. Orahood* on the brief,) for plaintiff in error.

Mr. Harvey Riddell for defendant in error.

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

The pleadings put in issue all questions of fact. Outside of the pleadings the only matter before the jury was a deposition of the defendant, taken in a prior litigation between the same parties. In that deposition he admitted that he had been in possession of the property as a managing director; that he at no time denied the right of the company to the possession of the property, and that his term as managing director had expired. There was nothing in the deposition to qualify this admission. There was, therefore, no impropriety in the court's directing a verdict for the plaintiff. *Jackson* v. *Dennison*, 4

Wend. 558. One who holds possession of real estate as manager for or under another cannot dispute that other's title. *Johnson* v. *Baytup*, 3 Ad. & El. 188; *Phelan* v. *Kelley*, 25 Wend. 389, 393. The estoppel is like to that which arises in the case of landlord and tenant, and comes within the scope of the general rule that an agent in possession cannot deny the title of his principal.

Neither is it necessary to inquire into the right of the plaintiff as a foreign corporation to take and hold title to real estate in Colorado, a question which, in some of its aspects, was before this court in the case of *Fritts* v. *Palmer*, 132 U. S. 282; for if, by so doing, any laws of the State are violated, the State is the one to challenge the act, (Devlin on Deeds, § 127, and cases cited in note,) and it does not lie in the mouth of the agent of the corporation to raise the question.

The judgment is, therefore,

Affirmed.

LUXTON v. NORTH RIVER BRIDGE COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 1040. Submitted January 5, 1894. — Decided May 14, 1894.

Congress, under the power to regulate commerce among the States, may create a corporation to build a bridge across navigable water between two States, and to take private lands for the purpose, making just compensation.

The act of July 11, 1890, c. 669, to incorporate the North River Bridge Company, and to authorize the construction of a bridge across the Hudson River between the States of New York and New Jersey, is constitutional.

THIS was a petition by the North River Bridge Company, incorporated by the act of Congress of July 11, 1890, c. 669, (the material part of which is copied in the margin,[1]) for the

[1] AN act to incorporate the North River Bridge Company, and to authorize the construction of a bridge and approaches at New York City across

appointment under that act of commissioners to assess damages for the appropriation and condemnation, for the approaches to

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the Hudson River, to regulate commerce in and over such bridge between the States of New York and New Jersey, and to establish such bridge a military and post road.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That authorization is hereby given to Jordan L. Mott, John King McLanahan, James Andrews, Thomas F. Ryan, Garrett A. Hobart, F. W. Roebling, Charles J. Canda, Edward F. C. Young, Henry Flad, Gustav Lindenthal, A. G. Dickinson, John H. Miller, William Brookfield, Samuel Rea, William F. Shunk, Philip E. Chapin, and their associates, as a corporation as hereinafter provided, to locate, build, maintain, equip and operate a bridge, proper approaches thereto, and terminals, appurtenances and works connected therewith, across the Hudson River in and between the city of New York, in the State of New York, and the State of New Jersey, and to lay tracks thereon for the connection of the railroads on either side of said river, in order to facilitate interstate commerce in the transportation of persons and property, and for vehicle, pedestrian, postal, military and other purposes: Provided, that said bridge shall have not less than six railroad tracks, with a capacity for four additional tracks for future enlargement, and shall be constructed with a single span over the entire river between the towers, located between the shore and the established pier head lines in either State, and at an elevation above the river not less than that of the existing Brooklyn suspension bridge over the East River, and which elevation may be increased by the Secretary of War as hereinafter provided, and that no pier or other obstruction to navigation, either of a temporary or permanent character, shall be constructed in the river between said towers.

SEC. 2. That the construction of said bridge shall be commenced within three years after the passage of this act, and shall be completed within ten years after the commencement of construction. But that the Secretary of War is hereby authorized to extend the time for the commencement of construction for two additional years upon cause shown by the company, and provided that the Secretary of War shall deem such cause sufficient and satisfactory; and that, if the company fail to commence the construction of said bridge within the time so extended, this act shall be null and void. And the company, at least three months previous to commencing the erection of said bridge, shall submit to the Secretary of War a plan of the bridge, with a detailed map of the river at the proposed site of the bridge, and for the distance of one half of a mile above and below the site, with such other information as the Secretary of War may require for a full and satisfactory understanding of the subject. And the Secretary of War may, upon receiving said plans and map and other information, order a hearing before a board of engineers, appointed by him for taking testimony of persons interested in railroads and navigation, relative to the clear height of

its bridge across the Hudson or North River, between the States of New York and New Jersey, of land of Sarah Luxton

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the superstructure above ordinary high water. Such clear height shall not be less than that named in section one of this act, and the Secretary of War may thereupon order such additional clear height as he shall deem necessary for the security of navigation. And he is hereby authorized and directed, upon being satisfied that a bridge built on such plan and at said locality will conform to the conditions of this act, to notify the said company that he approves the plans therefor; whereupon said company may proceed to the erection of said bridge. But until the Secretary of War approve the plan and location of said bridge the erection of the same shall not be commenced; and should any change be made in the plan of the bridge during the progress of the work thereon, such change shall likewise be subject to the approval of the Secretary of War.

SEC. 3. That the bridge, with its approaches and railroad thereover, constructed under the provisions of this act, shall be a lawful structure, and a military and post road, but no toll charges shall be made for the transmission over the same of the mails of the United States, or for the right of way for the United States postal telegraph purposes.

SEC. 4. That for the purpose of carrying into effect the objects stated in this act, the persons named in the first section hereof, and their associates, are hereby constituted and created a body corporate in law, to be known as the North River Bridge Company, and by that name, style and title shall have perpetual succession; may sue and be sued, implead and be impleaded, complain and defend in all courts of law and equity, of record and otherwise; may make and have a common seal, and shall have and possess all rights, powers, franchises and privileges incident to or usually possessed by such companies. It may receive, purchase, and also acquire by lawful appropriation and condemnation, upon making proper compensation therefor, to be ascertained according to the laws of the State within which the same is located, real and personal property and rights of property, and may mortgage, encumber, charge, pledge, grant, lease, sell, assign and convey the same. And to aid in the construction of said bridge and approaches thereto, and railroad terminals, appurtenances and works connected therewith, and to carry out the purposes of this act, the said North River Bridge Company is hereby authorized to issue its bonds, and secure the same by mortgage on its property and rights of property, of all kinds and descriptions, and its franchise to be a corporation. And generally and specially for the fully carrying out of the purposes and intentions of this act, the said North River Bridge Company, and its successors, shall have and possess all such rights and powers to enter upon lands, and for the purchase, acquisition, condemnation, appropriation, occupation, possession and use of real estate and other property, and for the location, construction, operation and maintenance of said bridge with its approaches, terminals and appurtenances, as are possessed by railroad or bridge companies in the

in the city of Hoboken and the county of Hudson in the latter State. Upon the order of the Circuit Court, appointing commissioners, she sued out a writ of error, which was dismissed by this court at the last term, because that order was not a final judgment. 147 U. S. 337. The commissioners afterwards made an award and report, assessing her damages at the sum of $2000, to the acceptance of which she objected, upon the ground that the act of Congress was unconstitutional, and particularly that Congress could not confer the right of eminent domain upon the company. But the court overruled the objection, and adjudged that the award be approved and confirmed, and remain of record in the office of its clerk; and that, upon payment or tender of the sum awarded, the company might enter upon and take possession of the land for the purpose for which it was condemned. She thereupon sued out this writ of error.

Mr. Gilbert Collins for plaintiff in error.

Mr. Joseph D. Bedle, for defendant in error.

Mr. Josiah M. Vale, by leave of court, filed a brief on

States of New York and New Jersey, respectively. That all persons, railroad and telegraph companies, respectively, desiring to use said bridge, shall have and be entitled to equal rights and privileges in the passage over and the use of the same, and the approaches thereto, for a reasonable compensation, to be approved by the Interstate Commerce Commission as hereinafter determined, and to be paid to the North River Bridge Company, which is hereby duly empowered to collect the same. And sufficient trackage and terminal facilities shall be provided for all railroads desiring to use said bridge and appurtenances. In case any litigation arises out of the construction, use or operation of said bridge or approaches thereto and railroad thereon, or for the condemnation or the appropriation of property in connection therewith under this act, the cause so arising shall be heard and tried before the Circuit Court of the United States for the judicial district in which the bridge or one of the approaches is located. Applications for condemnation or appropriation of property shall be made in the Circuit Court of the United States for the district in which such property is situated, upon the petition of said company; and the hearing and trial of all other proceedings thereon shall conform as nearly as may be to the practice in the courts of the State, in which such district is situated, in the case of condemnation or appropriation of property for railroads. 26 Stat. 268–270.

behalf of Crevier, a party in like interest with the plaintiff in error.

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

The validity of the act of Congress incorporating the North River Bridge Company rests upon principles of constitutional law, now established beyond dispute.

The Congress of the United States, being empowered by the Constitution to regulate commerce among the several States, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end. As said by Chief Justice Marshall, "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished." Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the States. *McCulloch* v. *Maryland*, 4 Wheat. 316, 411, 422; *Osborn* v. *Bank of United States*, 9 Wheat. 738, 861, 873; *Pacific Railroad Removal Cases*, 115 U. S. 1, 18; *California* v. *Pacific Railroad*, 127 U. S. 1, 39. Congress has likewise the power, exercised early in this century by successive acts in the case of the Cumberland or National Road from the Potomac across the Alleghenies to the Ohio, to authorize the construction of a public highway connecting several States. See *Indiana* v. *United States*, 148 U. S. 148. And whenever it becomes necessary, for the accomplishment of any object within the authority of Congress, to exercise the right of eminent domain and take private lands, making

just compensation to the owners, Congress may do this, with or without a concurrent act of the State in which the lands lie. *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 154, and cases cited; *Cherokee Nation* v. *Kansas Railway*, 135 U. S. 641, 656.

From these premises, the conclusion appears to be inevitable that, although Congress may, if it sees fit and as it has often done, recognize and approve bridges erected by authority of two States across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water. 1 Hare's Constitutional Law, 248, 249. See acts of July 14, 1862, c. 167; 12 Stat. 569; February 17, 1865, c. 38; 13 Stat. 431; July 25, 1866, c. 246; 14 Stat. 244; March 3, 1871, c. 121, § 5; 16 Stat. 572, 573; June 16, 1886, c. 417; 24 Stat. 78.

The judicial opinions cited in support of the opposite view are not, having regard to the facts of the cases in which they were uttered, of controlling weight.

Mr. Justice McLean, indeed, in an opinion delivered by him in the Circuit Court, by which a bill by the United States to restrain the construction of a bridge across the Mississippi River was dismissed, no injury to property of the United States and no substantial obstruction to navigation being shown, and there having been no legislation by Congress upon the subject, took occasion to remark that "neither under the commercial power, nor under the power to establish post roads, can Congress construct a bridge over a navigable water;" that "if Congress can construct a bridge over a navigable water, under the power to regulate commerce or to establish post roads, on the same principle it may make turnpike or railroads throughout the entire country;" and that "the latter power has generally been considered as exhausted in the designation of roads on which the mails are to be transported; and the former by the regulation of commerce upon the high seas and upon our rivers and lakes." *United States* v. *Railroad Bridge Co.*, 6 McLean, 517, 524, 525.

The same learned justice repeated and enlarged upon that idea in his dissenting opinion in *Pennsylvania* v. *Wheeling Bridge*, 18 How. 421, 442, 443, where, after the Wheeling Bridge, constructed across the Ohio River under an act of the State of Virginia, had by a decree of this court, at the suit of the State of Pennsylvania, been declared to be in its then condition an unlawful obstruction of the navigation of the river, and in conflict with the acts of Congress regulating such navigation, and therefore ordered to be elevated or abated, Congress passed an act, declaring the bridge to be a lawful structure in its then position and elevation, establishing it as a post road for the passage of the mails of the United States, authorizing the corporation to have and maintain the bridge at that site and elevation, and requiring the captains and crews of all vessels and boats navigating the river to regulate the use thereof, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation and construction of the bridge. Act of August 31, 1852, c. 111, §§ 6, 7; 10 Stat. 112.

But the majority of this court in that case held that "the act of Congress afforded full authority to the defendants to reconstruct the bridge." 18 How. 436. Mr. Justice Nelson, in delivering its opinion, said: "We do not enter upon the question, whether or not Congress possess the power, under the authority of the Constitution to establish post offices and post roads, to legalize this bridge; for, conceding that no such powers can be derived from this clause, it must be admitted that it is, at least, necessarily included in the power conferred to regulate commerce among the several States. The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation; and that power, as we have seen, has been exercised consistently with the continuance of the bridge." 18 How. 431. And Mr. Justice Daniel, in a concurring opinion, sustaining the validity of the act of Congress, said: "They have regulated this matter upon a scale by them conceived to be just and impartial, with reference to that commerce which pursues

the course of the river, and to that which traverses its channel, and is broadly diffused through the country. They have at the same time, by what they have done, secured to the government, and to the public at large, the essential advantage of a safe and certain transit over the Ohio." 18 How. 458. A similar decision was made in *The Clinton Bridge*, 10 Wall. 454. See also *Miller* v. *New York*, 109 U. S. 385.

In the cases, cited at the bar, of *The Passaic Bridges*, 3 Wall. appx. 782, decided by Mr. Justice Grier in the Circuit Court, and of *Gilman* v. *Philadelphia*, 3 Wall. 713, and *Wright* v. *Nagle*, 101 U. S. 791, in this court, the bridge in question had been erected under authority of a State and was wholly within the State, and no question arose, or was considered, as to the power of Congress, in regulating interstate commerce, to authorize the erection of bridges between two States.

But in *Stockton* v. *Baltimore & New York Railroad*, 32 Fed. Rep. 9, Mr. Justice Bradley, sitting in the Circuit Court, upheld the constitutionality of the act of Congress of June 16, 1886, c. 417, authorizing a corporation of New York and one of New Jersey to build and maintain a bridge, as therein directed, across the Staten Island Sound or Arthur Kill. 24 Stat. 78.

The reasons upon which the decision in that case rested were, in substance, the same as were stated by that eminent judge in two opinions afterwards delivered by him in behalf of this court, in which the power of Congress, by its own legislation, to confer original authority to erect bridges over navigable waters, whenever Congress considers it necessary to do so to meet the demands of interstate commerce by land, is so clearly demonstrated, as to render further discussion of the subject superfluous.

In *Willamette Bridge* v. *Hatch*, 125 U. S. 1, in which it was held that section 2 of the act of February 14, 1859, c. 33, (11 Stat. 383,) for the admission of Oregon into the Union, providing that "all the navigable waters of the 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,"

did not prevent the State, in the absence of legislation by Congress, from authorizing the erection of a bridge over such a river, Mr. Justice Bradley, speaking for the whole court, said: "And although, until Congress acts, the States have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject-matter, that the consent of Congress is so frequently asked in the erection of bridges over navigable streams. It might itself give original authority for the erection of such bridges, when called for by the demands of interstate commerce by land; but in many, perhaps the majority of cases, its assent only is asked, and the primary authority is sought at the hands of the State." 125 U. S. 12, 13.

In *California* v. *Pacific Railroad*, 127 U. S. 1, it was directly adjudged that Congress has authority, in the exercise of its power to regulate commerce among the several States, to authorize corporations to construct railroads across the States, as well as the Territories of the United States; and Mr. Justice Bradley, again speaking for the court, and referring to the acts of Congress establishing corporations to build railroads across the continent, said: "It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the

Cumberland or National Road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed, and led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress over the Territories of the United States, and its power to grant franchises exercisible therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of state as well as Federal corporations." 127 U. S. 39, 40.

The act of Congress now in question declares the construction of the North River Bridge between the States of New York and New Jersey to be "in order to facilitate interstate commerce;" and it makes due provision for the condemnation of lands for the construction and maintenance of the bridge and its approaches, and for just compensation to the owners, which has been accordingly awarded to the plaintiff in error.

In the light of the foregoing principles and authorities, the objection made to the constitutionality of this act cannot be sustained.

Judgment affirmed.

MILLER *v.* TEXAS.

ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

No. 1166. Submitted April 23, 1894. — Decided May 14, 1894.

This court expresses no opinion as to the validity or invalidity of the writ of error in this case.

When the record in a case brought by writ of error from a state court shows nothing of what took place in the state court of original jurisdiction, and in the appellate state court no objection raising a Federal question during the trial and before judgment, but such question is raised for the first time in the appellate court on a motion for a rehearing, the writ of error must be dismissed upon the ground that the Federal question is not properly presented by the record.

MOTION to dismiss. The plaintiff in error was indicted by the grand jury of Dallas County, Texas, for the murder of one Riddle on June 18, 1892. He was convicted July 23, 1892, and sentenced to death. From the judgment of the District Court of Dallas County, before which he was tried, he appealed to the Court of Criminal Appeals of Texas, the court of last resort in criminal cases, where the judgment of the court below was affirmed. A motion for a rehearing was then made and overruled. Defendant thereupon sued out this writ, assigning as error that the statute of the State of Texas prohibiting the carrying of dangerous weapons on the person, by authority of which statute the court charged the jury that, if defendant was on a public street carrying a pistol, he was violating the law, infringed the right of the defendant as a citizen of the United States, and was in conflict with the Second Amendment to the Constitution of the United States, providing that the right of the people to keep and bear arms shall not be infringed; *second*, that the same statute, which provided that any person carrying arms in violation of the previous section, might be arrested without warrant, under which the court charged the jury that defendant, if he were carrying arms in violation of the statute, was subject to arrest

without warrant, was in contravention of the Fourth Amendment of the Constitution, which provides that the right of the people to be secure in their persons against unreasonable searches and seizures shall not be violated; and of the Fifth and Fourteenth Amendments, which provide that no person shall be deprived of life, liberty, or property without due process of law, and that no State shall pass or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Mr. C. A. Culberson, Attorney General of the State of Texas, for the motion.

Mr. J. Abbott and *Mr. Robert B. Seay* opposing.

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

Motion is made to dismiss the writ of error in this case upon the ground that it was issued and signed by the clerk of the Court of Criminal Appeals of Texas, and was, therefore, insufficient to give this court jurisdiction, and the case of *Bondurant* v. *Watson*, 103 U. S. 278, is cited as authority for the position. In that case, however, the writ ran in the name of the Chief Justice of the Supreme Court of the State, to the clerk of that court, was tested in the name of the Chief Justice of the Supreme Court of the State, signed by its clerk, and sealed with the seal of that court. "It had not," said the court, "a single requisite of a writ of this court." Revised Statutes, § 999, provides that when a writ of error "is issued by the Supreme Court to a state court, the citation shall be signed by the chief justice, or judge, or chancellor of such court, rendering the judgment or passing the decree complained of, or by a Justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice." And by § 1003, "writs of error from the Supreme Court to a state court in cases authorized by law shall be issued in the same manner, and under the same regulations,

and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

In this case the writ runs in the name of the President of the United States, to the judges of the Court of Criminal Appeals, is tested in the name of the Chief Justice of the Supreme Court of the United States, signed by the clerk of the Court of Criminal Appeals, and allowed by its presiding judge. If there was any error, it was in the signature of the writ by the clerk of the Court of Appeals, instead of by the clerk of this court, or of the Circuit Court of the United States for the proper district, *Ex parte Ralston*, 119 U. S. 613, and such error would be amendable under § 1005, which provides that the Supreme Court may allow an amendment of a writ of error in all particulars of form. *Texas & Pacific Railway* v. *Kirk*, 111 U. S. 486. Of a similar mistake it was said in *McDonogh* v. *Millaudon*, 3 How. 693, 707: "If errors had been assigned by the plaintiff here and joined by the defendant, no motion to dismiss for such a cause could be heard." But the court express no opinion as to whether the error was, in itself, cause for dismissal. As was said in *Ex parte Ralston*, it has doubtless "been the prevailing custom from the beginning for the clerk of this court, or of the Circuit Court for the proper district, to issue the writ, and for such writ to be lodged with the clerk of the state court," but it has never been held that the signature of the clerk of the state court was fatal to the writ. On the contrary, it was held in *Sheppard* v. *Wilson*, 5 How. 210, that the act of 1838, providing that writs of error and appeals from the final decisions of the Supreme Court of a Territory, should be allowed in the same manner and under the same regulations as from the Circuit Courts of the United States, gave to the clerk of the territorial court the power to issue the writ of error, and to a judge of that court the power to sign the citation, and approve the bond.

Without, however, expressing a decided opinion upon the invalidity of the writ as it now stands, we think there is no Federal question properly presented by the record in this

case, and that the writ of error must be dismissed upon that ground. The record exhibits nothing of what took place in the court of original jurisdiction, and begins with the assignment of errors in the Court of Criminal Appeals. In this assignment no claim was made of any ruling of the court below adverse to any constitutional right claimed by the defendant, nor does any such appear in the opinion of the court, which deals only with certain alleged errors relating to the impanelling of the jury, the denial of a continuance, the admission of certain testimony, and certain exceptions taken to the charge of the court. In his motion for a rehearing, however, defendant claimed that the law of the State of Texas forbidding the carrying of weapons, and authorizing the arrest without warrant of any person violating such law, under which certain questions arose upon the trial of the case, was in conflict with the Second and Fourth Amendments to the Constitution of the United States, one of which provides that the right of the people to keep and bear arms shall not be infringed, and the other of which protects the people against unreasonable searches and seizures. We have examined the record in vain, however, to find where the defendant was denied the benefit of any of these provisions, and even if he were, it is well settled that the restrictions of these amendments operate only upon the Federal power, and have no reference whatever to proceedings in state courts. *Barron* v. *Baltimore*, 7 Pet. 243; *Fox* v. *Ohio*, 5 How. 410; *Twitchell* v. *Commonwealth*, 7 Wall. 321; *Justices* v. *Murray*, 9 Wall. 274; *United States* v. *Cruikshank*, 92 U. S. 542, 552; *Spies* v. *Illinois*, 123 U. S. 131.

And if the Fourteenth Amendment limited the power of the States as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court. In *Spies* v. *Illinois*, 123 U. S. 131, 181, objection was made that a certain letter was obtained from the defendant by an unlawful seizure, and the constitutional immunity was set up in the Supreme Court of Illinois, as well as in this court, but it was not made on the trial in the court of original jurisdiction. It was held, both

by the Supreme Court of Illinois and by this court, that the defence should have proven that the letter was unlawfully seized by the police, and should then have opposed its admission upon the ground that it was obtained by such unlawful seizure. Said the Chief Justice: "As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more. . . . If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is concerned." So in *Texas Pacific Railway* v. *Southern Pacific Co.*, 137 U. S. 48, it was held directly that a privilege or immunity under the Constitution of the United States cannot be set up here under Revised Statutes, § 709, when suggested for the first time in a petition for rehearing after judgment. See also *Caldwell* v. *Texas*, 137 U. S. 692, 698.

There was no other question under the Fourteenth Amendment to the Constitution. As the proceedings were conducted under the ordinary forms of criminal prosecutions there certainly was no denial of due process of law, nor did the law of the State, to which reference was made, abridge the privileges or immunities of *citizens of the United States*, as such privileges and immunities are defined in the *Slaughter-house Cases*, 16 Wall. 36; and in *Crandall* v. *Nevada*, 6 Wall. 35; and *Ward* v. *Maryland*, 12 Wall. 163.

The writ of error is, therefore,

Dismissed.

Statement of the Case.

ANVIL MINING COMPANY *v.* HUMBLE.

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

No. 323. Argued March 26, 27, 1894. — Decided May 14, 1894.

A provision in a contract for the mining, removing, and loading by the party of the first part of ore from a mine of the party of the second part, that the party of the second part may be at liberty to terminate it at any time when he shall be satisfied that the system employed by the party of the first part is prejudicial to the welfare and development of the mine, and that, in that event, there shall be a reference to determine the damages sustained by the party of the first part by reason of the termination, does not give the party of the second part a right arbitrarily to terminate the contract, but only to do so when it is determined that the system employed is prejudicial to the future welfare and development of the mine.

A contract made for the extract of ore from the first level of a mine provided that the ore should contain at least 56 per cent of metallic iron. Subsequently the parties extended the contract so as to include the ore contained on and above the second and third levels, with the exception that the ore extracted under this contract should contain at least 58 per cent of metallic ore. *Held*, that this stipulation was applicable only to the ore taken from the second and third levels.

Whenever one party to a contract is guilty of such a breach as is here attributed to the defendant the other party may treat the contract as broken, and may abandon it, and recover as damages the profits he would have received through full performance, which measure of profits was within the intent of both parties when the contract was made, and could be ascertained without difficulty.

A letter of a party to the suit bearing upon the issues introduced in evidence against him, may be explained by him as a witness in his own behalf, and its effect upon the issues and the force of the explanation are proper subjects for the consideration of the jury.

By the terms of the contract in this case the amount due the plaintiffs from time to time was to be determined by the weigh-bills, which were in the possession of the defendant's bookkeeper. The plaintiff applied to the bookkeeper for information on this point, and received a reply. *Held*, that that was competent evidence on that point.

On May 1, 1888, John Humble, Joseph H. Johns, and James Johns, who were partners doing business under the firm name of Johns Brothers & Humble, entered into a contract with the Anvil Mining Company for mining iron ore.

Statement of the Case.

The provisions of the contract, so far as they are material are that "they, the said party of the first part, shall and will in a good and workmanlike manner, and at their own proper charge and expense, mine, remove, and load into the skips all the merchantable iron ore contained on or above the first level of the mine now owned and worked by the said Anvil Mining Company at its No. 1 shaft, in said township of Bessemer. The said ore shall be mined and removed by what is known as the caving system, and the ore removed shall be at least seventy-five per cent (75 per cent) of the merchantable iron ore contained on or above said first level, and shall be worked, taken out, and removed in such manner as not to interfere with the future workings and development of said mine. Said party of the first part shall work said mine to its full capacity, and remove the ore therefrom without unnecessary delay, and shall mine from said level at least two hundred (200) tons of merchantable iron ore per day; that is, the average amount of ore removed each month shall not be less than two hundred (200) tons per day.

"It is understood and agreed between the parties hereto that should it be determined by said second party that the ore from the second and third levels of said mine can be removed and extracted by the caving system of mining, or by the same system practised in removing the ore from the said first level, that this contract, at the option of said second party, shall extend to and include the ore contained on and above the second and third levels of said mine.

"It is also agreed that it shall be entirely optional with said party of the second part to extend the contract to the ore below the second level, and that the said party of the second part shall have the right of terminating this contract and the said system of mining at any time when said second party shall decide that said system is prejudicial to the future welfare and development of said mine; equitable compensation to be made said party of the first part for damage suffered by them by reason of the said party of the second part so terminating this contract, and should said parties be unable to agree upon the basis of settlement, then the matter

shall be left to two disinterested mining superintendents, one to be chosen by the party of the first part, and the other to be chosen by the party of the second part, and in case said referees fail to agree, they shall choose a third, and the decision of said referees, or the majority of them, shall be final and conclusive upon the parties hereto as to the compensation to be made said party of the first part because of the termination of this contract.

"The said party of the first part agrees that the said party of the second part shall have the use of number one shaft for the purpose of raising either rock or ore from said mine, in the sinking of said shaft and developing said mine below the first level. This privilege to use number one shaft is to be considered to apply only to the removal of ore, rock, or other material necessary to be taken out in sinking said shaft, and in drifting, cross-cutting, and opening the lower levels.

"The ore to be taken out by said party of the first part under this contract shall be merchantable iron ore, containing at least fifty-six (56) per cent or upwards of metallic iron, and no ore of lower grade shall be accepted or paid for by the said party of the second part.

"The said party of the first part are to mine said ore and place the same in the skips at No. 1 shaft in said mine, ready for hoisting, the ore to be hoisted at the expense of the said party of the second part, who agree to furnish all necessary power to properly run the skip in said No. 1 shaft for the purpose of hoisting the ore mined and placed therein by the parties of the first part, but this covenant shall not deprive the party of the second part of the right to use said skip for the purposes and in the manner hereinbefore provided. In case of any accident to said machinery, said party of the second part shall not be liable for any damages sustained by said party of the first part caused by delay in replacing or repairing said machinery, provided the said party of the second part shall cause the same to be replaced or repaired with all reasonable diligence.

"The said party of the first part are to take out all the ore which can possibly be taken out under the caving system of

Statement of the Case.

mining, and in no case shall the amount taken out be less than seventy-five (75) per cent of the ore contained therein, as above agreed.

"The party of the second part are to have the right or privilege of superintending and directing said work, and for that purpose to enter said mine and inspect the works thereof at any time, for the purpose of seeing that the work is properly conducted by the said first party, and that the work so done is not prejudicial to the future interest and working of said mine.

"It is further expressly stipulated and agreed that the said party of the second part shall not, under any circumstances, be liable for any damage or injury to either person or property by reason of the carelessness or negligence of the said party of the first part or of their workmen, apprentices, or other persons in their employ, in the furtherance of this contract, and that the said party of the first part shall and will indemnify and forever save harmless the said party of the second part from all actions, claims, suits, and damages by reason thereof. In consideration whereof the said party of the second part covenants and agrees to and with the said party of the first part to pay to them, the said party of the first part, the sum of sixty cents (60 cts.) for each and every gross ton of merchantable iron ore mined and removed by the said party of the first part from the said mine under this contract, each gross ton to contain two thousand two hundred and forty (2240) pounds avoirdupois. The amount of ore shipped from said premises, and the amount due said party of the first part therefor shall be determined by and based upon the weights as ascertained by the reports of the railroad company or companies, made to said party of the second part, of the shipment of the ore from said mine, in case of the shipment of the ore so mined from said premises."

This contract was subsequently extended by the following stipulation, dated the 10th day of July, 1888:

"It is mutually agreed by the parties to the within agreement that this contract shall extend to and include the ore contained on and above the second and third levels, as named

therein, with the exception that the merchantable iron ore extracted under this contract shall contain at least 58 per cent (fifty-eight per cent) or upwards of metallic iron."

The firm commenced the work soon after this contract was entered into and continued it until the 11th of October of that year. On February 11, 1889, they began this action in the Circuit Court of the State of Michigan for the county of Gogebic, to recover for work done and damages sustained. The defendant removed the case to the Federal court, where issue was joined, and the case went to trial before a jury, which, on September 16, returned a verdict for the plaintiffs in the sum of $5943.79. Pending the proceedings in the trial court one of the plaintiffs, Joseph H. Johns, died, and the suit was revived in the name of John Humble and James Johns, the surviving partners. Upon the verdict as returned judgment was entered, and to reverse such judgment the defendant sued out this writ of error.

Mr. Daniel H. Ball and *Mr. James G. Flanders* for plaintiff in error.

I. The contract sued upon was by its terms liable to be terminated. Neither party was bound to continue it, and neither would be entitled to damage against the other for terminating it, except compensation as provided by the terms of the contract.

The right was reserved by the mining company, in the contract, to terminate it whenever it should decide that the system of mining was injurious to the mine. That was left entirely with the mining company to determine. Its decision was conclusive. As it had the power to stop the work at any time, the plaintiff, of course, had the same right. They could not be bound to continue the work, while the company was at liberty at any time to decide that the system was prejudicial, and stop the work. *Finley Shoe & Leather Co.* v. *Kurtz*, 34 Michigan, 90; *Wilkinson* v. *Heavenrich*, 58 Michigan, 574; *Utica & Schenectady Railroad* v. *Brinckerhoff*, 21 Wend. 139; *S. C.* 34 Am. Dec. 220; *Lester* v. *Jewett*, 12 Barb. 502; *Dorsey* v. *Packwood*, 12 How. 126, 136.

Argument for Plaintiff in Error.

II. After the modification of the contract, July 10, all the ore to be taken out under the contract from any part of the mine was required to contain 58 per cent of metallic iron.

III. Under the facts in this case the damages claimed for loss of profits were too uncertain, contingent, and conjectural to found a verdict upon.

Whether any profits could be made on any ore left in the mine — or rather, whether any profit could be made in taking out all the ore of the required quality, whether 56 or 58 per cent on the first level, depended on so many unknown and uncertain conditions, that no estimate could be made of it, nor could any verdict be given therefor other than one based on pure guess work. *McKinnon* v. *McEwan*, 48 Michigan, 106; *Allis* v. *McLean*, 48 Michigan, 428.

IV. The court charged the jury substantially that if the defendant wantonly, carelessly, or negligently interfered with and hindered the plaintiffs about their work, so as to make it difficult to perform their contract, and greatly decrease the profits of it, the plaintiffs might abandon the contract, and still recover such damages as they suffered by being hindered and prevented from performing it. The error was in holding that one party to a contract, in case of failure of the other party to perform it, may abandon (*i.e.* rescind) the contract, and at the same time claim damages for being prevented from performing — or completing — it.

In the case supposed the plaintiffs would doubtless have the right to abandon or rescind the contract — refuse to proceed with it, or to continue, under the difficulties they were then wrongfully subjected to, and recover damages, under the contract, for the hindrance and delay. But the charge holds that a party may rescind — or abandon — a contract, and at the same time recover for the stoppage, on the theory that the contract remains in force. The correct rule is stated by Justice Christiancy, in the case of *Hubbardston Lumber Co.* v. *Bates*, 31 Michigan, 158, 169, as follows: "Plaintiff cannot rescind the contract, and then insist on damages for not performing; for where a contract is rescinded, an action will not lie for the breach of it." See also *Van*

Trott v. *Weise*, 36 Wisconsin, 439, 448; *Hunt* v. *Selk*, 5 East, 449.

V. The plaintiff Humble was allowed, against the objection of the defendant below, to testify to statements made by defendant's bookkeeper, to the effect that the superintendent of the company had forbidden him to show the railroad weighbills of the ore shipped, which were, by the contract, made evidence. There was no evidence that the bookkeeper was authorized to act for the company in any way. He was not an agent in any sense.

VI. Humble was also allowed to testify to the profits the plaintiffs had made on mining the ore they did mine, as evidence of what they might have made on what was left. This was erroneous for the reasons hereinbefore discussed, and also because past profits are no guide to what might have been made thereafter. *Masterton* v. *Mt. Vernon*, 58 N. Y. 391.

VII. The witness James Johns was allowed to testify that the superintendent Bennett told him "if we struck a good thing in the bottom level to keep it quiet, and they would call an assessment and buy in the stock; could make some money out of it, and get the stock for the assessment." This testimony could have had no other object than to impeach Bennett, who was a witness in the case. It has no bearing whatever on the issue. Its purpose was to make the jury believe that Bennett was engaged in a dishonest conspiracy to defraud the stockholders, and so affect his credibility. It needs no argument to show that this testimony was not allowable for that purpose, and that it was entirely irrelevant for any other purpose.

Mr. Edwin F. Uhl, (with whom were *Mr. Frank Kutts* and *Mr. Birney Hoyt* on the brief,) for defendants in error.

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

The claims of the respective parties, as stated by the court in its charge to the jury, are briefly these: Plaintiffs claimed,

first, an amount unpaid for ore mined in September and October; second, wages which they had paid during certain periods when they were delayed in the prosecution of the work by the fault of the defendant; and third, the profits which they would have made if the defendant had not prevented them from completing the contract. On the other hand, the defendant claimed first, excessive freights paid by reason of a failure on the part of the plaintiffs to produce the ore seasonably; second, damages for a failure to bring out that per cent of the ore which by the contract plaintiffs had agreed to take out of the mine; and third, damages on account of the unskilful working of the mine.

The first claim of the plaintiffs, to wit, for ore mined in September and October, is not disputed. With regard to the second, the court accepted the rule of law agreed upon by counsel for both parties, and, therefore, there is no dispute as to that. The controversy is in respect to plaintiff's claim for profits, and here many questions are discussed by counsel. We shall in our examination of them follow the order in which they are presented in the brief of defendant's counsel. The first objection to any recovery under this claim is that by the very terms of the contract the defendant was at liberty to terminate it at any time, and hence it is insisted that, even if it did so, plaintiffs were not entitled to recover any profits which they might have made had it not been terminated; that, coupled with the right to terminate, was a special provision, to wit, an award of referees for estimating the damages which the plaintiffs should sustain in consequence of such termination, and that no attempt to secure such an award was alleged or proved. To this it may be replied that the contract did not give to the defendant a right arbitrarily to terminate the contract, but only when it determined that the caving system was "prejudicial to the future welfare and development of the mine," and that there is no pretence that it ever made such determination. On the contrary, the defendant set up as a defence that the plaintiffs abandoned the work and thus broke the contract, and that it suffered great damage thereby, and on the trial the whole

scope of its testimony in this respect was in denial of the charge that it had stopped the plaintiffs from continuing the mining of ore, or in any manner sought to terminate the contract. For aught that appears to the contrary in this record, the defendant, now as ever, believes that the caving system is not only not prejudicial, but the best method of working the mine, and broke the contract with plaintiffs only for the sake of giving it to another party.

A second matter of dispute, and one which bears upon the rightfulness of the conduct of the respective parties pending the work, arises on the construction to be given to the stipulation of July 10. The original contract provided that the ore should contain at least 56 per cent of metallic iron, and that no ore of lower grade should be accepted or paid for by the company. The contention of the defendant is that this stipulation modified the contract so that thereafter all the ore taken from the mine in order to be accepted must contain at least 58 per cent of metallic iron, while the plaintiffs insist that this only applied to the ore from the second and third levels, that from the first level being subject to the provision of the original contract, to wit, 56 per cent of metallic iron. We agree with the plaintiffs in their construction of the stipulation. The original contract was only for removing ore from the first level, the company having, however, the option to extend it to the second and third levels. This stipulation provides for such an extension, but it is made expressly subject to "an exception." The use of the word "exception" indicates that something is taken out from the principal matter provided for in the clause or paragraph in which the word is found, and not that something is taken out of or changed from other provisions in other clauses of the entire contract. It will be borne in mind that this is an independent agreement, made at a subsequent time, though supplemental to and in extension of the original contract. And while for a full understanding of the scope of the obligations created by it, the original contract must be referred to, yet, in determining the import of the language used, it is to be construed as an independent agreement, and when it

makes an extension of the obligations of the plaintiffs to a new matter anything which is stated as an exception is to be taken as an exception to the obligations assumed in respect to this additional matter. If the intent was to change the stipulation as to the first level, some other word than "exception" would unquestionably have been used. It is unnecessary to refer to extrinsic testimony, of which there was some and of great significance, in order to establish the meaning of this stipulation. For, standing by itself, the fair and reasonable construction is that the stipulation as to the increased per cent was applicable only to the ore taken from the second and third levels, while as to the first level there was no change.

A third proposition of defendant is that "under the facts in this case the damages claimed for loss of profits were too uncertain, contingent, and conjectural to found a verdict upon." Profits which are a mere matter of speculation cannot be made the basis of recovery in suits for breach of contract, while profits which are reasonably certain may be. As said by Mr. Justice Lamar, in *Howard* v. *Stillwell & Bierce Manufacturing Co.*, 139 U. S. 199, 206: "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." See also *Cincinnati Gas Company* v. *Western Siemens Company*, 152 U. S. 200.

Now, there was in this case testimony to show the cost of mining each ton of ore, and also the amount of ore remaining in the first level of the mine at the time the work stopped. From these figures the profit which would have been made by the plaintiffs if they had completed the work of mining all the ore on the first level is a mere matter of multiplication.

It is true that the cost of mining the remaining ore might differ from that of mining the ore which had already been taken out. But still, proof of the cost of taking out that which had been mined and of the condition of the mine as it was left, furnished a basis upon which a reasonable estimate could be made as to the cost of extracting the remaining ore. Equally true is it that there was no mathematical certainty as to the amount of ore remaining in the mine. Yet, both plaintiff and defendant furnished testimony as to such amount, and testimony which, while not such as to put it beyond doubt, was sufficient to enable the jury to make a fair and reasonable finding in respect thereto. The case is one, therefore, in which the profits are not open to the objection of uncertainty, and certainly not to that of remoteness, for they would have been the direct result of carrying on the contract to a completion, and were obviously within the intent and mutual understanding of both parties at the time it was entered into.

Again, it is insisted that there was no evidence that the plaintiffs were stopped and prevented from going on with the contract. But this is a mistake; while there is no pretence that the plaintiffs were forcibly removed from the mine, there was testimony that they were directed to quit. One of the plaintiffs, John Humble, gave this account of a conversation held in October with the defendant's superintendent, and their action in consequence thereof:

"We worked from the 9th to the 11th, and then Mr. Bennett stopped me again. We had worked half a day, and at dinner time my partner and I were going together to the dry-house and Mr. Bennett came to us and said: 'You boys can stop in that third level altogether.' 'Well,' says I, 'you mean to bring our tools out?' 'Yes,' says he, 'you can run what ore you have broken in the first level and quit.' Then we went down and stopped the men in the lower level, and commenced to run out what we had in the first level, and we sent out all the tools in the mine and left. We got out all the ore we had broken on the foot-wall lens; there was no more ore left there to break except the pillar."

John Rowe testified that the defendant's superintendent told him that if he could get the plaintiffs out he would let him have the contract, and that by the superintendent's orders he ordered them to stop work. It must be borne in mind that the plaintiffs were making a profit of some thirty cents a ton in carrying on this mining, and it is hardly to be presumed that they were desirous of giving that up, and more reasonable to believe that they quit under compulsion.

In view of the verdict of the jury, which is equivalent to a finding that the defendant had broken the contract, it is unnecessary to inquire as to whether there was any error in the instructions of the court as to damages recoverable by the defendant in case the jury should find that the plaintiffs had broken the contract. It may also be remarked in passing that the court excluded from the consideration of the jury the amount of ore remaining in the second and third levels, and limited the recovery to the profits which the plaintiffs would have made if they had been permitted to continue the work so far as to remove all the ore from the first level.

Defendant also complains of the following instruction:

"If the jury find from the evidence that the plaintiffs were in good faith endeavoring to carry out and perform said contract according to its terms, and the defendant wantonly or carelessly and negligently interfered with and hindered and prevented the plaintiffs in such performance to such an extent as to render the performance of it difficult, and greatly decrease the profits which the plaintiffs would otherwise have made, then and in such case such interference was unauthorized and illegal and would have justified the plaintiffs in abandoning the contract, and would have entitled them to recover such damages as they actually suffered by being hindered and prevented from performing such contract."

It is insisted, and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for his non-performance. But no such proposition as that is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of a contract. Whenever one

party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrong-doing of the other party has brought about. Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the non-performance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the non-performance which the other has caused.

In the course of the trial a letter was produced, signed by the plaintiffs, and directed to the general manager of the company, in which was a statement that the first level had been practically exhausted of all commercial ore, and that not to exceed five per cent was left in it. The defendant insisted that this letter was conclusive upon the plaintiffs, but the court permitted testimony on their part to the effect that this letter was written at the solicitation of defendant's superintendent, who said to one of them that some one was reporting to the company that "they were leaving lots of ore in the first level, and he wanted to have this letter written by us to take the blame off of his back," suggesting at the same time that if anything good was discovered in the bottom level, to keep it quiet, and that they could make some money out of a speculation in the stock. The court instructed that this letter had "considerable value," as being "a statement in writing" of a party, but also that it was not conclusive, and if the testimony satisfied the jury that the facts were not as stated, they were

at liberty to so find. We see nothing in this ruling of which the defendant can complain. There was nothing in the way of estoppel in such a letter, and even if the plaintiffs had written it voluntarily and without any solicitation, they would not have been precluded from showing the actual facts. Much more is this the case if, as stated, the letter was written at the solicitation of the defendant's superintendent and to accomplish a wrongful purpose on his part.

Another matter is this: The contract provided that "the amount of ore shipped from said premises, and the amount due said party of the first part, shall be determined by and based upon the weights as ascertained by the reports of the railroad company, or companies, made to said party of the second part of the shipment of the ore from said mine." In the bill of exceptions is this statement of what took place when one of the plaintiffs, John Humble, was on the witness stand:

"'In order to get information as to the amount of ore shipped, I had to go to the office and ask the bookkeeper, and he gave me 3610 tons for the month of May. I asked the bookkeeper to give us the weigh-bills so that we could copy them off. There was no one present but the bookkeeper when I made this application.'

"The witness was then proceeding without further interrogatory to state what the bookkeeper said to him in answer to his application. Defendant's counsel objected thereto as irrelevant and incompetent, but the court overruled said objection, and to said ruling defendant's counsel excepted.

"The witness proceeded: 'He, the bookkeeper, told me Mr. Bennett's orders were to lock those weigh-bills in the safe and keep them and give us our account off the books. The next day I asked Mr. Bennett in the office, in the presence of the bookkeeper, to give us those weigh-bills, and he said there was no need of it as long as they copied them off from the books; that was good enough for us.'"

It is insisted that there was error in permitting the witness to give the statements of the company's bookkeeper, on the ground that such bookkeeper had no authority to speak for

the company; that his admissions were not the admissions of the company, and that what he said was mere hearsay, and tended to prejudice the jury against the company. There is no force in this objection. By the terms of the contract the amount due the plaintiffs was to be determined by the weigh-bills. They were in the possession of the bookkeeper, an officer of the company, and one of the plaintiffs applied to that officer for those bills. The reply of such officer, in possession of that made by the contract the evidence of the amount due the plaintiffs, was competent testimony. If there were any doubt as to its competency, the objection to it would be obviated by the fact that the next day the superintendent practically assented to the truth of the statement, and if the plaintiffs did not produce the weigh-bills, they certainly had a right to show why they were unable to do so, the efforts they had made to obtain them, and how it was that they failed.

These are all the questions that we deem it important to consider. We have examined the record very carefully, and find nothing in the rulings of the court of which the defendant can justly complain; and while, in view of the conflicting testimony, there is room for difference of opinion as to what the facts really were, there was testimony which, in amount and character, was sufficient to uphold the verdict of the jury, and, of course, under those circumstances, its determination is conclusive upon those questions of fact. The judgment will be *Affirmed.*

CHICAGO DEPOSIT VAULT COMPANY *v.* McNULTA.

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

No. 345. Submitted April 24, 1894. — Decided May 14, 1894.

A receiver of a railroad, appointed with authority "to make all contracts that may be necessary in carrying on the business of said railroad, sub-

ject to the supervision of this court," has no authority to make a lease for a term of general offices, without authority from the court, and to bind his successors and the property therefor for the term, without direction from or sanction by the court.

The facts that the receiver's accounts showed, monthly, the payment of the rent under such a lease, and that that rent was reasonable, and that the accounts as rendered were passed by the master and reported to and approved by the court, do not amount to a sanction of the lease for the term.

CHARLES H. BEERS, as the holder of certain bonds of the Wabash, St. Louis and Pacific Railroad Company, secured by a mortgage or trust deed on the Chicago division of that road, in 1886 filed a bill on behalf of himself and others in the Circuit Court of the United States for the Northern District of Illinois for the purpose of foreclosing the mortgage, and prayed that pending the rendition of the decree in the cause the court would appoint some disinterested and practical person receiver of all the mortgaged property, equipment, and appurtenances to hold and administer the same, and disburse the revenues and income thereof under the orders of the court from time to time to be entered in the cause.

On December 16, 1886, the court appointed Thomas M. Cooley receiver of the mortgaged property. The order appointing the receiver contained among other things the following: "And the said receiver is hereby empowered and instructed to take possession of all of the said property described in said mortgage or appurtenant thereto, and to manage, control, and operate the said railroad described in said mortgage, preserve and protect all said property, and collect, as far as possible, all assets, choses in action, and credits due to said company, acting in all things under the orders of this court. . . . Said receiver shall also have authority, subject to the supervision of the court, to make such repairs to said railway and property as are necessary in his judgment for carrying on the business thereof, and also to make all contracts that may be necessary in carrying on the business of said railroad, *subject to the supervision of this court.* . . . It is further ordered that the said receiver, out of the income which shall come into his hands by the

operation of said railroads or otherwise, proceed to make payments as follows: That he pay all current expenses incident to the creation or administration of his trust and to the operating of said railroad; That he pay all amounts now legally due or that shall hereafter become due for taxes on any of the property over which he is appointed receiver; That he pay all balances due or to become due to other railroads or transportation companies on balances growing out of the exchange of traffic with such railway accruing six months prior hereto; . . . That he pay all rentals to become due upon rolling stock heretofore sold to said railroad company and partially paid for and necessary for use in the operation of the road over which the said receiver is appointed, covered by the mortgage described in the bill herein, and which come into the hands of the receiver under the operation of this order."

The order further directed that after discharging and making all the payments and outlays required by the terms of the order the receiver should retain any surplus remaining in his hands to be applied to the payment of the past due and matured interest coupons secured by the mortgage.

The receiver qualified and took possession of the mortgaged property, and on December 31, 1886, entered into a contract with the Chicago Deposit Vault Company for the lease of rooms 523 to 547 inclusive in the Rialto Building in the city of Chicago, for his use as receiver in the transaction of the business of the railroad. The term of the lease was from January 1, 1887, to April 30, 1891, a period of four years and four months, at a yearly rental of $10,500, payable in instalments of $875 monthly in advance. There was a provision in the lease that the receiver might cancel it on May 1, 1888, by giving notice to that effect on or before February 1, 1888.

Cooley, as receiver, took possession of the rooms and continued to occupy them until his resignation in April, 1887, paying the stipulated rent regularly during that time, for which he took credit in his reports of receipts and disbursements. The monthly items of rent were entered in the

receiver's reports under the heading of "operating expenses" as "rent of general offices." These reports were regularly approved by the court.

Upon Cooley's resignation the court appointed John McNulta as his successor, who took possession of the rented premises and continued to occupy them and pay the stipulated monthly rental until July 31, 1889. Receiver McNulta made his reports of receipts and disbursements in the same form as those made by his predecessor, and they were from time to time approved by the court.

The mortgaged property was sold under foreclosure decree and purchased by James F. Joy, Ossian D. Ashley, Thomas H. Hubbard, and Edgar T. Welles as a purchasing committee. The sale and purchase having been confirmed, the court on June 20, 1889, entered an order directing receiver McNulta on or before July 1, 1889, to turn over all the property in his possession as receiver to the purchasing committee. This order contained the following provision: "But this order is made, and the surrender and delivery of possession by the receiver shall also be made, . . . subject also to the power and right of this court to consider and determine all questions which have heretofore arisen or shall hereafter arise herein concerning expenses of this cause or of the receivership herein, concerning claims against said receiver or against any of the property now in his possession as receiver, and concerning allowances to counsel or to parties, and to charge upon or against said property any amounts at any time deemed by this court proper to be charged upon it, and this court hereby reserves full power and right to consider and determine all such questions, to make any charges which it deems proper against said property now in the possession of said receiver, notwithstanding the surrender thereof, and to resume possession of all or any of said property, if necessary, at any time hereafter, and to place said property again in the possession of a receiver, and to resell or otherwise dispose of the same for the purpose of securing compliance with any orders which it shall make in this cause."

On June 27, 1889, McNulta, as receiver, gave notice to the

Chicago Deposit Vault Company that he would not need the leased rooms after August 1, 1889, and that on July 31, 1889, he would surrender possession of the premises to the lessor. The rent was paid by McNulta up to the latter date, when he vacated and gave up possession of the premises.

The Chicago Deposit Vault Company on June 29, 1889, filed an intervening petition in the foreclosure suit of Beers, setting up the execution of the lease; the taking possession and occupancy of the rooms under it by the receivers Cooley and McNulta, and the payment of the monthly rental therefor during the period of such occupancy. The petition also set out the notice given by McNulta, receiver, of his intention to surrender possession of the rooms, and that he would cease paying rent after July 31, 1889. The petition insisted that the receiver had no right to surrender the lease; that it would be unjust and inequitable, and prayed that he might be restrained from so doing, and that the purchasers of the mortgaged premises at the foreclosure sale should be required to abide by and perform the terms of the lease; that an adequate fund out of the trust assets should be retained in the court to assure the payment of the rent thereafter to accrue, and that the same be applied to the payment of such rent.

To this intervening petition the receiver and the purchasers filed an answer, which, after admitting the execution of the lease by Cooley, as receiver, averred that he had no power, without the approval of the court, to bind the court or the funds of the receivership beyond the time the premises should be required by the receiver, and that the lease was properly terminated by the last receiver's notice. The answer further stated that on July 1, 1889, the receiver, under and in pursuance of the order of the court of June 20, 1889, had turned over all the property to the purchasers at the foreclosure sale.

An amended petition, filed by the intervenor on April 5, 1890, set forth that $7875 had accrued as rental under the lease since the filing of its original petition, and repeated substantially the same prayer for relief.

Proof was made of the execution of the lease, possession of the premises by the two receivers, payment of the monthly

rental by them, and the approval of their accounts by the court, showing such payment. It was also shown by the petitioner that the rental agreed upon was as reasonable as the receiver could have secured elsewhere.

The monthly reports made by the respective receivers, which show, under the head of "operating expenses," the payment of certain sums as "rent for general offices," did not disclose to the master by whom the reports were examined, or to the court, that the lease had been made by the first receiver, or that the second receiver (McNulta) had occupied the rooms thereunder.

Upon the hearing the court dismissed the petition on the following grounds: "The order appointing the receiver was not broad enough to authorize him to enter into the contract of lease, and the lease was never reported to or confirmed by the court. It is true that from time to time the receiver's accounts, embracing payments of rent under the lease, were submitted to the master and passed by him, and the master's reports approved by the court. That, however, was not such a confirmation of the lease as concluded the court. Any contract entered into by the receiver not authorized by the order of appointment, and not subsequently confirmed by an order of the court, ended with the termination of the trust. The intervening petition is dismissed, each party paying half the costs."

From this decree the present appeal is prosecuted by the intervenor and the following errors are assigned for its reversal: (1) The court erred in holding that the order appointing the receiver did not authorize him to enter into the contract of lease in controversy; (2) in holding that such lease was never reported to or confirmed by the court; (3) in holding that the action of the court and the master in chancery upon the receiver's reports and accounts was not a sufficient confirmation of such lease; (4) in holding that the equities were with the defendants to the intervening petition; (5) and in ordering and decreeing that such petition be dismissed, and in not granting the relief prayed for in said petition.

Mr. George L. Paddock and *Mr. Hiram T. Gilbert* for appellant.

I. The lease was a contract proper for the receiver to make, and one which, if brought to the attention of the court when it was made, would not have been disapproved.

II. The lease was valid, in the absence of an express disapproval by the court. *Cowdrey* v. *Railroad Co.*, 1 Woods, 336; *Vanderbilt* v. *Central Railroad Co.*, 43 N. J. Eq. 669; *Field* v. *Herrick*, 101 Illinois, 110.

III. Even if the receiver exceeded his authority in making the lease, it was rendered valid by subsequent ratification by the court. *Supervisors* v. *Schenck*, 5 Wall. 772; *Smith* v. *United States Express Co.*, 135 Illinois, 279, 280; *Fisher* v. *Attleborough School District*, 4 Cush. 494; *Cowdrey* v. *Railroad Co.*, 1 Woods, 331, 336; *Drakely* v. *Gregg*, 8 Wall. 242; *Stark* v. *Starr*, 94 U. S. 477; *Connett* v. *Chicago*, 114 Illinois, 233, 239; *Ward* v. *Williams*, 26 Illinois, 447, 451; *S. C.* 79 Am. Dec. 385; *Harrod* v. *McDaniels*, 126 Mass. 413; *Whitbread* v. *Jordan*, 1 You. & Coll. (Exch.) 303.

IV. The parties interested in the foreclosure suit, the purchasers, the receiver, and the court itself, are estopped from insisting upon the invalidity of the lease. *Rogers* v. *Burlington*, 3 Wall. 654; *Ottawa* v. *First Nat. Bank*, 105 U. S. 342; *Anderson County* v. *Beal*, 113 U. S. 227.

V. The lessor is entitled to the payment of the rent stipulated in the lease.

Mr. Wells H. Blodgett for appellees.

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

The proof fails to show, as said in the opinion of the court below, that the lease was ever reported to or confirmed by the court. The receiver's reports which were approved by the court did not disclose the fact of the existence of the lease, or its terms and provisions, in such manner as to make the court's approval of the reports a confirmation of the lease.

The question then remains whether the order appointing the receiver conferred upon him the requisite authority to

enter into a contract of lease, involving a large annual expenditure, and extending beyond the receivership so as to make the contract a proper charge against the trust property under the administration of the court?

While there is some want of harmony in the authorities upon the question as to how far a receiver may make and enter into contracts without the previous approval or subsequent ratification of the court, which shall be binding upon the trust, we are of opinion that the order appointing the receiver in this case was not broad enough in its terms to authorize him to enter into the lease in question so as to give it validity without the approval or confirmation of the court.

It is undoubtedly true that a receiver, without the previous sanction of the court, manifested by special orders, may incur ordinary expenses or liability for supplies, material, or labor needed in the daily administration of railroad property committed to his care as an officer of the court; but it seems equally well settled that the courts decline to sanction the exercise of this discretion on the part of receivers in respect to large outlays, or contracts extending beyond the receivership, and intended to be binding upon the trust. The receiver being an officer of the court, and acting under the court's direction and instructions, his powers are derived from and defined by the court under which he acts. He is not such a general agent as to have any implied power, and his authority to make expenditures and incur liabilities — like the one in question — must be either found in the order of his appointment, or be approved by the court, before they acquire validity, and have any binding force upon the trust.

In *Cowdrey* v. *Galveston, Houston &c. Railroad*, 93 U. S. 352, it was held that a receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands, beyond what is absolutely essential to its preservation and use, as contemplated by his appointment. Accordingly, the expenditures of a receiver to defeat a proposed subsidy from a city, to aid in the construction of a railroad parallel with the one in his hands, were properly disallowed in the settlement of his final account,

although such road, if constructed, might have diminished the future earnings of the road in his charge.

This same general principle is recognized in *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, 479, where debts for considerable sums of money, borrowed by the receiver without previous authority from the court, were not allowed any priority out of the trust fund, although the moneys borrowed were applied to pay expenses of the receivership, such as supplies, repairs, and pay-rolls, and to replace moneys which had been so applied, for the reason that no order of the court had been obtained to borrow funds for those purposes.

In *Lehigh Coal and Navigation Co.* v. *Central Railroad*, 35 N. J. Eq. 426, it was said that "the receiver may undoubtedly appropriate moneys in his hands, belonging to the trust, to such purposes connected with the trust as he may think proper, always taking the risk that the court will finally approve his action; but he has no authority to bind the trust by contract without the authority of the court. Until his contracts are approved and ratified by the court the court is at liberty to deal with them as to it shall appear just, and may either modify them or disregard them entirely. . . . All persons dealing with receivers do so at their peril, and are bound to take notice of their incapacity to conclude a binding contract without the sanction of the court."

This states the correct rule upon the subject, especially in respect to contracts involving large outlays, and which may extend beyond the life of the receivership. The same general rule is stated in Beach on Receivers, section 257, as follows: "But a receiver is not allowed to exercise his discretion in applying the funds in his hands. These he holds strictly subject to the direction of the court, and only to be disposed of upon its order. Neither can he enter into contracts without the approval of the court. Although, as receiver, he may enter into negotiations and make such agreements as would be binding upon him as an individual, yet, in order to affect the fund in his hands his acts must be ratified by the court. This rule is so well established that it has been decided that all persons contracting with a re-

ceiver are chargeable with knowledge of his inability to contract, and enter into contracts with him at their own peril, and that the court has unquestioned power to modify or even vacate his agreements." To the like effect is a statement of the rule made in section 186 of High on Receivers.

What was said by Mr. Justice Bradley in *Cowdrey* v. *Railroad Company*, 1 Woods, 331, 336, and by the court in *Vanderbilt* v. *Central Railroad*, 43 N. J. Eq. 669, cited and relied on by the appellant, does not conflict with the general principle laid down in the authorities above referred to.

In respect to contracts which have been completely performed by a party dealing with a receiver, and when the claim is merely for compensation, equitable relief is often granted, although there was no previous approval or subsequent ratification of the receiver's act. This is pointed out by the chancellor in *Vanderbilt* v. *Central Railroad*, *ubi supra*.

In the case under consideration the intervening petitioner has been fully paid for the time that its premises were occupied for the benefit of the trust. The receiver not only had no authority to contract beyond that time, but by the order of his appointment his expenditure of the funds was limited and confined to designated objects and purposes. Under these circumstances the court was not bound to recognize any equitable right of the intervening petitioner to be paid for the unexpired term of a lease, which had no legal validity.

The position taken on behalf of the appellant that there was a confirmation of the lease growing out of the fact that the receiver's expenditures in the way of rental for general offices were approved, cannot be sustained. If the doctrine of ratification could be invoked, it would have no application in the present case, because there was no knowledge on the part of the court prior to the filing of the intervening petition that such a lease had been entered into by its receiver; and in respect to the remaining contention of the appellant, that the court and the purchasers under the foreclosure sale were estopped from denying the lease, there is nothing in the record on which to predicate such a proposition, even conceding that the doctrine of estoppel could be applied to courts.

Syllabus.

Under the order of June 20, 1889, directing the receiver to turn over the property to the purchasers at the foreclosure sale, the court undoubtedly had the authority to charge the property with such claims against the receiver as it might thereafter allow, but that reservation of power did not make it the duty of the court to allow the claim of the intervening petitioner.

The lease having no legal validity without the sanction of the court, the equitable considerations in favor of the purchasers of the trust property at the foreclosure sale are stronger than those of the appellant.

We are, therefore, of opinion that there was no error in the decree of the court below, and the same is accordingly

Affirmed.

LOUD *v.* POMONA LAND AND WATER COMPANY.

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

No. 194. Argued April 13, 16, 1894. — Decided May 19, 1894.

By an agreement under seal the party of the first part agreed that, after the making of the payments and the full performance of the covenants as agreed to by the party of the second part, he would convey to the party of the second part, certain described lands in California, together with a specified number of shares in the stock of an irrigation company, representing a certain pressure of water, to be delivered to the party of the second part on making payment in full for the land. The party of the second part agreed to pay for the land in fixed consecutive payments, and both parties agreed that the instrument should not be construed as a conveyance, equitable or otherwise, and that, until delivery of the formal deed or tender of all payments precedent thereto, the party of the second part should have no title, equitable or otherwise, to the premises. *Held*,

(1) That these covenants were independent, and that the payment or tender of payment of the purchase price for the land was a condition precedent to the right to the conveyance;

(2) That the party of the second part, on making the contract payments, became entitled to receive the agreed number of shares in the irrigation company, subject to the by-laws of such company, but not stock which represented the title to water or water rights to the extent of such pressure.

Statement of the Case.

THE Pomona Land and Water Company, defendant in error, a corporation duly organized under the laws of the State of California, brought this action of covenant against Henry M. Loud, a citizen of the State of Michigan, to recover various sums of money due upon agreements under seal, embodied in twenty contracts and nine applications for the sale and purchase, at different prices, of separate and distinct parcels of land lying and being in the State of California, together with designated shares of stock in certain irrigation companies.

The twenty contracts declared on in counts one to forty inclusive are substantially the same in form, the difference between them being in the dates, description of land, purchase price, time of payment, and the number of shares of stock in the irrigation companies. The applications declared on in counts forty-one to forty-nine inclusive, while relating to different parcels of land, and varying in dates, purchase price, time of payment, etc., are also substantially alike.

These several contracts and applications need not be separately noticed or considered. One class is represented and illustrated in the contract set out in the first count of the declaration, while the other is set out according to its legal effect in the forty-first count of the declaration. The contract declared on in the first count is as follows:

"This agreement made the eighth day of April, 1887, between Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the town of Pomona, county of Los Angeles, State of California, party of the first part, and H. M. Loud of Oscoda, Michigan, party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25, A.D. 1883, and in consideration of twenty-five hundred and thirty-nine dollars, paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants

hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain, and sale, to the party of the second part, his heirs or assigns, the following-described real property situated in the county of Los Angeles, State of California, to wit: Lot seventeen (17) of the northeast Pomona tract, according to the map of said tract duly recorded in book 5, page 461 of miscellaneous records of Los Angeles County, California, estimated to contain forty and .62 acres of land, together with 406.2 shares of stock of the Del Monte Irrigation Company, representing four and .062 inches of water under four-inch pressure, measured from centre of aperture, said stock to be delivered by the party of the first part and accepted by said party of the second part, subject to the by-laws of the said Del Monte Irrigation Company, when payment in full is made for the above-described land.

"The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

"And for and in consideration of the foregoing agreement, and as the purchase price of the above-described premises, the party of the second part do covenant and agree to pay to the party of the first part, its successors or assigns, the sum of ten thousand one hundred and fifty-five dollars, United States gold coin, to be paid in the following manner:

"$2539 on or before delivery of this contract,
3808 on or before April 8, 1888,
3808 on or before April 8, 1889,

and interest upon said respective sums from April 8, 1887, until paid, at the rate of eight per cent per annum, payable annually; and if not so paid, at option of said company, to be added to principal and bear like interest.

"And the party of the second part, in consideration that

the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy, and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments, and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase money the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from the date of such payment at the rate of one per cent per month.

"And the party of the second part further agrees that during the pendency of this agreement he will not commit or suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due, then it shall be lawful for the party of the first part, its successors or assigns, at their option, to rescind this agreement to convey, to reënter upon, and to repossess said premises and all improvements existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment, and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance or tender of all payments precedent thereto the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

"It is further expressly agreed that time is of the essence of this contract.

"In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed by

its president and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this third day of May, 1887. Executed in duplicate.

"POMONA LAND AND WATER COMPANY,
By H. A. PALMER, *President.*

"[Seal of the Company.]

"By F. L. PALMER, *Secretary.*

"H. M. LOUD. [L. S.]

"Sealed and delivered in the presence of —

"B. F. NICHOLS."

The applications are in the following form:

"*Application for Purchase.*

"POMONA, CAL., *April 15th*, 1887.

"Received from H. M. Loud seventy-five dollars deposit on application for purchase of northeast quarter (N. E. $\frac{1}{4}$) of lot twenty-two, (22,) containing ten (10) acres of land according to map of the San Antonio tract, duly recorded in book 3, p. 7, of map records of San Bernardino County, with usual water rights pertaining to said tract, at the price of fifteen hundred dollars and on the following terms; Seventy-five dollars cash deposit as above:

"First payment, $300.00, within sixty days from date; second payment, $562.50, on or before April 15th, 1888; third payment, $562.50, on or before April 15th, 1889; second and third payments to bear interest from date at the rate of eight per cent per annum, interest to be payable annually. In consideration of the premises I, H. M. Loud, hereby agree to purchase said property and pay for the same at the price and on the terms above set out; and in consideration that the Pomona Land and Water Company has withdrawn from the market the above-described land for sixty days, so that the said H. M. Loud may purchase the same at the above agreed on price in case the said H. M. Loud fails or refuses to make said first payment, as above, within the time above mentioned, then the deposit herein made shall be retained by the Pomona Land and Water Company as the estimated damages suffered

and the liquidated damages received by said company on account of the withdrawal of the land from the market as aforesaid. Time is hereby declared to be of the essence of the fulfilment of the obligation of the said H. M. Loud to purchase the above land under the terms and conditions above expressed. No title, legal or equitable, nor any right to the possession of the above-described land, shall inure to said H. M. Loud until the Pomona Land and Water Company shall have delivered an executed contract to him for the same.

"H. M. Loud. [seal.]
"Thomas & Easton. [seal.]
"F. MacPherson, *Ag't.*

"Endorsed: Pomona, June 20th, 1887. Rec'd $300.00, being balance of first payment on the within application. Pomona Land and Water Company. F. L. Palmer, treas."

The ninth application for the purchase of lot eleven (11) of the northeast section of the Pomona tract differed from the rest in the fact that only part of the first payment was made.

The declaration, after alleging the refusal and failure of the defendant below to pay the respective sums due under the several contracts, averred that the plaintiff had been at all times, and was still ready and willing, upon the making of the payments in said contracts expressed to be made and performed by the said Henry M. Loud, to convey by deed of grant, bargain, and sale to the said Loud, his heirs or assigns, the property described in said contracts, together with the shares of stock of the respective irrigation companies referred to in the contracts. There was no averment in the declaration of any tender of a conveyance or conveyances of the lands or of the stock in the irrigation companies, nor of any tender of any conveyance or contracts referred to in the applications.

The record contains no plea on the part of the defendant below, but there was served upon the plaintiff's attorney a copy of the plea of the general issue, with notice of special matters of defence, which the parties have treated as a pleading by the defendant. The special matters of defence set out in the notice were in effect as follows: That if the contracts

were made they were obtained by fraud and were therefore void; that the use and value of the lands depends upon their proper irrigation by artificial means; that to induce defendant below to make the purchase of the lands the plaintiff represented that it had a good, clear title in fee to the lands; that it controlled and possessed water and water rights by means of shares of stock in the Del Monte, the Palomares Irrigation Companies, and the Irrigation Company of Pomona to furnish ample and sufficient water to fully and sufficiently irrigate said lands, so that each parcel of land should have water to irrigate the same; that the plaintiff below, knowing that defendant's only purpose in making the contracts was to resell the lands at a profit, represented that it had not and would not place any other lands upon the market for sale; that defendant relied upon these representations and statements, which proved to be false; that the plaintiff was insolvent and irresponsible; that it did not have a good title to the lands, but that they were heavily encumbered with mortgages, and therefore the defendant could not convey a good title to them; that the plaintiff land company did not possess or control sufficient water or water rights to fully and sufficiently irrigate the lands, and water sufficient to irrigate said lands was not represented by means of the stock in the irrigation companies named, and could not be furnished by said stock; that the supply of water furnished thereby was not and could not be continuous; that the irrigation companies had not sufficient supplies of water to furnish such water or to furnish it continuously or in the quantities called for by the contracts; that the irrigation companies were not responsible for furnishing such supply which was not brought on, or supplied, to said lands; that notwithstanding the agreement of the plaintiff below that it would not put other lands on the market, it at once, after the making of the contracts, placed large quantities of land on the market, and became such a strong competitor that the defendant was prevented from making a sale of said lands; that to some of the lands no water was brought, and to none was it brought in sufficient quantities to irrigate them; that he was a stranger in Cali-

fornia; that he hesitated to enter into the contracts because he was unfamiliar with the laws of the State and of the business methods in common use by the plaintiff, and did not know the risk or the extent of the liabilities he would incur; but that plaintiff induced him to make such contracts, representing that they were upon the common printed forms it had adopted, and that defendant would not be liable under the laws of the State beyond the amount he should pay upon the contracts, and the loss of the land in case of failure to make payments; that plaintiff only dealt in that manner in its land sales, and in no event would it hold, or seek to hold, the defendant to any personal liability beyond the amount paid; that defendant relied upon these representations in entering into the contracts, and that this suit was in violation of such representations and a fraud upon defendant.

As a further special defence the defendant set up "that the plaintiff did not, on the day when the last instalment of the purchase-price was made payable by the terms of said alleged contracts respectively, nor at any time, convey or tender a conveyance of the land or stock described in said contracts respectively, or in either or any of them, to this defendant."

Upon the trial of the cause the Circuit Court directed a verdict for the plaintiff for the various sums due and unpaid under the contracts, amounting with interest to $79,819.30. On motion for a new trial, heard before the Circuit Justice, (Mr. Justice Brewer,) and the District Judge, who tried the case, (Judge Brown,) it was ordered that judgment be entered on the verdict, but that execution should be stayed "until thirty days after the plaintiff had deposited with the clerk of the court for the benefit of the vendee all the deeds to the lands and certificates of stock, so that defendant may have an opportunity of examining the same to see if the titles are perfect, and the transfers of stock are made in accordance with the laws of the State of California."

In compliance with this order the plaintiff below deposited deeds for the land and certificates for the stock in the irrigation companies in accordance with the terms of the several contracts, but the defendant declined to accept the benefits of

the order or to receive the deeds and stock so deposited, and prosecuted the present writ of error to reverse the judgment of the court below.

Mr. George F. Edmunds and *Mr. Benton Hanchett* for plaintiff in error.

I. We contend that the intent of the contracts is that upon payments being made, and when they are made, the conveyance of the land and delivery of the stock will be made. The acts of payment and of conveyance and delivery of the stock are to be concurrent; the undertakings are dependent. The provision that the stock shall be delivered and accepted when payment in full is made for the land is decisive as to the time when the conveyance of land and the stock are to be made by the vendor. They are not to be made at some indefinite time, or some reasonable time after payment, but they are to be delivered when payment is made.

Under these provisions, in order for the plaintiff below to recover, in an action at law, the purchase-money, after the last payment became due, the plaintiff must aver and prove that on the date when the last payment became due, the plaintiff tendered to the defendant a conveyance of the land and shares of stock, and tendered the stock itself. *Bank of Columbia* v. *Hagner*, 1 Pet. 455; *Washington* v. *Ogden*, 1 Black, 450; *Hill* v. *Grigsby*, 35 California, 656; *Bohall* v. *Diller*, 41 California, 532; *Englander* v. *Rogers*, 41 California, 422; *Heim* v. *Treadwell*, 72 California, 217; *Johnson* v. *Wygant*, 11 Wend. 48; *Parker* v. *Parmele*, 20 Johns. 129; *S. C.* 11 Am. Dec. 253; *Kane* v. *Hood*, 13 Pick. 281; *Carman* v. *Pultz*, 21 N. Y. 547; *Berryhill* v. *Byington*, 10 Iowa, 223; *Wilson* v. *Nelson*, 75 Iowa, 710; *Goodwin* v. *Morey*, 111 Indiana, 68; *Ackley* v. *Richman*, 5 Halsted, (10 N. J. Law,) 304; *Egbert* v. *Chew*, 2 Green, (14 N. J. Law,) 447; *Shinn* v. *Roberts*, 1 Spencer, (20 N. J. Law,) 435; *S. C.* 43 Am. Dec. 636; *Biddle* v. *Coryell*, 3 Harrison, (18 N. J. Law,) 377; *S. C.* 38 Am. Dec. 521; *Headley* v. *Shaw*, 39 Illinois, 354; *Eddy* v. *Davis*, 116 N. Y. 247; *Beecher* v. *Conradt*, 13 N. Y. 108; *S. C.* 54 Am. Dec. 535.

While there has been great diversity in the decisions of the

courts upon the question whether, in cases of land contracts, the undertaking of the vendor to convey and of the vendee to pay were dependent or independent covenants, this court has laid down a rule which is simple, clear, and easy of application, in the case of *Bank of Columbia* v. *Hagner*, 1 Pet. 455. If it is adhered to by this court it forbids the plaintiff's recovery.

Each of the contracts provides that the plaintiff shall deliver stock in the irrigation company named in the contract, representing the amount of water at the rate of one inch for every one hundred shares of stock, measured from the centre of aperture, when payment is made in full for the land.

This stock is the title to be given to the defendant of the water right which he purchases, and is as much required as a conveyance of the property purchased as the deed is required as a conveyance.

It is insisted that the plaintiff cannot recover on any of these contracts without averment and proof of the tender of such stock on the day when the last payment became due. The authorities above cited are to this point.

II. There is no averment whatever of a tender, or readiness to deliver the stock itself in either of the irrigation companies. There is no proof of any tender or offer of such stock.

The stock to be delivered to the defendant is a particular stock described in the contract, which stock is to represent a certain amount of water measured in a certain way. It is contended that the declaration should aver the ability of the plaintiff to deliver such stock, as well as a tender of it, and that proofs should be made to sustain the averment in order to warrant a recovery. The defendant is not bound to accept a defective title. *Washington* v. *Ogden*, 1 Black, 450, at 456, 458; *Bank of Columbia* v. *Hagner*, 1 Pet. 455; *Swan* v. *Drury*, 22 Pick. 485; *Courtwright* v. *Deeds*, 37 Iowa, 503; *Burwell* v. *Jackson*, 9 N. Y. 535; *Eddy* v. *Davis*, 116 N. Y. 247; *James* v. *Burchell*, 82 N. Y. at 108.

By the articles of incorporation of the irrigation companies, the Pomona Land & Water Company may sell the whole of the water to whom it pleases, without reference to any lands

or any stock. By by-law 9 the said company may sell the capital stock without reference to water.

The only provision which purports to connect the capital stock with water is by-law 9, which undertakes to limit the transfer of stock to the transfer of land, "on which the water represented by the stock is issued." *Provided*, that the company or stockholders may transfer their stock to the Pomona Land & Water Company, and it may transfer the stock without the transfer of land.

The right of transfer of capital stock in a corporation cannot be taken away, or limited by by-laws. *Anglo Cal. Bank* v. *Grangers' Bank*, 63 California, 359; *Driscoll* v. *West Bradley Mfg. Co.*, 59 N. Y. 96; *Bullard* v. *Bank*, 18 Wall. 589; *Bank* v. *Lanier*, 11 Wall. 369; *Kennebec & Portland Railroad* v. *Kendall*, 31 Maine, at 477; *Sargent* v. *Franklin Ins. Co.*, 8 Pick. 90; *S. C.* 19 Am. Dec. 306; *Taylor* v. *Griswold*, 2 Green, (14 N. J. Law,) 222; *S. C.* 27 Am. Dec. 33; *Farmers' Bank* v. *Wasson*, 48 Iowa, 336; *Pulford* v. *Fire Department of Detroit*, 31 Michigan, 458; *Morgan* v. *Struthers*, 131 U. S. 246.

This attempted limitation of the right to transfer being void, there is nothing which makes this stock different in its character from the capital stock of a gas company, a railroad company, or any other corporation, as representing property, or property rights. It does not and cannot represent any right to a specific amount of water, or any right to a quantity of water. Yet the plaintiff's contract is to deliver stock representing one inch of water for each one hundred shares of stock, measured from centre of aperture.

Mr. Don M. Dickinson and *Mr. Henry M. Duffield* for defendant in error.

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

Many of the special matters set up by the defendant below were clearly irrelevant and unavailable as defences to the suit. Thus, the various matters of inducement for entering into contracts, and the alleged representations made by agents of the plaintiff prior to their execution, and the purpose of

the defendant in making the purchases with a view to the resale of the lands at a profit, together with his being a stranger in California, unacquainted with the laws of that State, the business methods in common use, or those used by the plaintiff; and his hesitancy about entering into the contracts; his want of knowledge as to the extent of the risk and liability he would incur thereby; and his reliance upon representations that he would not under such contracts, by the laws of the State, incur any liability beyond the amounts he should pay and the loss of the lands, were matters, which, if true, could constitute no answer to the suit upon the sealed contracts. The errors assigned to the action of the court in excluding testimony relating to these matters are not well taken. The deeds to Charles W. Brown and to other parties, antedating the contracts in suit, and having no connection with the lands covered thereby, offered for the purpose of showing what constituted water rights and water stocks; the representations of the plaintiff's agent as to title to the land and stock, made before the execution of the contracts; the defendant's lack of knowledge of the by-laws of the irrigation companies; the abandonment of the lands since 1888; the transcript of the patent of the United States of January 20, 1875, to Henry Dalton and others of the San José ranch, without an official seal attached and wanting a proper certificate from the presiding judge of the court, were incompetent to control the terms of the written contracts, or to show any defect in plaintiff's title.

The other matters set up and relied upon, so far as the same were material or available as defences to the suit, — such as fraud in obtaining the contracts from defendant, want of title in the plaintiff to the lands and stock in the irrigation companies representing water rights, — were not supported by proof. These irrelevant and unestablished matters of defence need not be further discussed.

The defendant presented twenty-seven requests to charge, the legal questions arising under which are embodied in the general proposition covered by the last special ground of defence that the plaintiff did not, when the last instalment

of the purchase money matured, nor at any time, convey or tender a conveyance of the land and stock described in the contracts in suit, respectively, or in either or any of them, to the defendant. This presents the real controverted question in the case, and its determination turns upon the point whether the covenants in the contracts are dependent or independent; that is to say, whether the covenant upon the part of the defendant below to pay the stipulated price for the lands purchased, or agreed to be purchased, is a condition precedent to the performance by the plaintiff of his covenant to convey such lands?

The contention of the plaintiff in error is that the covenants are dependent and concurrent, and that he is not bound to perform his agreement to pay the purchase price without a tender of performance on the part of the land company. On the contrary, the defendant in error insists, as held by the court below, that the covenants were independent, and the plaintiff in error is bound to pay the stipulated price as a condition precedent to its obligation to convey or tender any conveyance of the lands described.

If the acts to be performed by the land company and the purchaser, respectively, are dependent and concurrent, neither party would be entitled to an action against the other without the averment of performance, or the tender of performance, on his part. If, however, the payment of the purchase price for the lands is a condition precedent to the land company's covenant to convey, then it is entitled to enforce payment without conveyance or tender of conveyance, and the allegation of its readiness and willingness to convey, upon payment of the purchase money, was sufficient.

The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement. If the language is clear and unambiguous it must be taken according to its plain meaning as expressive of the intention of the parties, and under settled principles of judicial decision should not be controlled by the supposed inconvenience or hardship that may follow

such construction. If parties think proper, they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by one shall be a condition precedent to the performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract?

In this case there is no ambiguity in the language of the contracts. The covenant and agreement of the land company is that "*after* the making of the payment and full performance of the covenants hereinafter to be made and performed by the party of the second part, (Loud,) the party of the first part (the land company) will, in consideration thereof, convey by deed of grant, bargain, and sale to the party of the second part, his heirs or assigns," the described lands, together with the designated shares in the irrigation companies. A subsequent clause of the contract provides that "this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and until the delivery of the final deed of conveyance, or *tender of all payments precedent thereto*, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises," and it is further provided that time is of the essence of the contract.

If these terms and provisions of the contracts are to be understood in their plain and obvious meaning, they clearly express the intention of the parties to be that the purchaser shall first pay the purchase price of the lands contracted for before he is entitled to demand a conveyance therefor. It is also clear that the purchaser (the defendant below) could not have legally demanded from the land company a deed or conveyance for the lands until after the purchase money had been fully paid. The payment or tender of payment of the purchase price for the land was a condition precedent to the right to the conveyance. The authorities, both in England and in this country, fully sustain this construction of the contract. A brief reference will be made to some of the principal cases on the subject.

In the learned note of Serjeant Williams to the early case of *Pordage* v. *Cole*, 1 Saund. 320 *a*, it is said that "if a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make *performance* a condition precedent; and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act."

In *Porter* v. *Shephard*, 6 T. R. 665, involving the right of a lessee to terminate the lease, it was held that the words "*from and after* payment of rent and performance of covenants," constituted a condition precedent.

In the subsequent case of *Grey* v. *Friar*, 4 H. L. C. 565, where the opinion of the judges was asked by the House of Lords as to whether a proviso constituted a condition precedent, the case of *Porter* v. *Shephard* was followed, and the proviso held to be a condition precedent.

In *Goldsborough* v. *Orr*, 8 Wheat. 217, it is said that where the acts are stipulated to be done at different times, the covenants are to be construed as independent of each other.

So, in *Goodwin* v. *Lynn*, 4 Wash. C. C. 714, the rule was laid down that to ascertain whether covenants are dependent or independent, the intention of the parties is to be sought for rather in the *order of time* in which the acts are to be done, than from the structure of the instruments.

In *Phillips' Constr. Co.* v. *Seymour*, 91 U. S. 646, 650, it was said by Mr. Justice Miller, speaking for the court, that "where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the general rule that the covenants are mutual, and are dependent, if they are to be performed at the same time; and if by the terms or the nature of the contract one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done, or tendered, before that party can sustain a suit against the other. There

is no doubt that in this class of contracts, if a day is fixed for performance, the party whose duty it is to perform or tender performance first must do it on that day, or show his readiness and willingness to do it, or he cannot recover in an action at law for non-performance by the other party."

In many cases, both in England and in the United States, the rule of construction is adopted that an agreement to pay by instalments or at different times would make the covenants independent, since such an agreement manifests a willingness to rely on the covenants of the other contracting party for title or performance as the consideration for such payments. Also, where the acts stipulated to be done are to be done at different times, the covenants are generally construed to be independent of each other.

The land company's contention as to the proper construction of the contracts is supported by the following authorities, amongst others that might be cited: *Davis* v. *Heady*, 7 Blackford, (Ind.,) 261; *Gale* v. *Best*, 20 Wisconsin, 44; *Sayre* v. *Craig*, 4 Arkansas, 10; *Mayers* v. *Rogers*, 5 Arkansas, 417; *Hill* v. *Fisher*, 34 Maine, 143; and *Leftwich* v. *Coleman*, 3 How. (Miss.,) 167.

The cases of *Bank of Columbia* v. *Hagner*, 1 Pet. 455, and *Washington* v. *Ogden*, 1 Black, 450, are not in conflict with the foregoing decisions and the propositions they announce. The stipulations of the contract in the former case were not similar to those in the case under consideration, while in *Washington* v. *Ogden* the agreement was expressly made dependent on the surrender and cancellation of a previous contract, made by the plaintiff for the sale of the same lands to a third party, without which surrender the vendor could not give a good title.

Neither do the cases of *Hill* v. *Grigsby*, 35 California, 656, 658, and *Bohall* v. *Diller*, 41 California, 532, cited on behalf of the plaintiff in error, control the present case. In *Hill* v. *Grigsby* the instrument provided that the plaintiff should convey "*as soon as*" the purchase money was paid. In *Bohall* v. *Diller* the terms of the contract were that the plaintiff, "upon payment of the purchase money, was to convey."

These stipulations were properly held to be dependent covenants, and that neither party could sue without performing, or an offer to perform, on its part. But in the case at bar the terms of the contract contain no stipulation that the covenants of the respective parties are to be performed at the same time or concurrently. On the contrary, the clearly expressed intention was that the payment of the purchase price of the lands should precede the performance of the land company's covenant to convey the lands and water stocks. The consideration to be paid covered both the lands and the stocks, and its payment was a condition precedent to a transfer of either, or both. The provision that the stock was to be delivered by the land company and accepted by the purchaser, (subject to the by-laws of the irrigation companies,) "when payment in full is made for the above-described land," in no way changes the proper construction of the contracts, or establishes that the stock was to be transferred concurrently with the payment for the lands. The expression, "when payment in full is made for the above-described land," confirms the construction that the payment was a condition precedent to the conveyance of either stock or land, or both. The purchaser had no right to a transfer of the stock before he became entitled to a conveyance of the land.

We cannot accede to the contention of the plaintiff in error that the contracts should be so construed as to make payment of the first instalment of purchase money a condition precedent to the covenant to convey, but that the last instalment of purchase money should be treated as dependent or concurrent with the covenant to convey. The covenants are to be interpreted as of the date of the execution of the contract, and as applying to each and all the instalments of purchase money alike. Covenants like those in the case under consideration are not of a shifting character, independent at one time and dependent at another, or independent as to one or more instalments of purchase money and dependent in respect to others, unless there is a clearly expressed intention on the part of the contracting parties that such should be the case. No such intention is either expressed or implied in the language of the

contracts in suit. The payment of all the instalments of purchase money is a condition precedent to the performance of the land company's covenant to convey.

In respect to the nine applications for purchase declared in counts forty-one to forty-nine, inclusive, of the declaration, while the terms are not so clearly expressed as in the twenty contracts already considered, it is fairly implied that the instalments of purchase-money were to be paid before the land company was under any obligation to convey.

The forty-ninth count, based upon the application to purchase lot 11, does not stand upon any different principle from the rest. It is true that the purchaser did not pay the first instalment in full, but the land company had the right to accept the partial payment, and treat the contract as a subsisting one; and it was so treated by Loud, who took possession of the lot, and exercised acts of ownership over it up to 1888 at least. Under these circumstances he is not in a position to claim that the contract was terminated because of his own failure to pay the first instalment in full.

It is earnestly urged on behalf of the plaintiff in error that the contracts declared upon required the land company to deliver stock in the irrigation companies, which should represent and convey title to water or water rights to the extent of one inch of water under four-inch pressure, measured from centre of aperture, for each one hundred shares of stock. In other words, that the purchaser's contracts entitled him to water rights as distinguished from stock in the irrigation companies, by means of which water could be procured in the quantity designated. This position cannot be sustained, for the contracts by their express terms stipulated for the transfer of stock in the designated irrigation companies, which stock was to be delivered and accepted subject to the by-laws of such companies. The statement that this stock represented so many inches of water, under a certain pressure, were words of description as to the quantity of water which the irrigation company would undertake to furnish to the owner of the designated shares of stock.

It is urged that the stock which the land company had

transferred to Loud, and produced for his acceptance at the trial, was not shown to have been fully paid up. This objection is not well taken. It appears by the testimony of the secretary of the land company that the land company delivered water until February, 1887 — before the organization of the irrigation companies. It is further shown that the land company had numerous artesian wells, pipe lines, flumes, and ditches from which water supplies were furnished for irrigating purposes; and it further appears that these wells, water facilities, pipe lines, etc., were transferred by the land company to the several irrigation companies, which, in consideration thereof, delivered fully paid up stock to the land company, or to a trustee for its benefit. Certificates of this stock were, under proper directions of the officers of the land company, made out in the name of Loud, and produced and tendered at the trial. There is no evidence showing that the consideration given by the land company for the shares of stock in the irrigation companies was in any way inadequate, so as to impair its right and title thereto as fully paid up stock.

It is further said on behalf of the plaintiff in error that the stock proposed to be transferred to him gave no special rights or privileges, and constituted no easement to the lands purchased. This is, however, a mistake. In the articles of association of each of the irrigation companies, which were put in evidence, it is declared: "That the purpose for which this corporation is formed is to acquire water, water rights, flumes, ditches, aqueducts, reservoirs, and other property that may be necessary or convenient for the supplying of water to such person or persons or their assigns in the counties of Los Angeles and San Bernardino, State of California, to whom the Pomona Land and Water Company has sold water rights, or to whom it may hereafter sell water rights, or to whom it may transfer water stock of this corporation, but to no other person or persons whomsoever."

In addition to this provision in the charters of the irrigation companies, it is provided by § 552, Deering's Anno. Stats. and Code of California, relating to the right to water, to irrigate lands sold by water or irrigating companies, that "whenever

any corporation organized under the laws of this State furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law."

Those provisions are recognized and sustained by the courts of California in *McFadden* v. *County of Los Angeles*, 74 California, 571, and *Applegarth* v. *McQuiddy*, 77 California, 408.

It is shown that the defendant in error had the requisite amount of stock in the irrigation companies to perform its contracts with the plaintiff in error, and the land company offered to prove, as a matter of fact, that the stipulated quantity of water was attached to the lands by the stock in the irrigation companies, but this offer was withdrawn on the objection of the defendant below that it was immaterial. The proper construction of the contracts was that the defendant in error was to deliver stock in the designated irrigation companies which would attach to the land and entitle the purchaser to the quantity of water represented by the stock, and the stock which the land company thus held and proposed to transfer was clearly within the terms of the contract.

There are other points of minor importance presented on behalf of the plaintiff in error, but the controlling question in the case turns upon the character of the covenants contained in the contracts, and in the view we have taken of that matter the defendant in error had the right to enforce the payment of the purchase money for the lands agreed to be purchased without first having conveyed or tendered a conveyance of the lands purchased. This question of law, depending upon the proper construction of the contracts, was not affected by any evidence, either introduced or offered.

Our conclusion is that there is no error in the judgment of the court below, and it is accordingly

Affirmed.

EVANS *v.* UNITED STATES.

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

No. 922. Argued April 17, 18, 1894. — Decided May 14, 1894.

An indictment should charge the crime, alleged to have been committed, with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged; but it is not necessary in framing it to set up an impracticable standard of particularity, whereby the government may be entrapped into making allegations which it would be impossible to prove.

Applying this rule, the eighth count in the indictment, charging the prisoner with unlawfully procuring the surrender and delivery to himself of the funds of a national bank of which he was a director, and the fourteenth count, charging him with knowingly and fraudulently aiding in procuring the discount of unsecured paper by the bank, are examined in detail, and are held to be sufficient to sustain the conviction.

A verdict of guilty, entered upon all the counts of an indictment, should stand if any one of them is good.

PLAINTIFF in error, who was a director in the Spring Garden National Bank, was indicted for an alleged violation of Revised Statutes, § 5209, which reads as follows: "Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association; . . . with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, . . . and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The indictment contained 146 counts, upon all of which, except 24, a *nolle pros.* was entered. A demurrer was filed to all these remaining counts, which was overruled. The defendant was then arraigned, pleaded not guilty, was put upon trial, and convicted upon all the 24 counts, and sentenced

to five years' imprisonment. A motion for a new trial and in arrest of judgment being overruled, defendant sued out this writ, assigning as error the action of the court in overruling his demurrer, and in refusing to arrest the judgment on account of the insufficiency of the indictment. The case was originally argued in this court upon the sufficiency of all these counts, and a reargument subsequently ordered upon the eighth, ninth, tenth, and fourteenth.

A copy of the eighth count, which was a representative one of its class, and in its framework and structure was similar to all the counts to which the attention of the court was called, is here given:

"8. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A.D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully, and fraudulently aid and abet one Harry H. Kennedy, (the said Harry H. Kennedy being then and there cashier of a certain national banking association then and there known and designated as the Spring Garden National Bank, in the State of Pennsylvania, which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided,) then and there to wilfully misapply a certain large amount of the moneys, funds, and credits then and there belonging to the said national banking association for the use, benefit, and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association — that is to say, the said Harry H. Kennedy, late of the district aforesaid, heretofore, to wit, on the day and year aforesaid, in the district aforesaid, and within the jurisdiction of this court, being then and there cashier, as aforesaid, of the said national banking association

aforesaid, did knowingly, unlawfully, fraudulently, and wilfully and with intent to injure and defraud the said national banking association misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of seventy-five hundred dollars, in the manner and by the means following — that is to say, a certain promissory note, dated, to wit, Philadelphia, November 10, 1890, made and drawn by a certain person, to wit, A. B. Nettleton, for the sum of, to wit, seventy-five hundred dollars, due and payable March 13, 1891, at the said bank, had been theretofore, to wit, upon the day and year aforesaid, discounted by the said bank, and was then and there overdue and unpaid, and held by the said bank as and for funds and credits, as aforesaid; whereupon, the said Harry H. Kennedy did then and there, with intent to injure and defraud the said national banking association, knowingly, unlawfully, and fraudulently wilfully misapply the same, in that he then and there surrendered and delivered the same to the said Nelson F. Evans, without receiving therefor for the said bank the said sum of seventy-five hundred dollars, or any part thereof; and the said Nelson F. Evans did then and there knowingly and unlawfully aid and abet the said Harry H. Kennedy, then and there cashier as aforesaid, knowingly, unlawfully, and fraudulently, to wilfully misapply the said funds and credits of the said national banking association, as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

Mr. Hampton L. Carson, (with whom were *Mr. J. Levering Jones* and *Mr. Rufus E. Shapley* on the brief,) for plaintiff in error.

Mr. Assistant Attorney General Conrad for defendants in error.

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

Opinion of the Court.

This case involves the sufficiency of an indictment for the wilful misapplication of the funds of a national bank, in violation of section 5209 of the Revised Statutes.

A rule of criminal pleading, which at one time obtained in some of the circuits, and perhaps received a qualified sanction from this court in *United States* v. *Mills*, 7 Pet. 138, that an indictment for a statutory misdemeanor is sufficient, if the offence be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said by this court in *United States* v. *Carll*, 105 U. S. 611, 612, "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. *United States* v. *Cook*, 17 Wall. 168, 174; *United States* v. *Cruikshank*, 92 U. S. 542, 558. "The fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." *United States* v. *Carll*, 105 U. S. 611.

Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offence intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offence to which the plea relates. *United States* v. *Simmons*, 96 U. S. 360; *United States* v. *Hess*, 124 U. S. 483; *Pettibone* v. *United States*, 148 U. S. 197; *In re Greene*, 52 Fed. Rep. 104.

The section in question in this case was before this court in *United States* v. *Britton*, 107 U. S. 655, 669, in which the wilful misapplication made an offence by this statute was defined to be "a misapplication for the use, benefit, or gain of the party charged or of some company or person other than the association," and that to constitute such an offence there must

be a conversion to the use of the offender, or of some one else, of the moneys or funds of the association by the party charged. It was said that a count which merely charged a maladministration of the affairs of the bank rather than a criminal misapplication of its funds was insufficient. "It would not," said Mr. Justice Woods, "be sufficient simply to aver that the defendant 'wilfully misapplied' the funds of the association. . . . There must be averments to show how the application was made, and that it was an unlawful one." The case again came before this court in 108 U. S. 199, and it was then held that the declaring of a dividend by the association when there were no net profits to pay it was not a criminal application of its funds, but an act of maladministration which, while it might subject the association to a forfeiture of its charter, and the directors to a personal liability for damages, did not render them liable to a criminal prosecution. Again, in *United States* v. *Northway*, 120 U. S. 327, it was held not to be necessary to charge that the moneys and funds alleged to have been misapplied had been previously entrusted to the defendant, since a wilful and criminal misapplication of such funds might be made by its officer or agent without having previously received them into his manual possession. See also *Claassen* v. *United States*, 142 U. S. 140.

The counts of this indictment may be divided into three general classes: First, those charging the defendant with procuring the surrender and delivery to himself of the funds of the bank, and which for convenience may be termed the "surrender and delivery" counts; second, those based upon the illegal discount of unsecured paper, and which may be termed the "unlawful discount" counts; and, third, those in which the defendant is accused of fraudulently overdrawing his own account at the bank, and which may be termed the "overdraft" counts.

1. The eighth, one of the "surrender and delivery" counts, charges in substance that on May 8, 1891, Evans did knowingly, wilfully, unlawfully, and fraudulently aid and abet one Harry H. Kennedy, cashier of the bank, to wilfully misapply certain moneys, funds, and credits belonging to the bank, for

the use, benefit, and advantage of the said Evans, with intent in him, the said Evans, to injure and defraud the bank: That is to say, that the said cashier did knowingly, unlawfully, fraudulently, and wilfully, and with intent to injure and defraud the bank, misapply the sum of $7500, to wit, a promissory note dated November 10, 1890, made and drawn by A. B. Nettleton for this amount, due March 13, 1891, which had been theretofore discounted by the bank, was then overdue and unpaid, and was held by the bank as and for funds and credits, as aforesaid: Whereupon, the said cashier, with intent to injure and defraud the bank, did wilfully, knowingly, and fraudulently misapply the same by surrendering and delivering the note to Evans, without receiving payment therefor for the bank, and the said Evans did there knowingly and unlawfully aid and abet the said cashier in such wilful misapplication with intent in him, said Evans, to injure and defraud the bank.

The ninth and tenth counts did not differ from the eighth, except in describing other notes made by Nettleton, of different dates and amounts.

The same objection was taken to all of them, viz., that there was no averment that the defendant did not receive such notes as an agent for collection, or to secure their renewal, and subsequently failed to account for the same to the bank for proceeds or renewals; and, further, that there was no averment that the bank did not, either at the time of the surrender, or at any subsequent time, receive security, value, or renewal notes therefor, and no averment that the bank had been in any manner a loser thereby.

In answer to the first objection, that there was no averment that the defendant did not receive the notes as an agent for collection or to secure their renewal, it is sufficient to say that the count charges defendant with wilfully misappropriating the money and credits of the bank for his own use, benefit, and advantage, and with intent to defraud the bank, and that the object of the subsequent language of the count is rather to identify the property misapplied than to charge a distinct offence, although the allegation of a wilful misappropriation,

with intent to defraud, is repeated. The count charges, as ingredients of the crime, *first*, that the defendant knowingly, wilfully, unlawfully, and fraudulently aided and abetted the cashier; *second*, in wilfully misappropriating the funds and credits of the bank; *third*, that he did this for his own use and benefit; *fourth*, with intent to defraud the bank; *fifth*, the credit misapplied is then described as a note of one Nettleton, which was then overdue and unpaid; *sixth*, the manner of the misapplication is then set forth as consisting in the surrender and delivery of the same to the defendant, without receiving any part of the sum represented by the note.

Every element of the offence being set forth in the earlier part of the count, there was no necessity of repeating it when the particular credit misapplied is described, nor of negativing every possible theory consistent with an innocent delivery of the note to the defendant. This requirement would have the effect of limiting the government to allegations it might be wholly unable to prove, and without subserving any useful purpose to the defendant. While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty, as well as to shield the innocent, and no impracticable standards of particularity should be set up, whereby the government may be entrapped into making allegations which it would be impossible to prove. The note might have been delivered to the defendant for a score of honest purposes, which it would be utterly impossible to anticipate. Neither in criminal nor in civil pleading is it required to anticipate or negative a defence. "Where there is no question of variance . . . the indictment need not, by way of negative, introduce matter of defence when it is drawn on a statute any more than when it is at common law." 1 Bish. Crim. Pro. § 638. "In general," says Chitty, "all matters of defence must come from the defendant, and need not be anticipated or stated by prosecutor." 1 Chitty Crim. Law, 231; see also *United States* v. *Cook*, 17 Wall. 173. The general words of a fraudulent misapplication to the use and benefit of the defendant, and of an

intent by so doing to defraud the bank, are of themselves inconsistent with an honest purpose. Indeed, the word "surrender" carries with it something more than a bare delivery, and indicates a transfer of title as well as of possession.

It was equally unnecessary to charge that the bank did not, either at the time of surrendering, or at any subsequent time, receive security, value, or renewals for the notes surrendered, or that it had been the loser by such surrender, since there was an allegation that the surrender was made without receiving therefor, for the bank, the sum represented by the notes, or any part thereof. If it did receive such value thereafter it was clearly a matter of defence. The misdemeanor was complete when the note was fraudulently misapplied to the use of the defendant, with intent to defraud the bank, and, if the bank subsequently saved itself from loss, it was a matter to be proven by the accused, if, indeed, it were any defence at all. If, at the time of the surrender, the bank received security, value, or renewals, as a part of the same transaction, this would undoubtedly be a defence; but if the accused subsequently repented and indemnified the bank, or the latter was able to protect itself from loss, it is very doubtful whether this would inure to the benefit of the defendant, or purge him of the charge. 2 Bish. Crim. Law, § 796; *Regina* v. *Phetheon*, 9 C. & P. 552; *Regina* v. *Peters*, 1 C. & K. 245; *State* v. *Scott*, 64 N. C. 586; Wharton's Am. Crim. Law, § 1797.

2. The fourteenth count, which may be treated as a representative of all the "unlawful discount" counts, charged in substance that Evans knowingly, wilfully, unlawfully, and fraudulently aided and abetted the cashier to wilfully misapply the money, funds, and credits of the bank, for the use, benefit, and advantage of the defendant, with the intent on defendant's part to injure and defraud the bank, in that the said cashier knowingly, unlawfully, fraudulently, and wilfully, with the intent to defraud the bank, and for the use, etc., of the said Evans, misapplied the sum of $15,000 by receiving and discounting, with the money and funds of the bank, a note made by Evans for this amount, (giving copy,) which note, when so discounted, "was not then and there well secured," as the

cashier and Evans both well knew, and which note was never paid, by reason of which the bank suffered loss in this amount, with intent, in the said Evans, to injure and defraud the bank.

While the mere discount of an unsecured note, even if the maker and the officer making the discount knew it was not secured, would not necessarily be a crime, if the maker believed that he would be able to provide for it at maturity; yet if his original intent was to procure the note to be discounted in order to defraud the bank, as charged in this count, every element of criminality is present. The case is not unlike that of purchasing goods or obtaining credit. If a person buy goods on credit in good faith, knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offence even if he be disappointed in making such payment. But if he purchases them, knowing that he will not be able to pay for them, and with an intent to cheat the vendor, this is a plain fraud, and made punishable as such by statutes in many of the States. In this particular of an intent to defraud, the case is distinguishable from that of *United States* v. *Britton*, 108 U. S. 193, in which the charge was that the defendant, being president and director of the association, and, being insolvent, procured his own note to be discounted, the same not being well secured, the payee and the endorser thereof being also insolvent, which he, defendant, well knew. The incriminating facts were that the note was not well secured, and that both the maker and endorser were, to the knowledge of the defendant, insolvent when the note was discounted. The question there presented was whether the procuring of the discount of such a note by an officer of the association was a wilful misapplication of its moneys within the meaning of the law. It was held that it was not. The criminality really depends upon the question whether there was, at the time of the discount, a deliberate purpose on the part of the defendant to defraud the bank of the amount.

It is objected, however, to this count that there was no averment that the cashier, in discounting the note, acted in excess of his powers or outside of his regular duties, nor was there

any averment that the cashier was not the duly authorized officer of the bank to discount paper, nor was there any averment that the discount was procured by any fraudulent means, or that Evans was at the time of such discount insolvent, or knew himself to be so. It was held by this court in *Bank of the United States* v. *Dunn*, 6 Pet. 51, that the power to discount paper was not one of the implied powers of the cashier, and this is believed to be the law at the present day. Morse on Banking, § 117. If the directors of this bank had authorized their cashier, either generally or in this particular case, to discount paper, it was clearly matter of defence. But even if he did possess such power, and wilfully abused it by discounting notes which he knew to be worthless, and did this with deliberate intent to defraud the bank, it is not perceived that his criminality is any less than it would have been if he had acted beyond the scope of his authority.

No averment was necessary that such discount was procured by fraudulent means, since the offence consists not in the use of fraudulent means, but in the discount of a note which both parties knew to be unsecured, with the intent thereby to defraud the bank. An averment that Evans was at the time insolvent, or knew himself to be so, was also unnecessary, in view of the allegation that Evans knew that the note was not secured, and procured the same to be discounted with intent to defraud the bank. The argument of the defendant in this connection assumes that under no circumstances is the discount of a note, which all parties know to be worthless, an offence under the statute, even though such discount be made for the deliberate purpose of defrauding the bank out of the proceeds of the note so discounted. We do not see how it is possible to give such an interpretation to the statute without a practical nullification of its provisions.

Defendant's entire criticism upon these counts seems to be founded upon the hypothesis that no weight whatever is to be given the words "knowingly, wilfully, unlawfully, and fraudulently," or to the general allegation of an intent to defraud — in short, that these words are mere surplusage. Where, however, the statute uses words which are not abso-

lutely inconsistent with an honest purpose, such as was held by this court in *Britton's case* were the words "wilfully misapplied," the allegation of an intent to defraud becomes material in the highest degree. In fact, the gravamen of the offence consists in the evil design with which the misapplication is made, and a count which should omit the words "wilfully," etc., and "with intent to defraud," would be clearly bad. While it is entirely true that an allegation of fraud is insufficient, either in an indictment or in a bill in equity, without giving the particulars of the fraud, an intent to defraud is only to be gathered by the jury from all the facts and circumstances of the case. There is no greater need of setting out the evidence to prove such intent than there would be of averring in detail the evidence of a *scienter*, or of any other fact material to the offence. Where the intent is a material ingredient of the crime it is necessary to be averred; but it may always be averred in general terms, as in a case of assault with intent to kill. So in an indictment for murder, it is necessary to aver that the killing was done "wilfully, feloniously, and of malice aforethought;" but the evidence that it was so done, though necessary to be given, is not necessary to be set forth. This subject, however, was so fully considered by this court in *United States* v. *Simmons*, 96 U. S. 360, 364, that it is needless to dwell upon it more at length here. In that case the indictment averred that the defendant "did knowingly and unlawfully engage in and carry on the business of a distiller . . . with intent to defraud the United States of the tax on the spirits distilled by him." It was held not to be necessary to state the particular means by which the United States was to be defrauded of the tax. "The defendant," said the court, "is entitled to a formal and substantial statement of the grounds upon which he is questioned, but not to such strictness in averment as might defeat the ends of justice. The intent to defraud the United States is of the very essence of the offence; and its existence in connection with the business of distilling being distinctly charged, must be established by satisfactory evidence. Such intent may, however, be manifested by so many

acts upon the part of the accused, covering such a long period of time, as to render it difficult, if not wholly impracticable, to aver, with any degree of certainty, all the essential facts from which it may be fairly inferred." "The means of effecting the criminal intent," says Mr. Wharton, "or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to go to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment." 1 Wharton's Criminal Law, § 292.

A general verdict of guilty was rendered upon all the counts of this indictment upon which a *nolle prosequi* was not entered, and as such verdict should stand if any one of the counts is good, it will not be necessary to consider them in any further detail. *Claassen* v. *United States*, 142 U. S. 140.

The judgment of the court below is, therefore,

Affirmed.

Mr. Justice Field dissenting.

I am unable to concur in the judgment of the court in these cases, or in the opinion upon which it is founded. The two cases arise out of the same state of facts, are similar in essential particulars, and were argued together.

The defendant below, Nelson F. Evans, the plaintiff in error here, was for some years previously to May, 1891, a director of the Spring Garden National Bank, a national banking association doing business by that name at Philadelphia in the State of Pennsylvania. The bank failed on the 9th of May, 1891, and passed into the hands of a receiver. A year afterwards, in May, 1892, the defendant Evans was indicted for various acts in alleged violation of section 5209 of the Revised Statutes of the United States, which is as follows:

"Sec. 5209. Every president, director, cashier, teller, clerk, or agent of any association who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or put forth any

certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report, or statement of the association with intent, in either case, to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years, nor more than ten."

The indictments originally contained several hundred counts, charging over one hundred and fifty different offences, but as to a large number of the counts a *nolle prosequi* was entered. The number retained was still large, amounting to twenty-three in one indictment and fifty-seven in the other. To them demurrers were filed and overruled. The defendant was then arraigned and pleaded not guilty, and, upon the issues, a jury was called and trials had, which resulted in conviction in both cases. A motion for a new trial in each case was overruled. Subsequently a motion in arrest of judgment, upon substantially the same grounds as those urged in support of the demurrers prior to the pleas, was made. This motion was also overruled, and the defendant was then sentenced, upon the conviction, under one of the indictments, to imprisonment in the penitentiary for the term of five years, and upon the conviction under the other indictment to a like imprisonment for the term of two years following the expiration of the previous imprisonment. The cases are brought to this court upon writs of error to review these judgments.

The counsel of the defendant has given the court much assistance in the consideration of the cases by the careful analysis he has made of the different counts. These are so numerous, presenting in many of them the same charge with confusing variations, as to obscure rather than to render clear the real offences intended.

In the indictment in case No. 923, the offence charged

against the defendant in the first four counts is set forth in the most general way. In the first of these four the defendant is charged as a director with wilfully misapplying the funds and credits of the bank. In the second he is charged with conspiring with officers of the bank to wilfully misapply its money and credits. In the third he is charged with aiding and abetting the president of the bank to misapply its moneys, funds, and credits. In the fourth count he is charged with aiding and abetting the cashier of the bank in a similar misapplication. A demurrer was interposed to each of these four general counts on the ground that it did not specify the means whereby the alleged misapplication was made, and show that they were unlawful.

The remaining counts of the indictment are more specific, some of them charging the defendant as a director with misapplying moneys, funds, and credits by depositing checks and obtaining fictitious credits thereon; others charging him with aiding and abetting the president in misapplying funds and credits in the same manner; others with aiding and abetting the cashier in a like misapplication of the funds; others with aiding and abetting the president in misapplying funds by surrendering notes; others with aiding and abetting the president in misapplying the funds by discounting unsecured notes of the defendant; others with misapplying the funds through overdrafts; others with aiding and abetting the president to misapply the funds through overdrafts.

In the indictment in case No. 922 the defendant, in some of the counts, is charged with aiding and abetting the cashier in misapplying the funds of the bank by surrendering to the defendant unpaid notes, which the bank had discounted and still held, without receiving for them the amount thereof, or any part of it; in some also with aiding and abetting the cashier to misapply the funds by discounting unsecured notes; in some also with aiding and abetting the cashier to misapply the funds through overdrafts.

For the disposition of these cases it is not necessary to pass upon each count separately. In the first instance the general counts will be considered, and then an examination made as

to the sufficiency of the specific counts upon which the government chiefly relies to sustain the prosecution. If they will not bear the scrutiny given to them, none will. The grounds of the demurrer to them will be designated when the counts are separately considered.

With reference to indictments for statutory offences, there are certain rules which govern their construction. It is usually sufficient, in such cases, to set forth the offence in the language of the statute, if it be accompanied by a statement of such facts and circumstances as will inform the accused of the specific offence, coming under the general description of the statute, with which he is charged. He must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, in order that he may be able to prepare for his defence, and, also, in case of conviction or acquittal, that he may plead the judgment in bar of further proceedings. *United States* v. *Simmons*, 96 U. S. 360; *United States* v. *Hess*, 124 U. S. 483.

A mere statement of the offence in the words of the statute, without a statement of the accompanying facts and circumstances essential to constitute a specific offence, will be insufficient. As said by this court in *United States* v. *Carll*, 105 U. S. 611, 612, speaking through Mr. Justice Gray, "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." Numerous authorities were cited in support of the views expressed.

There is a very general test applicable to all indictments. If the facts alleged be established or admitted to be true, and their truth is consistent with the defendant's innocence, the indictment is insufficient, however full the description in other

respects. Applying this well-settled doctrine to the different counts of the indictments in these cases, there will be little difficulty in determining as to their sufficiency. Yet the doctrine appears to be entirely ignored by the majority of the court, or at least set aside in these cases.

The four general counts are manifestly insufficient, as they wholly fail to aver the means by which the alleged misapplication of the funds was made by the defendant, or attempted by him, in conspiracy with the president or cashier, or in aiding and abetting them.

Upon an allegation that one has misapplied the funds of a bank, the natural inquiry would be, how — in what manner? Until the manner in which the application was made and the purpose of it are shown, no misapplication can be established. There is no averment of facts in either of the counts of the indictment to show that the application of the funds was an unlawful one, and unless it appear from the facts alleged that such was the case, the application will not constitute the offence charged. Nor is there any averment of facts to show that the bank suffered any loss or damage by the misapplication. From all that is alleged it may have been the exercise of an unwise judgment, for which the defendant could not be charged under the statute, and injury from which may have been avoided by a subsequent replacement of the moneys.

In *United States* v. *Britton*, 107 U. S. 655, 669, the words "wilfully misapplied," used in the section upon which the present indictments were found, were considered, and the court, speaking by Mr. Justice Wood, said: "The words 'wilfully misapplied' are, so far as we know, new in statutes creating offences, and they are not used in describing any offence at common law. They have no settled technical meaning, like the word 'embezzle,' as used in the statutes, or the words, 'steal, take, and carry away,' as used at common law. They do not, therefore, of themselves, fully and clearly set forth every element of the offence charged. It would not be sufficient simply to aver that the defendant wilfully 'misapplied' the funds of the association. This is well settled by the authorities we have already cited. *There must be averments*

to show how the application was made, and that it was an unlawful one." It follows that the demurrer to each of the four general counts was well taken and should have been sustained.

The two cases, as stated in the opinion of the court, were originally argued here upon the sufficiency of all the counts. A reargument having been ordered, it was confined principally to the eighth, ninth, tenth, and fourteenth counts. And in the opinion a copy of the eighth count is given at length as a representative one of its class, and as in framework and structure similar to all the counts to which the attention of the court was called.

This count stripped of its useless verbiage, and of its adjectives imputing supposed fraudulent motives to the conduct of the defendant, and of adverbs of objurgation, is substantially this and no more: That the defendant, Evans, did, on the 8th of May, 1891, in the district named, aid and abet the cashier of the bank to misapply an unpaid note of one Nettleton for seventy-five hundred (7500) dollars, formerly discounted and still held by the bank, by surrendering and delivering it to the defendant without receiving its amount or any part thereof, and that it was done by the defendant to injure and defraud the bank. The allegation of the motive of such surrender and delivery adds nothing to the character of the act unless its object is shown by stating the use to which the note was to be put, as that it was for cancellation or appropriation for the benefit of the defendant or of some one other than the bank, or to accomplish some object other than to obtain its payment, renewal, or security. Nor does the count aver that a valid consideration was not received for the note, or that the bank lost by the transaction. The mere charge of an intention to misapply the unpaid note is not sufficient without some allegation of the manner in which such misapplication was made. This was held in *United States* v. *Britton*, 107 U. S. 655. It was there said that to constitute the offence of wilful misapplication, there must be a conversion to the use of the offender or of some one else, of the moneys and funds of the association by the party charged. It would not be sufficient, the court added, simply

to aver that the defendant wilfully misapplied the funds of the association. "There must be averments to show how the misapplication was made and that it was an unlawful one."

It is an old doctrine, not to be forgotten in practice or in pleading, that an act lawful in itself cannot be made criminal by imputing wrong motives to the conduct of the party. Punishment is not in our days inflicted for the motives for which lawful acts are done. There is no force added to the allegation of "delivered" by the use of the word "surrendered" in this case, but rather its force is weakened. A surrender is usually made upon some right or claim, or upon coercion. The latter is not suggested here, and surrender is consistent with some useful purpose in the enforcement of a claim or right to the note.

Similar observations may be made of almost every count in both indictments. There is some fact which might be stated in connection with their allegations and which would obviate their criminality, but which is omitted, and the omission, in my judgment, makes the indictments invalid.

I do not claim that it is essential that the pleader should negative every conceivable lawful delivery, such as would be unusual though possible under some circumstances, but I do insist that a lawful delivery should be met by a negative to the natural and ordinary conduct which would be adopted by innocent parties in such cases. A note discounted at a bank, when not paid in whole or in part, is not usually surrendered to a third party without a valuable consideration, unless it be for collection or to obtain its renewal or security for it, and such usual action should be negatived by averment. No doctrine is more essential for the protection of a party accused of a criminal offence, and none should be more rigidly enforced than this — that the facts alleged by way of accusation, if admitted to be true, must be inconsistent with the inference of his innocence of the offence charged arising from the usual conduct of innocent parties in such cases.

I do not assent to the doctrine that the note might have been delivered to the defendant for a score of honest purposes which it would be unnecessary to negative, and that in

criminal pleading it is not required to anticipate and negative a natural and obvious answer to the accusation. Such is not the law as I understand it.

The counts which are more specific in their allegations, and upon the sufficiency of which the prosecution chiefly relies, will now be considered. These specific counts are grouped by the prosecution into four sets. The first set consists of counts five, ten, and eleven of the indictment in case 923. These counts are, substantially, that the defendant on the 8th of May, 1891, did knowingly, unlawfully, fraudulently, and wilfully, and with intent to injure and defraud the bank, misapply certain of its moneys, funds, and credits for his own use and benefit, to wit, the sum of fifteen thousand three hundred and thirty-three and $\frac{35}{100}$ dollars, in the manner and by the means following, that is to say, the defendant, being a director, did deposit and place to his credit in the bank his check, drawn by himself on the Keystone Bank in favor of the Spring Garden Bank, the amount being in excess of all the sums which he was then entitled to draw from the moneys and funds of the Keystone Bank, and by means of which check, thus deposited, he obtained a false credit upon the books of the Spring Garden Bank, and was thereby enabled, and did thereafter, draw out from that bank the sum mentioned for his own use, benefit, and advantage, as he then well knew, contrary to the act of Congress.

The three counts differ from each other in this, that the tenth count charges the defendant with knowingly and fraudulently aiding and abetting the president of the bank to misapply its moneys, funds, and credits, in the amount mentioned, by receiving on deposit and crediting to himself the check mentioned. The eleventh count differs only in alleging that the defendant aided and abetted the cashier of the bank in misapplying its moneys and credits in the manner mentioned. The charge is substantially the same in all three counts — that a false credit was secured by the defendant with the bank by depositing a check, drawn by him on the Keystone Bank in excess of what he knew to be his balance there, and which check was not paid. These counts are subject to the general

objection that, admitting all their statements to be correct, they are still consistent with the innocence of the defendant. The counts nowhere allege that the check on the Keystone Bank was ever presented to that bank for payment. The defendant may have overdrawn his account in that bank; the check may have been in excess of all sums which he was entitled to draw, and yet it might have been paid upon presentation. There is not, in the mere fact that one overdraws his account at a bank, necessarily any evidence that the drawer intended to defraud the bank, or any other bank with which the check was deposited. It is a matter of every day practice for depositors in a bank to overdraw their accounts. Whether checks so overdrawn will be paid may depend upon other considerations than the amount of deposits of the drawer in the bank. It would be an extraordinary position to hold that because a man drew upon a bank for more than he knew he had on deposit he should be charged by the holder with the commission of a fraud, before the latter had presented the check to the bank for payment, and payment had been refused. Whether or not the Keystone Bank would have paid it, had it been thus presented, may have depended upon the confidence which the bank might have entertained in the drawer's ultimate ability to pay. Though not entitled, in the words of the indictment, to draw at the time any sums whatever, yet he may have had such credit with the bank, from its knowledge of his character and habits, as to induce it to honor his check. It is within the experience of every one that checks thus drawn are often honored, even with a knowledge of the drawer's inadequate deposit. Other facts beside such knowledge by the drawer must be shown to justify the imputation of criminal intent to him. A demurrer was interposed to the counts mentioned, on the ground that it did not aver that the checks in question were presented to the Keystone Bank for payment and that payment was refused, and that the bank thereby became a loser. In my opinion the counts were, for that reason, insufficient, and the demurrer was well taken and should have been sustained.

The second set of counts upon which the prosecution relies are numbers six, seven, eight, nine, twelve, and thirteen of the same indictment. These also allege that the defendant, being a director of the Spring Garden Bank, caused certain checks drawn by him upon the Keystone Bank and the Fourth Street National Bank of Philadelphia for sums greater than he was entitled to draw or obtain from them, to be deposited with the Spring Garden Bank, and placed to his credit on its books, and thereby obtained a false credit and received from that bank, for his own use and benefit, the amount of such checks. But these counts also show that each of such checks was endorsed in this way: "For deposit to the credit of Nelson F. Evans. Received payment through the clearing-house." The purport of this endorsement is that the checks were passed by the bank through the clearing-house and paid there, a not unusual way of collecting checks in our large cities. The same objections that were made to counts five, ten, and eleven can be made to these counts; and also the further objection that there is an inconsistency in the allegation that thereby any false credit was obtained, the checks having endorsed on their face the statement that payment was received on them through the clearing-house.

These checks are set forth in the indictment with this endorsement, and there is no allegation that the endorsement was false or was made, or permitted to be made, by the defendant, with any intent to defraud the bank. The very face, therefore, of the checks negatives the charge of crime, and contradicts the idea of loss to the bank. If in answer to this view it be said that it is alleged that the checks were not paid, it must be observed that no averment is made of their presentation for payment or of anything to exclude the idea of negligence on the part of the bank receiving them, or that the money was not lost through the failure of the bank upon which they were drawn. The six counts differ from each other in this, that in some of them the checks are alleged to have been drawn on the Keystone Bank and in others on the Fourth Street National Bank; and in some of the counts the misapplication is charged directly upon the defendant, and in

others by his aiding and abetting the president or the cashier. On the several grounds stated a demurrer was interposed to these counts, and in my judgment it was well taken and should have been sustained.

The third set of counts upon which the prosecution relies are number fourteen, in the indictment in case 922, and number twenty, in the indictment in case 923. These counts charge the defendant with aiding and abetting the president and cashier of the bank in fraudulently misapplying its funds for the use and benefit of the defendant, by receiving and discounting his note for fifteen thousand dollars, payable in three months, knowing that that note was not secured; and it was not paid at maturity, or at any other time. But these counts are defective in not alleging that the discounting of the note was in excess of the power of the president or cashier or outside of their regular duties, or that the president or cashier was not the authorized officer of the bank to discount paper. Nor is it averred that the discount was procured by any fraudulent means, or, even, that the defendant was, at the time, insolvent or knew himself to be so. On these grounds a demurrer was interposed, and in my judgment should have been sustained.

The only remaining counts upon which the prosecution relies are numbers fourteen, fifteen, and sixteen of the indictment in case 923, and numbers eight, nine, and ten of the indictment in case 922. These counts charge in substance that the defendant aided and abetted the president or the cashier of the bank to fraudulently misapply a large amount of its funds by surrendering to him for his use and benefit certain notes of one Nettleton, discounted by the bank and held as part of its assets, without receiving for the bank the amount thereof, or any part thereof, and that such surrender was fraudulently made to injure the bank. The counts in the indictment in case 923 charge that the defendant aided and abetted the president of the bank in the fraudulent misapplication. The counts in the other indictment charge that the defendant aided and abetted the cashier in such misapplication of the funds. These counts do not show, in either case, *any*

application of the surrendered notes to the use and benefit of the defendant as charged, nor do they contain any averment that the defendant did not receive the notes as agent, for collection, or to obtain their renewal, which would readily suggest themselves as an answer to the alleged unlawful surrender, or that the bank was in any way a loser thereby. The defect in these counts is substantially the same pointed out in considering the eighth count of No. 922, a copy of which is set forth in the opinion of the court.

The allegations of fraudulent conduct and motive in the transactions, for which the indictments were found, are repeated with wearisome frequency, yet they are of no avail unless accompanied by a statement of facts from which such fraud must necessarily be inferred. A party is not to be condemned by the multitude or opprobriousness of the adjectives applied to his conduct or motives, unsupported by the facts, or, as said by Lord Chief Justice Holt, "a fact that appears to be innocent cannot be made a crime by adverbs of aggravation." Fraud is a conclusion of law from facts respecting the transactions designated, and if they do not necessarily tend to such conclusion, the allegation falls to the ground, however often repeated or with whatever amount of earnest asseveration.

Similar views are announced with great clearness and force in *United States* v. *Watkins*, decided by the Circuit Court for this District over sixty years. 3 Cranch C. C. 441. The defendant, who was the Fourth Auditor of the Treasury of the United States, was indicted for devising and intending fraudulently to obtain for his private use moneys of the United States, by means of letters to and drafts on the navy agent at New York and the navy agent at Boston, and certain requisitions on the Treasury of the United States, also sent by him to them, said letters, drafts, and requisitions being used as false pretences to enable him to obtain the moneys. There were three indictments found against him, and objections were taken to the sufficiency of their allegations of fraud. In considering the objections the court said: "Fraud is an inference of law from certain facts. A fraud, therefore, is not suffi-

ciently set forth in an indictment, unless all the facts are averred which in law constitute the fraud. Whether an act be done fraudulently or not is a question of law so far as the moral character of the act is involved. To aver that the act is fraudulently done is, therefore, so far as the guilt or the innocence of the act is concerned, to aver a matter of law, and not a matter of fact. An averment that the act was done with intent to commit a fraud is equivalent to an averment that the act was done fraudulently. No epithets, no averment of fraudulent intent, can supply the place of an averment of the fact or facts from which the legal inference of fraud is to be drawn. Starkey, in his late treatise on Criminal Pleadings, says: 'Whether particular circumstances constitute an indictable fraud is a question of law; and, therefore, according to a fundamental rule of description in indictments, such circumstances must be set out in order to show that the facts amount to an indictable offence.' And he quotes Archbold on Criminal Pleadings as follows: 'An indictment for an offence against the statute must with certainty and precision charge the defendant to have committed acts under the circumstances, and with the intent mentioned in the statute; and if any one of these ingredients in the offence be omitted, the defendant may demur, move in arrest of judgment, or bring a writ of error. The defect will not be aided by verdict, nor will the conclusion, *contra formam statuti*, cure it.'"

The charges in the two indictments, by their very number, setting forth over seventy-five distinct offences, after dismissing counts for over one hundred other offences — those retained varying from each other by confusing differences — were calculated to embarrass and oppress the defendant in his defence. The allegations of fraud in conduct and motive not being supported by any averment of facts from which such fraud is necessarily inferable, the other allegations as to the transactions charged are, upon a reasonable construction, consistent with the innocence of the defendant. And indictments, in my opinion, ought not to be viewed with favor which, by the very multitude of their counts, serve to embarrass and confuse the accused. If an offence cannot be stated in less than one hun-

dred counts of an indictment, I do not think that public justice will suffer if the indictment be dismissed.

My conclusion is that the indictments on all the counts retained are insufficient to hold the defendant, and that the judgment below thereon should be reversed in both cases and judgment entered upon the demurrers in each case for the defendant, and that he be discharged therefrom.

EVANS *v.* UNITED STATES (No. 2).

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

No. 923. Submitted April 17, 18, 1894. — Decided May 14, 1894.

Evans v. *United States*, No. 922, *ante*, 584, followed.

This case was argued with No. 922, *ante*, 584. It was also an indictment against Evans for a wilful misapplication of the funds of the Spring Garden National Bank. The indictment originally contained 152 counts, upon all of which except 57 a *nolle pros.* was entered. The same proceedings were had as in the former case. The defendant was convicted upon all the counts, and sentenced to imprisonment for two years at and from the expiration of such imprisonment as he might undergo by reason of the sentence in the prior case. He subsequently sued out this writ of error. A reargument was ordered upon the fifth to the eleventh counts inclusive, and upon the fourteenth, fifteenth, sixteenth, and twentieth counts.

Mr. Hampton L. Carson, (with whom were *Mr. J. Levering Jones* and *Mr. Rufus E. Shapley* on the brief,) for plaintiff in error.

Mr. Assistant Attorney General Conrad for defendants in error.

Mr. Justice Brown delivered the opinion of the court.

As the verdict of guilty was rendered upon all the counts, and the sentence did not exceed that which might properly have been imposed upon conviction under any single count, such sentence is good if any such count is found to be sufficient. As the fourteenth, fifteenth, and sixteenth counts of this indictment are the same as the eighth, ninth, and tenth of the other indictment, which were held to be good, except that the defendant is charged with aiding and abetting the president instead of the cashier in the fraudulent misapplication of the Nettleton notes, and the twentieth bears the same resemblance to the fourteenth of the other, it follows that these counts are also good, and the judgment of the court below is, therefore,

Affirmed.

Mr. Justice Field dissented for the reasons stated in his dissenting opinion in *Evans* v. *United States*, *ante*, 584.

SEEBERGER *v.* SCHWEYER.

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

No. 295. Submitted March 19, 1894. — Decided May 14, 1894.

The words "date of original importation," as used in Rev. Stat. § 2970, refer to the exterior port of first arrival of the merchandise, and not to the interior port of destination.

The case is stated in the opinion.

Mr. Assistant Attorney General Whitney for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Shiras delivered the opinion of the court.

This was an action brought in the Circuit Court of the United States for the Northern District of Illinois by John

Schweyer, an importer of goods, against Anthony F. Seeberger, the collector of customs for the port of Chicago, to recover duties paid under protest in 1888, upon goods imported in 1886 and placed in a bonded warehouse.

A jury was waived, and the case was tried by the court, which found the facts as follows:

"That on the 26th day of October, 1886, the plaintiff imported, *via* the port and district of New York, certain merchandise, and from thence transported the same to the port and district of Chicago, under the immediate transportation act, where it was duly entered for warehouse on the 11th day of December, 1886. That within a year after their arrival in Chicago, but more than a year after their arrival at the port of New York aforesaid, the plaintiff offered to pay the duties and charges assessed against said merchandise, but the customs officer at the port of Chicago assessed an additional duty of 10 per cent on the amount of duties and charges due thereon, under section 2970, Revised Statutes, for the reason, as he claimed, that the merchandise had not been withdrawn for consumption within one year from the date of the original importation, claiming that the date of original importation was the date when the merchandise arrived at the port of New York aforesaid."

The court further found that the plaintiff paid the additional duty, under protest, and duly appealed, and the last finding of the court was as follows:

"The court further finds that the merchandise was withdrawn for consumption at Chicago, November 2, 1887, which said withdrawal was at the port of original importation, in accordance with the law."

From the judgment of the court in favor of the plaintiff the case has been brought here on error. The question presented by the record is the single one whether the period of one year, within which the plaintiff was entitled to withdraw the goods upon paying the duties and charges, runs from the date of the arrival at the port of New York, or from the date of the arrival at the port of Chicago.

Section 2970 of the Revised Statutes reads as follows:

"Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after the expiration of one year from the date of original importation, and until the expiration of three years from said date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of ten per centum of the amount of such duties and charges."

In connection with that section must be read the first section of the act of June 10, 1880, c. 190, 21 Stat. 173, as follows:

"That when any merchandise . . . imported at the port of New York . . . shall appear by the invoice or bill of lading and manifest of the importing vessel to be consigned to and destined for either of the ports specified in the seventh section of this act, the collector at the port of arrival shall allow the said merchandise to be shipped immediately after the entry prescribed in section two of this act has been made."

Section 2 provides that the merchandise shall be examined as far as necessary, but shall not be subject to appraisement and liquidation of duties at the port of first arrival, but shall be appraised "at the port of destination."

Section 7 provides "that the privilege of immediate transportation shall extend to the port of . . . Chicago," etc.

Do, then, the words "date of original importation," as used in section 2970, refer to the exterior port of first arrival or to the interior port of destination? It is urged on behalf of the government that Congress cannot have intended that the period for warehousing should be indefinitely extended beyond a year after actual importation, and that this would be the result of fixing the date of importation at the arrival at the interior port, owing to the delays, sometimes considerable, in transportation.

The case of *Hartranft* v. *Oliver*, 125 U. S. 525, 528, is cited,

as holding that goods in process of transportation, under charge of the customs officers, are in effect already warehoused, within the meaning of the customs laws. That was where the imported article, salad oil, arrived in a vessel at the port of Philadelphia on Saturday, June 30, 1883, and was entered at the custom-house at two o'clock in the afternoon. It was not practicable to remove the goods on that day, and the next day was Sunday. On July 7 the cases were entered in bond at the custom-house, and on the same day the importer made a withdrawal entry for the goods, and offered to pay the collector duty thereon at the rate of 25 per cent ad valorem, but the collector exacted a specific duty of 25 cents per gallon, a change of rate of duty having gone into effect on July 1, and the court held, per Mr. Justice Field, that "goods on board of a ship, in charge of a custom-house officer, preliminary to their removal to a public store or a bonded warehouse, and during the time necessary for that purpose, are in like custody, and so are within the spirit and intent of the law subject only to such duties as are leviable when the goods are freed from such custody. So far as the government is concerned, they are in the same position as if technically in a public store or bonded warehouse. When in either of these places, they cannot be removed without a permit from the collector. When on shipboard, in charge of a custom-house inspector, they are in the same condition, and cannot be removed without a like permit. . . . The act of Congress of March 28, 1854, which is now embraced in § 2971 of the Revised Statutes, in providing for the deposit of goods in public stores and bonded warehouses, declares that 'any goods remaining in public store or bonded warehouse beyond three years shall be regarded as abandoned to the government;' and in the construction of this clause the Treasury Department has decided that the period limited for their remaining in a public store or a bonded warehouse includes the time on shipboard, after the arrival of the ship in port. Treasury Regulations of 1857, art. 483."

If, then, goods remaining on a vessel after arrival at the port of New York, and when the vessel is in charge of a custom-house officer, are to be regarded, within the customs laws,

as within the custody of the government in the same sense as if they had been actually discharged into a custom-house or bonded warehouse, it would seem to follow that when goods have arrived at the port of New York, and the arrival of the vessel has been reported at the custom-house, and then the goods, with the consent and allowance of the collector, under the provisions of the 1st and 2d sections of the act of June 10, 1880, have been shipped to Chicago, such goods must be deemed to have been warehoused from the time of the arrival of the ship.

As the language of section 2970 is express and free from ambiguity in specifying that, on payment of the duties and charges, merchandise may be withdrawn within one year from *the date of original importation*, and that an additional duty of ten per centum shall be assessed against goods after the expiration of one year from the *date of original importation*, and as the argument that the port of destination is to be regarded as the port of original importation is not based on the language of the act of June 10, 1880, but is inferential only, we think that the natural and safe course is to abide by the words of the statute. In the first section the language is "*any merchandise imported at the port of New York*," etc., which naturally means that such importation is the original importation. This conclusion is strengthened by the contents of the third section, which provides that the merchandise shall be delivered to and transported by common carriers, to be designated for this purpose by the Secretary of the Treasury, and to and by none others; that such carriers shall be responsible to the United States for the safe delivery of such merchandise to the collector at the port of its destination; and that before they shall be permitted to receive and transport any such merchandise such carriers shall become bound to the United States in bonds in such form, amount, and condition as the Secretary of the Treasury shall require. This would seem to bring such carriers within the meaning of the case heretofore cited, *Hartranft* v. *Oliver*, and the goods in their charge may well be regarded as in like condition with goods in a custom-house or bonded warehouse.

Syllabus.

Upon the whole, we conclude that the court below erred in refusing the defendant's request to hold the law to be that the port of New York was the port of original importation, and not the port of Chicago; and as this was a case of a special finding which ascertained all the facts of the case, there is no reason for awarding a new trial. *Allen* v. *St. Louis Bank*, 120 U. S. 20, 40.

Judgment reversed and case remanded to the Circuit Court, with directions to enter judgment for the original defendant.

Mr. Justice Harlan dissented.

STARR *v.* UNITED STATES.

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

No. 1080. Submitted March 5, 1894. — Decided May 14, 1894.

A warrant issued by a commissioner of a court of the United States is not void for the want of a seal, the commissioner having no seal, and not being required by statute to affix one to warrants issued by him.

The same result is reached under the laws of Arkansas, which prescribed the form of warrant as attested under hand, but not under seal.

The settled rule that where a person having authority to arrest, and using the proper means for that purpose is resisted, he can repel force with force, and, if the party making the resistance is unavoidably killed, the homicide is justifiable, may be invoked by a person who resists and kills the officer if he was ignorant of the fact that he was an officer; and, when such a defence is set up to an indictment for murder, it is error to charge the jury that, if the threatening or violent conduct of the prisoner prevented the officer from giving notice of his official character, he would not be required to give notice.

The possession of a conscience void of offence towards God and man is not an indispensable prerequisite to justification of action in the face of imminent and deadly peril, nor does the intrinsic rightfulness of the occupation or situation of a party, having in itself no bearing upon or connection with an assault, impose a limitation upon the right to repel it.

The motive of a person, accused of murdering an officer trying to arrest him, in being where he was at the time of the killing, has nothing to do with the question of his right of self-defence in itself, and his previous

Statement of the Case.

unlawful conduct should form no element in the solution of that question, except as it throws light on his belief that his arrest was sought by the officer.

While it is well settled in Federal courts that the presiding Judge may sum up the facts to the jury, and express an opinion upon them, he should take care to separate the law from the facts, and leave the latter in unequivocal terms to the judgment of the jury.

The circumstances of this case apparently aroused the indignation of the Judge who presided at the trial of it in an uncommon degree, and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances; and this court is constrained to express its disapprobation of this mode of instructing and advising a jury.

HENRY STARR was convicted of the murder of Floyd Wilson, a white man and not an Indian, on December 13, 1892, at the Cherokee Nation in the Indian Territory, and, November 4, 1893, sentenced to be hanged on February 20, 1894, and thereupon sued out this writ of error.

It appeared on the trial that on November 18, 1892, a warrant was issued by a United States commissioner for the Western District of Arkansas for the arrest of Starr and others on a charge of larceny, which was delivered for execution to Henry E. Dickey, a deputy United States marshal; and that the marshal summoned Floyd Wilson, the deceased, as his posse to aid in the execution of the warrant. The evidence tended to show that they proceeded on horseback to the neighborhood of the place where Starr was to be found, and, after visiting several points, came to the house of one Dodge, where they concealed themselves to await his coming; that Starr passed Dodge's house on horseback, whereupon Wilson mounted his horse and pursued him; that the two jumped from their horses and stood facing each other a short time, apparently talking; that it looked as if Starr "was trying to work off away from Wilson," when Wilson mounted his horse again and rode up to within twenty-five or thirty feet of Starr, who made no effort to flee; that Wilson then sprang from his horse, threw his gun to his shoulder and fired at Starr, who was then standing with his gun in both hands holding it down, but, upon Wilson's shooting, returned the

fire and continued to fire rapidly; that Wilson fell, raised himself in a sitting position, jerked his six shooter out and fired four times, when Starr ran up to him and fired point blank into him; Wilson died immediately afterwards. The evidence further tended to show that during the affray Starr fired one shot at the marshal; that he picked up Wilson's gun, found the lever out of order, could not fire it, and turned to go away, and, as he turned, the marshal fired at him; that the marshal's and Starr's horses ran away, but Starr caught Wilson's horse, and, mounting it, rode off. The marshal testified that at the time of this occurrence he had the writ in his possession, and had instructed Wilson as to his duties, and told him, "Now, don't kill this boy if possible to get along without it. We will call on him to surrender."

One Mrs. Padget testified that she saw the transaction from a distance, called a quarter of a mile, and understood Wilson to say: "Hold up; I have a warrant for you;" and that Starr said: "You hold up." She also, in answer to a question put by the district attorney, stated that three or four weeks before the shooting Starr told her that he guessed a marshal named Cowden was hunting for him, "for jumping his bond." And Dickey said in the course of his testimony that he went up in Starr's neighborhood to see a person "shortly after Henry started, got out and jumped his bond."

The witnesses agreed that Wilson fired the first shot, and also that during the time he was riding up to Starr, Starr did not raise his gun or make any effort to stop Wilson. Starr was a Cherokee Indian, and at that time between eighteen and nineteen years of age.

The warrant was signed by Stephen Wheeler, "Commissioner U. S. Court, Western District of Arkansas," and tested as under seal, but no seal was affixed, and counsel for defendant objected to the warrant for the want of a seal, and took exception to its admission on that ground, though in answer to questions by the court they admitted that Wheeler was a United States commissioner for the Western District of Arkansas at the time the writ issued, and that the signature thereto was genuine.

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

Mr. Assistant Attorney General Conrad for defendants in error.

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

1. Exception was taken to the admission of the warrant in evidence, and also to the reference thereto as valid process in the charge of the court, upon the single ground that it bore no seal.

It was not contended that a seal is required to such a warrant by any act of Congress or any statute of the State of Arkansas, but the argument is that a warrant of arrest at common law was void if it were without seal, and that the common law rule so asserted was applicable.

In *Padfield* v. *Cabell*, Willes, 411, it was held that a warrant need not be under seal unless required by statute, and Willes, C. J., said: "A warrant does not *ex vi termini* apply to an instrument under seal; it signifies no more than an authority. All the books in which it said that a warrant must be under seal are founded on a case in the year books, 14 Hen. 8, 16, *a*, where it is said that a justice of the peace is a judge of record, and hath a seal of office; and that the inferior officer when he sees the seal must give credit thereto." In *Aylesbury* v. *Harvey*, 3 Levinz, 204, the defendant seized a cup under a warrant by justices of the peace, on a conviction under the excise law, to levy twenty shillings; and in answer to an objection taken to the plea, that the warrant was not pleaded with a profert, the court said: "The statute does not require that the warrant be under hand and seal, but only in writing; and no writing is to be so pleaded, except it be a deed," etc.

Hawkins, P. C. bk. 2, c. 13, § 21, follows Lord Hale in stating the necessity of the seal to a warrant of a justice of the peace, but what Lord Hale says is this (1 Hale, P. C. 577): "It must be under seal, though some have thought it sufficient to

be in writing, subscribed by the justice;" and he refers to Dalton's Justice, wherein it is laid down that "their warrant or precept in writing should be under their hand and seal, or under their hand at least." First ed. 1618, 287. In the third edition, (1630,) this is repeated, and it is further said: "Also the warrant of the justice of the peace should be under the seal of the said justice; for every justice of the peace (being a judge of record) hath a seal of his office; and when he maketh a warrant under his seal to the officer, then the officer ought to give credence to the seal, for that is his authority. *Per Brudenel*, 14 H. 8, 16."

This was the ground of Lord Coke's statement (2 Inst. 590) that a mittimus "must be in writing, in the name and under the seal of him that makes the same, expressing his office, place, and authority, by force whereof he maketh the mittimus."

Lord Chief Justice Willes, in *Padfield* v. *Cabell*, thus explains the language of Coke, and points out that Dalton "puts two instances of warrants only under hands: one by Lord Chancellor Ellesmere for a contempt, A.D. 1607; the other by Chief Justice Popham, 3 Jac. 1. There is also reference in Dalton to two precepts or warrants by justices only under their hands."

Blackstone states that the "warrant ought to be under the hand and seal of the justice," (4 Bl. Com. 290,) but Chitty's note on that passage is that "it seems sufficient if it be in writing and signed by him, unless a seal is expressly required by a particular act of Parliament," citing Willes, 411; Buller, N. P. 83. And this is repeated in 1 Chitty Crim. Law, 38.

In *Davis* v. *Clements*, 2 N. H. 390, it was thought to be well settled on the authority of the cases in Willes and Levinz, and Buller's N. P., that a seal was not essential when not specifically required or provided for; and in *State* v. *Vaughn*, 1 Harp. 313, the Supreme Court of South Carolina announced a similar conclusion in relation to a warrant of arrest, the court saying: "There appears to be no reason why the official act of a magistrate should be under seal, as it derives its character from the law which prescribes it." The authori-

ties were reviewed by Foster, J., in the carefully considered case of *Millett* v. *Baker*, 42 Barb. 215, and it was held that at common law a seal was not necessary, even in criminal cases, unless required by statute.

We are of opinion that there was no settled rule at common law invalidating warrants not under seal unless the magistrate issuing the warrant had a seal of office or a seal was required by statute, and that the warrant of a commissioner of the United States not having a seal of office, and not being required to affix a seal thereto, cannot be held void for its omission. The same result is reached under the laws of Arkansas, by sec. 1993 of which the requisites and form of warrant, where the offence charged is felony, are given, the form being attested "under hand" but not "under seal." Dig. St. Ark. 1884, 505, c. 46, sub. iv, § 1993; 26 Stat. 81, 96, c. 182, § 33.

2. Counsel for defendant asked the court to give to the jury four instructions. Of these, the first does not appear to have been given, but no exception was taken to its refusal, except as involved in an exception to the action of the court in refusing the request as to all. The court modified the last three and gave them, and the defendant excepted to the modifications and the giving of the instructions as modified in each instance. As the case will be sent back for a new trial on other grounds, we will not review the action of the court in respect of these instructions further than to indicate our views as to a particular modification of instruction numbered 3.

That instruction was as follows, the additions and modifications by the court being italicized:

"The court instructs the jury that if the defendant, being placed in a position in which his life is imperilled, slay an officer of whose official character he has no notice, *or had no reasonable ground to know his character*, this is homicide in self-defence, if the killing was apparently necessary to save the defendant's life, nor does it matter that the officer was legally seeking to arrest the defendant, the defendant having no notice [of that fact] *of the facts or no reason to know what the purpose of the party was: Provided the defendant did not*

by his threatening and violent conduct prevent the officer from making his character and mission known. This is given in connection with the principle I have given you, that if a man stands up and obstructs arrest, prevents arrest, armed with deadly weapons, and using them in a way that is threatening, then the officer has no time, nor is he called upon to make proclamation. The officer can stand on the defensive and overcome the danger and take his man or overcome him by violence, if necessary.

"If the jury believe from the evidence that the defendant was placed in a position at the time of the killing in which his life was imperilled by the deceased, and he slew him without having any notice of his official character, and the killing was apparently necessary to save his own life, then the killing of the deceased was homicide in self-defence; nor does it matter that the deceased was legally seeking to arrest the defendant, if the defendant had no notice of the fact, *or no reasonable grounds to know that he was an officer.*

"*It is not necessary to know that it is Floyd Wilson, but an officer. But if the defendant prevented Floyd Wilson from giving notice of his character or mission by threatening or violent conduct, then, of course, he would not be required to give notice. He can stand, as upon the other proposition, on the defensive. These propositions are given on the theory that you believe that no proclamation was made. If a proclamation was made, then the defendant had express notice, he had positive notice, of it.*"

The doctrine expressed in this instruction, as originally drawn, was taken from section 419 of Wharton's Criminal Law, vol. I, p. 419, where many authorities are cited in its support, and was accepted as correct by the learned trial judge. But he felt called upon to qualify it, not only in the direction whether the defendant had reasonable ground to know that Wilson was an officer, but also to the effect that if the accused prevented Wilson from giving notice that he was acting officially, then the rule invoked would not apply. The text-books lay it down as a general proposition that where a person, having authority to arrest and using the

proper means for that purpose, is resisted in so doing, he can repel force with force and need not give back; and if the party making the resistance is unavoidably killed in the struggle, the homicide is justifiable. (1 Russ. on Crimes, 9th Am. ed. 892; Hale, Hawkins, East, and Foster as there cited; 2 Bish. Crim. Law, § 647; 1 Whart. Cr. L. § 415; and cases referred to.) But the question did not arise here in respect of homicide by the officer, but by the person whom he was trying to arrest, and if defendant had no knowledge, was not informed, and was not chargeable with notice of Wilson's mission or official character, the fact, if there was evidence tending to show it, that defendant prevented the giving of notice, had no such relation to defendant's claim of exemption from liability founded on his ignorance and the appearance of the facts to him as to justify the modification.

His conduct was part of the *res gestæ* and important in other aspects of the case, but the qualification went too far as applied to the instruction under consideration.

3. In the case of *Commonwealth* v. *Selfridge* the following propositions were laid down by Mr. Justice Parker, afterwards Chief Justice of Massachusetts: "*First.* A man, who, in the lawful pursuit of his business, is attacked by another under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, may lawfully kill the assailant, provided he uses all the means in his power, otherwise, to save his own life or to prevent the intended harm — such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power. *Secondly.* When the attack upon him is so sudden, fierce, and violent, that a retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating at all. *Thirdly.* When from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended." (Selfridge's Trial, p. 160.)

The learned judge in his charge in the present case, refer-

ring to the law as thus declared, said: "Now, what is the first proposition? Before I read it I say to you it contemplates a state of actual danger, real danger, in this case to this defendant at the time of the killing, springing from the hands of Floyd Wilson, and danger that he did not create, or bring into existence by a wrongful act of his, because when we undertake to enter upon the execution of as grave a design as the taking of the life of individuals, we must enter upon it with clean hands and a pure heart. If we have created a condition that leads to a deadly result, the law of self-defence does not apply to it; if we create that condition by doing a wrongful thing upon our part which would naturally or reasonably or probably produce a deadly result, the law says there is no self-defence for us, because we are in the wrong in the first place; and especially does that principle apply to a case when we are doing an act which from its nature and the way we are doing it death would be naturally produced in the conflict that may ensue, because of the act that we do. I say, then, we must enter upon the execution of this grave act upon our part with clean hands and a pure heart, or, as this law expresses it, we must be in the lawful pursuit of our business. It says that a man who is in the lawful pursuit of his business — that means doing what he had a right to do — in the right at the time — is attacked by another under circumstances which denote an intention to take away his life, or, it may be, to do some enormous bodily harm, may lawfully kill the assailant — when? — provided he use all the means in his power, otherwise, to save his own life, or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him if it be in his power. Now, that is the first proposition of the law of self-defence. Now, let us see again, by enumerating each condition that must enter into it, what they are. First, we must be in the right; we must be doing what we had a right to do at the time of the killing, and when we are so situated we are attacked by another. How? What sort of attack? . . . Now, in this case, this contemplates as far as this case is concerned, that at the time that Floyd Wilson was killed this defendant was in the right; that he

was doing exactly what he had a right to do, and when so situated he was attacked by Wilson in such a way as to indicate a deadly purpose upon his part."

We presume that the learned judge intended to express the view that the existence of a state of facts which might render the homicide excusable was subject to the qualification that wrongful action on defendant's part towards Wilson did not occasion the attack. But we are of opinion that the language just quoted was open to a different construction and tended fatally to mislead. Whether the right of self-defence is legitimately exercised, depends upon the circumstances of the particular transaction, and we take it that the possession of a conscience void of offence toward God and men is not an indispensable prerequisite to justification of action in the face of imminent and deadly peril, nor does the intrinsic rightfulness of the occupation or situation of a party, having in itself no bearing upon or connection with an assault, impose a limitation on the right to repel it.

This Cherokee, when riding across the country, was entitled to protect his life, although he may have forfeited a bail bond and been seeking to avoid arrest on that account, of which there was some slight evidence incidentally given. But if such were the fact, he could not be considered as doing exactly what he had a right to do, or as having an especially pure heart and clean hands. In a subsequent part of the charge the learned judge said, referring to the defendant: "He was a fugitive from justice if he had jumped the bond he had in this court, as they say; if he had forfeited his bond, and was up in that country hiding out from his usual place of abode to avoid arrest, he was then a fugitive from justice, and you have a right to take that condition into consideration; and in passing upon the question as to what was the probable action of these parties at that time, as to what would be the rights of the officer and of this defendant, you have a right to see this transaction in the condition that surrounded it, and as it was characterized by the position of the parties towards it. You have a right to look at that condition, and see if he was expecting officers to pursue him; if he was hiding away from

them, he was then a fugitive from justice, and if that was true it is a fact that becomes pertinent for you to take into consideration, and the question whether he had reasonable ground from what transpired to know that Floyd Wilson was an officer and was seeking to arrest him." This was duly excepted to, but, apart from the exception, and assuming that the circumstance that he may have anticipated arrest for the reason suggested tended to show that he knew or believed that such was the mission of Wilson, these comments put it beyond question that the defendant was not doing what he had a right to do, and if the jury understood that the scope of what had previously been said embraced the rightfulness of his conduct generally, rather than his conduct in respect of the immediate transaction, they could not but have been materially influenced to his prejudice.

In Selfridge's case, the defendant was walking up State Street in Boston on an errand to the bank, and undoubtedly was in the lawful pursuit of his business when he was attacked, and it was in reference to that fact that the first proposition in the charge in that case was laid down; but here the particular words were inapplicable, and their use calculated to create an erroneous impression.

The motive of the accused in being where he was had nothing to do with the question of his right of self-defence in itself, and the unlawfulness of his previous conduct formed in itself no element in the solution of that question, but was to be considered only in so far as it threw light on his belief that his arrest was sought by the officer.

We are not insensible to the consideration that the learned judge probably did not intend that his words should bear so sweeping a signification, but they were used more than once, and were not withdrawn or so qualified that it can be fairly held that they were not substantially prejudicial.

4. We are compelled to add some further observations in relation to the charge before us.

It is true that in the Federal courts the rule that obtains is similar to that in the English courts, and the presiding judge may, if in his discretion he think proper, sum up the facts to

the jury; and if no rule of law is incorrectly stated, and the matters of facts are ultimately submitted to the determination of the jury, it has been held that an expression of opinion upon the facts is not reviewable on error. *Rucker* v. *Wheeler*, 127 U. S. 85, 93; *Lovejoy* v. *United States*, 128 U. S. 171, 173. But he should take care to separate the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. *M'Lanahan* v. *Universal Insurance Co.*, 1 Pet. 170, 182. As the jurors are the triers of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made distinctly to understand that the instruction is not given as to a point of law by which they are to be governed, but as a mere opinion as to the facts to which they should give no more weight than it was entitled to. *Tracy* v. *Swartwout*, 10 Pet. 80, 96; *Games* v. *Stiles*, 14 Pet. 322. The same rule prevails in the courts of many of the States, and in the charge in *Commonwealth* v. *Selfridge*, referred to by the court below, these views were expressed upon the subject: "As to the evidence, I have no intention to guide or interfere with its just and natural operation upon your minds. I hold it the privilege of the jury to ascertain the facts, and that of the court to declare the law, to be distinct and independent. Should I interfere, with my opinion, with the testimony in order to influence your minds to incline either way, I should certainly step out of the province of the judge into that of an advocate. All that I can see necessary and proper for me to do in this part of the cause, is to call your attention to the points or facts on which the cause may turn, state the prominent testimony in the case which may tend to establish or disprove these points, give you some rules by which you are to weigh the testimony, if a contrariety should have occurred, and leave you to form a decision according to your best judgment, without giving you to understand, if it can be avoided, what my own opinion of the subject is. Where the inquiry is merely into matters of fact, or where the facts and law can be clearly discriminated, I should always wish the jury to leave the stand without being able to ascertain what the

opinion of the court as to those facts may be, that their minds may be left entirely unprejudiced to weigh the testimony and settle the merits of the case."

So the Supreme Court of Pennsylvania says: "When there is sufficient evidence upon a given point to go to the jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided. The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him; deductions and theories not warranted by the evidence should be studiously avoided. They can hardly fail to mislead the jury and work injustice." *Burke* v. *Maxwell*, 81 Penn. St. 139, 153. See also 2 Thompson on Trials, §§ 2293, 2294, and cases cited.

It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling. *Hicks* v. *United States*, 150 U. S. 442, 452. The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree, and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances.

In addition to what has already been quoted, the following remarks, among others, were made:

"How unjust, how cruel, what a mockery, what a sham, what a bloody crime it would be upon the part of this government to send a man out into that Golgotha to officers, and command them in the solemn name of the President of the United States to execute these processes, and say to them, Men may defy you; men may arm themselves and hold you at bay; they may obstruct your process; they may intimidate your execution of it; they may hinder you in making

the arrest; they may delay you in doing it by threats of armed violence upon you, and yet I am unable as chief executive of this government to assure you that you have any protection whatever." . . . "What was this posse to do? What was he commanded to do? To go into the Indian country and hunt up Mr. Starr, and say to him that on a certain day the judge of the Federal court at Fort Smith will want your attendance at a little trial down there wherein you are charged with horse stealing, and you will be kind enough, sir, to put in your attendance on that day; and the judge sends his compliments to you, Mr. Starr. Is that his mission? Is that the message from this court that is to be handed to Mr. Starr upon a silver platter with all the formalities of polite society? Is that what Floyd Wilson was employed or engaged to do? No. This court did not have anything to do with that command; it does not go in the name of this court; it goes in the name of the chief executive officer, the President of the United States. What does he say, of course acting for the people?" . . . "Without these officers what is the use of this court? It takes men who are brave to uphold the law here. I say, because of this, and because there is no protection unless the law is upheld by men of this kind, if it be true that you are satisfied of the fact beyond a reasonable doubt that Floyd Wilson was a man of this kind, that he was properly in the execution of the high duty devolving upon him, and while so properly executing it by the light of these principles of the law I have given you, his life was taken by this defendant, your solemn duty would be to say that he is guilty of the crime of murder, because if the law has been violated it is to be vindicated; you are to stand by the nation; you are to say to all the people that no man can trample upon the law wickedly, violently, and ruthlessly; that it must be upheld if it has been violated."

These expressions are qualified to some extent by other parts of the charge, which we cannot give at length, but we are constrained to express our disapprobation of this mode of instructing and advising a jury.

Whatever special necessity for enforcing the law in all its

rigor there may be in a particular quarter of the country, the rules by which and the manner in which the administration of justice should be conducted are the same everywhere, and argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them.

The judgment is reversed and the cause remanded with a direction to grant a new trial.

NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 591. Argued April 23, 1894. — Decided May 14, 1894.

The New York and Erie Railroad Company was a corporation organized under the laws of, and having its principal place of business in, the State of New York. Its object was to construct and operate a railroad between the Hudson River and Lake Erie. In 1841 the legislature of Pennsylvania granted to it the right to construct a few miles of its proposed road in the county of Susquehanna in that State. In 1846, no work having been done on the road, the legislature of Pennsylvania granted to it the further right to construct a portion of its road in Pike County, and further enacted that, after the road should be completed to Lake Erie, the company should pay annually into the treasury of the State of Pennsylvania the sum of ten thousand dollars, and that the stock of the road should be subject to taxation in Pennsylvania to an amount equal to the construction of so much of the road as was in that State. The road was then completed from the Hudson to Lake Erie, passing through portions of Pike County and of Susquehanna County, and the requisite payments have been made, first by the original company, and since by its successors through foreclosures of mortgages. The plaintiff in error is now possessed of the property and of the rights under the acts of 1841 and 1846, and has its principal place of business in the city of New York. In 1885 the legislature of Pennsylvania assessed an annual tax of three mills on the dollar on moneys, loans, stocks, moneyed capital, etc., in the hands of individual citizens of that State, and required the treasurer of each private corporation, incorporated under the laws of any other State and doing business in Pennsylvania, when making payment of interest upon its bonds, etc., held by residents of that State, to assess the tax upon it, and to report to the auditor general of

Statement of the Case.

the State, and to pay the tax so assessed and collected into the state treasury. In accordance with this law the treasurer of the railroad company in 1888 reported the nominal value of all its scrip, bonds, and evidences of indebtedness to be $78,573,485.10, and the nominal value of all such known to be owned by residents of Pennsylvania as "None." Thereupon the State, by its attorney general, commenced an action to recover of the company a tax of three mills on the whole amount returned. In the course of the trial it was found that the amount of bonds of the company held and owned by residents of Pennsylvania aggregated $841,000, and judgment was given for a tax of three mills on that amount, which was affirmed on appeal by the Supreme Court of the State. *Held,*

(1) That the Commonwealth of Pennsylvania cannot, consistently with the Constitution of the United States, impose upon the New York, Lake Erie and Western Railroad Company the duty, when paying *in the city of New York* the interest due upon scrip, bonds, or certificates of indebtedness held by residents of Pennsylvania, of deducting from the interest so paid the amount assessed upon bond and moneyed capital in the hands of such residents of Pennsylvania.

(2) That the fourth section of the act of 1885, in its application to the New York, Lake Erie and Western Railroad Company, impairs the obligation of the contract originally made by the New York and Lake Erie Railroad Company and the State of Pennsylvania, as disclosed by the acts of 1841 and 1846, and by what was done by the companies, upon the faith of those acts.

This writ of error brings up for review a judgment of the Supreme Court of Pennsylvania, affirming a judgment of the Court of Common Pleas of Dauphin County in that State, against the New York, Lake Erie and Western Railroad Company, a New York corporation, for the amount of certain taxes assessed by and alleged to be due to Pennsylvania for the year 1888 in respect to certain bonds and evidences of indebtedness issued by that company, and which were ascertained by the court to have been held and owned by residents of that State.

The judgment of the Court of Common Pleas was affirmed upon the authority of *Commonwealth* v. *New York, Lake Erie & Western Railroad*, 129 Penn. St. 463, and *Commonwealth* v. *Lehigh Valley Railroad*, 129 Penn. St. 429.

The State based its claim against the railroad company upon a statute enacted on the 30th day of June, 1885. The

company insisted that that statute, if applied to it in respect to taxes due and payable in Pennsylvania by residents of that State, was repugnant to the Constitution of the United States.

The relations existing between the plaintiff in error, as the successor of the New York and Erie Railroad Company, and the Commonwealth of Pennsylvania, at the time of the passage of the statute of 1885, are shown by legislative enactments to which some reference should be made.

From the preamble of a statute approved February 16, 1841, it appears to have been represented to the General Assembly of Pennsylvania that the New York and Erie Railroad Company, having authority to construct a railroad from the city of New York to Lake Erie through the southern tier of counties in the State of New York, was hindered in building its road through Broome County bordering on Pennsylvania by a mountain of such magnitude as to require tunnelling or to be surmounted by stationary power at immense expense, and that a level and easy route could be established if the proposed road followed the valley of the Susquehanna River in Pennsylvania, a distance of about fifteen miles, and near to Broome County, New York. In consequence of these representations, and to maintain "amity between adjoining States in respect to their internal improvement operations," it was provided that the railroad company "shall have full power to extend their road through such portion of the county of Susquehanna as in the proper construction of their road they may find it necessary." This statute contained numerous provisions for the protection of both the railroad company as well as the public, one of which provided that, if any buildings, fences, timber or other property, situated in Susquehanna County, should be destroyed by fire occasioned by sparks falling from locomotive engines upon the road, the company should be liable to make full compensation for all damages sustained in consequence of such fire, § 11, — a liability which, according to the statement of counsel, Pennsylvania does not impose upon its own corporations. As these provisions do not affect the particular questions now before us, they need not be here set out.

By an act of the General Assembly of Pennsylvania, ap-

proved March 26, 1846, and supplementary to that of 1841, authority was given the New York and Erie Railroad Company to construct its road through a portion of Susquehanna and Pike Counties. That act, among other things, required the company to so regulate its tolls that the charge on anthracite coal should not exceed one and one-half cents per ton per mile. § 3. It also made it the duty of the president and managers of the company, as soon as its railroad was completed through Susquehanna and Pike Counties, to prepare a full and accurate account of the cost of that portion of the road within Pennsylvania and communicate the same to the auditor general of the Commonwealth; and after the road was completed and in operation to Dunkirk, or became connected at the western end with any other improvement extending to Lake Erie, the company should pay into the treasury of this State, annually, in the month of January, ten thousand dollars — any neglect or refusal to make such payment to work a forfeiture of the rights and privileges granted by the act. § 5.

That act also provided that the stock of the company to an amount equal to the costs of the construction of that part of its road situated in Pennsylvania should be subject to taxation by that State, in the same manner, at the same rate as other similar property; and the company should pay into the treasury of the Commonwealth any tax to which that proportion of stock was liable, and make, annually, a statement to the legislature, under oath, of its affairs and of the business done on said road during the previous year — such statement to contain a full and accurate account of the number of passengers, amount and weight of produce, merchandise, lumber, coal, and minerals transported on its said road, east of Dunkirk and west of Piermont. § 6.

Under the authority of these statutes the railroad company constructed, and has ever since maintained, its road through parts of Pennsylvania. Of the company's road, extending from Jersey City to Dunkirk and Buffalo, a distance of 446 miles, about 42 miles are within the counties of Pike and Susquehanna.

Statement of the Case.

The taxes in question were imposed under the above statute of 1885, which assessed an annual tax of three mills on the dollar for state purposes, on all mortgages, money owing by solvent debtors, whether by promissory note, or penal or single bill, bond, or judgment, also on all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever, (except notes or bills for work or labor done, and obligations given to banks for money loaned and bank notes,) on all public loans or stocks, (except those issued by Pennsylvania or the United States,) on all moneys loaned or invested in any other State, and on all other moneyed capital in the hands of individual citizens of Pennsylvania — the property and interests so taxed being exempted from all taxation, except for state purposes, and the act not to apply to building and loan associations. Penn. Laws, 1885, 193, § 1.

By the fourth section of the act it was provided that "hereafter it shall be the duty of the treasurer of each private corporation, incorporated by or under the laws of this Commonwealth, or the laws of any other State, or of the United States, and doing business in this Commonwealth, upon the payment of any interest on any scrip, bond, or certificate of indebtedness, issued by said corporation to residents of this Commonwealth, and held by them, to assess the tax imposed and provided for state purposes upon the nominal value of each and every said evidence of debt, and to report on oath, annually, on the first Monday in November to the auditor general the amount of indebtedness of the corporation owned by residents of this Commonwealth, as nearly as the same can be ascertained; and it shall be his further duty to deduct three mills on every dollar of the interest paid as aforesaid, and return the same into the state treasury within fifteen days after the thirty-first day of December in each year; and his compensation for his services shall be the same that city and borough treasurers receive for similar services; and for every failure to assess and pay said tax and make report as aforesaid the auditor general shall add ten per centum as a penalty to the amount of the tax; on payment of said tax by

a corporation the bonds, certificates, or other evidences of indebtedness issued by it shall be exempt from all other taxation in the hands of the holders of the same."

In November, 1888, the treasurer of the railroad company made the following report under oath to the auditor general of Pennsylvania:

"In accordance with the provisions of the fourth section of the act of June 30, 1885, and the requirements of your department, as treasurer of the New York, Lake Erie and Western Railroad Company, I make the following report of the indebtedness of said company for the year ending first Monday of November, 1888:

"Nominal value of all scrip, bonds, and evidences of indebtedness.....	$78,573,485 10
"Nominal value of all scrip, bonds, and evidences of indebtedness known to be owned by residents of Pennsylvania...	None.
"Nominal value of all scrip, bonds, and evidences of indebtedness none of which are known to be owned by residents of Pennsylvania	$78,573,485 10"

This report was accompanied by a communication from the treasurer of the railroad company, stating that it was made in deference to the wishes of the auditor general, but under protest and not in admission of any authority contained in the 4th section of the act of 1885.

In 1890 the Commonwealth, by its attorney general, proceeded against the railroad company in the Court of Common Pleas of Dauphin County to recover the amount claimed from it under section four of the act of 1885 for the year ending first Monday of November, 1888, for taxes on its scrip, bonds, and certificates of indebtedness held by residents of Pennsylvania. The amount so claimed was $234,490.86 with 12 per centum interest from 60 days after the settlement of the tax account by the auditor general. That officer settled the account upon the basis that the railroad company was subject

to taxes in Pennsylvania on the nominal value of all the scrip, bonds, and certificates of indebtedness issued by the company, and then outstanding, to wit, $78,573,485.10. Having no information whatever as to ownership, the auditor general arbitrarily assumed in the settlement that all the company's outstanding scrip, bonds, and certificates of indebtedness were owned by residents of Pennsylvania.

A trial by jury was dispensed with by the parties, and the case was heard by the court. From the evidence in the cause the court found the following facts:

"1. Defendant is a corporation chartered by the State of New York, and having its principal office and place of business in the city of New York. It has and exercises the right of way, under a special act of the legislature of the State of Pennsylvania, to run its railroad for somewhat more than thirty miles through the State of Pennsylvania, for which it pays annually to the State the sum of ten thousand dollars. 2. The settlement appealed from is based upon a report made by the treasurer of defendant to the auditor general of Pennsylvania for the year 1888, which contains a detailed statement of the several issues of bonds, scrip, and certificates of indebtedness by defendant and the corporation whose successor it is, amounting in all to $78,573,485.10, in which it is stated that none of the indebtedness is known to be owned by residents of Pennsylvania, and that it is believed by the officers of the company that nearly all is owned by non-residents of Pennsylvania. 3. In the settlement appealed from defendant is charged with tax upon the nominal value of all scrip, bonds, and certificates of indebtedness issued by it, and the corporation whose successor it is, and owing by it, amounting to the sum of $78,573,485.10, as stated in said report. 4. All the evidences of indebtedness owing by defendant were created and issued under authority granted by the legislature of the State of New York, and were issued, sold, and delivered in the city of New York, in said State, or in London, England, and the interest accruing from time to time thereon is payable and paid in said city of New York and in London. The right to the interest is evidenced by coupons payable to the bearer,

which, when due, are separated from the bonds and are presented for payment at the office of defendant in the city of New York by banks, bankers, and their messengers on behalf of themselves and their correspondents in other places, by whom the coupons have been transmitted, either as cash or for collection; and it is practically impossible for the treasurer or other officers of defendant, at the time the coupons are presented, to ascertain the residence of the owner of the bonds from which they have been separated, because of the large number of coupons presented at the dates when they become due, the whole number of coupons due semi-annually amounting to more than one hundred and fifty thousand, and as many as twenty thousand being presented in a single day; and for the further reason, that the bankers and their messengers, when they present the coupons, in very many instances do not know who are the owners of the bonds from which they have been detached, and could not be compelled to disclose if they did know, as the coupons are payable to bearer, and a refusal of the treasurer of the company to pay the coupons on presentation, except upon condition of the ownership being disclosed, would subject it to the risk and expense and loss of credit of having the coupons protested for non-payment. Some of the evidences of indebtedness are coupon bonds issued and payable to bearer, and others are coupon bonds which may be registered or not at the option of the holders or owners. 5. Holders of the evidences of indebtedness of defendant are entitled to vote for directors of this company, and a register is kept in the office of defendant, in which all holders of such evidences of indebtedness are required to register between sixty and thirty days prior to any election for directors at which they desire to vote. The register for the year 1888 shows an ownership of bonds to the amount of $28,562,700, of which we find that $338,000 were owned by residents of Pennsylvania, but this ownership does not appear on the register. 6. A record of registered bonds is also kept in the office of defendant, and in 1888 there were registered $11,124,300 in value of bonds. Of this amount $2,054,000 were owned by residents of Pennsylvania, $1,551,000 of which were owned by Pennsylvania cor-

porations, leaving $503,000 which were owned by individual residents of Pennsylvania. 7. There is no evidence in this case from which we could find that any particular bonds, other than those which make up the two amounts of $338,000 and $503,000 as above stated, were held or owned, during the year 1888, in Pennsylvania; nor is there any evidence tending to show that the treasurer of defendant, at the time the coupons were paid, could know that any, and if any, which, of the coupons, other than those which belonged to the bonds above specified, belonged to bonds held or owned in this State; and we, therefore, do not find that there were any other bonds, or any greater amount of bonds, held in Pennsylvania, during the year for which the tax is claimed in this settlement, than the bonds specified in findings of fact numbers five and six."

Subsequently, the court found the following additional facts: "1. The treasurer of defendant is, and was, in 1888, a resident of the State of New York. 2. The legislation of the State of New York constituting the charter of the company, and in pursuance of which the bonds and mortgages were issued, is silent upon the subject of their taxation by the State of Pennsylvania, or the assessment or collection of a tax thereon by the company or its officers, and that the legislation of the State of Pennsylvania authorizing the construction of a portion of its road through a portion of said State is silent upon the subject of the taxation of the bonds and mortgages of the company, or of the collection of a tax thereon by the company or its officers. 3. The railroad of defendant extends from New York City to Buffalo, a distance of 446 miles, and that, so far as the State of Pennsylvania is concerned, the business of the company consists chiefly in the transportation of freight and passengers from or to other States, into, out of, or through the State of Pennsylvania."

It was adjudged that the defendant was liable for the tax in respect of the bonds held and owned in 1888 by residents of Pennsylvania, represented by the two items of $338,000 and $503,000 — aggregating $841,000 — and not on any other or greater amount of bonds. And that view was approved by the Supreme Court of Pennsylvania.

Argument for Defendant in Error.

Mr. E. J. Phelps and *Mr. M. E. Olmsted* for plaintiff in error.

Mr. W. U. Hensel, Attorney General of the Commonwealth of Pennsylvania, for defendant in error.

That the plaintiff in error comes within the terms of section 4 of the act of June 30, 1885, is not denied. It is admitted that it is doing business in this Commonwealth. There is no question about the amount of bonds taxed being held by residents of the State; and further, we do not know of any objections by the owners of the bonds to the payment of the tax. The tax is against the bondholder, not against the company. The company is asked only to retain it when it pays the interest to the bondholder. It does not allege ignorance of the law nor of the duty it owed to the Commonwealth under the law. It had made no attempt to comply with the requirement of the law, but protested against its enforcement and comes before this honorable court on this ground and this only.

This act of Assembly applies to all corporations, domestic or foreign, and asks them only to retain the tax from such as they can ascertain to be residents of the State. This is surely a reasonable requirement and this corporation should yield obedience to it in common with all others. As applicable to such corporations as are solely domestic, the statute has received judicial construction by the Supreme Court of Pennsylvania and by the Supreme Court of the United States. This principle was decided in the case of *Commonwealth of Pennsylvania* v. *Bell's Gap Railroad Company* in the Supreme Court of Pennsylvania, and upon appeal taken to the Supreme Court of the United States, Mr. Justice Bradley, delivering the opinion of the court, said:

"3. *That the corporation is taxed for property it does not own.* This objection is not true in point of fact. The corporation, as the debtor of its bondholders, holding money in its hands for their use, namely, the interest to be paid, is merely required to pay to the Commonwealth out of this fund the proper tax

due on the security. The tax is on the bondholder, not on the corporation. This plan is adopted as a matter of convenience, and as a secure method of collecting the tax. That is all. It injures no party. It certainly does not infringe the Constitution of the United States by making one party pay the debts and support the just burdens of another party, as is implied in the objection." *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, 239.

What relation does this company bear to the State of Pennsylvania for purposes of taxation under its revenue laws?

We contend that it is *not*, in all respects, that of a foreign corporation. It has no right to do business in the State without permission. It gets this permission by statutory authority, and therefore it comes in under the laws of the State, is amenable to them, and should consent to their reasonable requirements. This was a voluntary act upon the part of the company. "Doing business" in the State, by reason of the laws thereof, it is a quasi-domestic corporation, and in any event it is subject to the tax laws of the State. This rule is applicable to domestic or foreign corporations. Wood's Railway Law, 27, 28.

A corporation, like an individual, may have a domicil in one State and a residence in another. Its domicil is in the State creating it, but its residence is in the place where its principal operations are conducted, and may be in a foreign State, as well as in the State to which it owes its corporate life. Id. 28.

We further contend that doing business in this State under its laws, renders the corporation liable and subject to the revenue laws of the State. This position is fully covered by the case of *Erie Railway Co.* v. *Pennsylvania*, 21 Wall. 492. See also *Paul* v. *Virginia*, 8 Wall. 168; *Philadelphia Fire Association* v. *New York*, 119 U. S. 110. See also *State Tax on Foreign-held Bonds*, 15 Wall. 300.

From these authorities it plainly appears that this company, having voluntarily obtained a right to do business in the State of Pennsylvania, and actually doing the same to a very large amount, places itself under the revenue laws of the Commonwealth of Pennsylvania, and it should bear its proportionate

share of the burdens imposed upon it in common with all other corporations, domestic or foreign, within the State. The legislature surely has the right to impose this condition upon this company, and it has generally exercised that right against all corporations within the State. This corporation obeys this law so far as making its report to the auditor general of the State is concerned, and it might as well protest against the right to require a report and refuse to make it as to contest the right of the State to impose the other condition upon it of retaining the tax upon the resident bondholder of the State.

We also refer the Court to the opinion of the Supreme Court of Pennsylvania rendered in this case. Justice Clark, who delivered that opinion, has entered into a very full and complete discussion of the question that is before the court in this case, and cites several authorities not cited in this argument, and we also refer to his cogent reasoning bearing upon the legal question involved and the legislative right to require the condition in controversy in this case of any foreign corporation doing business within the State.

This question is an important one to the Commonwealth of Pennsylvania. If it is unconstitutional to require this condition to be performed by the treasurer of a foreign corporation, it is equally unconstitutional to require any of these corporations to make a report to the accounting officers of the Commonwealth at all, as the report is only made for the purposes of taxation. If this right is denied to the Commonwealth of Pennsylvania, it would be an impossibility for it to reach the resident bondholders of the State for purposes of taxation, as required by the act of Assembly.

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

The principal question in the case is whether the Commonwealth of Pennsylvania may, consistently with the Constitution of the United States, impose upon the New York, Lake Erie and Western Railroad Company the duty — when paying *in the city of New York* the interest due upon scrip, bonds, or

certificates of indebtedness held by residents of Pennsylvania — of deducting from the interest so paid the amount assessed upon bonds and moneyed capital in the hands of such residents of Pennsylvania.

The court recognizes the far-reaching consequences of its determination of this question, and has, therefore, bestowed upon it the careful consideration which its importance demands.

It is contended that, in our examination of this question, there are certain principal facts found by the Court of Common Pleas, which, so far as they are pertinent, must be accepted as the basis of any decision that may be rendered. *Commonwealth* v. *Westinghouse Electric & Mfg. Co.*, 151 Penn. St. 265, and authorities there cited. These facts are: That all the evidences of debt owing by the railroad company were created and issued under the authority of the State of New York, and were sold and delivered in that State or in London; that the interest on such indebtedness is payable and paid in the cities of New York and London; that the interest coupons are payable to bearer, and when due are separated from the bonds and presented for payment at the company's office in New York, by banks, and their messengers, on their own behalf or on behalf of their correspondents in other places, by whom the coupons have been sent either as cash or for collection; and that it is practically impossible for the company's officers, at the time the coupons are presented, to ascertain the residence of the owners of the bonds from which the coupons were detached — the number of coupons due semi-annually amounting to more than one hundred and fifty thousand, and those presented in a single day often amounting to twenty thousand, and the bankers and their messengers, at the time of presenting their coupons, not knowing, in very many instances, who own the bonds, and, as the coupons are payable to bearer, could not be compelled to disclose the ownership of either bonds or coupons.

In our judgment, however strongly those facts may indicate the injustice that would be done to the railroad company by subjecting it to the provisions of the fourth section of the

statute of 1885, and although such facts are important in some aspects of this case to be presently examined, they are not, in themselves, decisive of the question to be here determined. It is not enough to justify the overthrow, by judicial decision, of a state law imposing taxation, simply to show that such law operates unjustly. So far as the courts of the Union are concerned, they must recognize and, when necessary to do so in cases within their jurisdiction, enforce the statutes of the several States, unless those statutes encroach upon legitimate national authority, or violate some right granted or secured by the Constitution of the United States. *Kirtland* v. *Hotchkiss*, 100 U. S. 490, 498. The question here is not one of mere injustice done to the railroad company, but one of power or authority in Pennsylvania to compel that corporation to do what the act of 1885 is held by the state court to require at its hands in respect to taxes upon bonds and moneyed capital in the hands of individual citizens of Pennsylvania.

The fundamental propositions upon which the argument of counsel for the State is based are that the New York, Lake Erie and Western Railroad Company is a private corporation of another State; that it has no right to do business in Pennsylvania without the permission of that State, and that it is, therefore, subject at all times to such reasonable regulations as may be prescribed by Pennsylvania, whether those regulations relate to taxation or to the business or property of the company in that Commonwealth. This view was expressed by the Supreme Court of Pennsylvania in *Commonwealth* v. *New York, Lake Erie & Western Railroad*, 129 Penn. St. 463, 476, in the following language: "It was competent for the legislature of Pennsylvania to impose as a condition upon foreign corporations doing business in this State that they shall assess and collect the tax upon that portion of their loans in the hands of individuals resident within this State, and otherwise comply with the provisions of the act of 1885. The act imposes no tax upon the company; it simply defines a duty to be performed, and fixes a penalty for disregard of that duty. The legislature having so provided, compliance with the act may, in some sense, be said to form one of the conditions upon

which corporations may do business within the State, and the corporation continuing its business subsequently would be taken to have assented thereto. There is, however, a condition, implied even in the case of domestic corporations, that they will be subject to such reasonable regulations, in respect to the general conduct of their affairs, as the legislature may from time to time prescribe, and such as do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted. *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574. If this be so as to corporations who are entitled to their charter privileges upon the footing of a contract, how much the more is it so as to corporations who are merely permitted by the legislature to do business within this State as a matter of grace and not of right?"

It is found, as a fact in this case, that so far as Pennsylvania is concerned, the business of the railroad company consists chiefly in the transportation of freight and passengers from or to other States, into, out of, or through that State. We are not sure that the court below, or counsel here, intended to be understood as claiming that it was competent for Pennsylvania to make compliance with the fourth section of the act of 1885 a condition of the right of the railroad company to continue the use of its track in Pennsylvania for purposes of interstate commerce. Some of the considerations necessary to be borne in mind, when any such question arises for determination, are adverted to in the recent decision of this court in *Crutcher* v. *Kentucky*, 141 U. S. 47, 59. But no such question is here presented. The Commonwealth of Pennsylvania has not attempted to impose any such condition upon the corporations embraced by the statute of 1885.

Assuming, for the purposes of this case, the correctness of the position taken by the learned attorney general of Pennsylvania that the commerce clause of the Constitution of the United States has no bearing upon the present inquiry, we are of opinion that the fourth section of the act of 1885, in its application to this railroad company, impairs the obligation of the contract between it and Pennsylvania, as disclosed by the acts of 1841 and 1846, and by what was done by that company

upon the faith of those acts. Those acts prescribe the terms and conditions upon which Pennsylvania assented to the company's constructing and operating its road through limited portions of its territory. Those terms have been fully indicated in the statement of this case, and need not be repeated. When the State, by the acts of 1841 and 1846, gave this assent the possibility that the company might misuse or abuse the privileges granted to it, or violate the provisions of those acts, was not overlooked; for, by the seventh section of the act of 1846, into which, by its second section, all the restrictions, prohibitions, privileges, and provisions contained in the act of 1841 were imported, it was declared that the right of the legislature to repeal it was reserved, "if the said company shall misuse or abuse the privileges hereby granted, or shall violate any of the privileges [provisions] of this act." And the question whether the privileges granted had been misused or abused, or the provisions of the act violated, was to be determined by *scire facias* issued out of the Supreme Court of Pennsylvania. § 7. There is no claim in the present case of any violation by the railroad company of the provisions of the acts of 1841 and 1846 specifying the terms and conditions upon which it acquired the right, so far as it depended upon state legislation, to enter Pennsylvania and construct and operate a part of its road within the territory of that Commonwealth. Consistently with those terms and conditions, Pennsylvania cannot withdraw the assent which it gave, upon a valuable consideration, to the construction and operation of the defendant's road within its limits. Nor can the right of the company to enjoy the privileges so obtained be burdened with conditions not prescribed in the acts of 1841 and 1846, except such as the State, in the exercise of its police powers for purposes of taxation, and for other public objects, may legally impose in respect to business carried on and property situated within its limits.

The argument in behalf of the State leads, logically, to the conclusion that notwithstanding the provisions of the acts of 1841 and 1846, prescribing the terms upon which the company acquired the privilege of constructing and operating its road

in that State, Pennsylvania could, in its discretion, change those terms and impose any others it deemed proper. If the State amended those acts so as to increase the sum to be paid annually into the state treasury, as a bonus, from ten thousand to one hundred thousand dollars, the argument made by its attorney general would sustain such legislation upon the ground that the State, at the outset, could have exacted the larger amount from the company as a condition of its entering the State with its road. To any view which assumes that the State could — so long, at least, as the railroad company performed the conditions of the acts of 1841 and 1846 — burden the company with conditions that would substantially impair the right to maintain and operate its road within Pennsylvania upon the terms stipulated in those acts, we cannot give our assent. No such terms as those named in the act of 1885 were imposed prior to the building of the road in Pennsylvania, and the road having been constructed in that State upon the faith of the legislation of 1841 and 1846, and with the assent of the State given for a valuable consideration paid by the company, its maintenance in Pennsylvania cannot be made the pretext for imposing such conditions as those prescribed in the act of 1885.

But it is said that regulations prescribed after the construction of the road, applicable to railroad companies doing business in the State, — such regulations being reasonable in their character, — should be deemed to have been within the contemplation of the parties when those acts were passed, and, therefore, not in violation of the agreement under which the company entered the State for the purpose of transacting business there; and that it should not be assumed that the State intended to surrender or bargain away its authority to establish such regulations.

Of the soundness of this general proposition, there can be no doubt, in view of the settled doctrines of this court. The contract in question left unimpaired the power of the State to establish such reasonable regulations as it deemed proper touching the management of the business done and the property owned by the railroad company in Pennsylvania, which

did not materially interfere with or obstruct the substantial enjoyment of the rights previously granted. But the fourth section of the act of 1885 is not within that category. It assumes to do what the State has no authority to do, to compel a foreign corporation to act, *in the State of its creation*, as an assessor and collector of taxes due in Pennsylvania from residents of Pennsylvania. Under the sanction of the laws of New York, the defendant corporation executed prior to the passage of the act of 1885 bonds, with interest coupons attached, payable in that State and not elsewhere. It gave mortgages to secure the payment of those bonds and coupons, according to their tenor. Neither the bonds, nor the coupons, nor the mortgages, contain anything that would, in law, justify the company in refusing to meet its obligations, according to their terms and without deduction on account of taxes due from the holders of such bonds or coupons residing in another State. We have seen that the bonds and coupons in question were payable to bearer, and that it was practically impossible for the company, when the coupons were presented for payment, to ascertain who, at that time, really owned them or the bonds from which they were detached, or whether the coupons were owned by the same person or corporation that owned the bonds. This fact is quite sufficient to show the unreasonable character of the regulations attempted to be applied to this company under the act of 1885. This view is strengthened by the fact that the coupons were negotiable instruments, and, being detached from the bonds, were separate obligations, passing by delivery, upon which an action could have been maintained by the holder, independently of the ownership of the bonds. Such is the settled doctrine of commercial law as declared by this court. *Clark* v. *Iowa City*, 20 Wall. 583; *Hartman* v. *Greenhow*, 102 U. S. 672, 684; *Koshkonong* v. *Burton*, 104 U. S. 668. And it is the doctrine of the Supreme Court of Pennsylvania, which has declared that "the coupons of railroad bonds are negotiable instruments, and may be sued on by the holder separately from the bonds, and interest from the date of demand and refusal of payment may be recovered." *County of Beaver* v. *Armstrong*, 44 Penn. St. 63.

If Pennsylvania, in order to collect taxes assessed upon bonds issued by its own corporations and held by its resident citizens, could require those corporations to deduct the required amount from the interest when the coupons are presented by holders known at the time by the corporation paying the interest to be residents of that State — and it may be admitted, in this case, that the State, if not restrained by a valid contract to which it was a party, could establish such a regulation — it does not follow that the State may impose upon foreign corporations, because of their doing business in that State with its permission given for a valuable consideration, any duty in respect to the mode in which they shall perform their obligations in other States.

The New York, Lake Erie and Western Railroad Company is not subject to regulations established by Pennsylvania in respect to the mode in which it shall transact its business in the State of New York. The money in the hands of the company in New York to be applied by it in the payment of interest, which by the terms of the contract is payable in New York and not elsewhere, is property beyond the jurisdiction of Pennsylvania, and Pennsylvania is without power to say how the corporation holding such money, in another State, shall apply it, and to inflict a penalty upon it for not applying it as directed by its statutes; especially may not Pennsylvania, directly or indirectly, interpose between the corporation and its creditors, and forbid it to perform its contract with creditors according to its terms and according to the law of the place of performance. No principle is better settled than that the power of a State, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction. *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319; *Railroad Co.* v. *Jackson*, 7 Wall. 262; *St. Louis* v. *Ferry Co.*, 11 Wall. 423; *Delaware Railroad Tax*, 18 Wall. 206.

The fallacy of the contrary view is in the assumption that this railroad company, by purchasing from Pennsylvania the privilege of constructing and operating a part of its road through the territory of that State, thereby impliedly agreed

to submit to such regulations as that State should, at any subsequent period, adopt in respect to the mode in which it should, in the State of New York, apply money in its hands in discharge of the obligation to pay interest to the holders of its bonds residing in Pennsylvania. But, for the reasons stated, this assumption is unwarranted by any sound principle of law, or by the circumstances under which the railroad company obtained the assent of Pennsylvania to build and maintain its road through that State.

It is due to the learned counsel who argued this case that something be said, before concluding this opinion, about certain authorities upon which great reliance was placed.

Reference was made by counsel for the company to the decision of this court in the case of *State Tax on Foreign-held Bonds*, 15 Wall. 300, 320, which case involved the validity of a Pennsylvania statute of 1868, requiring corporations, created by and doing business in that State, to deduct from the interest paid on its obligations the tax assessed on such interest by the State. It was attempted to make that statute applicable to interest payable on bonds held by non-residents of Pennsylvania. This court said: "The tax laws of a State can have no extra-territorial operation, nor can any law of a State inconsistent with the terms of a contract made with, or payable to, parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents of the State. . . . It is a law which interferes between the company and the bondholder, and under the pretence of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the State. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal

enforcement. The act of Pennsylvania of May 1, 1868, falls within this description. It directs the treasurer of every incorporated company to retain from the interest stipulated to its bondholders five per cent upon every dollar and pay it into the treasury of the commonwealth. It thus sanctions and commands a disregard of the express provisions of the contracts between the company and its creditors. It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property."

If the present case involved any question as to the authority or duty of the railroad company to deduct anything from the interest paid on its scrip, bonds, or certificates of indebtedness, when held by non-residents of Pennsylvania, the case of *State Tax on Foreign-held Bonds* would be decisive against the State. But no such question is here presented. The statute of 1885 only applies to scrip, bonds, or certificates of indebtedness issued to and held by residents of Pennsylvania.

Counsel for the State insisted that the present case is controlled by *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, reaffirmed in *Jennings* v. *Coal Ridge Improvement and Coal Co.*, 147 U. S. 147. It is only necessary to observe that the corporations which complained in those cases of the tax assessed, under a Pennsylvania statute, upon their loans held by residents of Pennsylvania, were Pennsylvania corporations. No question arose in either of those cases as to the authority of Pennsylvania to make a corporation of another State an assessor or collector of taxes assessed by or under the authority of Pennsylvania against residents of Pennsylvania. Nor does the case now before us involve any question as to the extent to which the State may tax property within its limits belonging to the railroad company.

The views we have expressed are sufficient for the disposition of the case, without considering other grounds upon which, it is contended, the judgment below was erroneous.

The judgment of the Supreme Court of Pennsylvania is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Statement of the Case.

The case of NEW YORK, LAKE ERIE, AND WESTERN RAILROAD COMPANY *v.* COMMONWEALTH OF PENNSYLVANIA, No. 75, and that of NEW YORK, LAKE ERIE, AND WESTERN RAILROAD COMPANY *v.* COMMONWEALTH OF PENNSYLVANIA, No. 79, each upon writ of error to the Supreme Court of Pennsylvania, involved the same questions as were presented and have been determined in the above case. For the reasons stated, the judgment in No. 75 and the judgment in No. 79 are each reversed, and those cases are remanded for further proceedings not inconsistent with the opinion in case No. 591.

LYONS *v.* WOODS.

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

No. 267. Submitted March 13, 1894. — Decided May 14, 1894.

Field v. *Clark*, 143 U. S. 649, would seem to be decisive of this case.

The council of the legislature of the Territory of New Mexico which took part in the passage of the act approved March 14, 1884, authorizing the building of a penitentiary, and of the act approved March 29, 1884, to provide for the building of a capitol, having been recognized by the governor of the Territory, and by the secretary of the Territory, and by the House of Representatives of the Territory, and it further appearing that the objections to its organization now made were brought to the attention of Congress, and that that body took no action on the subject, and the courts of the Territory having adjudged that those statutes were duly enacted; *Held*, That considerations of public policy forbid this mode of attacking the validity of officers *de facto*, whatever defects there may have been in the legality of their appointment or election.

The allegations of this bill make no such case for interposition as would justify the courts in going behind the enrolled bills, as deposited with the secretary of the Territory, and declaring them invalid because some of the members of the council were seated without certificates of election.

THIS was a bill filed by James Lyons and others in the District Court of the Third Judicial District of the Territory of New Mexico for the county of Grant, August 27, 1885, against Woods and others, being the collector of taxes, the assessor, and the county commissioners for that county, aver-

ring that complainants were taxpayers within said county, whose property was referred to and described in the tax list and assessment roll in the hands of defendant Woods, collector, which list and roll were prepared from assessments made by the assessor of Grant County, compiled under the direction of the board of county commissioners, and approved by that board, and received by Woods, as collector, August 13, 1885, said list and roll being, under the laws of the Territory, the warrant under and by virtue of which the collector was about to collect and was collecting the various sums of money making up the several items of taxation as therein set forth. That among the items of taxation in said tax list and assessment roll for 1885, and upon which each of complainants was therein noted as being taxed, were two items respectively described in said list as penitentiary taxes and capitol building taxes, set down in columns, headed "penitentiary bonds" and "capitol building bonds," and levied as taxes upon complainants, and each of them, for the purposes described by said column heading.

The bill then set forth the several assessments of complainants' property respectively and the amounts severally taxed thereon, and alleged that the items described went to make up the sums total which the collector was about to collect from complainants respectively as the amount of taxes due "from each for various purposes pretended to be warranted by law and pretended to be due and payable for and during the year 1885; that the amounts of money thus in said list pretended to be due and payable upon account of penitentiary bonds and upon account of capitol building bonds and as taxation so levied for and on account of said items are so claimed and levied and included in said list by virtue and under authority of pretended acts of the legislative assembly of said Territory pretended to have been approved by the governor of said Territory, which said pretended acts so pretended to have been approved are entitled and described respectively as follows: 'An act authorizing the building of a penitentiary in the Territory of New Mexico, and regulating its management,' approved March 14, 1884, and 'An act to provide for the erection

of a capitol building in the city of Santa Fé,' approved March 29, 1884."

The bill then continued: "Your orators further represent that said pretended taxes under the pretended acts of the said legislative assembly aforesaid, and by the terms thereof, are to be assessed and levied in the same manner as other territorial taxes are levied and collected. Your orators further represent that the said pretended special taxes provided for under said pretended acts of the legislative assembly have been assessed by the tax assessor of the said county of Grant, passed upon by the board of county commissioners of said county sitting as a board of equalization as required by law, and are now on the tax lists in the hands of said defendant Woods, as collector of the county of Grant, which said tax lists in the hands of said collector have attached to them the warrant provided by law requiring said collector to collect the taxes by said lists or rolls shown to have been levied, and that copies of said lists or rolls are now on file in the probate clerk's office of said county of Grant, and that all the steps required by law for the proper levy of taxes with reference thereto have been taken, so that the said lists and rolls in the hands of said defendant, the collector as aforesaid of said county of Grant, and the copies thereof in the said probate clerk's office on their face and by virtue of said pretended acts of the said legislative assembly aforesaid and the general revenue law of the Territory are a lien upon the real and personal property of your orators in said county of Grant, and are a cloud upon the title of your orators to their property, and that said taxation pretended to have been assessed under invalid and pretended laws of said Territory, as hereinafter alleged, have the force and effect of personal judgment against your orators and are liens upon their property as aforesaid, and said lists or rolls are by law given the effect of executions against the property of your orators so assessed.

"Your orators further represent that said pretended acts of the legislative assembly entitled, as aforesaid, 'An act authorizing the building of a penitentiary in the Territory of New Mexico and regulating its management,' approved

March 14, 1884, and 'An act to provide for the erection of a capitol building in the city of Santa Fé,' approved March 29, 1884, under which said assessment of taxation is made, and by virtue of which said pretended liens against your orators' property are asserted, and by virtue of which said pretended assessment rolls are claimed to have the effect of executions in the hands of the said defendant as sheriff and *ex officio* collector of said county of Grant, are not and never have become valid laws of said Territory of New Mexico, for the reason that the same never were introduced and passed through the council of said legislative assembly when a legal quorum of said council was present and participating in the proceedings thereof, and for the reason that a majority of a legal quorum of said council never voted in favor of said pretended laws so as to legally pass the same through said body; and your orators charge the facts to be that an act of Congress of the United States of America was passed and approved on the 14th day of February, 1884, and thereby became a law, which said act of Congress, among other things, provided that a session of the legislative assembly of said Territory should be held, and said assembly convene on the third Monday of February, A.D. 1884; and said act of Congress declared that the members elected to the territorial legislature of said Territory in November, 1882, and all vacancies legally filled since that time, if any, should be the legal members of the legislature by said act authorized, subject to all valid contest.

"Your orators further state that in accordance with said act of Congress a pretended session of said legislative assembly was held, commencing on the third Monday of February, A.D. 1884.

"Your orators further state the fact to be, and that the same so appears by the published journal of the proceedings of said pretended sessions of the council of said legislative assembly, that upon the convening of said council on the said third Monday in February, A.D. 1884, only five members appeared who had regularly received certificates of election and were so shown to be elected by the election returns of the said election held in November, A.D. 1882, to have been

elected members of said council; to wit, José Armijo y Vigil, of Socorro County; Pablo Gallegos, of Rio Arribi County; W. H. Keller and Andrew Sena, of San Miguel County; and John A. Miller, of Doña Ana, Lincoln, and Grant Counties, and that thereupon the said five persons qualified as members of said council by taking the oath of office required by law and signing the roll of members.

"Your orators further allege that by law the said council is composed of twelve members, and that seven thereof are necessary to constitute a legal quorum for the transaction of business.

"Your orators further allege that after said five members had been sworn in, as aforesaid, a motion was unanimously adopted by the vote of said five members only, and no more, that Thomas B. Catron, of Santa Fé County, be declared entitled *prima facie* to the seat from Sante Fé County, and that thereupon the said Thomas B. Catron took the oath of office as a member of said council, signed its roll, and thereafter acted as a member thereof.

"And your orators further allege that said Catron's seat was claimed by Henry L. Warren, of Santa Fé County, and that said Warren held a certificate of election as a member of said council from Santa Fé County; which said certificate was the first certificate of election issued by the county commissioners as evidence of the election of members of said council from said county at said election held in said month of November, A.D. 1882, but that afterwards said county commissioners, acting under protest and compelled by an order of the District Court in said county of Santa Fé, issued a certificate of election to said Thomas B. Catron.

"Your orators further allege that they are not informed as to whom the election returns on file in the office of the secretary of the Territory show to have been elected as a member of said council from the said county of Santa Fé at said election.

"Your orators further allege that afterwards, while said council was composed of the said five persons as aforesaid and the said Thomas B. Catron and no others, a motion was

therein introduced by the said John A. Miller to the effect that Charles C. McComas and José Manuel Montoya, be declared entitled *prima facie* to the seats from Bernalillo County, subject to the right of contest, and that said motion was unanimously adopted by the vote of the said six members and no more, who were then acting, as aforesaid, as members of said council.

"Your orators further allege that said Charles C. McComas and José Manuel Montoya held no certificates of election whatever as members of said body, but, on the contrary, Charles Montaldo and Francisco Perea held the certificates of election to the seats therein of the members from said county of Bernalillo, and that all the election returns of the election held in said month of November, A.D. 1882, both in the office of the county commissioners, and in that of the secretary of said Territory, showed and still show that said Charles Montaldo and Francisco Perea received a majority of the votes cast in said county at said election for members of the council from said county, and that said Charles C. McComas and José M. Montoya did not receive a majority of said votes so cast and were not duly elected members of said council.

"Your orators further allege that the said Charles C. McComas after the said election in November, A.D. 1882, had commenced proceedings as a contestant for the seat of said Charles Montaldo as a member in said council from Bernalillo County, and served his notice of contest on said Montaldo and taken testimony under said notice of contest, and that said José M. Montoya had so commenced contest proceedings against the said Francisco Perea for the other seat of the member from said county of Bernalillo, and that said notice of contest so served and testimony so taken were duly filed with the secretary of the Territory, and by him were transmitted and delivered to the said pretended council so organized as aforesaid, and at the time of the proceedings aforesaid the said papers relating to said contest were in possession of the said secretary, and that long afterwards, to wit, on the 3d day of April, A.D. 1884, the committee on elections of said pretended council reported to said body that the said contested election

cases had been referred to them, and that they found that said McComas and Montoya were entitled to the seats then held by them in said body, which said reports are stated by the journal published by said body to have been on said day adopted.

"Your orators further allege that the said six persons aforesaid and the said McComas and Montoya constituted said council until on or about the 25th day of March, A.D. 1884, when the said W. H. Kellar absented himself from said body and never afterwards participated in its proceedings.

"And your orators further allege that after the said Kellar had ceased to act with said body J. Innocente Valdez, who was elected a member of the council from Colfax and Mora Counties, took the oath of office and participated in the proceedings; but your orators allege that at no time during the pretended session of said body did more than six persons, including the said Thomas B. Catron, take part in its proceedings, except the said Charles C. McComas and J. M. Montoya, unlawfully and arbitrarily seated as aforesaid.

"And your orators further allege that, including the said McComas, Montoya, and Catron, there were just eight members of said body present and voting when the said bill aforesaid, entitled 'An act authorizing the building of a penitentiary in the Territory of New Mexico and regulating the management,' was introduced and passed through its several readings in said body; that said last-mentioned bill by the journal of said pretended council is alleged to have passed, under a suspension of the rules of said council, on the 14th day of March, A.D. 1884, and which said journal shows that there were present on said day the said José Armijo y Vigil, T. B. Catron, Pablo Gallegos, W. H. Kellar, and McComas, Miller, Montoya, and Sena, and no more, and that said journal does not show that said last-mentioned bill was ever passed on any other day, and that on said day it had never been determined by any legal quorum or by any other way except by the illegal and arbitrary action of the said six persons aforesaid that said McComas and Montoya were entitled to said seats in said body.

"And your orators further allege that, including the said McComas, Montoya, and Catron, there were just eight members of said body present and voting when said bill aforesaid, entitled 'An act to provide for the erection of a capitol building in the city of Santa Fé,' was introduced and passed through its several readings in said body; that said last-mentioned bill, by the journal of said body, is alleged to have passed, under a suspension of the rules, on the 26th day of March, A.D. 1884, and which said journal shows there were present on said day the said José Armijo y Vigil, T. B. Catron, and McComas, Montoya, Gallegos, Sena, Miller, and Valdez, and no more, and that of these Messrs. Catron, McComas, Montoya, Gallegos, Sena, and Armijo y Vigil voted in favor of the passage of said last-mentioned bill, while Messrs. Miller and Valdez voted against the passage of the same; and that said journal does not show that said last-mentioned bill was ever passed on any other day, and that on said day it had never been determined by any legal quorum or by any other way, except by the illegal and arbitrary action of the six persons aforesaid, that said McComas and Montoya were lawfully entitled to seats in said body.

"Your orators further represent that said pretended acts of the legislative assembly aforesaid, having been approved by the governor's signature attached thereto and filed in the office of the secretary of the Territory and certified by said secretary as valid laws, legally passed by the legislative assembly of the Territory, and that said acts have been incorporated and published in volumes of the laws of the Territory, so that on their face they seem to be valid laws, so as to give apparent validity to the assessment of said taxation and to the lien on the property of your orators aforesaid, when in truth and fact the said pretended acts of the said legislative assembly were never legally passed by said legislative assembly and are absolutely null and void, and that by reason of the premises the said defendant, collector as aforesaid, has acquired and can acquire no authority in law whatever for exacting and collecting the said pretended taxes from your orators, either by virtue of said pretended acts of the legislative assembly or the steps taken as aforesaid thereunder."

The bill then set up various grounds of equity interposition, not necessary to be repeated, and prayed an injunction and for general relief. To this bill a general demurrer was filed by the defendants and sustained, and the complainants declining to plead further, the bill was dismissed for want of equity with costs, December 4, 1885, whereupon complainants prayed an appeal to the Supreme Court of the Territory, by which the decree was affirmed on the authority of *Chavez* v. *Luna*, 21 Pac. Rep. 344, Brinker, J., dissenting, Id. 345. The case was thereupon brought by appeal to this court.

Mr. W. B. Childers for appellants.

The court will look at the journals of legislative bodies to see if legislation has been constitutionally and legally enacted: *South Ottawa* v. *Perkins*, 94 U. S. 260; *Gardiner* v. *Collector*, 6 Wall. 499; *Brown* v. *Nash*, 1 Wyoming, 85; *Post* v. *Supervisors*, 105 U. S. 667; *Gregg* v. *Forsythe*, 24 How. 179; *The Railroad Tax Case*, 8 Sawyer, 238; *Green* v. *Weller*, 32 Mississippi, (3 George,) 650; *Spangler* v. *Jacoby*, 14 Illinois, 297; *S. C.* 58 Am. Dec. 571; *Barnes* v. *Starne*, 35 Illinois, 121; *Ryan* v. *Lynch*, 68 Illinois, 160; *Pacific Railroad* v. *Governor*, 23 Missouri, 353; *S. C.* 66 Am. Dec. 673; *Burnham* v. *Morissey*, 14 Gray, 226; *S. C.* 74 Am. Dec. 676; *Southwark Bank* v. *Commonwealth*, 2 Penn. St. 446; *DeBow* v. *People*, 1 Denio, 9.

As to what constitutes a quorum, and what is meant by "House" in the organic act, see *Southworth* v. *Palmyra & Jackson Railroad*, 2 Michigan, 287; *In re The Executive Session*, 12 Florida, 653.

There can be no such thing as *de facto* legislation. The rule that the acts of *de facto* officers are upheld applies to purely ministerial officers.

Constitutional restrictions upon legislative bodies would be entirely nugatory if any rule can be applied to sustain acts of a body of usurpers claiming to be a legislature.

No appearance for appellees.

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

By § 3 of the organic act of the Territory of New Mexico, act of September 9, 1850, c. 49, 9 Stat. 446, the executive power and authority in and over that Territory was vested in a governor, whose duty was, among others, to "approve the laws passed by the legislative assembly before they shall take effect." By the fourth section it was provided that there should be a secretary of the Territory, who shall "hold his office for four years unless sooner removed by the President of the United States," and that "he shall record and preserve all the laws and proceedings of the legislative assembly hereinafter constituted, and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and one copy of the executive proceedings, on or before the first day of December in each year, to the President of the United States, and, at the same time, two copies of the laws to the Speaker of the House of Representatives and the President of the Senate, for the use of Congress." By § 5 "the legislative power and authority of said Territory shall be vested in a governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of thirteen members, having the qualification of voters hereinafter prescribed, whose term of service shall continue two years. The house of representatives shall consist of twenty-six members, possessing the same qualifications as prescribed for members of the council, and whose term of service shall continue one year." By § 7 it was enacted "that the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act. . . . All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect."

By chapter 1 of title XXIII of the Revised Statutes, provisions were made "common to all the Territories;" and most of those in the organic act of New Mexico were there reproduced, with the addition of certain matters of detail.

By § 1842, it was provided in nearly the identical words, *mutatis mutandis*, of paragraph two of section seven of article

I of the Constitution of the United States, that every bill which had passed the legislative assembly of any Territory should, before it became a law, be presented to the governor; if he approved it, he should sign it, but if not, he should return it, with his objections, to the house in which it originated, and that house should enter the same on its journals and proceed to reconsider it. If, after such reconsideration, two-thirds agreed to pass it, it should be sent, together with the objections, to the other house, where it should likewise be reconsidered, and, if approved by two-thirds of that house, should become a law. "But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for or against the bill shall be entered on the journal of each house." The section then provided for a bill becoming a law in like manner, as if signed by the governor, if not returned by him within three days, Sundays excluded, (or five days in Washington and Wyoming,) after it had been presented, unless the legislative assembly, by adjourning *sine die*, should prevent its return, in which case it should not become a law.

By § 1844 it was provided that the secretary of such Territory should record and preserve all the laws of the legislative assembly and all the acts and proceedings of the governor in the executive department, "and transmit one copy of the laws and journals of the legislative assembly, within thirty days after the end of each session thereof, to the President," as well as two copies of the laws to the President of the Senate and the Speaker of the House for the use of Congress. And it was further provided that "he shall prepare the acts passed by the legislative assembly for publication, and furnish a copy hereof to the public printer of the Territory, within ten days after the passage of each act."

By the act of July 27, 1868, c. 272, 15 Stat. 239, 240, the organic act was amended, and that amendment was carried forward into § 1921 of the Revised Statutes, which reads: "The secretary of the Territory of New Mexico, upon the convening of the legislature thereof, shall administer the oath of office to the members elect of the two houses and the

officers thereof, when chosen; and no other person shall be competent to administer such oath save in the absence of the secretary; in which case, any one member of either house may administer the oath to the presiding officer elected, and he shall administer the same to the members and other officers."

The acts of the legislative assembly of the Territory of New Mexico at its twenty-sixth session, which convened at the capitol at the city of Sante Fé on Monday, the 18th day of February, 1884, and adjourned on Thursday, the 3d day of April, 1884, were duly certified to by the secretary of the Territory as having been compared with the enrolled originals and original translations thereof, respectively, on file in his office, and that the same were true and correct copies thereof, and published by authority.

Among these acts, as so published, appear "An act authorizing the building of a penitentiary in the Territory of New Mexico and regulating its management," approved March 14, 1884; and an act entitled "An act to amend an act authorizing the building of a penitentiary and regulating its management, approved March 14, 1884," approved March 26, 1884; and "An act to provide for the erection of a capitol building in the city of Sante Fé," approved March 29, 1884. Laws of New Mexico, c. 58, 59, 60.

The legislative journals for that year, to which reference will hereafter be made, show that each of these acts was signed by the president of the council and the speaker of the house, and its approval by the governor reported to the house in which the act originated in each instance.

The question in this case is whether the territorial courts should have gone behind the enrolled bills whose passage was thus duly attested, and which were duly approved, placed in the proper depository, and duly certified to and published, and held them void upon the ground that certain members of the quorum of one of the two bodies by which they were passed were seated without having certificates of election. And this notwithstanding the fact that "all the laws passed by the general assembly and governor" were, as must be assumed, duly submitted to Congress, and that body did not see fit to

disapprove any of them under the power reserved by section seven of the organic act, a power which had been exercised affirmatively in some instances. Act of April 10, 1869, c. 21, 16 Stat. 44; act of July 14, 1870, c. 270, 16 Stat. 278; act of February 3, 1879, c. 41, 20 Stat. 280.

In *Miners' Bank* v. *Iowa*, 12 How. 1, 7, a question arose whether the validity of a certain act of the Territory of Iowa could be brought before this court under the 25th section of the judiciary act, and it was held it could not, the court saying: "It seems to us, that the control of these territorial governments properly appertains to that branch of the government which creates and can change or modify them to meet its views of public policy, viz., the Congress of the United States. That control certainly has not been vested in this court, either in mode or in substance, by the 25th section of the judiciary act. It has been argued in this case, that as Congress, in creating the territorial governments of Wisconsin and Iowa, reserved to themselves the power of disapproving and thereby annulling the acts of those governments, and had, in the exercise of that power, stricken out several of the provisions of the charter of the Bank of Dubuque, enacted by the legislature of Wisconsin, assenting to the residue; that therefore the charter of this bank should be regarded as an act of Congress, rather than of the territorial government; and consequently the decision of the state court, in favor of the repealing law of Iowa, must be held to be one in which was drawn in question and overruled the validity of a statute of or an authority exercised under the United States, and as a decision also against a right, title, or privilege set up under a statute of the United States. The fallacy of this argument is easily detected. Congress, in creating the territorial governments, and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from those powers, until expressly sanctioned by themselves, whilst for considerations equally strong they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental."

In *Chavez* v. *Luna*, 21 Pac. Rep. 344, the Supreme Court of New Mexico held, upon a bill of complaint setting up in substance the same matters as alleged here, that where the constitution of a State prescribed the mode to be observed by the legislature in passing bills, there was no doubt whatever about the power of a court to inquire into the question as to whether the constitution had been violated or not, but that that rule of law did not apply to the state of facts presented in that case, in which the only question was one of the organization of the body; and *People* v. *Mahaney*, 13 Michigan, 481, was cited to the point that courts cannot entertain a bill to review the action of a legislature in the manner of its organization, or the election or qualification of its members. Referring to section seven of the organic act of the Territory, the court declined to decide whether, in the general terms therein used, conferring legislative power upon the legislative assembly of New Mexico, it was intended to confer the usual and ordinarily incidental power to determine finally the election, qualification, and return of the members, but concluded that as by that section all laws passed by the legislative assembly and governor had to be submitted to Congress, and, if disapproved, were null and void and of no effect, it must be presumed that these acts were so submitted, and, there being nothing to show that they were disapproved, that they had received the passive assent of the Congress, and had been in that way approved, and that, therefore, there was nothing upon which to ground the jurisdiction of the court over the subject sought to be reviewed. In the present case the decree below was affirmed on the authority of *Chavez* v. *Luna*, and the dissent was placed upon the ground that mere non-action by Congress was not to be taken as an approval of the acts of the legislature so as to preclude judicial investigation.

We need not consider this difference of opinion further than to say that the fact that resort to Congress was open to those who objected to the legality of the acts passed by this legislative assembly is not without significance in inquiring into the jurisdiction of the courts in the premises.

In *Field* v. *Clark*, 143 U. S. 649, it was held by this court,

upon great consideration, that the signing by the Speaker of the House of Representatives and by the President of the Senate in open session of an enrolled bill is an official attestation of such bill as one that has passed Congress; and that when the bill thus attested receives the approval of the President and is deposited in the Department of State according to law, its authentication as a bill that has passed Congress is complete and unimpeachable. That conclusion was reached in view of the clauses of the Constitution of the United States bearing upon the subject, and would seem to be decisive of this case.

It is true that the courts of many of the States under constitutional or statutory provisions of a peculiar character, which, expressly or by necessary implication, required or authorized the court to go behind the enrolled act, when the question was whether the act, when authenticated and deposited in the proper office, was duly passed by the legislature, have announced a different conclusion. These cases are given in the notes to *Field* v. *Clark*, and some of them are referred to and considered in the opinion in that case. But as the organic act of New Mexico, taken with the Revised Statutes, conforms quite closely to the provisions of the Federal Constitution, the rule laid down in *Field* v. *Clark* governs the case before us.

Perhaps, however, it would be proper to extend our examination somewhat further. The question whether a seeming act of a legislature has become a law in accordance with the fundamental law is a judicial one to be tested by the courts and judges, and not a question of fact to be tried by a jury. *South Ottawa* v. *Perkins*, 94 U. S. 260, 267; *Post* v. *Supervisors*, 105 U. S. 667. In the first case *Gardner* v. *The Collector*, 6 Wall. 499, 511, was cited with approval, in which the court laid down the proposition: "That whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear

and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." And see *In re Duncan*, 139 U. S. 449; *Jones* v. *United States*, 137 U. S. 202, 216; *Field* v. *Clark*, *supra*.

The bill alleged that the council consisted of twelve members, seven constituting a quorum. By the organic act it was provided that the council shall consist of thirteen members, Act of September 9, 1850, c. 49, § 5; 9 Stat. 446, 448. The act of June 19, 1878, c. 329, 20 Stat. 193, limited the number to twelve and directed the legislative assembly to divide the Territory into representative and council districts. An act of June 27, 1879, c. 40, 21 Stat. 35, referred to the act of June 19, 1878, and to "the twelve members of the council." In the sessions of 1880 and 1882 there appear to have been thirteen members of the council, Acts New Mexico, 1880, 11; Acts 1882, 7. By an act of December 21, 1881, the election held for members of the legislature on the second day of November, 1880, was declared to be valid, and all the acts of the legislature, the members of which were chosen at that election, were validated, and the legislature directed to apportion the representative and council districts, but it was provided that if they failed to do so the apportionment should be made in accordance with an act referring to the legislatures of Montana, Idaho, and Wyoming, approved June 3, 1880, c. 119, 21 Stat. 154, Act of December 21, 1881, c. 3, 22 Stat. 1. By an act of February 14, 1884, c. 6, it was provided "that the members elected to the territorial legislature of New Mexico in November, anno Domini eighteen hundred and eighty-two, and all vacancies legally filled since that time, if any, are hereby declared to be the legal members of the legislature hereby authorized, subject to all valid contests." And the legislature was directed to convene on the third Monday of February, 1884. 23 Stat. 3. But whether composed of twelve or thirteen members, there can be no doubt that seven constituted a quorum authorized to do business.

It was the duty of the secretary of the Territory, under section 1921, to administer the oath of office to the members

elect of the two houses, and there is nothing in this bill to exclude the presumption that he did so, and if so, it is difficult to see why persons so sworn in did not thereby become entitled in the first instance to take their seats, or why the council thus organized was not at least a council *de facto*.

The charges of the bill relate to three out of eight members, but as to one of these, Mr. Catron, the bill states that while he did not originally have a certificate of election from the board of county commissioners, which was *ex officio* the canvassing board, he did have a certificate issued by that board, under the order of the district court, in respect of which adjudication no further question appears to have been made. Neither as to him nor the two other members, (Mr. McComas and Mr. Montoya,) whose title to their seats is questioned, was it alleged that they were not elected to the council, but the averment as to the latter is that the election returns of the election held in November, 1882, showed and still show that two other persons received a majority of the votes cast in Bernalillo County at the election of members of the council for that county, and that the two sitting members did not receive a majority of the votes so cast and were not duly elected members of said council.

Reference is made in the bill to the journals of the council and house of the legislative assembly of New Mexico for its twenty-sixth session, and we have examined them as published by authority. That of the council, after stating that the legislative council assembled February 18, 1884, in conformity with the act of Congress, (23 Stat. 3,) recites that the secretary of the Territory being present, "proceeded to call the names of the councilmen elected from the different counties, respectively, for the purpose of swearing them in as such. The following gentlemen answered and were duly sworn, and signed the official register, to wit." Then follow the names of eight persons, including those whose title to seats is questioned in this proceeding. The record shows that the election of officers thereupon ensued, who being duly sworn in by the secretary, that officer retired. A committee was then appointed to wait upon the governor and inform him that the

council was duly organized and ready to receive any communication which he might be pleased to make them, which committee having retired in the discharge of the duty assigned them, after a short absence returned, and reported that they had done so and that the governor "recognized this body as legally organized, and would be ready to deliver his message to both houses in joint session on the next day." But this record of the proceedings of February 18, 1884, is preceded by a prefatory statement headed "organization." This states that the secretary of the Territory appeared at the council chamber at noon "for the purpose of swearing in the members of the council, (all as a question of fact being present;) he was met with a degree of confusion, which, being long continued," the secretary retired and proceeded to the house, where organization was effected. Subsequently, and on the same day, the secretary of the Territory called the members of the council to order and made some remarks, stating among other things, "the seats of members from Bernalillo County are disputed. It appears from the judgment of the district court presented, it has passed upon the question involved in the case of county officers elected at the same election that the members of the legislature were, from that county; and decided adversely to those elected upon the face of the returns, and that a large number of fraudulent votes were cast. And it appearing that the application of the same facts would change the result as to members claiming to have been elected upon the same ticket, and it likewise appearing that the question of fraud in said election has become one of public notoriety, and it also appearing that the seat of the member from Santa Fé County is involved in a similar contest, it therefore seems to me proper and just that at this time, the members only who are not involved in the contest should be sworn." Whereupon five members signed the oath and were sworn in. The secretary thereupon further remarked: "In view of the situation it seems to me just, in the absence of law to the contrary, that the members sworn in and not involved in contest should express their judgment as to who of the contestants are *prima facie* entitled to be sworn in. For this purpose, and this pur-

pose alone, I will consider a motion to be submitted without debate." A motion was then made that Thomas B. Catron be declared entitled *prima facie* to the seat from Santa Fé County, subject to the right of contest, which motion was carried by unanimous vote. The name of Mr. Catron was then called by the secretary, and he appeared, signed the oath, and was sworn in. A similar motion was made as to Messrs. McComas and Montoya, which being adopted by unanimous vote, their names were called by the secretary and they appeared, signed the oath, and were sworn in as members from Bernalillo. Mr. José Armijo y Vigil was then elected president of the council and sworn in by the secretary, and "the latter then retired." We understand the object of this preface to be to explain that the three persons, in respect of whom it was claimed that they were improperly admitted to seats to the council, did not take their seats in virtue of the vote of the five members, whose right to act as members of the council was not disputed, but that the vote of those five was simply taken by the secretary as advisory, he himself determining upon his own responsibility who were entitled to be sworn in. So far as the record proper is concerned, irrespective of this prefatory matter, nothing appears upon the journals to show that this was otherwise.

The journal of the house discloses similar proceedings as to certain members from Bernalillo County. It further appears therefrom that two bodies had organized, each claiming to be the territorial council, one presided over by J. F. Chavez and the other by J. Armijo y Vigil, and each had sent a communication to that effect to the house. The house thereupon appointed a committee to ascertain which of the two councils was legally organized, a majority of which reported that, according to the law of the United States, the secretary of the Territory was "the only authorized person to administer the oath to the members of either body of the legislature; that no body can legally be organized until first being sworn in by said officer;" "that the body represented and presided over by Hon. José Armijo y Vigil have been duly sworn in by the secretary of the Territory and recognized by the gov-

ernor of the Territory, as the regularly organized and legal legislative council;" and recommended that the house recognize such council accordingly. The majority report was adopted, the sitting members from Bernalillo County voting in the affirmative, but there being a majority without them.

On the other hand, among the joint resolutions passed and approved at the session of the legislative assembly in question and to be found in the laws for 1884 as published, is one approved April 3, 1884, reciting that whereas the chairman of the Committee on Territories of the United States Senate had advised the governor of the purpose of the committee "to investigate the questions at issue in connection with the memorial of J. Francisco Chavez and others, referred to said committee," and having requested certain record evidence bearing upon the issues aforesaid, it was resolved that the secretary be authorized and directed to turn over for the use of that committee "all poll books of the said precincts of the counties of Bernalillo and Santa Fé, of the election held on the 7th day of November, 1882, and all other record evidence concerning and touching said election in said counties now in his possession." Laws New Mexico, 1884, 241. The memorial thus referred to will be found in the Congressional Record for the first session of the Forty-eighth Congress, p. 1549, where it appears that a memorial signed by Mr. Chavez and six others, holding, as they state, the proper legal evidences of election to the twenty-sixth legislative assembly of New Mexico, was presented to the Senate of the United States on March 3, 1884, and was referred to the Committee on Territories.

This memorial refers to the provisions of the territorial laws that "each branch of the legislative assembly shall decide and determine the election and qualifications of their own members under the rules and restrictions that may be respectively adopted by each branch for that purpose." That "if a contested election be pending, the person holding the certificate of election shall take possession and discharge the duties of the office until the contest shall be decided." Comp. Laws New Mexico, 1865, c. 63, §§ 35, 50. And that the board of county commissioners shall act as boards of canvassers of

the elections within their respective counties; "and shall immediately issue a certificate of election, under their hands, to the person that may have received the highest number of votes for any office." Laws New Mexico 1876, c. 1, § 14, par. 9.

The proceedings of February 18, 1884, are then related at length, and it is insisted that the conduct of the secretary was unlawful, arbitrary, and in defiance of right, justice, and the plain provisions of the law. We are not advised as to what became of the investigation based on the memorial and referred to in the joint resolution, but it would appear that Congress took no action whatever in the premises, although its attention was thus called to the condition of affairs.

It is undisputed, therefore, that the council which participated in the enactment of these laws was recognized by the governor and the secretary of the Territory and by the house, nor is there any suggestion in the bill of the existence of any other council than the one thus recognized; and the courts of the Territory have adjudged that these acts were duly enacted.

In the meantime, it must be presumed that bonds have been issued to provide funds for the erection of a penitentiary and a capitol, and that these public works have gone forward. Considerations of public policy and necessity for the protection of the public and individuals whose interests may be affected thereby forbid this mode of attacking the validity of acts of officers *de facto*, if this council were no more than that, whatever defects there may be in the legality of their appointment or election. *Norton* v. *Shelby County*, 118 U. S. 441.

Under these circumstances we think it clear that the judgment of the Supreme Court of the Territory must be affirmed.

In *Clough* v. *Curtis*, 134 U. S. 361, 371, petitions for mandamus to compel the secretary of the Territory of Idaho to record certain proceedings as part of the proceedings of a session of the legislature of the Territory, and to compel the clerk of the territorial house to bring his minutes and journals into court to be there corrected, came under review, and this court said: "It is not one of the functions of

a court to make up the records of the proceedings of legislative bodies. Nor can it be required, in a case not involving the private interests of parties, to determine whether particular bodies assuming to exercise legislative functions, constitute a lawful legislative assembly. Such a question might indeed arise in a suit depending upon an enactment passed by such an assembly. And it might be that, in a case of that character, and under some circumstances, the court would be compelled to decide whether such an enactment was passed by a legislature having legal authority to enact laws. How far in the decision of such a question the judiciary would be concluded by the record of the proceedings of those bodies, deposited by the person whose duty it was to keep it, with the officer designated by law as its custodian, are questions we have no occasion at this time to consider."

Without undertaking to consider under what circumstances which of two legislative bodies may be judicially determined to be the lawful and true body, or when or how the lawful organization of a legislative body may be judicially drawn in question, we are of opinion that the allegations of this bill made no such case for interposition as would have justified the courts in going behind the enrolled bills as deposited with the secretary of the Territory, and declaring them invalid because some of the members of the council were seated without certificates of election.

We may add that, by an act passed by the legislative assembly in question, approved April 3, 1884, (Laws New Mexico, 1884, c. 66,) a compilation of the laws of the Territory was provided for, which compilation was duly made and published by authority, (Compiled Laws New Mexico, 1884;) that an official index to these compiled laws was adopted; the compiled laws amended in many particulars; and other acts of 1884 amended or repealed, by the succeeding, the 27th legislative assembly, (Laws New Mexico, 1886, 1887, c. 49, and *passim*;) and an act was also passed for the issue of bonds "for the purpose of paying the present and current indebtedness of the capitol building," (Laws 1886–7, c. 45,) which latter act was approved by Congress on June 23, 1888, c. 693, 25 Stat. 340.

Decree affirmed.

METCALF *v.* WATERTOWN.

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

No. 18. Argued April 18, 1894. — Decided May 14, 1894.

The right of action upon a judgment or decree of a court of record of the United States, sitting within the State of Wisconsin, is limited by the Revised Statutes of that State of 1858, to twenty years after the cause of action accrued.

THIS was an action brought June 29, 1883, in the Circuit Court of the United States for the Western District of Wisconsin, by a citizen of Ohio, the assignee of certain persons who were assignees in different proportions of a judgment for the sum of $10,207.86, recovered April 9, 1866, in the Circuit Court of the United States for the District of Wisconsin, by a citizen of Tennessee against a municipal corporation of Wisconsin. The petition having been amended, (in accordance with the opinion delivered by this court when the case was before it at a former term, and reported in 128 U. S. 586,) by showing that this plaintiff's assignors were citizens of other States than Wisconsin, the defendant answered that the cause of action did not arise within ten years before this action was brought, and that the action was therefore barred by the statute of limitations of Wisconsin. The case having been submitted to the Circuit Court for trial without a jury, that court, on August 2, 1889, so held, and, having filed findings of fact and conclusions of law, rendered judgment for the defendant. The plaintiff sued out this writ of error.

The Revised Statutes of Wisconsin of 1849, c. 127, § 41, applied one limitation to all judgments of courts of record within the United States, as follows: "Every judgment and decree in any court of record of the United States, or of any State or Territory of the United States, shall be presumed to be paid and satisfied at the expiration of twenty years after the judgment or decree was rendered."

The Revised Statutes of 1858, c. 138, contain the following provisions:

"SECT. 1. Civil actions can only be commenced within the periods prescribed in this chapter, except when in special cases a different limitation is prescribed by statute."

"SECT. 14. The periods prescribed in section one of this chapter, for the commencement of actions other than for the recovery of real property, shall be as follows:

"SECT. 15. Within twenty years: 1. An action upon a judgment or decree of any court of record of this State. 2. An action upon a sealed instrument, when the cause of action accrues within this State.

"SECT. 16. Within ten years: 1. An action upon a judgment or decree of any court of record of any State or Territory within the United States, or of any court of the United States. 2. An action upon a sealed instrument, when the cause of action accrued without this State."

In the Revised Statutes of 1878, §§ 4220, 4221, the language of the provisions as to actions on judgments is modified, so as to include in the limitation of twenty years "an action upon a judgment or decree of any court of record of this State, or of the United States, sitting within this State;" and to confine the limitation of ten years to "an action upon a judgment or decree of any court of record of any other State or Territory of the United States, or of any court of the United States, sitting without this State." By reason of a saving clause in § 4984, the case at bar is not governed by these statutes, but by the statutes of 1858.

Mr. C. E. Monroe and *Mr. G. A. Jenks* for plaintiff in error.

Mr. George W. Bird, (with whom was *Mr. Daniel Hall* on the brief,) for defendant in error.

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

It will be perceived that the questions arising upon the

record in this case relate to the meaning, applicability, and validity of the first paragraph of section 16 of the Revised Statutes of Wisconsin of 1858, which, taken in connection with sections 1 and 14, barred "an action upon a judgment or decree of any court of record of any State or Territory within the United States, or of any court of the United States," in ten years. The contention of the plaintiff is that, under a proper construction of the paragraph, judgments or decrees of the courts of the United States sitting within the State of Wisconsin are not included therein, and that if this were not so, it would be so far unconstitutional. Defendant claims that such judgments or decrees plainly fall within the statute, no room being left for construction; and that it is valid as to suits on Federal judgments or decrees in the state courts, and therefore valid as to suits on such judgments or decrees in Federal courts, under the 34th section of the Judiciary Act of 1789.

By that section it was provided that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply;" and this was carried forward into section 721 of the Revised Statutes. And from the beginning this court has recognized statutes of limitations of actions, real and personal, as enacted by the legislature of a State, and as construed by its highest court, as rules of decision in the courts of the United States. *Bauserman* v. *Blunt*, 147 U. S. 647, 652, and cases cited.

McElmoyle v. *Cohen*, 13 Pet. 312, 327, is an early and leading case on the subject cited, and largely quoted from by counsel for defendant. The statute of limitations of Georgia involved in that case required "actions of debt upon judgments obtained in courts other than the courts of this State" to be brought "within five years next after the judgments shall have been obtained," and an action having been brought in the Circuit Court of the United States for the District of Georgia upon a judgment rendered in a court of the State of South Carolina, it was held that the statute could be pleaded

in bar thereof. Mr. Justice Wayne delivered the opinion of the court, and after stating that judgments recovered in one State "are record evidence of a debt, or judgments of record, to be contested only in such way as judgments of record may be, and consequently are conclusive upon the defendant in every State, except for such causes as would be sufficient to set aside the judgment in the courts of the State in which it was rendered;" but that a plea of the statute of limitations was "well settled to be a plea to the remedy, and consequently that the *lex fori* must prevail;" proceeded as follows: "It would be strange, if in the now well understood rights of nations to organize their judicial tribunals according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their courts. Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred has been, from a remote antiquity, fixed by every nation in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction. This being the foundation of the right to pass statutes of prescription or limitation, may not our States, under our system, exercise this right in virtue of their sovereignty? Or is it to be conceded to them in every other particular than that of barring the remedy upon judgments of other States by the lapse of time? The States use this right upon judgments rendered in their own courts; and the common law raises the presumption of the payment of a judgment after the lapse of twenty years. May they not then limit the time for remedies upon the judgments of other States, and alter the common law by statute, fixing a less or larger time for such presumption, and altogether barring suits upon such judgments, if they shall not be brought within the time stated in the statute? It certainly will not be contended that judgment creditors of other States shall be put upon a better footing in regard to a State's right to legislate in this particular, than the judgment creditors of the State in which the judgment was obtained. And if this right so exists, may it not be exercised by a State's restraining

the remedy upon the judgment of another State, leaving those of its own courts unaffected by a statute of limitations, but subject to the common law presumption of payment after the lapse of twenty years? In other words, may not the law of a State fix different times for barring the remedy in a suit upon a judgment of another State, and for those of its own tribunals? We use this mode of argument to show the unreasonableness of a contrary doctrine. But the point might have been shortly dismissed with this safe declaration, that there is no direct constitutional inhibition upon the States, nor any clause in the Constitution, from which it can be even plausibly inferred that the States may not legislate upon the remedy in suits upon the judgments of other States, exclusive of all interference with their merits. It being settled that the statute of limitations may bar recoveries upon foreign judgments; that the effect intended to be given under our Constitution to judgments is, that they are conclusive only as regards the merits; the common law principle then applies to suits upon them, that they must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred."

Reference is also made to *Ross* v. *Duval*, 13 Pet. 45, in which it was held that an act of the legislature of Virginia providing that judgments of any court within the State, when execution had not been issued, might be revived within ten years from that date by *scire facias* or action of debt thereon, and that when execution had been issued and not returned, other executions and proceedings on the judgment might be had within ten years and not after, was a statute of limitations and applicable to a judgment obtained in the Circuit Court of the United States for the District of Virginia. That was no more than applying to the judgments of the United States courts the same rule that applied to the judgments of the state courts, and in neither of these cases did the precise question arise presented in the case before us.

By the act of May 26, 1790, c. 11, 1 Stat. 122, and the supplement thereto of March 27, 1804, c. 56, 2 Stat. 299, now embodied in Rev. Stat. § 905, it is provided that the records and judicial proceedings, not only of the courts of any State, but

also of any Territory or of any country subject to the jurisdiction of the United States, authenticated as therein prescribed, "shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from which they are taken;" that is to say, such faith and credit as they are entitled to in the courts of the State, Territory, or other country subject to the jurisdiction of the United States from which they are taken.

In *Dupasseur* v. *Rochereau*, 21 Wall. 130, 135, Mr. Justice Bradley, speaking for the court, said: "The only effect that can be justly claimed for a judgment in the Circuit Court of the United States, is such as would belong to judgments of the state courts rendered under similar circumstances;" and "it is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case under such circumstances than is due to the judgments of the state courts in a like case and under similar circumstances." The same views were expressed by the court through Mr. Justice Matthews in *Embry* v. *Palmer*, 107 U. S. 3, 7, 9, 10; *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141, 146, 147. It cannot be doubted that, in respect of their effect under section 905, the judgments and decrees of the Circuit Courts of the United States are entitled to the same sanctity and effect in the courts of each State, when those courts are held within the State, as their own judgments, nothing more, but nothing less.

So far as that section relates to the effect to be given to the judicial proceedings of the States, it is founded on article IV, section 1, of the Constitution; but the power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States; which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the government of the United States, or in any department or officer thereof; and which declare the supremacy of the power of the national government within the limits of the Constitution.

Opinion of the Court.

The judicial power of the United States is vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. Congress has accordingly established Circuit Courts; the judicial power vested in them extends to controversies between citizens of different States; and the citizens of each State are entitled to the privileges and immunities of citizens in the several States.

It is argued that this legislation, if given the construction contended for, would involve the assertion of power over the Federal courts, and by discrimination impair their jurisdiction and authority; and also in effect deprive the citizens of other States of privileges secured to them by the supreme law of the land; that as long as a limitation prescribed by state law is equally applicable to all judgments rendered within or without a State, there is no discrimination against judgments rendered in the Federal courts; but when there is a discrimination between judgments rendered in the courts of a State and those rendered in the Federal courts held in the same State, it is an attack upon the judicial authority of the United States, and in limitation of the right of citizens to invoke that jurisdiction. Hence, that this statute of 1858, if it have the scope insisted on, cannot apply as a rule of decision in this case under section 721, because the Constitution of the United States otherwise requires; that that section does not concede to the States the right to make laws that in any way discriminate against the judgments of the courts of the United States in a particular State, but simply prescribes the rule that whatever the state laws are in respect of the conduct and course of the judgments of its own courts should be the guide within constitutional limits for the action of courts of the United States in proceedings in respect of the judgments of those courts in that State; and that in that view the first paragraph of section 15, providing that actions could be brought within twenty years upon a judgment or decree of any court of record of Wisconsin, applied, while the first paragraph of section 16 did not apply except in reference to judgments of any court of the United States other than in the State of Wisconsin.

Massingill v. *Downs*, 7 How. 760, 766, is cited by plaintiff,

which, however, did not involve the limitation of actions. There a lien upon real estate acquired by virtue of a judgment recovered in the Circuit Court of the United States for the Southern District of Mississippi in 1839, when, by a law of the State, it was a valid lien, was held not to be lost by non-compliance with a subsequent statute of the State, passed in 1841, making it a condition of the validity of liens under judgments theretofore rendered that the judgments should be recorded within four months of the passage of the statute, in the office of the Circuit Court of the county in which the land was. And this court said: "In those States where the judgment or the execution of a state court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the Circuit Court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the Union. It would place suitors in the state courts in a much better condition than in the Federal courts." *Cooke* v. *Avery*, 147 U. S. 375, 387.

But we do not understand defendant's counsel to contend that a State has power to regulate or vary the proceedings or judgments of the United States courts as such, or that Congress can either delegate its own powers or enlarge those of a State, but that as a mere question of power a State may prescribe limitations upon judgments without regard to the court pronouncing them; that a judgment is simply record evidence of the debt or liability as between the parties; that there is no constitutional prohibition upon the power to limit actions thereon, and that while actions on judgments in the courts of the United States cannot be controlled by the exercise of this power, that result is reached under section 721, which makes the law of the State in that regard a rule of decision.

As a general rule this court follows the decisions of the highest court of a State in the construction of the statutes of

the State, unless they conflict with or impair the efficacy of some provision of the Constitution of the United States or of an act of Congress; but we think we are at liberty, and perhaps required, under the circumstances existing here, to interpret this statute for ourselves.

In June, 1870, the Circuit Court of the United States for the District of Wisconsin, in the case of *Cole* v. *Weil*, Judge Drummond and District Judge Miller holding the court, sustained a demurrer to the plea of the ten years' limitation in bar of an action upon a judgment recovered in the District Court of the United States for the District of Wisconsin. In January, 1885, the Circuit Court held otherwise in the case before us and found for the defendant on the defence now under consideration, and, judgment having been rendered, the cause was brought on error to this court, the record being filed October 9, 1885. On December 10, 1888, that judgment was reversed upon a question of jurisdiction and the cause remanded. 128 U. S. 586. While that writ of error was pending in this court, and in August, 1886, an action was brought in one of the state Circuit Courts against the town of Waterloo, upon, among other causes of action, a judgment obtained in the United States Circuit Court for the District of Wisconsin. To this the ten-year bar was pleaded and sustained, and the case carried to the state Supreme Court, which, September 20, 1887, decided that the judgment came within the words of subdivision one of section sixteen, c. 138, Rev. Stats. 1858, and that the action thereon was barred by the lapse of ten years. *Waterman* v. *Waterloo*, 69 Wisconsin, 260.

In *Ballin* v. *Loeb*, 78 Wisconsin, 404, decided December 16, 1890, plaintiffs obtained judgment against a corporation in the Circuit Court of the United States for the Eastern District of Wisconsin, and execution was issued thereon and returned no property found, whereupon they filed a bill in the state court under a state statute in that behalf for the sequestration of the property of the corporation and to have a receiver appointed in order to a fair and equal division of the assets of the corporation among all its creditors. The question was raised whether they, having obtained their judgment in the

Circuit Court of the United States, could avail themselves of the statutory remedy.

The Supreme Court held that they could, and said: "It is contended by the learned counsel of the appellant that the return of an execution on a judgment in a Federal court will not sustain this action, and that such a judgment is that of a foreign court or the same as one of a sister State. There may have been late decisions to such effect, but the current of authorities, as well as the laws of the United States and of this State, establish the rule that the judgments of the United States courts of the Wisconsin districts are to be treated as domestic judgments of a superior court of this State." The court referred to various acts of Congress under which proceedings and judgments in Federal courts are assimilated to those of state courts, and to the fact that in state courts they "are treated in all respects as to remedies like domestic judgments in the States in which they were rendered;" and after citing to the point that United States courts are not foreign within the State where they are held, *Turrell* v. *Warren*, 25 Minnesota, 9; *Wandling* v. *Straw*, 25 W. Va. 692, 705; *Thomson* v. *Lee County*, 22 Iowa, 206; *St. Albans* v. *Bush*, 4 Vermont, 58; *Barney* v. *Patterson's Lessee*, 6 Har. & Johns. 182; *McCauley* v. *Hargroves*, 48 Georgia, 50; *Williams* v. *Wilkes*, 14 Penn. St. 228; *Embry* v. *Palmer*, 107 U. S. 3, thus concluded: "We are disposed to adopt this rule, so well established, as against any adverse decisions, as it appears more in the spirit of comity and reasonable. In this proceeding the judgment of the plaintiff will have the same effect as if rendered by any superior court of this State, because it was rendered in a Wisconsin district of a United States court."

It seems to us that if the Supreme Court had arrived at this conclusion at the time *Waterman* v. *Waterloo* was under consideration, a different result might have been reached. It is true that in that case the Supreme Court said: "That the Circuit Courts of the United States are properly called domestic courts of the States wherein they are held could not possibly change the meaning of this language, 'or of any

court of the United States,' without destroying it entirely. What other United States courts, except the District and Circuit Courts of the United States, render judgments upon which the statute of limitations can run?" But we think we may be permitted to assume that if the Supreme Court had then definitely adjudicated that judgments of the United States courts held in Wisconsin were not to be regarded as those of a foreign court or of a sister State, but were to be treated as domestic judgments of a superior court of that State, it would have found a sufficient subject for the operation of the first paragraph of section 16 in respect of judgments and decrees "of any court of the United States," in the judgments and decrees of such courts when held in other States. Moreover, it should be observed that the question of the power under the Constitution to control in any way or to discriminate as to Federal judgments rendered in the State does not seem to have been brought to the attention of the court and was not adverted to.

Since the domestic character of the Federal courts sitting in the State of Wisconsin is conceded, and the principle fully recognized that their judgments are to be treated in all respects as to remedies like the judgments of the state courts, it would seem to follow that the words "judgment or decree of any court of record of this State" in section 15 of chapter 138 of the Revised Statutes of 1858 included the judgments and decrees of Federal courts rendered within the State, and but for the words "or of any court of the United States," in section 16, there would be no difficulty in arriving at that conclusion. And in view of all the legislation upon the subject, we think we are not obliged to take those words literally, but that they are open to construction.

By the Revised Statutes of 1849 a limitation of twenty years was prescribed for actions upon all judgments of record, wherever rendered, and upon all specialties, wherever the cause of action accrued. Rev. Stats. 1849, c. 127, §§ 14, 20, 41.

By an act of 1866, as amended in 1868, it was provided that executions might be issued any time within five years, and at any time thereafter "upon any judgment which has heretofore

been or may hereafter be rendered or docketed in any court of record *in* this State, . . . *provided*, that no execution shall issue, nor any action or proceedings be had upon any such judgment after twenty years from the time of the rendition or docketing thereof." (Laws 1866, c. 14, p. 16; Laws 1868, c. 11, p. 14.)

The Revised Statutes of 1878 provided that actions must be commenced within twenty years "upon a judgment or decree of any court of record of this State, or of the United States, sitting within this State," and "upon a sealed instrument when the cause of action accrues within this State," with an exception relating to municipal bonds; and within ten years "upon a judgment or decree of any court of record of any other State or Territory of the United States, or of any court of the United States sitting without this State," and "upon a sealed instrument when the cause of action accrued without this State," with a similar exception as to municipal bonds. Rev. Stat. 1878, §§ 4220, 4221.

The provisions of the Revised Statutes of 1858 under consideration (c. 138, p. 821) were that the period of time for the commencement of actions other than for the recovery of real property should be:

"Section 15. Within twenty years: 1. An action upon a judgment or decree of any court of record of this State. 2. An action upon a sealed instrument, when the cause of action accrues within this State.

"Section 16. Within ten years: 1. An action upon a judgment or decree of any court of record of any State or Territory within the United States, or of any court of the United States. 2. An action upon a sealed instrument when the cause of action accrued without this State."

Thus it is seen that under the statute of 1849 there was no discrimination; under the statute of 1878 a discrimination was made between causes of action accruing on judgments, decrees, and sealed instruments, within, and without, the State; under the acts of 1866 and 1868 judgments of courts of record in the State were treated alike.

Was it intended by the statute of 1858 to make any other

discrimination than that more accurately expressed in the statute of 1878? Was it intended to discriminate against the judgments and decrees of the Federal courts in Wisconsin as if they were foreign courts or courts of another State? Was it intended to disparage the jurisdiction and authority of the Federal courts? It is said in *Harrington* v. *Smith*, 28 Wisconsin, 43, 59, that "the true rule for the construction of statutes is, to look to the whole and every part of the statute, and the apparent intention derived from the whole, to the subject-matter, to the effects and consequences, and to the reason and spirit of the law; and thus, to ascertain the *true* meaning of the legislature, though the meaning so ascertained may sometimes conflict with the literal sense of the words."

If we take the words in section 16, "any court of record of any State or Territory of the United States," literally, they include the courts of Wisconsin as they did in the statute of 1849; yet we should say that the first paragraph of section 15 was not thereby repealed, but, on the contrary, that the cases therein mentioned were to be taken as excepted. And so, while the words in section 16, "any court of the United States," are broad enough to cover the courts of the United States in Wisconsin, we do not consider that the latter were embraced thereby, but that section 16 applied to those courts of the United States which were not included in section 15, as those holding courts in Wisconsin were. The distinction intended was between causes of action accruing within, and causes of action accruing without, the State, and the statute of 1878 was declaratory of a meaning which already existed. *Koshkonong* v. *Burton*, 104 U. S. 668, 671, involved a different question, but it will be found that in the statement of the statute of 1858 the distinction was indicated.

We cannot attribute to the legislature of Wisconsin any design to discriminate against the judgments and decrees of the courts of the United States rendered in that State by reducing the statutory period for the commencement of actions thereon to a less number of years than obtained as to the judgments and decrees of the state courts, and so to compel citizens of other States to bring their suits originally in those

courts rather than in the Federal courts, as secured to them by the Constitution, or their own citizens to do so if they had causes of action arising under the Constitution and laws of the United States. We do not entertain the least idea that the legislature was actuated by any such disposition, and are persuaded that the language of the act of 1858 produced no such result.

We are of opinion that the ten-year bar constituted no defence to the action of plaintiff, and, therefore, the judgment is

Reversed, and the cause remanded, with a direction to enter judgment for plaintiff on the findings.

McKANE *v.* DURSTON.

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

No. 1185. Submitted April 23, 1894. — Decided May 14, 1894.

In the State of New York the committal to prison of a person convicted of crime, without giving him an opportunity, pending an appeal, to furnish bail, is in conformity with the laws of that State when no certificate is furnished by the judge who presided at the trial or by a Justice of the Supreme Court of the State, that in his opinion there is reasonable doubt whether the judgment should stand; and such committal under such circumstances violates no provision of the Constitution of the United States.

An appeal to a higher court from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing it, and a State may accord it to a person convicted of crime upon such terms as it thinks proper.

THE case is stated in the opinion.

Mr. Thomas A. Atchison and *Mr. Robert H. Griffin* for appellant.

Mr. Benjamin F. Tracy and *Mr. Edward M. Shepard* for appellee.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

Upon the trial in one of the courts of New York of an indictment charging John Y. McKane, the present appellant, with having wilfully violated certain provisions of the law of that State relating to elections and to the registration of voters, the accused was found guilty and was adjudged, February 19, 1894, to be imprisoned in the State prison at Sing Sing at hard labor for the term of six years. It was further ordered by the court that the convict be forthwith conveyed to that prison in execution of the sentence. That order was complied with, and he was delivered by the sheriff to the agent and warden of the prison to be therein confined in conformity with the sentence against him.

From the judgment ordering his imprisonment in Sing Sing, McKane prayed and was allowed an appeal to the General Term of the Supreme Court of New York.

On the 15th day of March, 1894, his counsel presented to the Circuit Court of the United States for the Southern District of New York an application for a writ of *habeas corpus*, directed to the agent and warden of Sing Sing prison, and requiring him to produce the body of the petitioner before the court, and there abide such order as may be made in the premises. The petitioner represented that he was deprived of his liberty in violation of the Constitution of the United States.

Under the statutes of the United States an appeal may be taken to this court from the final decision upon *habeas corpus* of a Circuit Court of the United States, in the case of any person alleged to be restrained of his liberty in violation of the Constitution or any law or treaty of the United States. *In re Shibuya Jugiro*, 140 U. S. 291, 294, 295; Rev. Stat. §§ 751, 752, 753, 761, 762, 763 to 765; Act of March 3, 1885, c. 353, 23 Stat. 437. Section 766 provides: "Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined, or restrained of his liberty,

in any state court, or by or under the authority of any State, for any matter so heard and determined, or in process of being heard and determined, under such writ of *habeas corpus*, shall be deemed null and void."

The object of this statute, as was said in *In re Shibuya Jugiro*, above cited, was, in cases where the applicant for the writ was held in custody under the authority of a state court, or by the authority of a State, to stay the hands of such court or State, while the question whether his detention was in violation of the Constitution, laws, or treaties of the United States was being examined by the courts of the Union having jurisdiction in the premises.

When McKane applied for the writ of *habeas corpus* he was an inmate of Sing Sing prison pursuant to the judgment of the court in which he was indicted and found guilty. His appeal to the General Term of the Supreme Court, so far as the statutes of New York are concerned, did not prevent his being committed to that prison in execution of the sentence pronounced against him. For, by section 527 of the Code of Criminal Procedure of New York, it is provided that "an appeal to the Supreme Court from a judgment of conviction, or other determination from which an appeal can be taken, stays the execution of the judgment or determination upon filing, with the notice of appeal, a certificate of the judge who presided at the trial, or of a Justice of the Supreme Court, that in his opinion there is reasonable doubt whether the judgment should stand."

As the accused does not claim to have filed with his notice of appeal the required certificate of reasonable doubt, his committal to prison pending his appeal to a higher court of the State was in conformity with the laws of New York.

But it is contended that the Constitution of the United States secured to him the right to give bail, pending his appeal to the General Term of the Supreme Court of New York.

By the law of New York, "after the conviction of a crime not punishable with death, a defendant who has appealed, and when there is a stay of proceedings, but not otherwise, may be admitted to bail: 1. As a matter of right, when the appeal

is from a judgment imposing a fine only; 2. As a matter of discretion in all other cases." N. Y. Code of Crim. Pro. § 555. There was no stay of proceedings on the judgment of conviction of McKane, and, therefore, under the statutes of the State, he was not entitled of right, to be admitted to bail pending his appeal. If he applied for bail, and bail was denied, the action of the court was not the subject of review, because the granting or refusing bail was made by the statute matter of discretion. *Clawson* v. *United States*, 113 U. S. 143.

It is, however, insisted, in effect, that these statutory regulations of the State are repugnant to section 2 of article IV of the Constitution of the United States, which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The only reason suggested in support of this position is, that in most of the States of the Union a defendant convicted of a criminal charge other than murder has the right, as a matter of law, upon the granting of an appeal from the judgment of conviction, to give bail pending such appeal. Whatever may be the scope of section 2 of article IV — and we need not, in this case enter upon a consideration of the general question — the Constitution of the United States does not make the privileges, and immunities enjoyed by the citizens of one State under the constitution and laws of that State, the measure of the privileges and immunities to be enjoyed, as of right, by a citizen of another State under its constitution and laws. An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.

It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its

wisdom may be deemed proper. In a large number of the States an appeal from a judgment of conviction operates as a stay of execution only upon conditions similar to those prescribed in the New York Code of Criminal Procedure; in others, a defendant, convicted of felony, is entitled of right to a stay pending an appeal by him. But, as already suggested, whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself.

Another provision of the Constitution of the United States invoked by the accused in support of his appeal is that part of the Fifth Amendment prohibiting the deprivation of liberty without due process of law. We assume that counsel who prepared the application for a writ of *habeas corpus* intended to refer to that clause of the Fourteenth Amendment which declares that no State shall deprive any person within its jurisdiction of his liberty without due process of law. What has been said is sufficient to indicate that, in our judgment, there is nothing of merit in this contention. It need not be further noticed.

Our attention has been called to that section of the New York Code of Criminal Procedure which provides that if, before the granting of a certificate of reasonable doubt by the judge who presided at the trial, or by a justice of the Supreme Court, "the execution of the judgment have commenced, the further execution thereof is suspended, and the defendant must be restored by the officer in whose custody he is, to his original custody," which, in this case, would be to the sheriff of Kings County. § 531. The point here made, if we do not misapprehend counsel for the accused, is that a suspension of proceedings in the state court when it occurs under the circumstances stated in section 766 of the Revised Statutes of the United States, has the same effect as a certificate of reasonable doubt given by a state judge, under the state law, after the execution of the judgment of conviction has commenced. This contention cannot be sustained. The only purpose of the Federal statute was to prevent the state court, or the State, pending proceedings on appeal to this

court, from changing, to the prejudice of the accused, the situation as it was at the time the appeal was taken from the judgment of a Circuit Court disallowing an application for a writ of *habeas corpus* based upon grounds of which, under the statutes of the United States, the courts of the Union could take cognizance. The warden of the prison in which McKane is confined is not authorized or directed — even if he could legally be authorized or directed — by the statutes of the United States to return the accused to the custody of the sheriff to await the final action of this court. The appeal to this court had no effect whatever upon the confinement of the accused, in conformity with the laws of the State, in Sing Sing prison before such appeal was taken from the judgment of the Circuit Court.

The judgment of the Circuit Court is

Affirmed.

CONNECTICUT *ex rel.* NEW YORK & NEW ENGLAND RAILROAD COMPANY *v.* WOODRUFF.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

No. 958. Submitted April 30, 1894. — Decided May 14, 1894.

New York & New England Railroad Co. v. *Bristol*, 151 U. S. 556, affirmed and followed.

Insurance Company v. *The Treasurer*, 11 Wall. 204, affirmed and followed to the point that in order to give this court jurisdiction by writ of error to a state court, it must appear by the record that a Federal question was raised.

Delaware Navigation Company v. *Reybold*, 142 U. S. 636; *Hammond* v. *Johnston*, 142 U. S. 73; and *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, followed to the point that even if a Federal question was raised in a state court, yet, if the case was decided on grounds broad enough in themselves to sustain the judgment, without reference to the Federal question, this court will not entertain jurisdiction.

Baltimore & Potomac Railroad Co. v. *Hopkins*, 130 U. S. 210, affirmed and followed.

Argument for Defendants in Error.

MOTION to dismiss. The material parts of the motion were as follows:

And now come the defendants in error, George M. Woodruff *et al.*, Asylum Street Bridge Commissioners of the State of Connecticut, and move the court to dismiss the writ of error in the above-entitled cause, for the following reasons:

1. There is no Federal question arising on the record filed in this court.

2. No Federal question arose in the trial court, or in the Supreme Court of Errors of the State of Connecticut, which was decided against the title, right, privilege, or immunity set up or claimed by the plaintiff in error.

3. This case involves a statute whose construction by the state court of last resort adverse to the plaintiff will be respected by this court.

4. The Supreme Court of Errors of the State of Connecticut, the court of last resort in that State, in construing a local statute, the one here in question, has ruled that the law is an amendment of the charter of the plaintiff company, which charter is amendable at the will of the General Assembly of that State.

5. No Federal question is necessarily involved in the judgment of the court below.

6. The error, if error there was, was not in sustaining, but in interpreting, the statutes in question.

7. The question on which jurisdiction depends is so frivolous as not to need further argument.

8. If there is a Federal question involved in the judgment, the decision of the court below is so clearly right that the writ of error should be dismissed or the decree and judgment affirmed.

9. This suit is an application, or written motion, addressed to the Superior Court for New Haven County in the name of the State by the State's Attorney for that county, for an alternative mandamus. Upon the application, the alternative writ was not issued, but a rule to show cause against the defendants was made, and upon that hearing, the defendants moved to quash the application for manifold reasons, set forth

in the record. The motion to quash was granted, and the applicant appealed from the judgment to the Supreme Court of Errors. That court dismissed the appeal upon the grounds that the commission was a body whose power was plenary, and that the duties to be performed were such as in the highest degree call for the exercise of judgment and discretion, and that the Superior Court had no power by mandamus to control the acts of the commission; that the commission had acted on the damages, and that their action was just and wise. From the denial to issue even an alternative writ, the relators appealed. If this appeal brings any Federal question in any way before this court, it is precisely the same one recently disposed of upon the motion to dismiss the writ of error brought by these same parties against the Railroad Commissioners in the *Town of Bristol case*, opinion announced February 5, 1894. *New York & New England Railroad* v. *Bristol*, 151 U. S. 556. This writ of error attempts to raise a constitutional question, which is not included in the decision of the state courts, but which, in another action, was adjudged against them, on precisely the same statute, and between precisely the same parties, and when a writ of error from that judgment was dismissed by this court at their motion.

10. There was no property of the company taken, and the duty which the order imposed was by due process of law and of laws of equal protection.

Mr. Henry C. Robinson for the motion.

Mr. Tilton E. Doolittle opposing.

The Chief Justice: The motion to dismiss is sustained. *Woodruff* v. *Railroad Company*, 59 Connecticut, 63; *Railroad Company* v. *Woodruff*, 63 Connecticut, 91; *Railroad Company* v. *Woodruff*, 140 U. S. 691; *Railroad Company* v. *Bristol*, 151 U. S. 556; *Insurance Company* v. *The Treasurer*, 11 Wall. 204; *Delaware Navigation Co.* v. *Reybold*, 142 U. S. 643; *Hammond* v. *Johnston*, 142 U. S. 73; *New Orleans* v. *N. O. Water Works Co.*, 142 U. S. 79; *Balt. & Potomac Railroad* v. *Hopkins*, 130 U. S. 210.

POSTAL TELEGRAPH CABLE COMPANY *v.* CHARLESTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 1009. Submitted January 22, 1894. — Decided May 14, 1894.

A city ordinance, made under power conferred by a state statute, imposing a license of five hundred dollars upon a telegraph company which had accepted the provisions of the act of July 24, 1866, c. 230, 14 Stat. 221, upon business done exclusively within the city and not including any business done to or from points without the State, and not including any business done for the government of the United States, its officers or agents, is an exercise of the police power and is not an interference with interstate commerce.

THE case is stated in the opinion.

Mr. R. S. Guernsey and *Mr. T. M. Mordecai* for appellant.

Mr. Charles Inglesby for appellees.

MR. JUSTICE SHIRAS delivered the opinion of the court.

On the first day of July, 1892, the Postal Telegraph Cable Company, a corporation of the State of New York, filed in the Circuit Court of the United States for the District of South Carolina a bill of complaint against the city of Charleston, a municipal corporation of the State of South Carolina, and William L. Campbell and Glenn E. Davis, citizens of the State of South Carolina, and respectively sheriff and treasurer of said city, seeking to restrain the collection of a license imposed upon the said Postal Telegraph Cable Company by an ordinance of the city council of Charleston. A preliminary injunction was granted enjoining the defendants from proceeding to collect said license until the hearing of the cause on its merits. Answers were filed by the city and by the city treasurer and city sheriff, and issue was joined by repli-

cations. The complainant put in evidence tending to sustain the allegations of the bill.

The facts, as disclosed by the bill, answers, and evidence, were substantially these:

The Postal Telegraph Cable Company, a corporation of the State of New York, has an office in the city of Charleston; is engaged in sending and receiving messages by wire to and from points inside and outside of the State of South Carolina; and has its lines over the post roads, highways and railroads in the city of Charleston, and in several of the States. The company has accepted the provisions of the act of Congress approved July 24, 1866, c. 230, 14 Stat. 221, [now Rev. Stat. § 5263,] whereby it has put its lines at the service of the United States for postal, military, and other purposes, and given precedence to its business. The company has offices in other cities and towns in South Carolina, several of which have adopted ordinances exacting licenses from the company. During the year commencing January 1, 1892, and for several years prior to that time, the company has been engaged in the business of receiving and sending telegrams for private persons and for the public between the city of Charleston and other places within the State of South Carolina, and also in sending telegraphic communications between the governmental departments of the United States, and was and is engaged in the telegraph business for the purpose of interstate commerce. By an act approved December 17, 1881, the general assembly of the State of South Carolina authorized the city council of Charleston to impose a license tax, not exceeding five hundred dollars, on all persons engaged in any business, trade, or profession in the city of Charleston. By an ordinance, entitled "An ordinance to regulate licenses for the year 1892," the city council enacted that every person, firm, company, or corporation engaged in any trade, business, or profession within the city of Charleston should obtain, on or before the 20th day of January, 1892, a license therefor. The provision relating to telegraph companies is as follows: "Telegraph companies or agencies, each, for business done exclusively within the city of Charleston, and not including

any business done to or from points without the State, and not including any business done for the government of the United States, its officers or agents, $500." A penalty, for failure to take out the license, of fifty per cent of the amount of the tax was provided for, and a continuing penalty of fifty per cent for each day's business done without taking out such license. The Postal Telegraph Cable Company, after notification, declined and failed to take out and pay for such license, and, on May 28, 1892, in pursuance of the terms of the ordinance, the license tax of $500, with penalty of fifty per cent, was assessed against the company and put in the hands of the city treasurer for collection, who issued execution therefor, addressed to the city sheriff, requiring him to proceed to collect said license tax and penalty by distress and sale.

At the final hearing, on June 21, 1893, the temporary injunction was dissolved, and the bill dismissed with costs. From this decree the present appeal was taken.

We do not deem it necessary to discuss the contention that the ordinance imposing the license tax in question is invalid by reason of its disregard of provisions of the constitution of South Carolina. The Supreme Court of that State has, in several cases, judicially settled that the power to raise revenue by a license tax on business, given by statute to the city council of Charleston, does not violate any provision of the state constitution. *State* v. *Hayne*, 4 S. C. 403, 413; *Information* v. *Jager*, 29 S. C. 438, 443.

It is claimed that the license required by the ordinance is a tax upon the telegraph company for the privilege of exercising its franchise within the city of Charleston, and not an exercise of the police power granted to the city by the State; that the Postal Telegraph Cable Company, having constructed its lines along post roads in the city of Charleston and elsewhere, no State or municipal authority can exact a license for the privilege of conducting its business, thus restraining the powers possessed by it under its franchises and under the acts of Congress; and that the ordinance in question is an interference with interstate commerce and therefore void.

Opinion of the Court.

The questions thus suggested have been so frequently and so recently considered and decided by this court, in well-known cases, that our duty will be sufficiently performed by briefly citing and applying those cases.

That this license is not a condition upon which the right to do business depends, but is a tax, is shown by the case of *Home Insurance Company* v. *City Council*, 93 U. S. 116, 122. There the city council of the city of Augusta passed an ordinance which imposed a license tax of $250 "on each and every fire, marine, or accidental insurance company located, having an office, or doing business within the city of Augusta." The Home Insurance Company, a corporation of the State of New York, and having an agency in the city of Augusta, refused to recognize the obligation of the ordinance, and filed a bill in the Superior Court of Richmond County in the State of Georgia, to enjoin the city council from collecting the license tax. That court, having refused the injunction prayed for, and having dismissed the bill, the case went to the Supreme Court of Georgia, which affirmed the decree of the Superior Court, and the case was then brought to this court.

It was argued on behalf of the insurance company that, as it had complied with the provisions of the laws of Georgia which authorized foreign insurance companies to do business in that State, it was not competent for a municipal corporation of the State to impose an additional condition on the right of the company to do business. But it was held, citing *The License Tax Cases*, 5 Wall. 462, that the license in question must be regarded as nothing more than a tax; that the penalty provided was a mode of enforcing its payment; and that the license, when issued, was only a receipt for the tax, and not a grant of an authority to conduct business on condition of paying the license.

In *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, 376, where a ferry company, authorized by an act of assembly of the State of Illinois to carry on its business and paying state taxes prescribed in its charter, was called upon by a city ordinance to pay a license tax, it was held by this court that the exaction of a license fee is an ordinary exercise of police

power by municipal corporations; that the power of the State to authorize any city within its limits to enforce a license tax on trades or callings generally, especially those which are *quasi* public, cannot be disputed; and that whether a license fee is exacted under the power to regulate or the power to tax, is a matter of indifference if the power to do either exists.

It was held, in *West. Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530, that a tax imposed by the laws of Massachusetts upon the Western Union Telegraph Company, a corporation of the State of New York, on account of the property owned and used by it within Massachusetts, was valid.

But it is contended that, while a State can prohibit a foreign corporation from doing business within its territory, or can impose conditions upon the exercise of its franchises, such power does not exist when such corporations are engaged in interstate commerce or are agents of the United States government, and reliance is placed on the case of *Leloup* v. *Port of Mobile*, 127 U. S. 640. There it was held that where a telegraph company is doing the business of transmitting messages between different States, and has accepted and is acting under the telegraph law passed by Congress July 24, 1866, no State within which it sees fit to establish an office can impose upon it a license tax, or require it to take out a license for the transaction of such business; that telegraphic communications are commerce, as well as in the nature of postal service, and if carried on between different States, they are interstate commerce, and within the power of regulation conferred upon Congress, free from the control of state regulations, except such as are strictly of a police character; and that any state regulations by way of tax on the occupation or business, or requiring a license to transact such business, are unconstitutional and void. Accordingly, a judgment of the Supreme Court of Alabama, which sustained the validity of an ordinance of a municipal corporation of that State imposing a license tax upon the Western Union Telegraph Company, engaged in the business of transmitting telegrams from and to points within the State of Alabama and between

private individuals of the State of Alabama, as well as between citizens of said State and citizens of other States, was reversed. But it was said, in the course of the discussion in that case, that "it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. This tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

In *Telegraph Company* v. *Texas*, 105 U. S. 460, in error to the Supreme Court of Texas, it was held that, in respect to its foreign and interstate business, a telegraph company is, as an instrument of commerce, subject to the regulating power of Congress, and, if it accepts the provisions of act of the July 24, 1866, (Revised Statutes, §§ 5263, 5268,) it becomes an agent of the United States, so far as the business of the government is concerned; and that the state laws, so far as they impose upon such company a specific tax on each message which it transmits beyond the State, or which an officer of the United States sends over its lines on public business, are unconstitutional; but it was said that "any tax which the State may put on messages by private parties, and not by agents of the United States, from one place to another exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States."

The case, in *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, was one where the telegraph company, a corporation of the State of New York, filed a bill in the Circuit Court of the United States for the Southern District of Ohio, against Ratterman, treasurer of Hamilton County, Ohio, seeking to restrain the collection of a tax on the gross receipts of the company, which were principally, but not wholly, derived from business between points within and points without the State of Ohio. The complainant, in its bill, expressed its willingness to pay and offered to pay taxes chargeable against its property and business within the State, but alleged that

the defendant refused to accept such partial payment, and demanded payment for the total assessment on all the gross receipts. The District and Circuit Judges certified a division of opinion to this court, as to whether a single tax upon the receipts of a telegraph company, which receipts were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross and without separation or apportionment, was wholly invalid, or invalid only in proportion and to the extent that said receipts were derived from interstate commerce. Mr. Justice Miller delivered the unanimous opinion of this court. The case of *The State Freight Tax*, 15 Wall. 232, was cited as ruling that where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the court will act upon this distinction, and will restrain the tax on interstate commerce while permitting the State to collect that arising upon commerce wholly within its own territory. Accordingly the decree of the court below, following the opinion of the circuit judge, enjoining the collection of the taxes on that portion of the receipts derived from interstate commerce, and permitting the treasurer to collect the other tax upon property of the company and upon receipts derived from commerce entirely within the limits of the State, was affirmed.

The question arose, and was determined in the same way, in the case of *West. Union Tel. Co.* v. *Alabama*, 132 U. S. 472. It there appeared that a statute of Alabama imposed a tax "on the gross amount of the receipts by any and every telegraph company derived from the business done by it in this State." The Western Union Telegraph Company reported to the board of assessors only its gross receipts received from business wholly transacted within the State. The board required of the company a further return of its gross receipts from messages carried partly within and partly without the State. The company made such further return, and the tax was imposed on the gross receipts as shown by the two returns. This mode of assessment was sustained by the Supreme Court of Alabama,

but this court held that the statute of Alabama, thus construed, was a regulation of commerce, and that the tax imposed upon the messages comprised in the second return was unconstitutional. In the discussion of the case, Mr. Justice Miller expressed himself as follows: "The principle is, in regard to telegraph companies which have accepted the provisions of the act of Congress of July 24, 1866, (Rev. Stat. § 5263 to § 5268,) that they shall not be taxed by the authorities of a State for any messages, or receipts arising from messages, from points within the State to points without, or from points without the State to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the State. The foundation of this principle is that messages of the former class are elements of commerce between the States and not subject to legislative control of the States, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the State, and, therefore, subject to its taxing power." See, likewise, *Pacific Express Co.* v. *Seibert*, 142 U. S. 339.

The reasoning of these cases needs no reinforcement, and their conclusions are readily applied to the case in hand.

The express terms of the ordinance restrict the tax to "business done exclusively within the city of Charleston, and not including any business done to or from points without the State, and not including any business done for the government of the United States, its officers or agents."

It is claimed that the Postal Telegraph Cable Company is not within the terms of this ordinance, because it does not do any business exclusively within the city of Charleston; that its city offices are merely initial points for sending and receiving messages, and that, irrespective of the messages sent or received outside of the State, the interstate messages are not between points within the city; and that, if license exactions were allowed to and made by the various cities in the State, great injury and wrong would be done to the telegraph company.

But this is a hardship, if such exists, that it is not within our province to redress. If business done wholly within a State is

within the taxing power of the State, the courts of the United States cannot review or correct the action of the State in the exercise of that power.

It is further contended that the ruling of the cited cases does not cover the case of a telegraph company which has constructed its lines along the post roads in the city of Charleston, and elsewhere, and which is exercising its functions under the act of Congress as an agency of the government of the United States. It is obvious that the advantages or privileges that are conferred upon the company by the act of July 24, 1866, (Rev. Stat. §§ 5263–5268,) are in the line of authority to construct and maintain its lines as a means or instrument of interstate commerce, and are not necessarily inconsistent with a right on the part of the State in which business is done and property acquired to tax the same, within the limitations pointed out in the cases heretofore cited.

It was upon the doctrine of these cases that the court below acted in refusing the injunction and dismissing the bill, and its decree is, therefore,

Affirmed.

Mr. Justice Harlan, Mr. Justice Brown and Mr. Justice Jackson, dissented.

INDEX.

ADMIRALTY.

1. A steamship entering or leaving the port of New York in a fog through which vessels cannot be seen when distant more than a quarter of a mile, should reduce its speed to the lowest point consistent with good steerage way. *The Martello*, 64.
2. It is the duty of a steamship, hearing a blast from a fog-horn on its starboard bow, indicating that a vessel is approaching from a direction which may take it across the steamer's bow, to stop at once until she can assure herself of the bearing, speed, and course of the approaching vessel. *Ib.*
3. It is within the discretion of the court below to refuse to find a fact asked for several months after the disposal of the case on other issues, but if such finding is made it is binding on this court. *Ib.*
4. The requirement in article 12 of the International rules and regulations for preventing collisions at sea, that sailing vessels shall be provided with an efficient fog-horn, to be sounded by a bellows, or other mechanical means, is so far obligatory, as to throw upon the sailing vessel in fault the burden of proof, in case of collision, that the want of a mechanical fog-horn could not have contributed to it. *Ib.*
5. In entering the port of New York, the steamship Britannia came so close to Governor's Island as to graze the bottom. This made it necessary for her pilot to direct the engines to be put at full speed till she cleared the ground. After that the speed of the vessel was slowed, and her wheel was put hard-a-port to round into East River. About the time of touching bottom the Britannia sighted the steamship Beaconsfield on her starboard bow, and blew a single whistle. The Beaconsfield, going out from the port, had also seen the Britannia when it came around Governor's Island, and about the time it was disengaging itself from the ground, blew a single blast of her whistle, put her helm to port a little, and went on at a slow speed. The whistle of the Britannia was heard upon the Beaconsfield, but that of the Beaconsfield was not heard on the Britannia. After clearing the bottom and reducing her speed, the Britannia did not respond promptly to her helm, owing to the fact that the condition of the wind and tide was such as to form a flood eddy on the north side of the channel between the Battery and Governor's Island, and an ebb

tide on the south side of the channel. These tides operate to turn the head of a vessel attempting to enter the East River near Castle William to the westward, as it crosses the ebb until it enters the flood eddy. Such tidal action, and its effect upon vessels, were known to the pilot of the Beaconsfield, and should have been known to the pilot of the Britannia. It retarded the efforts of the Britannia to pass astern of the Beaconsfield. The Beaconsfield thereupon blew another single whistle, and, hearing no answer, put her wheel hard-a-port, stopped her engines and reversed full speed. Her engines were kept in this condition until her headway was stopped. Then she lay still in the water until struck by the Britannia and sunk. *Held*, (1) [*All concurring*,] That the Britannia was in fault in running at a place where she was liable to meet outward going vessels, across the ebb tide in such a way that the current prevented her from answering her helm with promptness, and that such fault was enough to render her liable, in whole or in part, for the loss occasioned by the collision; (2) [Brown and Jackson, JJ., *dissenting*,] That the Beaconsfield was also in fault (*a*) in disregarding Rule 23 of the Rules for preventing Collisions on the Water, Rev. Stat. § 4233, directing that when, by Rule 19, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of Rule 24; and (*b*) in remaining motionless for a minute and a half, in full view of the tardy motions of the Britannia in getting astern. *The Britannia*, 130.

6. The statement in Finding 31, that "the conduct of those in charge of the Beaconsfield . . . does not warrant the inference that there was, on their part, negligence contributory to produce the collision," is not a finding of fact, within the meaning of the rule, but is a conclusion of law upon the previous facts. *Ib.*

7. The act of August 19, 1890, c. 802, 26 Stat. 320, not having been proclaimed by the President, as required by sec. 3 thereof, it is not yet operative, and this court is not bound by the construction put by English courts on Art. 21, providing that "where, by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed." *Ib.*

8. When it is agreed by a charter party, on the part of the vessel, that she shall be tight, staunch, strong, and in every way fitted for the voyage, the owner is bound to see that the vessel is seaworthy and suitable for the service on which she is to be employed, and he is not excused by the fact that a defect is latent and unknown to him; but no obligation in that respect rests upon the owner of the cargo. *The Edwin I. Morrison*, 199.

9. In a suit in admiralty, where the libellant sought to recover for injuries to a cargo caused by the vessel taking in water through a hole in her side, made by the breaking away of the cap from one of the bilge-pump holes, and where the defence was that such breaking was caused by a danger of the sea within the exception in the charter party and bills of

lading, the court below, after finding that such bilge-pumps were not unusual, and describing them and the dangers to be apprehended from them, and after finding that before sailing the cap and plate showed no indications of looseness, in an examination which, after detailing it, was found to be such as a reasonably prudent master might be expected to give, and after finding the condition of the hole at the end of the voyage, found further that "at the time of the contract and lading of cargo and commencement of voyage the vessel was tight, staunch, and strong, and in every way fitted for the contemplated voyage;" that "there was no latent defect in the vessel which contributed to the injury to the cargo;" and that "the whole of said damage to cargo was caused by a danger of the sea, and was within the exception in charter party and bills of lading." *Held*, (1) That these were findings determined by the interpretation which the law put upon the circumstances of the transaction as stated in the previous findings, and, as such, open to revision here; (2) That these deductions were incorrect, and the specific conclusions of law did not follow. *Ib.*

APPEAL.

See CONSTITUTIONAL LAW, 21.

ARREST.

See CRIMINAL LAW, 18.

CASES AFFIRMED OR FOLLOWED.

1. *Seeberger* v. *Castro*, 153 U. S. 32, followed. *Spalding* v. *Castro*, 38.
2. *The Stephen Morgan*, 94 U. S. 599, affirmed to the point that a party who does not appeal from the final decree of a Circuit Court cannot be heard in opposition thereto, when the case is properly brought here by the appeal of the adverse party. *Groves* v. *Sentell*, 465.
3. *Evans* v. *United States*, 153 U. S. 584, followed. *Evans* v. *United States*, (No. 2,) 608.
4. *Field* v. *Clark*, 143 U. S. 649, would seem to be decisive of this case. *Lyons* v. *Woods*, 649.
5. *New York & New England Railroad Co.* v. *Bristol*, 151 U. S. 556, affirmed and followed. *New York & New England Railroad Co.* v. *Woodruff*, 689.
6. *Baltimore & Potomac Railroad Co.* v. *Hopkins*, 130 U. S. 210, affirmed and followed. *Ib.*

See CONSTITUTIONAL LAW, 11; JURISDICTION, A, 5, 6; TAX AND TAXATION, 2; TIDAL LANDS, 7; WILL, 2.

CASES DISTINGUISHED.

Hager v. *Swayne*, 149 U. S. 241, distinguished. *Seeberger* v. *Castro*, 32.

CASES DOUBTED, QUESTIONED, OR OVERRULED.

Hendricks v. *Commonwealth*, 75 Virginia, 934, questioned. *Wharton* v. *Wise*, 155.

See WILL, 2.

CHEROKEE OUTLET.

See CRIMINAL LAW, 1, 2.

CONSTITUTIONAL LAW.

1. The compact of March 28, 1785, between the States of Virginia and Maryland, having been duly ratified by each State, is binding upon both as to the subjects embraced within it, so far as it is not inconsistent with the Constitution of the United States. *Wharton* v. *Wise*, 155.
2. That compact was not prohibited by Article 6 of the articles of Confederation, forbidding any treaty, confederation or alliance between two or more States without the consent of Congress; and it continued in force after the adoption of the Constitution, except so far as inconsistent with its provisions, and received the assent of Congress by the adoption or approval of proceedings taken under it. *Ib.*
3. The compact of 1785 contained no reference to fish of any kind in Pocomoke River or Pocomoke Sound, and no clause in that compact gave Maryland a right to fish in that river or sound. *Ib.*
4. *Hendricks* v. *Commonwealth*, 75 Virginia, 934, criticised and questioned. *Ib.*
5. The 10th section of the compact of 1785 does not forbid the State of Virginia from trying and convicting citizens of Maryland for offences committed in Virginia against its laws regulating the oyster fisheries. *Ib.*
6. An ordinance requiring agents soliciting orders on behalf of manufacturers of goods to take out a license and pay a tax therefor, made by a municipal corporation under authority conferred by a statute of the State, granting to such corporations power to levy and collect license taxes on hawkers, pedlers and merchants of all kinds, is an exercise, not of the police power, but of the taxing power; and when it is enforced against an agent, sent by a manufacturer of goods in another State to solicit orders for the products of his manufactory, it imposes a tax upon interstate commerce, in violation of the provisions of the Constitution of the United States. *Brennan* v. *Titusville*, 289.
7. This court is not bound by the decision of the highest court of the State in which such a tax is authorized and imposed, that its authorization and imposition are an exercise of the police power, and not of the taxing power. *Ib.*
8. When a plaintiff below has the benefit of a full and fair trial in the several courts of his own State, whose jurisdiction he invokes, and where his rights are measured, not by laws made to affect him in-

dividually, but by general provisions of law applicable to all in like condition, even if he can be regarded as deprived of his property by an adverse result, the proceedings that so resulted were in "due process of law," as that phrase is used in the Fifth and the Fourteenth Amendments to the Constitution of the United States. *Marchant* v. *Pennsylvania Railroad Co.*, 380.

9. The leading cases touching the construction of that phrase in the Amendments reviewed. *Ib.*

10. The act of March 7, 1891, c. 126, of North Dakota, "regulating grain warehouses and weighing and handling of grain," declaring elevators, etc., to be public warehouses, and their owners to be public warehousemen, and requiring them to give bond conditioned for the faithful performance of their duty as such, fixing rates of storage, and requiring them to keep insured for the benefit of the owners all grain stored with them, does not apply to elevators built by a person only for the purpose of storing his own grain, and not to receive and store the grain of others, and being so construed it does not deny the equal protection of the laws to the owner of an elevator made a public warehouse by it, does not deprive him of his property without due process of law, does not amount to a regulation of commerce between the States, and is not in conflict with the Constitution of the United States. *Brass* v. *Stoeser*, 391.

11. This case differs in no substantial respect from *Munn* v. *Illinois*, 94 U. S. 113, and *Budd* v. *New York*, 143 U. S. 517, and an adherence to the rulings in those cases requires the affirmance of the judgment of the court below. *Ib.*

12. When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution of the United States, upon the determination of which the result depends, then it is not a suit arising under the Constitution. *New Orleans* v. *Benjamin*, 411.

13. Upon the bill and answer in this case no such dispute or controversy arose as would give original jurisdiction to the Circuit Court of the United States without regard to the diverse citizenship of the parties. *Ib.*

14. The act of the legislature of Louisiana repealing the act creating the Board of Metropolitan Police and other acts in relation thereto, was, in itself, a mere change of an instrumentality of municipal government, and as, upon the record, it must be assumed that the assets of that board and the remedies in respect thereof of those who held evidences of indebtedness issued by the board remained unaffected by the repealing act, the act could not be attacked in this way as unconstitutional because it made no specific provision for the payment of such indebtedness, on the liquidation of the affairs of the board. *Ib.*

15. If several railroad corporations, each existing under the laws of separate States, consolidate into one corporation, a statute of one of the States, imposing a charge upon the new consolidated company

of a percentage on its entire authorized stock as the fee to the State for the filing of the articles of consolidation in the office of the Secretary of State of the State, without which filing it could not possess the powers, immunities, and privileges which appertain to a corporation in that State, is not a tax on interstate commerce, or the right to carry on the same, or the instruments thereof; and its enforcement involves no attempt on the part of the State to extend its taxing power beyond its territorial limits. *Ashley* v. *Ryan*, 436.

16. A state statute, requiring insurance companies to make full and specified returns to the proper state officers of their business condition, liabilities, losses, premiums, taxes, dividends, expenses, etc., is an exercise of the police power of the State, and may be enforced against a company organized under a special charter from the legislature of the State which does not in terms require it to make such return, without thereby depriving it of any of its rights under the Constitution of the United States. *Eagle Ins. Co.* v. *Ohio*, 446.
17. Congress, under the power to regulate commerce among the States, may create a corporation to build a bridge across navigable water between two States, and to take private lands for the purpose, making just compensation. *Luxton* v. *North River Bridge Co.*, 525.
18. The act of July 11, 1890, c. 669, to incorporate the North River Bridge Company, and to authorize the construction of a bridge across the Hudson River between the States of New York and New Jersey, is constitutional. *Ib.*
19. The New York and Erie Railroad Company was a corporation organized under the laws of, and having its principal place of business in the State of New York. Its object was to construct and operate a railroad between the Hudson River and Lake Erie. In 1841 the legislature of Pennsylvania granted to it the right to construct a few miles of its proposed road in the county of Susquehanna in that State. In 1846, no work having been done on the road, the legislature of Pennsylvania granted to it the further right to construct a portion of its road in Pike County, and further enacted that, after the road should be completed to Lake Erie, the company should pay annually into the treasury of the State of Pennsylvania the sum of ten thousand dollars, and that the stock of the road should be subject to taxation in Pennsylvania to an amount equal to the construction of so much of the road as was in that State. The road was then completed from the Hudson to Lake Erie, passing through portions of Pike County and of Susquehanna County, and the requisite payments have been made, first by the original company, and since by its successors through foreclosures of mortgages. The plaintiff in error is now possessed of the property and of the rights under the acts of 1841 and 1846, and has its principal place of business in the city of New York. In 1885 the legislature of Pennsylvania assessed an annual tax of three mills on the dollar on moneys, loans, stocks, moneyed capital, etc., in the hands of individual citizens of that State, and required the

treasurer of each private corporation, incorporated under the laws of any other State and doing business in Pennsylvania, when making payments of interest upon its bonds, etc., held by residents of that State, to assess the tax upon it, and to report to the auditor general of the State, and to pay the taxes so assessed and collected into the state treasury. In accordance with this law the treasurer of the railroad company in 1888 reported the nominal value of all its scrip, bonds, and evidences of indebtedness to be $78,573,485.10, and the nominal value of all such known to be owned by residents of Pennsylvania as "None." Thereupon the State, by its attorney general, commenced an action to recover of the company a tax of three mills on the whole amount returned. In the course of the trial it was found that the amount of bonds of the company held and owned by residents of Pennsylvania aggregated $841,000, and judgment was given for a tax of three mills on that amount, which was affirmed on appeal by the Supreme Court of the State. *Held*, (1) That the Commonwealth of Pennsylvania cannot, consistently with the Constitution of the United States, impose upon the New York, Lake Erie and Western Railroad Company the duty, when paying *in the city of New York* the interest due upon scrip, bonds, or certificates of indebtedness held by residents of Pennsylvania, of deducting from the interest so paid the amount assessed upon bond and moneyed capital in the hands of such residents of Pennsylvania. (2) That the fourth section of the act of 1885, in its application to the New York, Lake Erie and Western Railroad Company, impairs the obligation of the contract originally made by the New York and Lake Erie Railroad Company and the State of Pennsylvania, as disclosed by the acts of 1841 and 1846, and by what was done by the companies, upon the faith of those acts. *New York, Lake Erie & Western Railroad* v. *Pennsylvania*, 628.

20. In the State of New York the committal to prison of a person convicted of crime, without giving him an opportunity, pending an appeal, to furnish bail, is in conformity with the laws of that State when no certificate is furnished by the judge who presided at the trial or by a Justice of the Supreme Court of the State, that in his opinion there is reasonable doubt whether the judgment should stand; and such committal under such circumstances violates no provision of the Constitution of the United States. *McKane* v. *Durston*, 684.

21. An appeal to a higher court from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing it, and a State may accord it to a person convicted of crime upon such terms as it thinks proper. *Ib.*

22. A city ordinance, made under power conferred by a state statute, imposing a license of five hundred dollars upon a telegraph company which had accepted the provisions of the act of July 24, 1866, c. 230, 14 Stat. 221, upon business done exclusively within the city and not including any business done to or from points without the State, and not including any business done for the government of the United

States, its officers or agents, is an exercise of the police power and is not an interference with interstate commerce. *Postal Telegraph Co.* v. *Charleston*, 692.

See TAX AND TAXATION, 4, 5, 6.

CONTRACT.

1. A contract for a loan and water works in Havana having been awarded to R., G., L., and M., a deposit was required as a guarantee. N. was employed by R. to raise the money. He borrowed it from B. R. became the assignee of the interests of his co-contractors, and then failed to perform the contract. In order to procure a general release from the liabilities arising from such failure, he gave a power of attorney to Q., who thereupon, in his name and as attorney in fact, entered into an agreement in writing with B. by which it was, among other things, agreed that R. should pay to B. an agreed balance of $19,087.36 in three months from date, with interest at 9 per cent. That sum not being paid when due, B. sued R. to recover it. *Held*, (1) That the power granted by R. to Q. was outstanding when the agreement was executed; (2) that the agreement made by Q. with B. was authorized by the power; (3) that R., having taken an assignment of the respective interests of his co-contractors, stood in their shoes, and that evidence touching the transaction, admissible against an assigning co-contractor, was admissible against him. *Runkle* v. *Burnham*, 216.

2. A provision in a contract for the mining, removing, and loading by the party of the first part of ore from a mine of the party of the second part, that the party of the second part may be at liberty to terminate it at any time when he shall be satisfied that the system employed by the party of the first part is prejudicial to the welfare and development of the mine, and that, in that event, there shall be a reference to determine the damages sustained by the party of the first part by reason of the termination, does not give the party of the second part a right arbitrarily to terminate the contract, but only to do so when it is determined that the system employed is prejudicial to the future welfare and development of the mine. *Anvil Mining Co.* v. *Humble*, 540.

3. A contract made for the extract of ore from the first level of a mine provided that the ore should contain at least 56 per cent of metallic iron. Subsequently the parties extended the contract so as to include the ore contained on and above the second and third levels, with the exception that the ore extracted under this contract should contain at least 58 per cent of metallic ore. *Held*, that this stipulation was applicable only to the ore taken from the second and third levels. *Ib.*

4. Whenever one party to a contract is guilty of such a breach as is here attributed to the defendant the other party may treat the contract as broken, and may abandon it, and recover as damages the profits he would have received through full performance, which measure of

profits was within the intent of both parties when the contract was made, and could be ascertained without difficulty. *Ib.*

5. By an agreement under seal the party of the first part agreed that, after the making of the payments and the full performance of the covenants as agreed to by the party of the second part, he would convey to the party of the second part, certain described lands in California, together with a specified number of shares in the stock of an irrigation company, representing a certain pressure of water, to be delivered to the party of the second part in making payment in full for the land. The party of the second part agreed to pay for the land in fixed consecutive payments, and both parties agreed that the instrument should not be construed as a conveyance, equitable or otherwise, and that, until delivery of the formal deed or tender of all payments precedent thereto, the party of the second part should have no title, equitable or otherwise, to the premises. *Held*, (1) That these covenants were independent, and that the payment or tender of payment of the purchase price for the land was a condition precedent to the right to the conveyance; (2) that the party of the second part, on making the contract payments, became entitled to receive the agreed number of shares in the irrigation company, subject to the by-laws of such company, but not stock which represented the title to water or water rights to the extent of such pressure. *Loud* v. *Pomona Land & Water Co.*, 564.

See PROMISSORY NOTE;
RECEIVER, 1;
USURY, 1, 2.

CORPORATION.

1. A State, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation, organized under its laws, may impose such conditions as it deems proper, and the acceptance of the franchise implies a submission to the conditions without which the franchise could not have been obtained. *Ashley* v. *Ryan*, 436.

2. The State only can challenge the right of a foreign corporation to take and hold real estate within its limits. *Seymour* v. *Slide & Spur Gold Mines*, 523.

See CONSTITUTIONAL LAW, 15, 16;
DIVIDEND.

COSTS.

A defendant, who wrongfully removes a cause from a state court into the Circuit Court, from whose decree appeals are taken by himself and other parties to this court, must, upon reversal of the decree by this court for want of jurisdiction in the Circuit Court, pay the costs in that court, as well as of all the appeals to this court. *Hanrick* v. *Hanrick*, 192.

COURT AND JURY.

1. While it is well settled in Federal courts that the presiding judge may sum up the facts to the jury, and express an opinion upon them, he should take care to separate the law from the facts, and leave the latter in unequivocal terms to the judgment of the jury. *Starr* v. *United States*, 614.

2. The circumstances of this case apparently aroused the indignation of the judge who presided at the trial of it in an uncommon degree, and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances; and this court is constrained to express its disapprobation of this mode of instructing and advising a jury. *Ib.*

See EJECTMENT, 2.

CRIMINAL LAW.

1. On November 12, 1890, in the Indian country, within the boundaries of Oklahoma Territory, as defined by the act of May 2, 1890, c. 182, 26 Stat. 81, horse stealing was not a crime against the United States, punishable under the act of February 15, 1888, c. 10, 25 Stat. 33; but as to the Cherokee Outlet, it remained Indian country after the passage of the act of May 2, 1870, and such an offence, committed there, continued to be an offence against the United States. *United States* v. *Pridgeon*, 48.

2. An indictment in the District Court of the United States within and for Logan County in Oklahoma Territory, and for the Indian country attached thereto, charging the commission of the offence of horse stealing in November, 1890, and laying the venue of the offence "at and within that part of the Territory of Oklahoma attached for judicial purposes to Logan County," with a description of territory which included part of Oklahoma and part of the Cherokee Outlet not in Oklahoma, and which averred the same to be "then and there Indian country, and a place then and there under the sole and exclusive jurisdiction of the United States of America," will not be held to be fatally defective when attacked collaterally by writ of *habeas corpus*. *Ib.*

3. Where a court has jurisdiction of the person and the offence, the imposition of a sentence in excess of what the law permits, does not render the legal or authorized portion of the sentence void, but only leaves such part of it as may be in excess open to question and attack. *Ib.*

4. In accordance with this principle the court answers the third question certified in the negative, without expressing an opinion as to what would have been the proper action of the Circuit Court in dealing with the prisoner's application. *Ib.*

5. A person who has an angry altercation with another person, such as to

lead him to believe that he may require the means of self-defence in case of another encounter, may be justified, in the eye of the law, in arming himself for self-defence; and if on meeting his adversary, on a subsequent occasion, he kills him, but not in necessary self-defence, his crime may be that of manslaughter or murder, as the circumstances, on the occasion of the killing, make it the one or the other. *Gourko* v. *United States*, 183.

6. If, looking alone at those circumstances, his crime be that of manslaughter, it is not converted into murder by reason of his having previously armed himself. *Ib.*

7. B. having been indicted under Rev. Stat. § 5511 for voting more than once at the same election for a Representative in Congress, a special deputy of the marshal swore at the trial that he saw B. vote twice at the poll. On cross-examination he was asked why he did not arrest B. when he saw that he had thus voted. The question, being objected to, was excluded. *Held*, that it was irrelevant and was properly excluded. *Blitz* v. *United States*, 308.

8. The refusal by a Federal court to grant a new trial cannot be reviewed on a writ of error. *Ib.*

9. An indictment under Rev. Stat. § 5511 for knowingly personating and voting under the name of another at an election at which a Representative in Congress and also state officers were to be elected, is fatally defective if it fails to clearly charge that the accused so voted for a Representative in Congress. *Ib.*

10. A count in an indictment under that section which charges that the defendant did then and there unlawfully, knowingly, and feloniously vote at said election for a candidate for the same office for Representative in the Congress of the United States, more than once, describes the offence with sufficient certainty, and the election at which it took place sufficiently by such reference to the date of it named in a previous count in the indictment. *Ib.*

11. The indictment in this case contained three counts, specifying three separate offences against Rev. Stat. § 5511. The defendant was convicted of all. A motion in arrest of judgment under the second count being entertained, he was sentenced, under the first conviction, to imprisonment for a term commencing on a day named, and under the third conviction to a further term, commencing on the expiration of the first term. *Ib.*

12. This court, holding the first count in the indictment to be fatally defective, and sustaining the arrest of judgment under the second count, directs that the term of imprisonment under the third count shall be held to commence on the day named for the commencement of the first term. *Ib.*

13. An indictment should charge the crime, alleged to have been committed, with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged; but it is not necessary in framing it to set up an impracticable standard of partic-

ularity, whereby the government may be entrapped into making allegations which it would be impossible to prove. *Evans* v. *United States*, 584.

14. Applying this rule, the eighth count in the indictment, charging the prisoner with unlawfully procuring the surrender and delivery to himself of the funds of a national bank of which he was a director, and the fourteenth count, charging him with knowingly and fraudulently aiding in procuring the discount of unsecured paper by the bank, are examined in detail, and are held to be sufficient to sustain the conviction. *Ib.*
15. A verdict of guilty, entered upon all the counts of an indictment, should stand if any one of them is good. *Ib.*
16. A warrant issued by a commissioner of a court of the United States is not void for the want of a seal, the commissioner having no seal, and not being required by statute to affix one to warrants issued by him. *Starr* v. *United States*, 614.
17. The same result is reached under the laws of Arkansas, which prescribed the form of warrant as attested under hand, but not under seal. *Ib.*
18. The settled rule that where a person having authority to arrest, and using the proper means for that purpose is resisted, he can repel force with force, and, if the party making the resistance is unavoidably killed, the homicide is justifiable, may be invoked by a person who resists and kills the officer if he was ignorant of the fact that he was an officer; and, when such a defence is set up to an indictment for murder, it is error to charge the jury that, if the threatening or violent conduct of the prisoner prevented the officer from giving notice of his official character, he would not be required to give notice. *Ib.*
19. The possession of a conscience void of offence towards God and man is not an indispensable prerequisite to justification of action in the face of imminent and deadly peril, nor does the intrinsic rightfulness of the occupation or situation of a party, having in itself no bearing upon or connection with an assault, impose a limitation upon the right to repel it. *Ib.*
20. The motive of a person, accused of murdering an officer trying to arrest him, in being where he was at the time of the killing, has nothing to do with the question of his right of self-defence in itself, and his previous unlawful conduct should form no element in the solution of that question, except as it throws light on his belief that his arrest was sought by the officer. *Ib.*

See CONSTITUTIONAL LAW, 20, 21;
CRIMINAL PROCESS.

CRIMINAL PROCESS.

A warrant of a commissioner of a Circuit Court of the United States, commanding the arrest of a person of a certain name, not otherwise desig-

nating or describing him, upon a charge of murder, will not justify the arrest of a person who has never been known or called by that name, notwithstanding the commissioner testifies that he was the person intended. *West* v. *Cabell*, 78.

CUSTOMS DUTIES.

1. The purchaser of an imported article in bond, pending an appeal from the assessment of duties upon it which is subsequently overruled, can, on paying the duties as assessed, maintain an action in his own name against the collector to recover an excess in the payment exacted. *Seeberger* v. *Castro*, 32.
2. Tobacco scrap, consisting of "clippings from the ends of cigars and pieces broken from the tobacco, of which cigars are manufactured in the process of such manufacture," "not being fit for any use in the condition in which the same are imported, and their only use being to be manufactured into cigarettes and smoking tobacco," was, under the tariff act of March 3, 1883, c. 121, subject to a duty of 30 per cent *ad valorem* as unmanufactured tobacco, and not to a duty of 40 cents per pound as manufactured tobacco. *Ib.*
3. The action of a collector of customs under § 2 of the act of June 10, 1890, c. 407, 26 Stat. 131, in estimating the value of paper florins of Austria-Hungary, in which the value of imported merchandise is expressed in the invoices, and converting them into the currency of the United States, is not the subject of appeal to and reversal by the board of general appraisers. *United States* v. *Klingenberg*, 93.
4. A Circuit Court of the United States has jurisdiction to review the action of a board of general appraisers in entertaining such an appeal, and in reversing the action of a collector in that respect. *Ib.*
5. Saccharine, imported into the United States in 1887, was not entitled to free entry as an acid. *Lutz* v. *Magone*, 105.
6. Whether Boonekamp bitters, imported in September, 1889, were so similar to absinthe as to be susceptible of being assessed under the clause applicable to it, was a question of fact properly left to the jury. *Erhardt* v. *Steinhardt*, 177.
7. The jury having determined that fact adversely to the government, it follows that such bitters were at that time to be classified under the proprietary preparation clause of Schedule A of the act of March 3, 1883, c. 121, 22 Stat. 488, 494. *Ib.*
8. The rate of duty on the bottles was dependent upon the rate of duty on the contents. *Ib.*
9. The words "date of original importation," as used in Rev. Stat. § 2970, refer to the exterior port of first arrival of the merchandise, and not to the interior port of destination. *Seeberger* v. *Schweyer*, 609.

DAMAGES.

1. The fact that a railroad company is held liable for damages suffered by a person by reason of the occupation of a public street in a city in

front of his premises by an elevated track furnishes no ground for holding it liable to an owner on the other side of the same street but in a different part of it, by reason of the construction of a similar elevated track opposite to him but not on the public street. *Marchant* v. *Pennsylvania Railroad Co.*, 380.

2. The construction of an elevated railroad, under laws of the State, on private land abutting on a public street in a city, gives to the owner of land on the opposite side of the street no claim to recover consequential damages for injury inflicted upon him thereby. *Ib.*

3. When a person from whom an internal revenue tax has been illegally exacted accepts from the government, without objection, the payment of the sum thus illegally exacted, he thereby gives up his right to sue for interest as incidental damages. *Stewart* v. *Barnes*, 456.

DISTRICT ATTORNEY.

See FEES.

DIVIDEND.

Dividends can rightfully be paid only out of profits; profits are measured by the amount of net earnings; and net earnings are what remain after maintaining the property and paying the interest upon its debts. *Mobile & Ohio Railroad Company* v. *Tennessee*, 486.

EJECTMENT.

1. One who holds possession of real estate as manager for or under another cannot, when sued in ejectment by his principal, dispute the principal's title. *Seymour* v. *Slide & Spur Gold Mines*, 523.

2. When such agent admits the relation and the title of his principal, there is no impropriety in the court's directing a verdict for the plaintiff. *Ib.*

EQUITY.

See STATUTE, A, 1, 2;
TAX AND TAXATION, 1, 3.

EVIDENCE.

1. A defendant who proceeds to introduce testimony, after denial of his motion for a verdict in his favor on the close of the plaintiff's evidence in chief, thereby waives his exception to that denial. *Wilson* v. *Haley Live Stock Co.*, 39.

2. Where a cause of action is not proven, not merely in some particular, but in its entire scope and meaning, the courts treat it, not as a case of variance merely, but as an entire failure of proof. *Ib.*

3. A report of the names of Indians and half-breeds entitled to participate in an allotment of land, made under the act of July 31, 1854, 10 Stat. 315, to the Indian bureau under instructions to report in full a

list of all applicants, showing names, age, sex, etc., is not admissible in evidence in an action between two parties, each of whom claims under the same person and the same allotment, in order to show the age of that person at the time of the allotment. *Hegler* v. *Faulkner*, 109.

4. The rejection of evidence immaterial to the result did not constitute reversible error. *Runkle* v. *Burnham*, 216.
5. A witness may be asked as to the relations of the parties at the time of the execution of a written power of attorney, although his answers may have a bearing upon their obligations arising under a written contract made under the power. *Ib.*
6. Findings of fact made by the court below are binding here when there is any evidence to support them. *Ib.*
7. A defendant who, after denial of his motion for a nonsuit made at the close of plaintiff's evidence in chief, offers evidence in his own behalf, thereby waives his motion and an exception to the denial of it. *Ib.*
8. A letter of a party to the suit bearing upon the issues introduced in evidence against him, may be explained by him as a witness in his own behalf, and its effect upon the issues and the force of the explanation are proper subjects for the consideration of the jury. *Anvil Mining Co.* v. *Humble*, 540.
9. By the terms of the contract in this case the amount due the plaintiffs from time to time was to be determined by the weigh-bills, which were in the possession of the defendant's bookkeeper. The plaintiff applied to the bookkeeper for information on this point, and received a reply. *Held*, that that was competent evidence on that point. *Ib.*

See PROMISSORY NOTE.

EXCEPTION.

See EVIDENCE, 6.

FEES.

1. A district attorney, whose place of abode is at a distance from the place at which court is held, is not entitled to mileage for travel in going to his home every Saturday, and in returning to the place of holding court the following Monday morning, during the continuous session of the court. *United States* v. *Shields*, 88.
2. Fees allowed to public officers depend upon the provisions of the statute granting them, and are not open to equitable construction by the courts or discretionary action on the part of officials. *Ib.*

FINDING OF FACT.

See EVIDENCE, 6.

HABEAS CORPUS.

Under a writ of *habeas corpus* the inquiry is not addressed to errors, but to the question whether the proceedings and judgment are nullities; and unless it appears that the judgment or sentence under which the prisoner is confined is void, he is not entitled to his discharge. *United States* v. *Pridgeon*, 48.

See CRIMINAL LAW, 2.

INDICTMENT.

See CRIMINAL LAW, 2, 7, 9 to 15.

INTEREST.

See DAMAGES, 3.

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

1. On a writ of mandamus in behalf of a State to the Commissioner of Patents to register, under the act of March 3, 1881, c. 138, a trademark used by the State on intoxicating liquors in commerce with a foreign nation, and which the Commissioner of Patents has refused to register, on the ground that the State by its own laws had no authorized trade in liquors outside of its limits, the validity of an authority exercised under the United States is not drawn in question; and therefore, in the absence of evidence of the value of the registration, a judgment of the Court of Appeals of the District of Columbia, denying the writ of mandamus, cannot be reviewed by this court on writ of error, under the act of February 9, 1893, c. 74, § 8. *South Carolina* v. *Seymour*, 353.
2. This court has no jurisdiction over an appeal from the judgment of a Circuit Court denying the application of counsel for a solicitor's allowance out of a fund realized from a sale made under direction of that court in execution of a mandate of this court, the appeal being taken after July 1, 1891, and not being taken under the provisions of section 5 of the Judiciary Act of March 3, 1891, c. 517. *Mason* v. *Pewabic Mining Co.*, 361.
3. This court has jurisdiction to revise the judgment of the Supreme Court of Tennessee in this case, deciding that the provision in the eleventh section of the Tennessee charter of the Mobile and Ohio Railroad Company that no tax shall ever be laid on said road or its fixtures which shall reduce the dividends below eight per cent does not forbid the assessment and collection of taxes under the acts of the legislature of Tennessee referred to in the opinion of that court; that "the said eight per cent clause is invalid," "null and void," and that the said legislation "does not violate or impair the obligation of any contract with the Mobile and Ohio Company." *Mobile & Ohio Railroad Co.* v. *Tennessee*, 486.

4. When the record in a case brought by writ of error from a state court shows nothing of what took place in the state court of original jurisdiction, and in the appellate state court no objection raising a Federal question during the trial and before judgment, but such question is raised for the first time in the appellate court on a motion for a rehearing, the writ of error must be dismissed upon the ground that the Federal question is not properly presented by the record. *Miller* v. *Texas*, 535.

5. *Insurance Company* v. *The Treasurer*, 11 Wall. 204, affirmed and followed to the point that in order to give this court jurisdiction by writ of error to a state court, it must appear by the record that a Federal question was raised. *N. Y. & N. E. Railroad* v. *Woodruff*, 689.

6. *Delaware Navigation Company* v. *Reybold*, 142 U. S. 636; *Hammond* v. *Johnston*, 142 U. S. 73; and *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, followed to the point that even if a Federal question was raised in a state court, yet, if the case was decided on grounds broad enough in themselves to sustain the judgment, without reference to the Federal question, this court will not entertain jurisdiction. *Ib.*

See CASES AFFIRMED, 2;
CONSTITUTIONAL LAW, 7.

B. JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES.

Whether this suit be regarded as seeking a decree against defendants as on a creditors' bill, or as by analogy to garnishee process, it was, under the pleadings, a suit to recover the contents of choses in action within the meaning of the Judiciary Act of 1887 and 1888, and, as the bill contained no averment that the suit could have been maintained by the assignors, the jurisdiction of the Circuit Court cannot be sustained on the ground of diverse citizenship. *New Orleans* v. *Benjamin*, 411.

See CUSTOMS DUTIES, 4.

LIMITATION, STATUTES OF.

The right of action upon a judgment or decree of a court of record of the United States, sitting within the State of Wisconsin, is limited by the Revised Statutes of that State of 1858, to twenty years after the cause of action accrued. *Metcalf* v. *Watertown*, 671.

See USURY, 3.

LOCAL LAW.

1. In view of the Nebraska statutes concerning the operation of statutes of limitation, there was no error in the instruction of the court below in that respect. *Hegler* v. *Faulkner*, 109.

2. A note by which three parties, signing it, promise to pay to the order of the payee at a bank in New Orleans the sum named therein with

interest, not negotiable, is a joint obligation under the law of Louisiana, and binds the several parties thereto only for their proportion of the debt; since, to make it a solidary obligation, binding each of the promisors for the whole debt, the solidarity must, under the law of that State, be expressly stipulated, and is never presumed. *Groves* v. *Sentell*, 465.

3. The promisors on that note, in order to secure it, mortgaged real estate in Louisiana, which they then held in common, undivided. They thereby severally declared that they were indebted to the mortgagee, etc., and that they did thereby mortgage to the mortgagee the property described in the deed. There was no stipulation showing an intention to mortgage separately an undivided part of the property for an undivided part of the debt. *Held*, that it was the intention of the parties that the security for the purchase money should rest upon the entire entity. *Ib.*
4. A mortgagor has the power, under the laws of Louisiana, to exclude indivisibility in contracting the mortgage, and, if he fails to do so, indivisibility applies, not alone as a result of his silence, but also because, being the general rule and of the nature of the contract, it exists unless excluded by its express terms or by a plain implication deducible from it. *Ib.*
5. The divisibility of a debt secured by a mortgage does not necessarily import the divisibility of the mortgage securing it. *Ib.*
6. The voluntary partition by the mortgagees of the property covered by the mortgage did not operate to prevent the mortgage creditor from enforcing his security against either part. *Ib.*
7. A subsequent mortgage creditor, who became such after the division of the property, and only as to one undivided part, is entitled to be subrogated to the rights of the first mortgage creditor, as they existed at the time of the subrogation. *Ib.*
8. If a party interested in the result of the suit, claiming under the subsequent mortgage, files a bill in the nature of a bill of interpleader, he cannot be allowed a solicitor's fee, to be paid from the fund dedicated to the payment of the mortgage. *Ib.*

Arkansas. *See* CRIMINAL LAW, 17.
Colorado. *See* VENDOR'S LIEN, 2.
New Mexico. *See* STATUTE, A, 1, 2; USURY.
New York. *See* TIDAL LAND, 1, 2.
Wisconsin. *See* LIMITATION, STATUTES OF.

MANDAMUS.

1. Mandamus is the proper remedy when a mandate of this court has been disregarded. *In re City Bank*, 246.
2. In this case the court cannot hold that its mandate was disregarded by the decree rendered under it by the Circuit Court. *Ib.*

3. When a mandate of this court has been misconstrued or disregarded by a Circuit Court, the proper remedy now is by mandamus; but in this case the Circuit Court was at liberty to consider the application for an allowance, and its action in that regard was open to review in the Circuit Court of Appeals. *Mason* v. *Pewabic Mining Co.*, 361.
See JURISDICTION, A, 1.

MANDATE.
See MANDAMUS.

MORTGAGE.
See LOCAL LAW, 3–8.

OKLAHOMA.
See CRIMINAL LAW, 1, 2.

PATENT FOR INVENTION.

1. When a question between contending parties, as to priority of invention, is decided in the Patent Office, the decision there made must be accepted as controlling, upon that question of fact, in any subsequent suit between the same parties, unless the contrary is established by testimony which, in character and amount, carries thorough conviction. *Morgan* v. *Daniels*, 120.
2. The claims covered by letters patent No. 56,793, issued July 31, 1866, to Henry Pearce for "a new and useful machine for crushing and pulverizing quartz-rock, stone, and any description of ores," were not infringed by the machine made by the defendants, and were, in some respects, anticipated by the invention patented to Jonathan F. Ostrander by letters patent No. 4478, dated April 25, 1846; by the invention patented to George H. Wood by letters patent No. 28,031, dated April 24, 1860; and by the invention patented to James W. Rutter by reissued letters patent No. 3633, dated September 7, 1869. *Gates Iron Works* v. *Fraser*, 332.
3. The invention patented to Charles M. Brown by letters patent No. 201,646, dated March 26, 1878, for "a new and useful improvement in ore-crushers," was in its general features a reproduction of the machine patented to James W. Rutter by reissued letters patent No. 3633, dated September 7, 1869; and, in view of the prior patents to Rutter and Tripp, must receive a narrow construction, which frees the defendants from the charge of infringing them. *Ib.*
4. The invention patented to George Raymond and Albert Raymond by letters patent No. 237,320, dated February 1, 1881, for "improvements in grinding mills," was for a combination which included several features not found in the machines made by the defendants. *Ib.*
5. The function of the safety pin in letters patent No. 110,397, issued to

John H. Rusk, December 20, 1870, and antedated December 9, 1870, is practically the same as that of the pin in the combination patented to George and Albert Raymond. *Ib.*

6. The claim in letters patent No. 243,343, issued June 21, 1881, to Philetus W. Gates for the segmental cast-bearing for the ball of the socket joint, having a form which gives it a bearing contact upon the ball, was anticipated by machines constructed by Charles M. Brown and in public use more than two years before Gates applied for his patent. *Ib.*
7. The claim in letters patent No. 243,545, issued June 28, 1881, to Philetus W. Gates for a novel application of a loose collar around the eccentrically gyrating shaft to prevent dirt from getting into the bearing, was anticipated in the Brown machine, as changed in 1878, by a circular washer or collar upon the top of the sleeve that surrounded the breaking head, which fitted around the shaft. *Ib.*
8. The invention patented to Philetus W. Gates by letters patent No. 246,608, dated September 6, 1881, viz., a device for a depression or groove in the outer bearing surface of the bearing-box, and applying within this depression a removable portion of carbon-bronze metal, so as to correct the wear of the machine at that place, is void for want of patentable invention. *Ib.*
9. The alleged invention in letters patent No. 250,656, issued December 13, 1881, to Philetus W. Gates, is for a combination of old features, viz., a shaft, a bearing for the shaft, a hard metal plate in the lower end of the shaft, an adjustable sliding step block, an oil step box, and a hard metal plate at the end of the shaft, all of which, except the metal plate, were present in the Brown machine as made and sold more than two years before Gates applied for the patent; and the metal plate was old and in use for the same purpose as in Gates's machine long before his application. *Ib.*
10. The use of safety pins for saving machinery from the strain of a sudden jar did not involve patentable invention. *Ib.*
11. A verbal assignment of an interest in letters patent is held to have no force or effect against a subsequent assignee claiming under a formal written transfer, and having no knowledge of the previous verbal transfer. *Ib.*

PRACTICE.

1. A ruling by the court below, correct when applied to this case, is sustained without regard to its correctness as a general proposition. *Spalding* v. *Castro*, 38.
2. Depositions placed in the custody of the clerk as taken in this case may be opened and filed, as well as map exhibits, and an order is made for the taking of further testimony, and for the receiving of such documents and maps as the city of Oakland may offer touching its title to the lands in dispute, and for the opening and filing of the same when returned to the clerk. *California* v. *Southern Pacific Company*, 239.

3. This court expresses no opinion as to the validity or invalidity of the writ of error in this case. *Miller* v. *Texas*, 535.

PRINCIPAL AND AGENT.

See EJECTMENT, 1, 2.

PROMISSORY NOTE.

In an action by the payee of a negotiable promissory note against the maker, evidence is admissible to show a parol agreement between the parties, made at the time of the making of the note, that it should not become operative as a note until the maker could examine the property for which it was to be given, and determine whether he would purchase it. *Burke* v. *Dulaney*, 228.

PUBLIC LAND.

See TIDAL LAND, 3, 4, 5, 6.

PUBLIC POLICY.

See STATUTE, A.

RAILROAD.

See DAMAGES, 1, 2;
JURISDICTION, A, 3;
TAX AND TAXATION, 4, 5, 6.

RECEIVER.

1. A receiver of a railroad, appointed with authority "to make all contracts that may be necessary in carrying on the business of said railroad, subject to the supervision of this court," has no authority to make a lease for a term of general offices, without authority from the court, and to bind his successors and the property therefor for the term, without direction from or sanction by the court. *Chicago Deposit Vault Co.* v. *McNulta*, 554.
2. The facts that the receiver's accounts showed, monthly, the payment of the rent under such a lease, and that that rent was reasonable, and that the accounts as rendered were passed by the master and reported to and approved by the court, do not amount to a sanction of the lease for the term. *Ib.*

REMOVAL OF CAUSES.

Under the act of March 3, 1887, c. 373, corrected by the act of August 13, 1888, c. 866, (as under earlier acts,) one of several defendants, being a citizen of the same State as a plaintiff, cannot remove a cause from a state court into the Circuit Court of the United States upon the ground of prejudice and local influence between himself and the other defendants. *Hanrick* v. *Hanrick*, 192.

See COSTS.

STATUTE.

A. Generally.

1. The council of the legislature of the Territory of New Mexico which took part in the passage of the act approved March 14, 1884, authorizing the building of a penitentiary, and of the act approved March 29, 1884, to provide for the building of a capitol, having been recognized by the governor of the Territory, and by the secretary of the Territory, and by the House of Representatives of the Territory, and it further appearing that the objections to its organization now made were brought to the attention of Congress, and that that body took no action on the subject, and the courts of the Territory having adjudged that those statutes were duly enacted; *Held*, That considerations of public policy forbid this mode of attacking the validity of officers *de facto*, whatever defects there may have been in the legality of their appointment or election. *Lyons* v. *Woods*, 649.
2. The allegations of this bill make no such case for interposition as would justify the courts in going behind the enrolled bills, as deposited with the secretary of the Territory, and declaring them invalid because some of the members of the council were seated without certificates of election. *Ib.*

B. Statutes of the United States.

See Admiralty, 5, 7;
Constitutional Law, 18;
Criminal Law, 1, 7, 9, 11, 16;
Customs Duties, 2, 3, 7, 9;
Evidence, 3;
Jurisdiction, A, 1, 2; B;
Removal of Causes;
Tidal Land, 3.

C. Statutes of States and Territories.

Arkansas. *See* Criminal Law, 17.
Dakota Territory. *See* Tax and Taxation, 3.
Louisiana. *See* Constitutional Law, 14.
Maryland. *See* Constitutional Law, 1, 2, 3, 5.
Nebraska. *See* Local Law, 1.
New Mexico. *See* Statute, A, 1, 2;
Usury, 1.
New York. *See* Constitutional Law, 20, 21;
Tidal Land, 1.
North Dakota. *See* Constitutional Law, 10.
Pennsylvania. *See* Constitutional Law, 6, 19.
Tennessee. *See* Jurisdiction, A, 3;
Tax and Taxation, 4, 5, 6.
South Carolina. *See* Constitutional Law, 22.
Virginia. *See* Constitutional Law, 1, 2, 3, 5.
Wisconsin. *See* Limitation, Statutes of.

SUNDAY.

Sunday is a non-judicial day which does not interrupt the continuity of a term of court. *United States* v. *Shields*, 88.

TAX AND TAXATION.

1. No one can be permitted to go into a court of equity to enjoin the collection of a tax, until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay. *Northern Pacific Railroad Co.* v. *Clark*, 252.
2. *State Railroad Tax Cases*, 92 U. S. 575, and *National Bank* v. *Kimball*, 103 U. S. 732, affirmed and followed on this point. *Ib.*
3. The Northern Pacific Railroad Company, having accepted the provisions of the act of Dakota of March 7, 1889, c. 107, became liable thereby to pay the designated percentage of its gross earnings in lieu of taxes for the year 1889, which liability was not discharged by the subsequent repeal of the gross earnings act of 1889; and, having failed to make that payment, or to make a tender of what was due under one or the other modes of taxation, it is not entitled to relief in equity to enjoin the enforcement of a tax upon its property as upon the property of individuals in the counties in which the property is situated. *Ib.*
4. In 1848 the legislature of Tennessee had, under the constitution of the State of 1834, then in force, power to grant to the Mobile and Ohio Railroad Company the exemption from taxation which was granted to it by the eleventh section of the act of January 28, 1848, incorporating it in Tennessee, in the following terms: "That the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent." *Mobile & Ohio Railroad Co.* v. *Tennessee*, 486.
5. Under the provisions of that section the capital stock of the company is forever exempt from taxation during the existence of the corporation; the road, fixtures, etc., were exempt for twenty-five years after the completion of the road, which term has now expired; and now they can be taxed only when the net earnings of the road are more than sufficient to pay to the stockholders, on the present basis of its capital, a dividend of eight per cent a year. *Ib.*
6. In sustaining the validity of the exemption, the court must not be understood as holding that the railroad company has the right, in its discretion, to issue hereafter additional capital stock, or to increase its bonded indebtedness, even for legitimate purposes, and have the same taken into consideration upon the question of its liability

for taxation under the eight per cent dividend clause of its charter. *Ib.*

See CONSTITUTIONAL LAW, 19;
JURISDICTION, A, 3.

TIDAL LAND.

1. The grant to the town of Huntington, made by the Governor General under the Duke of York, on the 30th of November, 1666, and confirmed by Governor General Dongan in 1688, and again confirmed, with a change in description, by Governor General Fletcher, in 1694, operated to convey to the grantee the lands under tide water in Huntington Bay, as defined by a line drawn from Lloyd's Neck to Eaton's Neck; and any title to such lands under water which came to the State of New York, was ceded to the trustees of the town by the State, by the act of its legislature of May 10, 1888, c. 279. *Lowndes* v. *Huntington*, 1.
2. In reaching this conclusion this court follows the settled rules of decision in the courts of New York relating to the form of the action, the title to the submerged lands, and the special defences set up in this case. *Ib.*
3. Scrip or certificates for public land, issued under the act of April 5, 1872, c. 89, 17 Stat. 649, "for the relief of Thomas B. Valentine," cannot be located on tide land in the State of Washington, covered and uncovered by the flow and ebb of the tide. *Mann* v. *Tacoma Land Co.*, 273.
4. The general legislation of Congress in respect to public lands does not extend to tide lands. *Ib.*
5. This court cannot take judicial notice of the nature and extent of tide lands or mud flats. *Baer* v. *Moran Bros. Co.*, 287.
6. Land alternately covered and uncovered by the tide is strictly within the description of tide lands, and is covered by the settled rule in respect to such lands. *Ib.*
7. *Mann* v. *Tacoma Land Company*, *ante*, 273, followed. *Ib.*

TRADE-MARK.

See JURISDICTION, A, 1.

TRESPASS DE BONIS ASPORTATIS.

1. A count in trespass *de bonis asportatis*, for the taking and detaining of personal property, can only be supported on the theory that plaintiff was either its owner, or entitled of right to its possession at the time of the trespass complained of. *Wilson* v. *Haley Live Stock Co.*, 39.
2. In an act of trespass *de bonis asportatis* the plaintiff cannot recover as upon a count for money had and received, at least without an amendment of the complaint. *Ib.*

USURY.

1. The statutes of New Mexico, Compiled Laws 1884, §§ 1736–1738, do not permit the receiving of usurious interest by way of, or under the guise of discount, commission, agency, or other subterfuge. *McBroom* v. *Scottish Mortgage and Land Investment Co.*, 318.
2. Those statutes make void a contract of loan providing for usurious interest only as to the interest in excess of what the statute allows. *Ib.*
3. The limitation of three years, under the statutes of New Mexico, within which the borrower may sue for double the amount of usurious interest collected and received from him does not commence to run, and consequently the right of action therefor does not accrue, until the lender has collected or received more than the original debt with interest. *Ib.*

VENDOR'S LIEN.

1. The courts of the United States enforce vendor's and grantor's liens, if in harmony with the jurisprudence of the State in which the action is brought. *Slide & Spur Gold Mines* v. *Seymour*, 509.
2. It being conceded that a vendor's lien is recognized in Colorado, such a lien will be recognized and enforced in a Federal court in that District. *Ib.*
3. On the contracts in this case, set forth in the opinion of the court, and the circumstances attending the making of them as therein detailed, this court holds that the plaintiffs below retained a vendor's lien upon their mining property in Colorado which they conveyed to the defendants below, and affirm the decree of the court below to that effect. *Ib.*

WARRANT.

See CRIMINAL LAW, 16, 17.

WILL.

1. Under a will, by which the testator devises and bequeathes to his wife "all my estate, real and personal, of which I may die seized, the same to be and remain hers, with full power, right and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, however, that if she should marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike," the widow has power during widowhood to convey to third persons an estate in fee simple in his lands. *Roberts* v. *Lewis*, 367.
2. *Giles* v. *Little*, 104 U. S. 291, overruled; and *Little* v. *Giles*, 25 Nebraska, 313, followed. *Ib.*

WRIT OF ERROR.

See JURISDICTION, A, 4.